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Our File: 115064
February 15, 2017

The Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, PO Box 21040
St. John's, Newfoundland & Labrador A1A 5B2

Attention: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: The Board's Investigation and Hearing into Supply Issues and Power Outages on the Island Interconnected System - Phase 2 – Grand Riverkeeper Labrador, Inc. – GRK Motion to Rescind or Amend P.U. 2(2017)

On January 20, 2017, the Board issued Order No. P.U. 2(2017), striking from the record three reports filed in the above noted proceeding by the Grand Riverkeeper Labrador, Inc. (the "**GRK**"):

- A report dated November 26, 2015, by Dr. S. Bernander entitled "Lower Churchill River Riverbank Stability Report" (the "**First Bernander Report**"). This report was filed in November 2015. Errata, dated October 13, 2016 in respect of this report were also filed with the Board in October 2016.
- A report dated October 13, 2016, by Dr. S. Bernander entitled "Safety and Reliability of the Muskrat Falls Dam, in Light of the *Engineering Report* of 21 December 2015 by Nalcor/SNC Lavalin (the "**Second Bernander Report**").
- A report dated October 17, 2016, by Philip Raphals entitled "Muskrat Falls' Contribution to the Reliability of the Island Interconnected System" (the "**Raphals Report**").

(Collectively, the "**Reports**").

On February 2, 2017, the GRK filed a letter (the "**GRK Motion**"), requesting that the Board rescind its Order, or in the alternative, amend the Order to "suspend judgment until after hearing the witnesses' testimony."[1] By correspondence dated February 6, 2017, the Board requested comments and stated that the parties should "address both the issue of whether the Board should reconsider, rehear or reopen the decision as well as the issue as to whether the decision should be rescinded or amended".

[1] GRK Motion, page 7.

The GRK submits that the Order "contains errors in fact and law",[2] which permit the Board to reopen its Order. Hydro respectfully submits that there is no error of fact or of law in the Order and the Board should not reconsider, rehear or reopen the decision, nor rescind or amend the Order, for the reasons set out below.

1. The Board has complete authority to set the terms of this inquiry, to limit the scope of intervention by the parties and to determine the relevance of the evidence presented.

The legislative authority for this inquiry is found in Section 7 of the *Electrical Power Control Act*, *1994*, S.N.L. 1994, c. E-5.1 (the "***EPCA***"):

> ***7.*** *…*
>
> (3) Where the public utilities board believes that producers and retailers collectively or individually will not be able to satisfy, in accordance with the power policy set out in section 3, the current or anticipated power demands of consumers in the province, the public utilities board may further inquire into the matter.

The powers of the Board in respect of an investigation are also set out in Section 82 of the *Public Utilities Act*, R.S.N. 1990, c. P-47 (the "***PUA***"):

> **82.** Where the board believes that a rate or charge is unreasonable or unjustly discriminatory, or that a reasonable service is not supplied, or that an investigation of a matter relating to a public utility should be made, it may, of its own motion, summarily investigate the rate or charge or matter with or without notice.

The requirement to provide notice and to hold a public hearing is found in subsection 8(1) of the *EPCA*. Section 27 of the *EPCA* details the Board's powers in such a circumstance:

> **27.** (1) The public utilities board may
>
> (a) give directions as to the nature and extent of interventions by persons interested in a matter that is to be the subject of a reference or inquiry held under this Act; … [Emphasis added.]

The Board issued a public notice on January 14, 2014 and gave direction to the parties as to the scope of the proceeding by virtue of Order No. P.U. 3(2014), issued February 19, 2014. The GRK filed for late intervenor status on March 7, 2014. On April 30, 2014, the Board issued Order No. P.U. 15(2014), granting intervenor status and giving the following specific directions at page 4:

> The Board has determined that it would address adequacy and reliability of the Island Interconnected system following the interconnection with Muskrat Falls. The Board agrees with Newfoundland Power, Hydro and the Consumer Advocate that the issues in the matter should not be extended to the construction, legal, contractual and physical risks of the Muskrat Falls development, as raised by Grand Riverkeeper Labrador, Inc.
> …
> To ensure an efficient and effective proceeding all parties must respect the parameters and scope of the issues which have been established and must restrict the evidence in submissions filed to matters which may be of assistance to the Board in determining these issues. The

[2] GRK Motion, page 1.

> investigation and hearing cannot be allowed to be complicated by issues and evidence which are not relevant and helpful to the Board in its determination. To that end the Board will be diligent in ensuring that only matters that are relevant are raised and will exercise its discretion, either on its own or in response to motion from a party, to strike out any matters which are irrelevant or may tend to prejudice, embarrass or delay the proceeding upon its merits.
> [Emphasis added.]

By virtue of subsection 27(1) of the *EPCA* and Section 82 of the *PUA*, the Board has full authority to provide direction as to the nature and scope of the proceeding, which it has clearly done by virtue of Order No. P.U. 15(2014). In this context, it is not an error for the Board to exercise its judgment in determining relevance of evidence. As noted by Robert MacAulay and James Sprague in *Hearings Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 2012) at page 17-6.42 ("**MacAulay**") [Appendix 1]:

> Frequently in administrative proceedings attempts are made to enter evidence which is irrelevant or without any value to the mandate of the agency. Absent some (truly unusual) legislative direction to admit such evidence there is no doubt that an agency has the discretion to refuse to allow the...tendering of evidence which is irrelevant...and that such refusals do not offend the principles of fairness.

No such legislative provision limiting the Board's discretion exists in this case. It has clearly stated that it will exercise its discretion to "strike out any matters which are irrelevant" and it has full authority to do so.

2. The remedy requested is extraordinary.

Hydro submits that while the power of the Board to reconsider a decision exists pursuant to the *PUA*, the remedy is one that should be granted only in extraordinary circumstances.

Hydro submits that there are good policy reasons for having a high threshold for reconsideration of a decision including:

- there is a desire for expediency in administrative tribunal decision-making. To allow a low threshold for reconsideration of administrative decisions goes against this;
- there is value of finality and certainty in administrative decision-making; and
- a low threshold for reconsideration of decisions may result in the first hearing of a matter being treated as simply the "test run".[3]

Various administrative boards have considered the power to reconsider and determined it should only be exercised in the most compelling, rare, and extraordinary circumstances. Some examples of this view are set out below.

In *Duca, Re*, 2015 CarswellOnt 6426 (Ontario Municipal Board) [Appendix 3], the Board interpreted their authority under Section 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, which states that the Board may "rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it". The Board's rules of practice and procedure allowed them to grant a rehearing if there was an error of fact or law:

> 13 The process to review a Board's decision is set out under the Board's *Rules of Practice and Procedure* (the "Rules"), Rules 110 to 119 inclusive. Rule 115.01 provides that the Board's

[3] See Macaulay at page 27A-3 [Appendix 2].

discretion will only be exercised where the request raises a convincing and compelling case that the Board has:

> (a) acted outside its jurisdiction;
> (b) violated the rules of natural justice or procedural fairness, including those against bias;
> (c) made an error of law or fact such that the Board would likely have reached a different decision;
> (d) heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result;
> (e) should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.
> [Emphasis added.]

The Board reasoned that the rehearing remedy is "rare" and "extraordinary", and emphasized the value of finality:

> 12 The Board has been clear that the review process pursuant to s. 43 of the *Ontario Municipal Board Act* is not an opportunity to re-argue the case, and that a remedy would only be granted in the most compelling circumstance. Such circumstances are rare and extraordinary as the Board strives to achieve finality in its decisions. In this regard, in *Canada Mortgage & Housing Corp., Re*, [1994] O.M.B.D. No. 1941, 31 O.M.B.R. 471 (O.M.B.), cited with approval in *Russell v. Toronto (City)*, [2000] O.J. No. 4762, 138 O.A.C. 246 (Ont. C.A.), at p. 11, the Board said the following:
>
> > We cannot allow any of our decisions to be reviewed or retried for some flimsy or unsubstantial reasons. As an adjudicative tribunal which render decisions that have profound effects on public and proprietary interests, our decisions should be well-considered and must have some measure of finality. If a motion is launched on grounds other than those enumerated, it should be to the Divisional Court which has either the competence and the authority to overturn our findings of fact and law. It never has been nor would ever be our wont to constitute ourselves as an appellate body, routinely reviewing or rehearing our own decisions.
>
> ...
>
> 36 I am satisfied that that there are no convincing and compelling grounds for setting aside the Decision or any part thereof, and for all the foregoing reasons, I dismiss the requests by the City and WWHA for a re-hearing...
> [Emphasis added.]

The Ontario Municipal Board in *581355 Ontario Ltd., Re,* 1992 CarswellOnt 4541 [Appendix 4] came to the same conclusions:

> 9 This panel does not find that the alleged errors, if any, are such that an interference with the original decision is warranted. A remedy pursuant to Section 43 of the Ontario Municipal Board Act is an extraordinary one, which is not to be granted on any but the most compelling reasons and circumstances. A proliferation of such remedies, on grounds that are flimsy and unsubstantial, would bring disrepute to the Board and would be perilous to an adjudicative process that must maintain a level of finality.
> [Emphasis added.]

Similar considerations were in place in a 1999 decision of the Ontario Energy Board, wherein the Board stated, "ordering a review or rehearing is an extraordinary remedy and should not be undertaken lightly."[4]

Hydro respectfully submits that the Board should undertake a reconsideration of its decisions with great care and with due consideration to regulatory efficiency. This approach would be consistent with many other administrative bodies in Canada where the discretion to reconsider prior decisions should only be used in extraordinary circumstances.

3. In determining relevance, the Board did not commit an error and is acting consistently with its previous decisions on these matters.

The Board has been clear as to what would not be permitted in terms of evidence and specifically that it would not allow discussions on "the construction, legal, contractual and physical risks of the Muskrat Falls development, as raised by Grand Riverkeeper Labrador, Inc." However, despite these directions, the GRK persists in introducing evidence containing precisely the type of information to which Hydro was not required to respond by virtue of previous Board orders.

The Board stated in P.U. 41(2014) at page 23 that the "consequences regarding the availability of a reliable and adequate supply of power to the Island Interconnected system" [emphasis added] was pertinent for Hydro to address in responding to certain of GRK RFIs. In the responses that the Board ordered Hydro to provide, Hydro has addressed the specific issues and has noted both consequences and options in the context of either a dam breach and in the event of a negative Quebec ruling.[5]

The GRK states that "while the *information* contained in the reports may fall outside of scope as set by the Board in earlier orders, the *conclusions* of the reports…are profoundly relevant…".[6] To say the information is not in scope but the conclusions are relevant is illogical. The GRK admits that it is "literally true" that the First and Second Bernander Reports "do 'not address the adequacy or reliability of the Island Interconnected System'".[7] The GRK also admit that the First and Second Bernander Reports do not draw specific conclusions in respect of the consequences of the failure of the North Spur for Island Interconnected System ("**IIS**") reliability.[8] Hydro submits that the Board did not err in excluding the First and Second Bernander Reports. On their face, the Reports fail to assist in addressing the very questions being asked.

The GRK further admits that the Raphals Report "does not explicitly so state, it is self-evident – and GRK will demonstrate this point in its testimony at the hearing – that a shortfall of 400 MW could have significant reliability implications for the IIS."[9] The Board determined that the Raphals Report "does not provide analysis which addresses impacts on the reliability of the

[4] *IN THE MATTER OF the Ontario Energy Board Act, 1998; AND IN THE MATTER OF an Application by The Consumers' Gas Company Ltd., carrying on business as Enbridge Consumers Gas, for an Order or Orders approving or fixing rates for the sale, distribution, transmission, and storage of gas; AND IN THE MATTER OF a Motion for Review and Variance by the Industrial Gas Users Association, the Consumers' Association of Canada, and the Vulnerable Energy Consumers Coalition*, 1999-0001, Decision (June 29, 2000) at para. 4.13 [Appendix 5].
[5] See e.g., GRK-NLH-044 and GRK-NLH-021 (Revision 1, Jan 14-15).
[6] GRK Motion, page 7.
[7] GRK Motion, page 2.
[8] GRK Motion, page 3.
[9] GRK Motion, page 4.

Island Interconnected System".[10] Hydro submits that it is not an error for the Board to rely on the actual text of a report to determine relevance. Subsequent "added context" provided by a party seeking to "clarify" an expert's conclusions does not make relevant a document that has been found to be irrelevant.

The GRK maintains that the Board committed an error in relying on "untested evidence", specifically Hydro's statement that that IIS reliability would not be impacted by a change in the timing of energy produced at Muskrat Falls.[11] While the Board noted this statement by Hydro in its decision, it cannot be said to have relied on it as the basis of its decision. This assertion by Hydro can be questioned by the parties at any public hearing. Rather, as noted by the Board, it was Raphals' failure to provide evidence addressing "the impacts on reliability" of the IIS that is the reason for appropriately excluding the document.

In sum, none of the three Reports assists the Board in any manner in discussing consequences regarding availability of a reliable and adequate supply of power to the IIS, nor do they assist the Board in identifying Hydro's options. These are the issues at play. The Board made the appropriate determination that the Reports were not relevant to those defined issues. Further, Hydro submits that to allow the Reports (in whole or in part) to be permitted at this stage would be inconsistent with the Board's numerous previous decisions in this regard; decisions (it should be noted) that the GRK have not challenged to this point.

4. The GRK is not deprived of its right to be heard.

Refusing to entertain evidence submitted by a party (relevant or not) does not automatically constitute a breach of natural justice. The nature of the impact on fairness of the proceeding needs to be considered in determining whether a breach of natural justice has occurred.[12]

Unless the Board makes an additional ruling with respect to the GRK's involvement, it is not denied a right to be heard. Hydro assumes that the GRK would continue to be permitted to make statements in any public hearing for this inquiry, cross-examine witnesses, raise objections, etc. The only thing the GRK are deprived of as a result of this Order is expanding the scope of the proceeding further than originally intended by relying on evidence that (even the GRK admits) is out of scope of the current inquiry.

5. The Board is not discriminating against the GRK in granting Hydro's motion.

The GRK argues that sections of the Phase 2 Report from Liberty Consulting Group, the Commonwealth Associates report and the report of Elias Ghannoum "do not address adequacy or reliability of the Island Interconnected System".[13] In failing to strike these reports as well, the GRK argues that the Board committed an error of fact.

Hydro submits that the Board did not commit an error in merely considering the motion before it. The motion to strike only the Reports was brought by Hydro. The Board issued its decision considering the relief sought by Hydro. The fact Hydro did not challenge the remaining evidence does not preclude Hydro from challenging such evidence at any point. If such

[10] P.U. 2(2017), page 5.
[11] See GRK-NLH-021 (Revision 1, Jan 14-15).
[12] See *Université du Québec à Trois-Rivières v. Larocque* [1993] 1 S.C.R. 471 at page 491 [Appendix 6].
[13] GRK Motion, page 6.

evidence is challenged, Hydro assumes the Board would consider such a motion at the appropriate time.

Striking the Reports does not mean that the Board has accepted or is required to accept any of the other evidence before it. All evidence remaining on the record in this inquiry will be tested by the Board and parties during the course of any public hearing. As noted, to Hydro's knowledge, the GRK is not precluded from participating in a hearing and can thus test the veracity of any evidence presented during cross-examination (to the extent such questions are relevant to the defined scope of this proceeding). There is no error of fact or of law in this regard.

6. If the remedy is granted as GRK has requested (in particular, that the order should be suspended until end of hearing), this would be highly prejudicial to Hydro, and possibly to all intervenors.

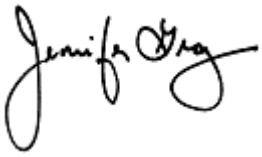
As noted in Hydro's original correspondence on this motion date November 10, 2016, to allow the Reports on the record, whether on a "suspended judgment" basis or otherwise, would add significant time and complication to an already complex proceeding. If the Reports are allowed back in (in whole or in part) for relevance, the parties will need an adequate opportunity to respond. The parties (including Hydro) will need to consider filing evidence in response, cross-examining the GRK expert(s) and replying to this evidence. To rescind or amend the Order and not then permit the other parties a corresponding right of response would be prejudicial to all parties, Hydro in particular.

Further, if the Reports are allowed to stand on the record in this proceeding, this would not be the end of the matter. The GRK has indicated in its letter that it "intends to provide additional evidence during the Phase 2 hearings" in respect of the subject matter in the First and Second Bernander Reports.[14] Hydro submits that the Reports are but a prelude to a possible flood of additional evidence on these matters, the consideration of which will be "time-consuming, hotly contested and liable to deflect" the Board from the issues in this inquiry. Any probative value of this evidence in an inquiry context has to be weighed against its prejudicial effect.[15]

The proceeding has now entered its third year and the record is already voluminous, with repeated direction by the Board to date as to the scope of its inquiry. There is significant risk that a reconsideration of the Order will "prejudice, embarrass or delay" the proceeding by reopening scope and forcing the parties to address issues previously considered closed.

For the reasons set out above (and in its previous correspondence of November 10, 2016), Hydro respectfully submits that the GRK's motion be denied.

Yours very truly,



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[14] GRK Motion, page 3.
[15] *Ontario Provincial Police v. The Cornwall Public Inquiry*, 2008 ONCA 33 at para. 69 [Appendix 7].

Appendix 1

Robert MacAulay and James Sprague in Hearings Before Administrative Tribunals, looseleaf (Toronto: Carswell, 2012) at page 17-6.42

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 2

by

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and

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17.1(f) Dealing With the Irrelevant or Weightless Submission

Frequently in administrative proceedings attempts are made to enter evidence which is irrelevant or without any value to the mandate of the agency. Absent some (truly unusual) legislative direction to admit such evidence there is no doubt that an agency has the discretion to refuse to allow the asking of questions or the tendering of evidence which is irrelevant (or unduly repetitious) to its proceedings and that such refusals do not offend the principles of fairness.[17B] And while it is equally clear that before exercising that authority an agency must make the necessary determination that the information is indeed irrelevant or unduly repetitious, there is also, surprisingly, some debate as to whether the agency should even exercise the authority.

It is common, in agency discussions, for some to argue that one of the purposes of agency hearings is to allow the affected parties an opportunity to "blow off steam" and that in this case it is a useful exercise to allow individuals to put anything into the record rather than attempting to restrict the record to matters which are relevant to the proceedings.

Another common approach on evidentiary disputes is for an agency member to allow the disputed material in with the statement that they will give it due weight.

This latter approach can be very useful in circumstances when the weight of the matter is truly in dispute. It permits the weight or the relevance of the matter to be determined in light of all of the evidence and avoids premature rulings.

Although the Court does not agree with the respondent's view that this must be done on a balance of probability, Mr. Anderson still had to establish more than a mere possibility.

17B See, in illustration the decision of the Australian Federal Court – Full Court in *Kowalski v. Repatriation Commission* 2010 WL 780208, [2010] FCAFC 19 (Aust. Fed. Ct. – Full Ct.) where the Court held that it was proper for the Australian Administrative Appeals Tribunal to refuse to allow a party to ask questions that were irrelevant or otherwise objectionable.

> 17 In oral argument, Mr Kowalski sought to make good the claim of bias in yet another way. He argued that the Deputy President was biased because he did not permit Mr Kowalski to ask certain questions of witnesses who gave evidence before the Tribunal. That complaint was also the basis for an assertion of denial of procedural fairness.
>
> 18 Mr Kowalski took us to a large number of transcript references to support his argument. However, rather than supporting his claim, the numerous passages of the transcript to which we were referred merely made good the finding of the primary judge at [80]. As his Honour said, an applicant is not entitled to ask whatever question he or she thinks appropriate; the Deputy President had the power to disallow irrelevant, or otherwise objectionable, questions and:
>
> > "... the Deputy President did no more than exercise appropriate control in respect of the conduct of the application for review."

See also *Jones v. IWA-Canada, Local 1-3567,* 2011 CarswellBC 1834, 2011 BCSC 929 (B.C.S.C.). (There is no requirement that an agency receive information which is not relevant to the issues before it. Fairness does not dictate that an agency to have before it a document which is not relevant, probative or material to the proceeding before it.)

I do not really recommend either approach simply as a method of moving the hearing along.

Firstly, it will be rather rare, I suggest, for an agency to have been created with a mandate of simply providing a sounding board for the disgruntled or upset. Presumably, one has some purpose to accomplish through your hearing process. Time taken on irrelevant matters is time taken away from relevant ones. It is inherent in the mandate of an agency conducting a hearing that the agency take the trouble of restricting the proceeding to the matters at hand.[17.1]

Secondly, an agency hearing is not generally an emotionally cleansing experience. A party who is allowed to whip themselves up into deep concern over a matter which is irrelevant to the proceeding is not likely to be satisfied with one speech. He or she may wish to speak again and again. The indulgence in letting him or her "blow off steam" may in fact be simply creating more "steam" to let off. Also, allowing a party to put evidence in simply to let off steam will create the, not unreasonable, expectation that the decision-maker will also let others have an opportunity for others to let off steam. This will make it difficult for you to control the proceedings or have them proceed at a reasonable rate.

Thirdly, when one allows irrelevant material into one's proceedings, an uncertainty is created in the minds of other parties as to whether they should introduce evidence to counter the material which is being admitted. Furthermore, if the irrelevant remarks become intemperate or if they contain allegations against another party (however irrelevant to your proceedings) the other party may wish to respond, leading to further delays.

Fourthly, allowing great amounts of irrelevant evidence in will clutter agency proceedings and make it difficult for the decision-maker and the other parties to focus on the matter at hand. It increases the likelihood of some substantive error being made. In *Kelly v. Nova Scotia (Police Commission)*, 2005 NSSC 142, [2005] N.S.J. No. 298 (QL) (N.S.S.C.) made a corollary point saying that allowing a significant amount of highly prejudicial evidence into the process sidetracked a five-day hearing from the main focus of the hearing which was not compensated by a simple statement by the Board at the conclusion that it was aware of the evidence's irrelevance and was giving it no weight. The Court held that the admission of the irrelevant evidence contributed to an unfair hearing. This trial level decision was reversed by the Court of Appeal (*Kelly v. Nova Scotia Police*

17.1 See, in illustration, *Forrest v. Canada (Attorney General)* (2002), F.T.R. 82 (Fed. T.D.), where the Federal Court Trial Division held that a prison Disciplinary Court did not err in refusing to allow an inmate to introduce evidence to establish a claim that was irrelevant to the issue before the Court. The Federal Court Trial Division stated that "Restricting the hearing to relevant evidence is an important and necessary part of the Chair's job. The fact that the relevancy rulings were contrary to the wishes of the applicant does not indicate bias."

There is no requirement that an agency receive information which is not relevant to the issues before it. Fairness does not dictate that an agency to have before it a document which is not relevant, probative or material to the proceeding before it. (*Jones v. IWA-Canada, Local 1-3567*, 2011 CarswellBC 1834, 2011 BCSC 929 (B.C.S.C.)).

Commission, 2006 CarswellNS 83 (N.S.C.A.)) which took into account the particular challenges facing the agency in question in determining exactly what issues were in dispute, the importance of not precluding evidence before its relevance could actually be determined, and the efforts of the agency throughout the proceeding to caution the participants about irrelevant evidence.[17.1.1] However, these decisions stand as a caution respecting the consequences of undue admission of irrelevant evidence and the care which must be taken with respect to it.[17.1.2]

Fifthly, by allowing the individual to put in irrelevant information you either build an expectation in that person's mind that you will be dealing with the matters he or she raises, an expectation which can lead to appeals or judicial reviews if you do not do so.

Lastly, if a decision-maker allows irrelevant evidence into its proceedings without making a ruling during the hearing it will likely have to expressly point out in its reasons that evidence which was found to be irrelevant lest a reviewing

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17.1.1 The Court of Appeal noted that it was very difficult to determine what was relevant to the case as what was in issue was not easy to determine. Between the broad scope of the evidence called by the unrepresented litigant bringing the complaint in question and the counsel for the respondent who assured the Board that his evidence was relevant and that this would become apparent as the hearing progressed the Board was faced with a difficult task.

> Hindsight is always 20:20. With the benefit of hindsight, a different and better approach might have been taken. However, the fairness of what the Board did must be assessed in the context of how the hearing unfolded and with the Board's considerable procedural discretion in mind. In all of the circumstances, I cannot fault the Board for failing to have exerted more control sooner. It would not have been easy to disallow evidence on the grounds of irrelevance for the simple reason that it was hard to say at the early stages of the hearing what was and was not relevant. . . .
>
> The Board had considerable discretion as to its procedure. It was not obliged to follow the strict rules of evidence that apply in court. In the context of this hearing, I respectfully cannot agree with the judge that the Board committed reviewable error by permitting evidence to be called which, in retrospect and with the benefit of hindsight, might better have not been received. The Board's reception of some irrelevant evidence on the first day of a five day hearing – evidence which the Board repeatedly indicated was not relevant or helpful and which clearly played no part in the decision – did not so seriously compromise the fairness of the hearing that the Board's decision must be quashed. In my respectful opinion, the judge erred in doing so.

17.1.2 In *Ontario Provincial Police v. Cornwall Public Inquiry Commissioner*, 2008 CarswellOnt 191, 2008 ONCA 33 (Ont. C.A.), the Ontario Court of Appeal (in obiter) considered whether evidence respecting an incident that was outside of the subject matter of a Commission of Inquiry could be admitted before the Commission as being "reasonably relevant" to the inquiry. In considering the evidence in question before it, the Court of Appeal concluded that it should not be admitted as being reasonably relevant. The evidence had no probative value as it did not speak to systemic problems that could shed light on similar problems in the specific subject matter of the Commission. Furthermore, the Court stated that if the evidence was "a prelude to an avalanche of similar evidence – the reception of which is likely to be very time-consuming, hotly contested and liable to deflect the Commissioner from the task at hand – any marginal probative value that such evidence might have would . . . be greatly outweighed by its prejudicial effect."

body assume that the decision-maker had based her its decision on irrelevant considerations.

On the other hand, it is also true that it is frequently easier and faster to allow some individuals to put irrelevant evidence than it is to attempt to stop them from doing so. Also, if you are too quick to leap in to cut someone off because it appears to you that the information is irrelevant you may fail to appreciate that in fact he or she is leading up to something that is very important.

Many decision-makers find it valuable when faced with what appear to be irrelevant evidence to allow the individual presenting it sufficient time to satisfy themselves that the material being put in is irrelevant (and to ensure that a reasonable person would believe that they have listened enough to be able to adequately judge its relevance). They then interject to attempt to control it. This usually involves explaining the purpose of the proceeding and an explanation as to why the evidence going in appears to be irrelevant. The person attempting to put the evidence in should then be allowed to argue why he or she thinks the material is relevant or sufficiently weighty. The ruling as to admissibility is then made and the hearing proceeds. Time taken up front in this exercise will save time in the long run as the decision-maker will have set the proper tone, be in control of the hearings (but fairly so), and be better positioned to control future diversions into irrelevancies.

17.2 STANDARD AND BALANCE OF PROOF

The concept of "standard of proof" refers simply to how convinced one must be that a certain fact exists. "Burden of proof" refers to who bears the burden of establishing a fact to that level of satisfaction.

17.2(a) Standard of Proof

There are two standards of proof.[17.2] The first, which is the standard applicable in civil proceedings, is proof on a balance of probabilities which requires

(*Continued on page 17–7*)

17.2 See *Stetler v. Agriculture, Food and Rural Affairs Appeal Tribunal*, 2005 CarswellOnt 2877 (Ont. C.A.):

> There are only two standards of proof used in legal proceedings. In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities, while in criminal matters it is proof beyond a reasonable doubt.

Appendix 2

Robert MacAulay and James Sprague in Hearings Before Administrative Tribunals, looseleaf (Toronto: Carswell, 2012) at page 24A-3

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 3

by
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and
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administrative decision-making. It may be argued that the agencies in which this expertise resides should also be the ones to decide when, for policy reasons, decisions must be reopened.

Arguments Against An Agency Authority to Reconsider A Decision

At the same time arguments can be raised against a reconsideration power in agencies.

1. Allowing or permitting an agency to review a decision which it has made, gives unfair assistance to those parties with deep pockets in that they can continue to contest the issue as long as their wallets hold out. The process, in short, would favour those with resources, a fact which ought not to be encouraged.

2. There ought, and in fact some say there must be, finality in the kinds of matters brought before administrative agencies. This can be seen to be particularly important in some areas, such as immigration, where individuals build their lives around the decision of the agency. The issue can also arise in instances where contractual or other financial interests are structured upon the decision (such as in the planning area). Aside from these types of decisions, finality itself has been seen as a desirable end. In *C.J.A., Local 494 v. Detroit River Const. Ltd.*[4] the Ontario Labour Relations Board stated:

> While depending upon the circumstances of the case and the applicable principles of natural justice, the Board ought not to be as strict or as technical as a court, it must nevertheless, in our view, recognize the necessity for and apply some principle of finality to its decisions. It stands to reason that when a party has gone through the ordeal, expense and inconvenience of a hearing and obtained a decision in his favour, that he should not be deprived of the benefit of that decision except in good cause.

3. Allowing an administrative agency to re-decide an issue may enable a person who ought to have been active in the first hearing to treat the first hearing as a ''trial-run'' (or form of discovery). Such a process would be unfair. It is not unknown in some administrative proceedings for parties to claim not to have documents or evidence which the agency feels necessary to its decision but which the party feels may not be in his best interests to present. Miraculously memories clear and documents appear out of the firmament when prompted by an unfavourable agency decision caused by their absence. (A reasonable answer to this concern, however, can be found in structuring the reconsideration rules to protect against such abuse.)

---

4 (1962), 63 C.L.L.C. 16,260 (Ont. Labour Relations Bd.).
No footnotes 5 and 6.

4. One of the factors cited in support of agency decision-making is the fact that that process is to be speedy and expeditious (at least speedier than the courts). A reconsideration power may lead to delays in the issuance of a final decision in the matter. (In some matters, however, while speed may be important, correctness may be more so!)

Conclusion As To Wisdom Of An Agency Reconsideration Power

In light of the pros and cons listed above it quickly becomes obvious that the propriety of an authority to reconsider must be considered in light of the particular decision in question. On balance, I believe that from a public interest, expense and practical point of view there are more reasons in favour of agencies being able to reconsider their decisions. Any abuses which may arise from such a power should be capable of control through the structuring of reconsideration rules or limitations upon agency action in specific cases.

That, however, is my conclusion as to what should be. Let us look at what the law, in fact, is.

An administrative agency may be faced with having to reconsider an earlier decision in two ways. It may be asked to amend its approach to a particular question, and thereby break with one or more of its earlier decisions on the same point. I discuss this aspect of reconsideration earlier in chapter six. The discussion which follows deals with the situation where the agency isasked by one of the parties, or it may wish on its own motion, to reopen and reconsider an earlier decision to change the result reached in it.

27A.2 THE POWER OF AN AGENCY TO REHEAR OR RECONSIDER DECISIONS ALREADY TAKEN

27A.2(a) Finality of Agency Decisions (Functus Officio)

Following the decision of the Supreme Court of Canada in *Chandler v. Association of Architects (Alta.)*,[7] and a number of other decisions which I will discuss below, administrative agencies only have the authority to reopen a decision once made:

a. when there is legislative authority to do so, which may be found:

   i) in an express legislative power to reconsider,

   ii) to be implied by other provisions or from the overall structure of the legislation, or

7 [1989] 2 S.C.R. 848, 40 Admin. L.R. 128, 70 Alta. L.R. (2d) 193, 36 C.L.R. 1, [1989] 6 W.W.R. 521, 62 D.L.R. (4th) 577, 99 N.R. 277, 101 A.R. 321.

Appendix 3

Duca, Re, 2015 CarswellOnt 6426 (Ontario Municipal Board)

2015 CarswellOnt 6426
Ontario Municipal Board

Duca, Re

2015 CarswellOnt 6426, 86 O.M.B.R. 365

Proceeding Commenced under subsection 22(7) of the Planning Act, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant: John Duca

Subject: Request to amend the Official Plan - Failure of the City of Vaughan to adopt the requested amendment

Existing Designation: "General Commercial"

Proposed Designation: "Prestige Areas - Centres & Avenue Seven Corridor"

Purpose: To permit the development of 6 stacked townhouse blocks comprising 180 units with 225 underground parking spaces

Property Address/Description: 5289 & 5309 Highway 7

Municipality: City of Vaughan

Approval Authority File No.: OP.12.003

OMB Case No.: PL121343

OMB File No.: PL121343

Proceeding Commenced under subsection 34(11) of the Planning Act, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant: John Duca

Subject: Application to amend Zoning By-law No. 1-88, as amended — Refusal or neglect of the City of Vaughan to make a decision

Existing Zoning: "C1 Restricted Commercial Zone", subject to Exceptions 9(791) & 9(424)

Proposed Zoning: "RM2 Multiple Residential Zone", with exceptions

Purpose: To permit the development of 6 stacked townhouse blocks comprising 180 units with 225 underground parking spaces

Property Address/Description: 5289 & 5309 Highway 7

Municipality: City of Vaughan

Municipal File No.: Z.12.008

OMB Case No.: PL121343

OMB File No.: PL121387

Proceeding Commenced under section 43 of the Ontario Municipal Board Act, R.S.O. 1990, c. O. 28, as amended

Request by: City of Vaughan

Request by: The West Woodbridge Homeowners Association Inc.

Request for: A review of the Board's Decision issued on February 28, 2014

K.J. Hussey V-Chair

Heard: August 28, 2014
Judgment: May 1, 2015
Docket: PL121343

Counsel: S. Rogers, for John Duca
B. Engell, for City of Vaughan
F. Santaguida, for Region of York
J. Fedele, for West Woodbridge Homeowners Association Inc.

Subject: Public; Municipal

Table of Authorities

Cases considered by *K.J. Hussey V-Chair*:

Canada Mortgage & Housing Corp., Re (1994), 1994 CarswellOnt 5662, (sub nom. *Canada Mortgage & Housing Corp. v. Vaughan (City)*) 31 O.M.B.R. 471 (O.M.B.) — considered

Russell v. Toronto (City) (2000), (sub nom. *Dickinson v. Toronto (City)*) 196 D.L.R. (4th) 558, 16 M.P.L.R. (3d) 1, 37 C.E.L.R. (N.S.) 114, 138 O.A.C. 246, (sub nom. *Dickinson v. Toronto (City)*) 72 L.C.R. 14, (sub nom. *Shanahan v. Russell*) 41 O.M.B.R. 305, 2000 CarswellOnt 4876, (sub nom. *Russell v. Shanahan*) 52 O.R. (3d) 9 (Ont. C.A.) — considered

Statutes considered:

Ontario Municipal Board Act, R.S.O. 1990, c. O.28
s. 43 — considered

Planning Act, R.S.O. 1990, c. P.13
Generally — referred to

s. 1 — considered

s. 2 — considered

s. 3(5) — considered

Rules considered:

Ontario Municipal Board Rules of Practice and Procedure, O.M.B. Rules
Generally — referred to

R. 32(a)-32(f) — referred to

R. 32(f) — considered

R. 110 — considered

R. 110-119 — referred to

R. 113 — considered

R. 115.01 — considered

R. 115.01(c) — considered

MOTION by homeowners association and city for order setting aside decision approving proposed official plan amendment to permit townhouse development.

***K.J. Hussey V-Chair*:**

1 The West Woodbridge Homeowners Association Inc. ("WWHA") and the City of Vaughan (the "moving parties") have requested a review of a decision issued on February 28, 2014 (the "Decision"), in case number PL121343. The Decision deals with appeals by John Duca to Official Plan and Zoning By-Law amendments for a 9,496.1 square metre parcel of land located west of Kipling Avenue, at 5289 and 5309 Highway 7, on the south side of Highway 7, north of Coles Avenue ("subject property").

2 A hearing of these appeals was held over nine days starting on January 6, 2014, and the decision by the Hearing Panel approved the proposed official plan amendment. The proposed draft zoning by-law amendment was approved in principle, with final approval withheld for six months to enable the parties to finalize a site plan concept and to develop a more detailed zoning by-law to implement the plan. The approvals would permit a development on the subject site of a maximum of 176 stacked townhouse units.

3 The Decision also ordered access to the proposed development to be provided from Coles Avenue and Highway 7, as agreed upon by the transportation witnesses, as well as protection in the final site plan for future interconnection with the adjacent property to the west. Those issues were identified by the Regional Municipality of York (the "Region") in the Procedural Order dated August 27, 2013.

4 The moving parties now seek an Order to set aside the Decision, and to grant a new hearing of these appeals before a different panel of the Board.

5 The Acting Executive Chair of the Environment and Land Tribunals of Ontario ("ELTO"), in his capacity as Chair of the Ontario Municipal Board, directed the request to be considered by way of an oral motion to determine whether there is a convincing and compelling case that the Decision contains errors of fact or law sufficient to warrant a new hearing.

6 In support of the motion the moving parties relied on affidavit evidence provided by Clement Messere, Planner for the Development Planning Department in the City and Josie Fedele, Vice President of the of the WWHA.

7 The moving parties have advanced the following grounds for their assertion that the Decision reveals material errors:

- The Decision failed to give effect to a prior Board decision on the same issue on the same lands.

- The Official Plan change would permit a tower form fronting on Coles Avenue (the low density residential neighbourhood immediately south of the subject property).

• The Hearing Panel misinterpreted the Vaughan OP 2010.

• The Decision is contrary to Provincial and City of Vaughan's policies to maintain the character of the established community areas, and to promote a mix of uses, including non-residential uses that support employment in the City. The effect of the decision is to amend the mixed use land designation, which includes employment, to residential use only.

• The Decision is contrary to s. 1, 2, and 3(5) of the *Planning Act*.

8 The Region and Mr. Duca responded to the motion.

9 The Region seeks an Order confirming the Decision with respect to access to the proposed development from Highway 7 and Coles Avenue and to protect the future interconnection to the adjacent property to the west in the final site plan. The Region relied on the Affidavit of Danail Terzievski in support of its request. Mr. Terzievski is a Professional Traffic Operations Engineer and the Manager of Development Approvals in the Region's Community Planning Branch, who provided expert transportation and traffic evidence at the hearing of the appeals.

10 Mr. Duca opposes the motion. He seeks an Order to dismiss the motion to nullify and rehear, and in addition, Mr. Duca seeks an Order revoking the determination by the Hearing Panel that approval of the proposed development protects for an interconnection to the lands to the west of the subject property. Mr. Duca moves for costs on a substantial indemnity basis against the moving parties and against Ms. Fedele personally. The grounds for the relief sought by Mr. Duca are as follows:

• The moving parties have failed to demonstrate a convincing and compelling case that the Board made an error of law or fact such that the Board would likely have reached a different decision.

• The moving parties were aware or ought to have been aware that their requests for review did not meet the tests set out by the rules of the Board or in the cases considering these rules.

• The requests are frivolous and vexatious and made only for the purpose of delay.

• Even if a re-hearing is not ordered, the Board should review and revoke the determination of the Hearing Panel that this proposed development must protect for an interconnection of the lands to the West on the basis that this determination was outside the jurisdiction of the Board and without notice to affected property owners.

11 Mr. Duca's position is supported by Ryan Mino-Leahan's affidavit, a Land Use Planner who was retained by Mr. Duca, and who provided opinion evidence at the hearing.

Findings and Analysis

12 The Board has been clear that the review process pursuant to s. 43 of the *Ontario Municipal Board Act* is not an opportunity to re-argue the case, and that a remedy would only be granted in the most compelling circumstance. Such circumstances are rare and extraordinary as the Board strives to achieve finality in its decisions. In this regard, in *Canada Mortgage & Housing Corp., Re*, [1994] O.M.B.D. No. 1941, 31 O.M.B.R. 471 (O.M.B.), cited with approval in *Russell v. Toronto (City)*, [2000] O.J. No. 4762, 138 O.A.C. 246 (Ont. C.A.), at p. 11, the Board said the following:

> We cannot allow any of our decisions to be reviewed or retried for some flimsy or unsubstantial reasons. As an adjudicative tribunal which render decisions that have profound effects on public and proprietary interests, our decisions should be well-considered and must have some measure of finality. If a motion is launched on grounds other than those enumerated, it should be to the Divisional Court which has either the competence and the authority to overturn our findings of fact and law. It never has been nor would ever be our wont to constitute ourselves as an appellate body, routinely reviewing or rehearing our own decisions.

The Board's Rules of Practice and Procedure

13 The process to review a Board's decision is set out under the Board's *Rules of Practice and Procedure* (the "Rules"), Rules 110 to 119 inclusive. Rule 115.01 provides that the Board's discretion will only be exercised where the request raises a convincing and compelling case that the Board has:

(a) acted outside its jurisdiction;

(b) violated the rules of natural justice or procedural fairness, including those against bias;

(c) made an error of law or fact such that the Board would likely have reached a different decision;

(d) heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result;

(e) should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.

14 This motion to review is brought on the basis that the Hearing Panel made material errors of facts and law (Rule 115.01(c)). I have reviewed the Decision, considered all the materials provided including the affidavits, and I have considered Counsel's submission. For reasons that follow, I have concluded that there is no convincing and compelling case that the Hearing Panel made any error of law or fact that the Board would likely have reached a different decision. I therefore deny the moving parties' request to set aside the Decision and to grant a new hearing of the appeals before a differently constituted panel of the Board.

15 I also deny the request by Mr. Duca to revoke the Decision of the Hearing Panel to protect for an interconnection of the lands to the West.

16 I will first deal with the questions raised by Mr. Duca on whether the moving parties complied with the Rules.

17 The first is with respect to the timeliness of the City's notice of request to review the Decision. The request was filed on March 31, 2014, 31 days after the Decision was issued. Rule 112 requires notice to be filed within 30 days. However, Rule 10 sets out how time is computed and provides an extension to the next business day when the time for "doing anything under these rules" falls on a holiday, which in this case was Sunday, March 30, 2014.

18 The Board finds that the City filed its notice in accordance with the Rules, within the prescribed time.

19 The second is whether the request made by WWHA should be considered, given the minimal role played by WWHA in the hearing. Mr. Duca argued that the WWHA was a party in name only, which failed to provide any meaningful evidence that would have assisted the Board in its determination, and therefore should be considered a participant.

20 Rule 113 states that the Board will not consider a request by a non-party unless the Board determines that there is a valid and well founded reason. In this case the requestors were all parties to the hearing and therefore assumed all the privileges and responsibilities conferred by Rule 32(a) to (f), which lists the ways in which a party *may* (emphasis added) participate in a hearing. Among these is the right to request a review of a Board decision or Order, as set out in Rule 110. Nothing within these rules limits a party's right to make a request under Rule 32(f) on the basis of the degree to which the party participated at the hearing. The Board therefore does not accept Mr. Duca's argument, and has considered the request for review made by WWHA.

21 Thirdly, Mr. Duca submits that the moving parties have failed to demonstrate a convincing and compelling case as required by Rule 115.01(c). On this point I agree with Mr. Duca. I find that the questions raised by the moving parties do not reveal a convincing and compelling case for setting aside the Hearing Panel's Decision.

1. Did the Decision fail to give effect to a prior Board decision on the same issue on the same lands?

22 This question relates to a decision dated August 28, 2009 by a different panel of the Board on a different application under OMB File PL080857 (the "Prior Decision"). The application was an appeal by Pine Grove on Seven Inc. from Council's failure to announce a decision respecting Proposed Official Plan Amendment No. 661 ("OPA 661") for the City of Vaughan that provided a new policy regime for the Highway 7 corridor which would be re-designated "Prestige Areas-Centres and Avenue Seven Corridor". The effect of the re-designation would be to increase the range of residential and employment uses.

23 The Decision sets out the history of the site in paragraphs 16 to 23, which gave context to the appeal. Pine Grove on Seven Inc. proposed a condominium development at the southwest corner Kipling Avenue and Highway 7. The residents in the abutting low density residential areas raised issues with respect to the re-designation as proposed in OPA 661. The parties, which included WWHA, Pine Grove on Seven Inc. and the City, arrived at a settlement and the Board allowed the Appeal in part. The result of the settlement was a modification to the boundary of the area that would be re-designated "Prestige Areas-Centres and Avenue Seven Corridor", which was originally proposed for OPA 661. This modification included moving the boundary line to approximately mid-point on the subject property.

24 The Decision discusses Mr. Duca's involvement in that appeal, and in paragraph 23. It states:

> John Duca was a participant in that hearing and upon being advised of the minutes of settlement and of its proposed effect on the subject lands, retained counsel who brought a motion for party status. PL080857 contains *inter alia* the decision of the Board to deny the request for party status, to approve of the requested OPA 661 boundary relocation on the subject lands, and to confirm the right of John Duca to make a development application under the *Planning Act.*

25 I find that the hearing panel considered the Prior Decision and its implication on the matter that was before him. In paragraphs 79 and 80 the Decision notes that the southern portion of the subject lands were excluded from commercial use to a depth of 30.3 metres and the settlement redrew the boundary to about midpoint of the subject lands.

26 In the section of the Decision entitled "Commentary and Findings," between paragraphs 68 through 90, the Hearing Panel provides his rationale for approving the application brought by Mr. Duca to re-designate the southerly potion of the subject lands. Included in his deliberation was the Prior Decision, a detailed account of the background to OPA 661, the Planning Report outlining the rationale for OPA 661 and the recommendation for its adoption. The Hearing panel considered the subsequent three modifications, including the modification by the "Prior Decision" and also the most recent review of the designations of the subject lands proposed through the Vaughan Official Plan 2010, which is under appeal and not in effect. The Hearing Panel found that the proposal was carefully designed to comply with height requirements in order to be compatible with the existing low-rise residential area. The Hearing Panel found that the proposed building typology, although not the same, would be generally compatible with and complementary to the existing residential neighbourhood.

27 I find that the Decision does not negate the finality of the Prior Decision, as alleged by the City and WWHA. I find that the Hearing Panel had before it a different application on a different parcel of land by a different applicant, which is unaffected by the Decision. The Prior Decision acknowledged that "Mr. Duca retained the right to make a development application under the *Planning Act*" and this was also the finding of the Board Chair in September 2009 in the s. 43 review of the Prior Decision. Mr. Duca exercised this right. The Hearing Panel made a determination on the merits of that application while giving effect to the Prior Decision. I therefore find no error in this regard.

2. Would the Official Plan Amendment permit a tower form fronting on Coles Avenue

28 The City argued that the Decision creates a situation where the mid-rise apartment building form contemplated by the OPA 661 designation for the lands along Highway 7 could also be built on Coles Avenue. The City submits that

while the current zoning proposed by the Appellant contemplates stacked townhouses spread across the entire site, the Official Plan Amendment sought and approved by the Board in the Decision would permit a higher intensity and higher built form along Coles Avenue, something that the evidence did not support or contemplate.

29 I find that this argument for a rehearing of the proceeding is based on conjecture and is an attempt to re-argue the case. There is nothing in the Decision that indicates that this application contemplates any other form of development but stacked townhouses on the subject site. I find that the Hearing Panel heard expert opinion land use planning evidence which supports the conclusion he reached, specifically, that stacked townhouses is an appropriate transition to the low-rise residential areas; is an appropriate form of intensification consistent with the *Provincial Policy Statement*; is in conformity with the *Growth Plan* and with the applicable City of Vaughan Official Plan policies. I find that the allegation does not meet the test that there is a convincing and compelling case that an error of law or fact was made such that the Hearing Panel would likely have reached a different decision.

3. Did the Hearing Panel misinterpreted the Vaughan OP 2010

30 The City argued that an important part of the Board's reasons relate to the interpretation of the Vaughan's OP 2010 and its policies respecting transition from low-rise residential uses. The City's emphasis was on the Hearing Panel's comments on the limitation of the type of building that would be permitted within 70 metres of a low rise residential designation in order to provide an appropriate transition.

31 I find that in raising this issue the City chose to ignore the Hearing Panel's expansive reasoning and discussion of the planning regime, namely, OPA 661, the 2010 Vaughan Official Plan Process, and the 2010 Vaughan Official Plan, which the Hearing Panel noted is under appeal. Paragraph 86 provides discussion on the "alternative development concept" proffered by the City, and its shortcomings. The Hearing Panel concluded that as a result of the 70 metre separation distance to low density areas, the only building type that would be permitted on the subject lands would be townhouses, stacked townhouses and low-rise buildings. I find no error in this statement. Policy 9.2.2.4 f. reads:

> f. Within 70 metres of an area designated as Low-Rise residential or on streets that are not arterial streets or major collectors streets, the following building types may be permitted, pursuant to policies in (9) 23 of this plan in order to provide an appropriate transition to the low-rise areas:
>
> I. Townhouses;
>
> II. Stacked Townhouses; and
>
> III. Low-Rise buildings

32 I cannot conclude that based on that statement the Hearing Panel misapprehended OPA 2010. I find that the Hearing Panel reasonably concluded that the proposed stacked townhouse typology, which he found was carefully designed to comply with the height requirement, would be compatible with the low-rise residential neighborhood on either side of the subject lands at the Coles Avenue frontage in light of the restriction of certain mixed use building types imposed by a 70 metre separation distance to low density areas,. I do not agree that the Hearing Panel erred by misinterpreting the Official Plan and therefore find no reason, based on that ground, to interfere with the Decision.

4. Is the Decision contrary to Provincial and City of Vaughan's policies to maintain the character of the established community areas, and to promote a mix of uses, including non-residential uses that support employment in the City. The effect of the decision is to amend the mixed use land designation, which includes employment, to residential use only.

33 I find that the Hearing Panel dealt adequately with the question of the mixed use designation, analysed the evidence and came to a decision that falls within a range of acceptable outcomes.

34 The Hearing Panel's analysis considered the City's position. The Decision states that the stacked townhouse project was, from the City's perspective, "both too little and too much" - too much density for Coles Avenue frontage and too

little on Highway 7. In that context, the Hearing Panel concluded that "the proposed re-development of the subject lands with a stacked townhouse typology has been thoughtfully advanced to be compatible with the existing low rise residential area and at the same time provide a dense, compact, urban form that better optimizes the subject lands, and is transit supportive". The development is located within 200 metres of a designated transit corridor. I find that the Hearing Panel considered, as it was obliged to, whether the development would be transit supportive, as required by the Growth Plan, the Provincial Policy Statement, and the City's Planning documents.

35 I also find no merit in the allegation that the Decision is contrary to s. 1, 2, and 3(5) of the *Planning Act*. I find that that the Hearing Panel dealt with all the planning considerations to satisfy the matters of Provincial interests and he provided cogent and extensive reasons to support his decision.

36 I am satisfied that that there are no convincing and compelling grounds for setting aside the Decision or any part thereof, and for all the foregoing reasons, I dismiss the requests by the City and WWHA for a re-hearing; I dismiss John Duca's request to revoke the Hearing Panel's Order to protect for an interconnection to the lands to the west of the subject property, and I dismiss John Duca's request for costs against the moving parties and against Ms. Fedele personally. I find that Mr. Duca seized on this opportunity to launch his own request for a review of the Decision. An assessment of costs against the moving parties and Ms. Fedele is not reasonable.

37 The Decision remains in full force and effect.

Motion dismissed.

Appendix 4

581355 Ontario Ltd., Re, 1992 CarswellOnt 4541 (Ontario Municipal Board)

1992 CarswellOnt 4541
Ontario Municipal Board

581355 Ontario Ltd., Re

1992 CarswellOnt 4541

In the Matter of Section 34(18) of the Planning Act, 1983

In the Matter of Section 44(12) of the Planning Act, 1983

In the Matter of an appeal by 581355 Ontario Limited and Grossman Holdings Limited from a decision of the Committee of Adjustment of the Borough of East York whereby the Committee dismissed an application numbered A-171-90 for a variance from the provisions of By-law 6752, premises known municipally as 7, 9, 11 Crescent Place and 1, 3, 5, 2-4, 6-8, 10-12 Massey Square

In the Matter of Section 43 of the Ontario Municipal Board Act, R.S.O. 1980, c. 347

In the Matter of a request from Karl D. Jaffary for a review of the Board's decision dated January 9, 1992

Lee Member

Judgment: August 14, 1992
Docket: V 910039

Counsel: Karl D. Jaffary, Q.C., for 581355 Ontario Limited and Grossman Holdings Limited
Peter Van Loan, for York Condominium Corp. No. 76 and Crescent Town Coalition

Subject: Public; Municipal

Table of Authorities

Statutes considered:

Ontario Municipal Board Act, R.S.O. 1980, c. 347
s. 43 — referred to

s. 44 — referred to

Decision of the Board:

1 Mr. Jaffary, on behalf of the appellant, requested the Board for a review of a decision dated January 9, 1992 whereby the relief for a minor variance was denied. The relief, if granted, would have the effect of allowing seven additional units within three existing rental buildings in the Borough of East York.

2 The motion to be decided is whether a review of the decision is justified so that a rehearing may commence.

3 Mr. Jaffary did not take issue with the Board's finding that these units would be available to those in need and within the percentiles of income deemed to be requiring affordable housing pursuant to the Provincial policy. Nor did he disagree with the findings on the Official Plan.

4 His allegations that the members had erred revolve around the findings the Board had made regarding the proposed units and the standards used by the learned member to assess "desirability" pursuant to Section 44 of the Act.

5 He submitted that the Board's finding that the development is not desirable for the appropriate development for the use of land is based on the difficulty of access and questions of security. With respect to access, he maintained that the evidence suggests only some units may have difficulty. With respect to security, he submitted that the standards have been set too high pursuant to Section 44 of the Act.

6 Furthermore, he contended that the Board's findings that the entrance to some of these units is in close proximity to driveways are not based on any expert evidence. He submitted evidence from a professional engineer, purporting to show that potential danger is minimal and remedial solutions are available.

7 The grounds for allowing a review of a decision pursuant to Section 43 of the Ontario Municipal Board Act are fourfold:-

(i) whether there is presence of jurisdictional or procedural defect;

(ii) whether there is fraud or misrepresentation;

(iii) whether there are manifest errors of findings of facts and law; and

(iv) whether there are changes of circumstances that new evidence is required.

8 The errors of findings alleged by Mr. Jaffary appear to fall within the third ground.

9 This panel does not find that the alleged errors, if any, are such that an interference with the original decision is warranted. A remedy pursuant to Section 43 of the Ontario Municipal Board Act is an extraordinary one, which is not to be granted on any but the most compelling reasons and circumstances. A proliferation of such remedies, on grounds that are flimsy and unsubstantial, would bring disrepute to the Board and would be perilous to an adjudicative process that must maintain a level of finality.

10 The Board is of the view that the evidence heard by the learned member in the hearing can reasonably give rise to the findings that were made. The fact that he attached particular weight to some evidence does not make the findings untenable or perverse. This panel did not find the standards used to assess desirability unreasonable or out of keeping with those developed by the jurisprudence of the Board. Furthermore, this member is singularly unimpressed with the effort to bring evidence which should have been adduced at the original hearing.

11 For these reasons, the Board will deny the motion.

End of Document

Appendix 5

IN THE MATTER OF the Ontario Energy Board Act, 1998; AND IN THE MATTER OF an Application by The Consumers' Gas Company Ltd., carrying on business as Enbridge Consumers Gas, for an Order or Orders approving or fixing rates for the sale, distribution, transmission, and storage of gas; AND IN THE MATTER OF a Motion for Review and Variance by the Industrial Gas Users Association, the Consumers' Association of Canada, and the Vulnerable Energy Consumers Coalition, 1999-0001, Decision (June 29, 2000)

RP-1999-0001

IN THE MATTER OF the *Ontario Energy Board Act, 1998;*

AND IN THE MATTER OF an Application by The Consumers' Gas Company Ltd., carrying on business as Enbridge Consumers Gas, for an Order or Orders approving or fixing rates for the sale, distribution, transmission, and storage of gas;

AND IN THE MATTER OF a Motion for Review and Variance by the Industrial Gas Users Association, the Consumers' Association of Canada, and the Vulnerable Energy Consumers Coalition.

BEFORE: Sheila K. Halladay
Presiding Member

Paul Vlahos
Member and Vice-Chair

DECISION WITH REASONS

June 29, 2000

1 THE MOTION

1.1 In its E.B.R.O. 497-01 Decision (the "PBR Decision"), dated April 22, 1999, the Board approved a three year Targeted Performance Based Regulation Plan relating to the operating and maintenance expenditures ("Targeted O&M PBR Plan") of The Consumers' Gas Company Ltd. (the "Company"). As part of that decision the Board determined that the base on which the PBR formula would be applied would be the 1999 O&M expense budget, approved by the Board in the E.B.R.O. 497 main rates case as adjusted for unbundling expenditures. The Board also indicated that it would monitor the results of the Company's Service Quality Indicators and directed the Company to continue its existing process of filing reports with the Board's Energy Returns Officer on a quarterly basis.

1.2 The Targeted O&M PBR Plan, accepted by the Board, dealt only with O&M expenditures and the Board determined that all other aspects of setting rates would continue to be reviewed under the traditional cost of service analysis.

1.3 In June 1999, the Industrial Gas Users Association ("IGUA"), the Consumers' Association of Canada ("CAC"), and the Ontario Coalition Against Poverty (the predecessor of the Vulnerable Energy Consumers Coalition ("VECC") (collectively, the "moving parties")

brought a motion requesting the Board to rescind or vary those portions of the PBR Decision approving the Company's PBR mechanism and to require the Company to submit a detailed O&M expense estimate for the Company's fiscal 1999 year based on available actual expenditures. The moving parties also requested that a detailed review of O&M expenditures for the fiscal 2000 year should be undertaken in the Company's next rates case. The Board found that there was no new evidence that the O&M component of the Company's fiscal 2000 rates, based on the application of the PBR formula to the 1999 O&M expense base, would not be "just and reasonable" and therefore the Board dismissed that motion.

1.4 During the main RP-1999-0001 proceeding, the Board once again dealt with intervenors' concerns about the Targeted O&M PBR Plan. Some intervenors perceived that the information to be filed in rates cases was inadequate and sought to expand the monitoring and reporting requirements of the Company. The Board expressed concern that acceptance of the intervenors' suggestions would compromise the PBR process before it had a chance to begin, and would inevitably result in a line by line scrutiny of the O&M budget as if it were under cost of service regulation. The Board concluded that it expected the financial monitoring issue relating to the O&M expenses would not be revisited for the duration of the Company's current Targeted O&M PBR Plan.

1.5 In the RP-1999-0001 proceeding the Board determined the utility's return on capital, rate base, capital structure, income, and revenue deficiency. The Board also dealt with the appropriate adjustments to be made to rate base, cost of service, and the O&M expense base, to reflect the removal of certain ancillary programs from the utility.

1.6 Effective January 1, 2000, the Company implemented an outsourcing plan (the "Outsourcing

Plan"), whereby the Company agreed to procure customer care services, information technology, and fleet management services from an affiliate, Enbridge Commercial Services Inc. ("ECS"). The Company transferred 1,100 employees to ECS resulting in approximately a 40% decrease of full time positions in the utility.

1.7 On March 16, 2000, IGUA, CAC, and VECC filed a motion requesting the Board to review and vary the Board's RP-1999-0001 Phase 1 Decision, dealing with setting rates for the Company's 2000 fiscal year, commencing October 31, 1999. The motion requested that the Board review and vary those portions of the Board's Decision relating to the Board's determination of the Company's O&M expenses, rate base, depreciation and amortization expenses, return on rate base, income taxes, and gross revenue deficiency for the Company's 2000 fiscal year.

1.8 The moving parties also requested that the Board issue a procedural order:

> declaring the 2000 rates interim, pending the final disposition of the request for review and variance;
>
> directing the Company to make full and complete disclosure of the particulars of the Outsourcing Plan which it implemented on January 1, 2000 with ECS, including directing the Company to record all payments made in appropriate deferral accounts;
>
> providing for directions for a hearing and a determination by the Board of the extent to which the 2000 rates ought to be adjusted as a result of the

Outsourcing Plan; and

directing the Company to file rate base and other cost of service information for the 2000 bridge year and the 2001 test year in the traditional cost of service format in its next rates application.

1.9 The Board held an oral hearing of the motion on May 29, 2000.

1.10 The Heating, Ventilation and Air Conditioning Coalition ("HVAC"), the Alliance of Manufacturers & Exporters Canada (the "Alliance") and Union Gas Limited ("Union") also participated in the hearing of the motion.

2 GROUNDS FOR THE MOTION

2.1 Section 21.2 of the *Statutory Powers Procedure Act* provides that a tribunal may, if it considers it advisable and if its rules deal with the matter, review all or part of its own decision or order and may confirm, vary, suspend or cancel the decision or order. Rule 62 of the Board's *Rules of Practice and Procedure* (the "Rules") provides that a person may bring a motion before the Board to ask the Board to review or rehear any matter or to rescind or vary any order.

2.2 Rule 64.01 provides that in respect of a motion brought under Rule 62 the Board shall determine the "threshold" question of whether the matter should be reheard or reviewed or whether there is reason to believe the order should be rescinded or varied. If the Board finds that the matter should be reheard or reviewed or that there is reason to believe the order should be rescinded or varied, the Board may, in its discretion, either dispose of the motion or issue procedural orders with respect to the conducting of the rehearing or review on the merits.

2.3 Rule 64.01 grants the Board wide powers to adopt whatever procedures it deems to be just and expeditious in the individual circumstances of each motion, including providing for

combining the consideration of the threshold question with the rehearing or review of the matter on its merits.

2.4 The Rules do not expressly state the grounds that the Board should consider in determining "whether the matter should be reheard or reviewed or whether there is reason to believe the order should be rescinded or varied". Rule 63.01 merely states that the notice of motion must "set out the grounds upon which the motion is made, sufficient to justify a rehearing or review or raise a question as to the correctness of the order or decision".

2.5 The grounds listed in Rule 63.01(a) include: error of law or jurisdiction, including a breach of natural justice; error in fact; a change in circumstances; new facts that have arisen; facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and an important matter of principle that has been raised by the order or decision.

3 POSITIONS OF THE PARTIES

3.1 The moving parties indicated that they were not made aware of the Outsourcing Plan until the Company filed an affidavit of Mr. Stephen McGill, dated January 17, 2000, in connection with an application by the Company requesting certain exemptions from the *Affiliate Relationships Code for Gas Utilities* (the "Code") and a related complaint filed by HVAC that the Company had breached the Code.

3.2 The moving parties noted that for the purposes of this motion the Company did not submit responding affidavit material and did not make Mr. McGill available for cross examination by the parties. The moving parties claimed that this was significant when the Board was considering the threshold question and that therefore the evidence before the Board was that there was no denial of the inference that the Company's plan to outsource all customer care functions was being formulated when Mr. McGill and Mr. Kent testified before the Board in the RP 1999-0001 proceeding on September 2, 1999. The moving parties stressed that there was an obligation on the Company to disclose the plans it was considering implementing.

3.3 The moving parties argued that they had met the "threshold test". They contended that the outsourcing of customer care services, information technology and fleet management services

amounts to new facts that have arisen and a change in circumstance. As a result the Board's findings pertaining to O&M expenses, rate base, depreciation and amortization, rate of return, taxes, revenue requirement and revenue deficiency, and the resulting rates for the 2000 the year, should be reviewed and varied.

3.4 The moving parties also pointed out that the list of grounds contained in Rule 63.01(a) is not exhaustive and that other grounds can be raised in support of a motion to review. The moving parties contended that an additional ground for review is the Company's breach of its obligation to make full, complete and timely disclosure of the Outsourcing Plan before the RP-1999-0001 decision was rendered.

3.5 The moving parties submitted that the prospective test year rate making process allows the utility to have its rates determined on the basis of forecasts and therefore it is central to the integrity of the process that the Company make full and timely disclosures of the plans it will be following in the test year. The moving parties argued that prospective rate- making is not intended to provide the Company with an opportunity to seek approval for rates based on a plan which may not be followed at all because it is only one of several options under consideration and may not be the preferred option. The moving parties submitted that if plans change before the Board's decision is rendered, there is an obligation on the Company to make full, plain and timely disclosure of the changed plans and their impact for rate-making purposes.

3.6 The moving parties argued that the Company's failure to disclose its Outsourcing Plan undermines the integrity of the prospective test year rate-making process and has led to a Board decision based on a forecast of an outsourcing plan to which the Company has made

substantial, material and radical changes. Therefore the resulting rate order is neither just nor reasonable.

3.7 The moving parties contended that they are not seeking a PBR reopening nor are they trying to rewrite the monitoring and review process. What they are seeking is a review of all aspects of the revenue requirement because the implementation of the Outsourcing Plan has implications for cost of service components beyond O&M expenses.

3.8 HVAC noted that when the rental program ancillary businesses were transferred to an affiliate there was an extensive review. The impacts of that transfer on the cost of service, involved only 573 people or about 17% of the then utility work force. VECC argued that it is difficult to believe that an outsourcing of this magnitude would not impact upon some of the adjustments made in the RP-1999-0001 case.

3.9 HVAC also submitted that the Outsourcing Plan amounted to a "disposition out of the ordinary course of business" that satisfies both the Rule 63.01 threshold in respect to a change in circumstance and the PBR off-ramp concept.

3.10 Some parties also argued that the Outsourcing Plan constituted "an important matter of principle that had been raised by the order or decision" and therefore the RP-1999-0001 proceeding should be reviewed pursuant to Rule 63.01 (a)(vi). The Alliance submitted that the important matter of principle is that the utility has an obligation to disclose all material information on which PBR is based and that they have failed to do so.

3.11 The Company argued that there had been full disclosure to the Board. The Company's

position was that the Company's witnesses, Mr. Kent and Mr. McGill, indicated in the oral phase of the RP-1999-0001 proceeding that the Company was considering a variety of outsourcing options. When asked for a list of the functions that the Company was contemplating outsourcing, the Company's witnesses replied that the most significant function being considered for outsourcing was the printing, inserting and mailing of bills; however there were other things that could be outsourced and added that there was "an almost unimaginable spectrum of variations on this." The Company also pointed out that at no time during the hearing was there a suggestion that the responses of Company witnesses were inadequate or incomplete.

3.12 The Company also argued that rate decisions, in particular, typically result from a lengthy process and it would be inappropriate to suggest that such decisions can be indiscriminately re-opened for every new fact or changed circumstance, regardless of relevance or materiality.

3.13 The Company pointed out that the O&M component of the Company's Outsourcing Plan is not relevant to rate-making at this time, because the Targeted O&M PBR Plan, approved by the Board, is now in effect.

3.14 The Company submitted that even aside from the existence of the Targeted O&M PBR Plan, management of a regulated utility should not be paralyzed and unable to act decisively during the period between rate cases. The fact that initiatives are pursued between rate cases does not mean that the decision in the preceding case should be re-opened.

3.15 Union argued that a productivity initiative, depending on its timing, size or nature, should not be the basis upon which the Board should reopen a matter during the term of the PBR plan.

This would defeat the purposes of PBR, which, Union submitted, include: allowing utilities to operate with flexibility, in an efficient manner; not committing Board resources to the extent that is necessary in a cost of service regime; and providing utilities with incentives to pursue productivity gains.

4 BOARD'S RULING ON THE MOTION

4.1 In E.B.R.O. 452 the Board considered the problem that arose when utility income was substantially different than that which had been forecasted in the previous rates case. In paragraph 6.5 of the decision the Board noted:

> Regulation is intended to be a surrogate for competition in the marketplace and the legislation intended that the Company has the opportunity to recover its costs and to earn a fair rate of return on its shareholders' equity. In recent years, the prospective test year was adopted because inflationary circumstances placed the shareholders' return at risk. The Board believes that this continues to be an acceptable system, when viewed overall. It enables the utility to reflect changing costs (up or down) in its rates without undue regulatory lag. The system requires the regulator to act on faith with the utility, bearing in mind the prospective nature of the evidence. **The regulator expects the utility, in return, to provide the best possible forecast data that can be made available, on a timely basis.** (emphasis added)

4.2 The Board appreciates that business plans are not carved in stone and the utility must have flexibility to meet ongoing demands of the marketplace; however, this flexibility must be balanced against the utility's obligations as a regulated entity. This is particularly true when the Company is not responding to exogenous events, beyond the Company's control, but is

implementing its own initiatives.

4.3 The Board notes that 1,100 employees, or approximately 40% of the utility's staff, were transferred from the utility to ECS as a result of implementing the Outsourcing Plan. The moving parties describe the Outsourcing Plan as "massive". Given the significant nature of the Outsourcing Plan, the Board concludes that the Outsourcing Plan would have been well known to the Company by the conclusion of the RP-1999-0001 proceeding.

4.4 The Board is not convinced that the Company adequately disclosed its Outsourcing Plan to the Board. Merely stating that the Company is considering a "range of options" and that "there are an almost unimaginable spectrum of variations on this", does not, in the Board view, constitute full, true and plain disclosure of the planned outsourcing of customer care, information technology and fleet management services. This is particularly true given that the Company's witnesses specifically mentioned the possibility of outsourcing other functions such as printing, inserting and mailing of bills as being the "closest on the horizon".

4.5 The Company has an affirmative obligation to provide the Board with the best possible evidence and it is not incumbent on the intervenors to ensure, through cross examination of the Company's witnesses, that the record is adequate and complete. The Company cannot shirk its responsibilities as a regulated entity by submitting evidence that is vague and incomplete.

4.6 However, the mere existence of new facts, change of circumstance or inadequately disclosed information is not alone sufficient to warrant a reopening of the proceeding. The matter must be relevant and material; minor or inconsequential changes to the proposed business plans of

the utility are not sufficient to justify a review.

4.7 The Board notes that customer care, information technology and fleet management functions must still be performed for the efficient operation of the utility. Utility customers should be indifferent as to whether these services are performed within the utility by utility employees or by a third party affiliate, as long as they are performed to the requisite standard.

4.8 In this case, complications in ordering a review arise from two areas: first, the regulatory model that applies to the Company is a hybrid one. The Company is not operating under a comprehensive PBR regulation scheme. Only the O&M expense component is under the PBR model and all other cost of service components are subject to scrutiny by the Board.

4.9 Mr. Thompson, counsel for IGUA, admitted that if the Company's rates were subject to a comprehensive PBR plan, including a price cap, the measures taken by the Company would not be subject to reopening and would have to wait for the monitoring process and rebasing at the end of the term of the plan.

4.10 The Board has repeatedly indicated its reluctance to reopen the Targeted O&M PBR Plan. The performance based regulation regime is new and must be given a chance to work. The Board is concerned that if it were to order the extensive review of the Outsourcing Plan, as requested by the moving parties, this would in effect constitute an off ramp, or a review for an off ramp, merely a few months into the three year Targeted O&M PBR term.

4.11 The second complication is that there is little evidence as to the direction and magnitude of the Outsourcing Plan on the Company's overall cost of service. The Board notes that the

implementation of the Outsourcing Plan does not require the pre-approval of the Board; therefore the Company has not disclosed the impact of the Outsourcing Plan on the utility's cost of service.

4.12 However, the Outsourcing Plan is significant and may have an overall impact on cost of service components other than O&M expenses. The Board agrees with the moving parties that to the extent there are assets involved with the implementation of the Outsourcing Plan, there could be material impact on, for example, rate base and depreciation expense. The Company cannot avoid scrutiny of these items by choosing to implement the Outsourcing Plan during the test year after the conclusion of the rates proceeding.

4.13 The Board agrees with the Company that ordering a review or rehearing is an extraordinary remedy and should not be undertaken lightly. On the basis of the submissions, the Board is not convinced that the extensive review requested by the moving parties is necessary. This is especially true where there may be other remedies available.

4.14 In that regard, the Board orders the Company to establish a deferral account, effective January 1, 2000, to record the impact of the Outsourcing Plan on all items supporting the determination of the revenue requirement, except operating and maintenance expenses. The Board expects the Company to discuss the specific line items and the method of calculation of the amount for each line item with the Board's Energy Returns Officer.

4.15 In the interest of regulatory efficiency, the Board is not prepared, at this time, to issue a procedural order directing a hearing of this matter alone. The Board expects that this issue shall be addressed in the next proceeding dealing with the Company's distribution rates. The

challenge for the Company in that proceeding will be to satisfy the requirement for testing the non-O&M cost of service components, such as rate base and depreciation expense, while staying within the framework of the Targeted O&M PBR Plan.

5 COSTS

5.1 The moving parties asked for their costs of bringing the Motion, regardless of the success of the motion or lack thereof. This is consistent with the position taken by the parties in the preceding Motion for Review in E.B.R.O. 497-01. HVAC and the Alliance also asked for their costs. The parties submitted that essentially the motion arises from the main rates case and the parties were found to have qualified for, and were in fact awarded, costs in that case. They have made every effort to be an of assistance to the Board and cost effective as possible.

5.2 The Company pointed out that in the E.B.R.O. 497-01 Motion for Review the moving parties only received 90% of their costs. The Company also submitted that the costs considerations where the moving parties initiate their own proceedings are different than where the parties are intervening in the Company's application.

5.3 The Board agrees that merely because the moving parties have been awarded costs in the main rates case does not necessarily mean that they should be awarded all of their costs in a subsequent proceeding that they may initiate. The Board is concerned that one of the purposes of this motion was, in essence, another attempt by the moving parties to require a

review of the Company's Targeted PBR Plan. The Board is not convinced that the moving parties and other intervenors are entitled to all of their costs.

5.4 The Board awards the moving parties (IGUA, CAC and VECC) and the intervenors (HVAC and the Alliance) 90% of their reasonably incurred costs.

5.5 The Board's costs shall be paid by the Company upon receipt of the Board's invoice.

DATED at Toronto, June 29, 2000

Sheila K. Halladay
Presiding Member

Paul Vlahos
Member and Vice-Chair

Appendix 6

Université du Québec à Trois-Rivières v. Larocque [1993] 1 S.C.R. 471

Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières *Appellant*

v.

Université du Québec à Trois-Rivières *Respondent*

and

Alain Larocque *Mis en cause*

and

Claude-Élizabeth Perreault and Céline Guilbert *Mis en cause*

INDEXED AS: UNIVERSITÉ DU QUÉBEC À TROIS-RIVIÈRES *v.* LAROCQUE

File No.: 22146.

1992: November 30; 1993: February 25.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Labour relations — Judicial review — Excess of jurisdiction — Arbitration — Dismissal due to lack of funds — Whether refusal by arbitrator to admit relevant and admissible evidence necessarily a breach of rules of natural justice — New arbitration before another arbitrator.

Pursuant to an agreement between the respondent University and the Government of Quebec to conduct research, the University hired two research assistants for a period of 14 months. Before the end of that period, they were advised that "as the result of a lack of funds" the University was forced to terminate their contracts. The employees filed grievances challenging this decision. At the hearing, the University sought to introduce evidence that the employees had done their work badly and that it was accordingly necessary to hire from the research funds provided for in the agreement another experienced person who would be able to redo the work already done. It was this additional expenditure which,

Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières *Appelant*

c.

Université du Québec à Trois-Rivières *Intimée*

et

Alain Larocque *Mis en cause*

et

Claude-Élizabeth Perreault et Céline Guilbert *Mises en cause*

RÉPERTORIÉ: UNIVERSITÉ DU QUÉBEC À TROIS-RIVIÈRES *c.* LAROCQUE

Nº du greffe: 22146.

1992: 30 novembre; 1993: 25 février.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Gonthier et Iacobucci.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Relations de travail — Contrôle judiciaire — Excès de compétence — Arbitrage — Congédiement dû à un manque de fonds — Est-ce que le refus de l'arbitre d'admettre une preuve pertinente et admissible constitue nécessairement une violation des principes de justice naturelle? — Nouvel arbitrage devant un autre arbitre.

À la suite d'une entente entre l'Université intimée et le gouvernement du Québec pour la réalisation d'une recherche, l'Université a engagé deux auxiliaires de recherche pour une période de 14 mois. Avant la fin de cette période, elles ont été avisées que «suite à un manque de fonds» l'Université était dans l'obligation de mettre fin à leurs contrats. Par voie de griefs, les employées ont contesté cette décision. Lors de l'audition, l'Université a cherché à mettre en preuve que les employées avaient mal fait leur travail et qu'il avait donc fallu engager, sur les fonds de recherche prévus à l'entente, une autre personne expérimentée capable de reprendre le travail déjà effectué. C'est ce déboursé sup-

according to the University, had led to the shortage of funds to pay the employees. The appellant union objected to this evidence and argued that the University was trying to alter the grounds relied on in the notices of termination of employment. The arbitrator allowed the objection. He subsequently allowed the grievances and ordered the University to pay the employees their full salaries. The arbitrator stated that when the University referred to a lack of funds, it could only mean funds of the University, with which the employees had entered into a contract. He concluded that the University had not discharged its burden of proving the lack of funds and that accordingly there was no cause for interrupting the contracts. He added that even if there had been a lack of funds, that lack could not be a valid reason for breaching a term contract, since this was a cause which was not within the employee's control, but "due to an agreement made between the University and a third party". The Superior Court allowed the motion in evocation submitted by the University, concluding that the arbitrator had exceeded his jurisdiction by refusing to hear relevant and admissible evidence. The court noted that the arbitrator had confined his ruling to the contractual relationship between the University and the employees in deciding on the merits of the grievance and had refused to hear the evidence that the reason the University lacked funds was precisely the poor quality of the work done by the employees. The court ordered that a new arbitration be held before another arbitrator. The Court of Appeal, in a majority decision, affirmed this judgment. This appeal is primarily to determine whether the refusal by a grievance arbitrator to admit evidence is a decision subject to judicial review.

Held: The appeal should be dismissed.

Per Lamer C.J. and La Forest, Gonthier and Iacobucci JJ.: The grievance arbitrator has jurisdiction to define the scope of the issue presented to him, and in this regard only a patently unreasonable error or a breach of natural justice can constitute an excess of jurisdiction and give rise to judicial review. The necessary corollary of this jurisdiction of the arbitrator is his exclusive jurisdiction then to conduct the proceedings, and he may *inter alia* choose to admit only the evidence he considers relevant to the case as he has chosen to define it. The arbitrator's exclusive jurisdiction to define the scope of the case is not a jurisdictional question.

An arbitrator does not necessarily commit a breach of the rules of natural justice, and therefore an excess of

plémentaire qui aurait occasionné, selon l'Université, le manque de fonds pour payer les employées. Le syndicat appelant s'est opposé à cette preuve et a soutenu que l'Université tentait de modifier le motif invoqué dans les avis de cessation d'emploi. L'arbitre a accueilli l'objection. Il a par la suite accueilli les griefs et ordonné à l'Université de payer aux employées leur plein salaire. L'arbitre a affirmé que lorsque l'Université fait mention du manque de fonds, il ne saurait s'agir d'autres fonds que ceux de l'Université avec laquelle les employées ont contracté. Il a conclu que l'Université ne s'était pas acquittée de son fardeau de prouver le manque de fonds et qu'il n'existait par conséquent pas de cause justifiant l'interruption des contrats. Il a également ajouté que même s'il y avait eu manque de fonds, ce manque de fonds ne saurait constituer une raison valable pour la rupture d'un contrat à durée déterminée, puisque c'est une cause qui ne relève pas du fait de l'employée, mais d'une «entente intervenue entre l'Université et un tiers». La Cour supérieure a accueilli la requête en évocation présentée par l'Université, concluant que l'arbitre avait excédé sa compétence en refusant d'entendre une preuve pertinente et admissible. La cour a souligné que l'arbitre s'était limité à la relation contractuelle entre l'Université et les employées pour décider du fond du grief et qu'il avait refusé d'entendre la preuve que l'Université manquait de fonds justement à cause de la piètre qualité du travail fourni par les employées. La cour a ordonné la tenue d'un nouvel arbitrage devant un autre arbitre. La Cour d'appel, à la majorité, a confirmé ce jugement. Le présent pourvoi vise principalement à déterminer si le refus d'un arbitre de griefs d'admettre une preuve est une décision sujette au contrôle judiciaire.

Arrêt: Le pourvoi est rejeté.

Le juge en chef Lamer et les juges La Forest, Gonthier et Iacobucci: L'arbitre de griefs a compétence pour délimiter le cadre du litige qui lui est soumis et, à cet égard, seule une erreur manifestement déraisonnable ou une violation de la justice naturelle peut constituer un excès de compétence et donner ouverture au contrôle judiciaire. Cette compétence de l'arbitre a nécessairement pour corollaire sa compétence exclusive pour ensuite diriger le débat et il peut, entre autres, choisir de n'admettre que la preuve qu'il estime pertinente à l'égard du litige tel qu'il a choisi de le délimiter. La compétence exclusive de l'arbitre sur la délimitation du cadre du litige n'est pas une question d'ordre juridictionnel.

Un arbitre ne commet pas forcément une violation des règles de justice naturelle, et donc un excès de compé-

jurisdiction, when he erroneously decides to exclude relevant evidence. The arbitrator is in a privileged position to assess the relevance of evidence presented to him and it is not desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the arbitrator. An arbitrator commits an excess of jurisdiction, however, if his erroneous decision to reject relevant evidence has such an impact on the fairness of the proceeding that it can only be concluded that there has been a breach of the rules of natural justice.

In this case, the Superior Court was justified in exercising its review power and ordering a new arbitration hearing. By refusing to admit evidence presented by the University, the arbitrator infringed the rules of natural justice. In the context of a hearing involving a dismissal due to a lack of funds, such evidence was crucial. Its purpose was to establish the cause of the lack of funds. The arbitrator added, moreover, that even if there had been a lack of funds, that lack could not be a valid reason for breaking a term contract, since that was a cause which was not within the employee's control but was due to an "agreement between the University and a third party". He thus recognized the importance of the lack of cause attributable to the employees but found himself in the position of disposing of it without having heard any evidence whatever from the University on the point, and even having expressly refused to hear the evidence which the University sought to present on the point. This quite clearly amounts to a breach of natural justice. The denial of the right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision.

The union did not succeed in establishing that the Superior Court had erred in the exercise of its discretion in ordering that the new arbitration be held before another arbitrator. The court was probably of the view that there could quite reasonably be doubt as to the ability of an arbitrator to objectively hear evidence which he already thought was so lacking in significance as to declare it irrelevant.

Per L'Heureux-Dubé J.: Although a reviewing court is held to a high standard of deference toward an administrative tribunal protected by a privative clause, an error on a question of law which goes to jurisdiction will always be reviewable. In this case, the arbitrator had jurisdiction to dispose of the grievances but committed an excess of jurisdiction by refusing to consider the evi-

tence, lorsqu'il décide de façon erronée d'exclure une preuve pertinente. L'arbitre est dans une situation privilégiée pour évaluer la pertinence des preuves qui lui sont soumises et il n'est pas souhaitable que les tribunaux supérieurs, sous prétexte d'assurer le droit des parties d'être entendues, substituent à cet égard leur appréciation à celle de l'arbitre. Un arbitre commet toutefois un excès de compétence si sa décision erronée de rejeter une preuve pertinente a un impact tel sur l'équité du processus que l'on ne pourra que conclure que les règles de justice naturelle ont été violées.

En l'espèce, la Cour supérieure a eu raison d'exercer son pouvoir de révision et d'ordonner un nouvel arbitrage. En refusant les éléments de preuve présentés par l'Université, l'arbitre a enfreint les principes de justice naturelle. Cette preuve, dans le contexte d'un examen qui porte sur un congédiement dû à un manque de fonds, était cruciale. Elle visait à établir la cause de ce manque de fonds. L'arbitre ajoutait d'ailleurs que même s'il y avait eu manque de fonds, ce manque de fonds ne saurait constituer une raison valable pour la rupture d'un contrat à durée déterminée, puisque c'est une cause qui ne relève pas du fait de l'employée, mais d'une «entente intervenue entre l'Université et un tiers». Il reconnaissait donc l'importance de la question de l'absence d'une cause imputable aux employées mais se trouvait à décider de cette question sans avoir entendu quelque preuve que ce soit de la part de l'Université sur cette question, et en ayant même expressément refusé d'entendre la preuve que l'Université cherchait à faire sur ce point. Cela équivaut très certainement à une violation de la justice naturelle. La négation du droit à une audition équitable rend toujours une décision invalide, que la cour qui exerce le contrôle considère ou non que l'audition aurait vraisemblablement amené une décision différente.

Le syndicat n'a pas réussi à démontrer que la Cour supérieure avait commis une erreur dans l'exercice de sa discrétion en ordonnant que la tenue d'un nouvel arbitrage se fasse devant un autre arbitre. La cour était probablement d'avis que l'on peut fort raisonnablement douter de la capacité d'un arbitre à entendre objectivement une preuve qu'il a déjà estimé dépourvue d'intérêt au point de la déclarer non pertinente.

Le juge L'Heureux-Dubé: Bien qu'un tribunal d'examen soit tenu à un haut niveau de déférence face à un tribunal administratif protégé par une clause privative, une erreur sur une question de droit qui va à la compétence est toujours révisable. En l'espèce, l'arbitre avait compétence pour disposer des griefs mais il a commis un excès de compétence en refusant de considérer la

dence presented by the University. That evidence was relevant to the consideration and disposition of the grievances. Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice.

Cases Cited

By Lamer C.J.

Not followed: *Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*, [1953] 2 S.C.R. 18; **distinguished**: *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, [1982] 2 S.C.R. 888; **referred to**: *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

By L'Heureux-Dubé J.

Referred to: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382.

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Labour Code, R.S.Q., c. C-27, s. 100.2 [ad. 1983, c. 22, s. 65].

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Ouellette, Yves. "Aspects de la procédure et de la preuve devant les tribunaux administratifs" (1986), 16 *R.D.U.S.* 819.

APPEAL from a judgment of the Quebec Court of Appeal, [1990] R.J.Q. 2183, affirming a judgment of the Superior Court* allowing a motion in evocation. Appeal dismissed.

* *Université du Québec à Trois-Rivières v. Larocque*, Sup. Ct. Trois-Rivières, No. 400-05-000148-875, August 26, 1987 (Lebrun J.).

preuve offerte par l'Université. Cette preuve était pertinente pour l'examen et la disposition des griefs. Le refus d'une preuve pertinente et admissible constitue une violation des règles de justice naturelle.

Jurisprudence

Citée par le juge en chef Lamer

Arrêt non suivi: *Toronto Newspaper Guild, Local 87 c. Globe Printing Co.*, [1953] 2 R.C.S. 18; **distinction d'avec l'arrêt:** *Roberval Express Ltée c. Union des chauffeurs de camions, hommes d'entrepôts et autres ouvriers, local 106*, [1982] 2 R.C.S. 888; **arrêts mentionnés:** *St. Anne Nackawic Pulp & Paper Co. c. Syndicat canadien des travailleurs du papier, section locale 219*, [1986] 1 R.C.S. 704; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643.

Citée par le juge L'Heureux-Dubé

Arrêts mentionnés: *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *Union internationale des employés des services, local 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382.

Lois et règlements cités

Code du travail, L.R.Q., ch. C-27, art. 100.2 [aj. 1983, ch. 22, art. 65].

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POURVOI contre un arrêt de la Cour d'appel du Québec, [1990] R.J.Q. 2183, qui a confirmé un jugement de la Cour supérieure*, qui avait accueilli une requête en évocation. Pourvoi rejeté.

* *Université du Québec à Trois-Rivières c. Larocque*, C.S. Trois-Rivières, nº 400-05-000148-875, le 26 août 1987 (le juge Lebrun).

Pierre Thériault, for the appellant.

Marc St-Pierre and *Louis Masson*, for the respondent.

English version of the judgment of Lamer C.J. and La Forest, Gonthier and Iacobucci JJ. delivered by

LAMER C.J.—

Facts

In October 1985 an agreement was concluded between the Government of Quebec and the respondent Université du Québec à Trois-Rivières whereby research was to be conducted by the respondent by means of questionnaires and interviews. The agreement provided for an initial payment of $25,000 on the signing of the agreement and a second payment of $33,000 after the questionnaire and the interview plan were submitted. A committee was set up under the authority of the director of research at the Ministère de l'éducation to provide follow-up on the research. Responsibility for the work was assigned to Professor Jean-Luc Gouvéia, who hired the *mis en cause* Perreault and Guilbert as grant-aided part-time professional research assistants. The date the employment commenced was to be October 15, 1985 and its termination December 15, 1986 [TRANSLATION] "or on notice from the University for cause".

An initial working document prepared by the *mis en cause* was submitted to the follow-up committee on or about April 15, 1986. This presentation was behind the schedule specified in the agreement between the Government and the respondent.

On May 1, 1986 the respondent advised the *mis en cause* by letter that [TRANSLATION] "as the result of a lack of funds" it would be forced to terminate their contract as of April 25, 1986.

A grievance was then filed for each of the *mis en cause* and at the first arbitration hearing, the respondent contended that the arbitrator lacked

Pierre Thériault, pour l'appelant.

Marc St-Pierre et *Louis Masson*, pour l'intimée.

Le jugement du juge en chef Lamer et des juges La Forest, Gonthier et Iacobucci a été rendu par

LE JUGE EN CHEF LAMER—

Faits

En octobre 1985, une entente est conclue entre le gouvernement du Québec et l'intimée, l'Université du Québec à Trois-Rivières, pour la réalisation d'une recherche par le moyen de questionnaires et d'entrevues. L'entente prévoit un premier versement de 25 000 $, suite à la signature de l'entente, et un second versement de 33 000 $ après le dépôt du questionnaire et du schéma d'entrevue. Un comité est mis sur pied, sous l'autorité du directeur de la recherche au ministère de l'Éducation, pour assurer le suivi de la recherche. La responsabilité des travaux est confiée au professeur Jean-Luc Gouvéia qui embauche, comme auxiliaires de recherche professionnelle sous octroi à temps partiel, les mises en cause Perreault et Guilbert. La date du début d'emploi est fixée au 15 octobre 1985 et celle de la fin d'emploi au 15 décembre 1986 «ou sur avis de l'Université pour cause».

Un premier document de travail préparé par les mises en cause est présenté au comité de suivi vers le 15 avril 1986. Cette présentation est en retard sur l'échéancier prévu à l'entente entre le gouvernement et l'intimée.

Le 1er mai 1986, par le biais d'une lettre, l'intimée prévient les mises en cause que «suite à un manque de fonds», l'intimée se voit obligée de mettre fin à leur contrat à compter du 25 avril 1986.

Un grief est alors formulé pour chacune des mises en cause et lors de la première séance d'arbitrage, l'intimée plaide l'absence de compétence de

jurisdiction by alleging that the grievance could not be arbitrated under the collective agreement. This allegation was dismissed by the *mis en cause* arbitrator in a preliminary decision dated December 16, 1986.

In February 1987 the *mis en cause* arbitrator proceeded to hear the grievances on the merits. The respondent then sought to introduce evidence that the two *mis en cause* employees had done their work badly and that, accordingly, in order to meet the schedule agreed on in the contract between the Government and the respondent, it was necessary to hire from the research funds another experienced person who would be able to redo the work done by the *mis en cause* employees in April 1986 and found by the Government's representatives to be of poor quality. It is this additional expenditure which, on the evidence which the respondent sought to present, led to the shortage of funds to pay the two assistants.

The appellant objected to this evidence on the ground that the respondent was trying to add to or alter the grounds relied on in the notices of termination of employment of May 1, 1986. The appellant contended that the respondent wanted to present evidence on the competence of the two *mis en cause* professionals when the sole and exclusive reason given by the respondent for ordering the termination of employment was a lack of funds. The *mis en cause* arbitrator allowed the appellant's objection. On March 19, 1987, he made an award allowing the two grievances and ordering the respondent to pay the *mis en cause* employees their full salary.

The respondent then submitted a motion in evocation to the Superior Court, alleging first that the arbitrator had assumed jurisdiction which he did not have in deciding that the *mis en cause* employees benefited from the grievance procedure laid down in the collective agreement. Alternatively, it argued that the arbitrator had exceeded his jurisdiction by not admitting evidence of the lack of competence of the two *mis en cause* employees. The Superior Court allowed the motion, rejecting the respondent's arguments as to the arbitrator's jurisdiction to hear the grievances but finding that

l'arbitre en alléguant que le grief n'était pas arbitrable aux termes de la convention collective. Cette prétention est rejetée par l'arbitre mis en cause dans une décision préliminaire en date du 16 décembre 1986.

En février 1987, l'arbitre mis en cause procède à l'audition sur le mérite des griefs. L'intimée cherche alors à mettre en preuve que les deux employées mises en cause ont mal fait leur travail et qu'il a donc fallu, pour rencontrer l'échéancier prévu au contrat entre le gouvernement et l'intimée, engager à même les fonds de recherche une autre personne expérimentée capable de reprendre le travail effectué en avril 1986 par les mises en cause et alors jugé de mauvaise qualité par les représentants du gouvernement. C'est ce déboursé supplémentaire qui aurait occasionné, selon la preuve que cherche à faire l'intimée, le manque de fonds pour payer les deux auxiliaires.

L'appelant s'oppose à cette preuve au motif que l'intimée tente d'ajouter ou de modifier les motifs invoqués dans les avis de cessation d'emploi du 1er mai 1986. L'appelant soutient que l'intimée veut faire une preuve concernant la compétence des deux professionnelles mises en cause alors que le seul et exclusif motif invoqué par l'intimée pour décréter la cessation d'emploi était le manque de fonds. L'arbitre mis en cause accueille l'objection de l'appelant. Le 19 mars 1987, il rend une sentence accueillant les deux griefs et ordonnant à l'intimée de payer aux mises en cause leur plein salaire.

L'intimée présente alors une requête en évocation devant la Cour supérieure alléguant tout d'abord que l'arbitre s'est attribué une compétence qu'il ne possédait pas en décidant que les mises en cause bénéficiaient de la procédure de grief prévue à la convention collective. Subsidiairement, elle prétend que l'arbitre a excédé sa compétence en ne permettant pas la preuve du manque de compétence des deux mises en cause. La Cour supérieure accueille la requête, rejetant les arguments de l'intimée relativement à la compétence de l'arbitre pour entendre les griefs, mais estimant que son

his refusal to hear the evidence offered by the respondent constituted an excess of jurisdiction. It ordered that the case be re-heard before another arbitrator.

The appellant appealed the part of the judgment vacating the arbitral award and ordering a new arbitration. The respondent then filed a cross-appeal, challenging the other part of the judgment which recognized the arbitrator's jurisdiction to hear the grievances filed by the *mis en cause* employees. On August 21, 1990, the Court of Appeal dismissed the two appeals, Rousseau-Houle J.A. dissenting on the main appeal. The present appeal is from the Court of Appeal's judgment on the main appeal.

Applicable Legislation

Section 100.2 of the *Labour Code*, R.S.Q., c. C-27, reads as follows:

100.2 The arbitrator shall proceed with all dispatch with the inquiry into the grievance and, unless otherwise provided in the collective agreement, in accordance with such procedure and mode of proof as he deems appropriate.

For such purpose, he may, *ex officio*, call the parties to proceed with the hearing of the grievance.

Applicable Provisions of the Collective Agreement

Clauses 2-1.03 (A), 5-1.01 and 5-5.01 of the collective agreement read as follows:

[TRANSLATION]

2-1.03 (A) A supernumerary, temporary, replacement or grant-aided professional is subject to the following provisions:

. . .

(5) Hiring, probation, resignation (article 5-1.00), except for clauses 5-1.03, 5-1.04 and 5-1.05.

. . .

refus d'entendre la preuve offerte par l'intimée constituait un excès de compétence. Elle ordonne que la tenue d'un nouvel arbitrage soit faite devant un autre arbitre.

L'appelant porte en appel la partie du jugement annulant la sentence arbitrale et ordonnant la tenue d'un nouvel arbitrage. L'intimée interjette alors un appel incident, contestant l'autre partie du jugement qui reconnaissait à l'arbitre la compétence pour disposer des griefs déposés par les mises en cause. Le 21 août 1990, la Cour d'appel rejette les deux appels, le juge Rousseau-Houle étant dissidente quant à l'appel principal. Le présent pourvoi porte sur le jugement de la Cour d'appel relatif à l'appel principal.

Dispositions législatives pertinentes

L'article 100.2 du *Code du travail*, L.R.Q., ch. C-27, se lit ainsi:

100.2 L'arbitre doit procéder en toute diligence à l'instruction du grief et, sauf disposition contraire de la convention collective, selon la procédure et le mode de preuve qu'il juge appropriés.

À cette fin, il peut, d'office, convoquer les parties pour procéder à l'audition du grief.

Dispositions pertinentes de la convention collective

Les clauses 2-1.03 A), 5-1.01 et 5-5.01 de la convention collective se lisent ainsi:

2-1.03 A) Le professionnel surnuméraire, temporaire, remplaçant ou sous octroi est assujetti aux dispositions suivantes:

. . .

5) Engagement, probation, démission (article 5-1.00), à l'exception des clauses 5-1.03, 5-1.04 et 5-1.05

. . .

(19) Procedure for the settlement of grievances and disputes and arbitration (chapter 11-0.00) to claim the benefits conferred herein.

5-1.01 All professionals shall be hired by a contract which the personnel branch will deliver to the professional, indicating to him certain of his terms and conditions of employment (group, classification, salary, date of hiring, probation period, probable length of employment in the case of a supernumerary, temporary, replacement, grant-aided or casual professional). A copy of this contract shall be sent to the union when the professional commences his or her employment.

5-5.01 (a) When an act done by a professional leads to disciplinary action the University, depending on the seriousness of the alleged act, shall take one of the following three (3) steps:

— written warning;
— suspension;
— dismissal.

(b) The University shall inform the professional in writing that he or she is subject to disciplinary action within twenty (20) working days of the time the University becomes aware of the offence alleged against him or her: this is a strict time limit and the burden of proof of subsequent knowledge of the facts by the University is on the University.

(c) In all cases in which the University takes disciplinary action, the professional concerned or the Union may have recourse to the grievance and arbitration procedure; the burden of proof that the cause in question is just and sufficient for disciplinary action to be taken is on the University.

(d) In the event that the University wishes to take disciplinary action against a professional, it shall summon the said professional by at least twenty-four (24) hours' written notice; at the same time, the University shall advise the Union that the professional has been summoned.

(e) The notice sent to the professional shall specify the time and place at which he shall attend and the nature of the facts alleged against him. The professional may be accompanied by a union representative.

19) Procédure de règlement des griefs et mésententes et d'arbitrage (chapitre 11-0.00) pour réclamer les avantages ici conférés.

5-1.01 L'engagement de tout professionnel se fait par contrat que le service du personnel remet au professionnel, l'informant de quelques-unes de ses conditions d'emploi (corps d'emploi, classement, traitement, date d'embauche, durée de probation, durée probable de l'emploi dans le cas d'un professionnel surnuméraire, temporaire, remplaçant, sous octroi ou intermittent). Une copie de ce contrat est transmise au Syndicat lors de l'entrée en fonction du professionnel.

5-5.01 a) Lorsqu'un acte posé par un professionnel entraîne une mesure disciplinaire, l'Université, selon la gravité de l'acte reproché, prend l'une des trois (3) mesures qui suivent:

— l'avertissement écrit;
— la suspension;
— le congédiement.

b) L'Université doit aviser par écrit le professionnel qu'il est sujet à une mesure disciplinaire dans les vingt (20) jours ouvrables de la connaissance par l'Université de l'infraction qu'on lui reproche, ce délai est de déchéance et le fardeau de la preuve de la connaissance ultérieure des faits par l'Université incombe à l'Université.

c) Dans tous les cas où l'Université applique une mesure disciplinaire, le professionnel concerné ou le Syndicat peut recourir à la procédure de grief et d'arbitrage; le fardeau de la preuve que la cause invoquée est juste et suffisante pour appliquer une mesure disciplinaire incombe à l'Université.

d) Dans le cas où l'Université désire imposer une mesure disciplinaire à un professionnel, elle doit convoquer ledit professionnel par un avis écrit d'au moins vingt-quatre (24) heures; au même moment, l'Université avise le Syndicat que ce professionnel a été convoqué.

e) Le préavis adressé au professionnel doit spécifier l'heure et l'endroit où il doit se présenter et la nature des faits qui lui sont reprochés. Le professionnel peut être accompagné d'un représentant du Syndicat.

Judgments

Arbitration Tribunal—Preliminary Decision

In the preliminary decision of December 16, 1986 the arbitrator held that he had total, absolute and exclusive jurisdiction to hear and decide the grievances presented by the complainants. He accordingly dismissed the objection made by counsel for the University that the dismissal of the grant-aided professionals was not subject to arbitration. The arbitrator pointed out that clause 2-1.03 (A) of the collective agreement, governing grant-aided professionals, makes them subject to the grievance procedure in claiming the benefits conferred by the collective agreement. Clause 5-1.01 provides that the hiring of any professional shall be by contract and that this contract shall specify, *inter alia*, the group, classification, salary, date of hiring, probation period and probable length of the employment in the case of a grant-aided professional. According to the arbitrator, it follows that if there is disagreement as to the interpretation or application of any of the provisions of the hiring contract, that disagreement is a grievance within the meaning of the Act and the collective agreement. The arbitrator stated that the contrary solution, namely referring complainants to proceedings in the ordinary courts of law, would be contrary to the manifest intention of the legislature that all grievances be subject to arbitration. This solution would also, the arbitrator concluded, be contrary to the spirit of the Supreme Court decision in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704. Finally, the arbitrator stated that there would have to be a very clear provision to exempt a privilege conferred under a collective labour agreement from the arbitration mechanism provided for in the event of a dispute.

Arbitration Tribunal—Decision on the Merits

In his decision on the merits of the grievances rendered on March 19, 1987, the arbitrator first stated that when the University referred to a lack of funds, it could only mean funds of the employer, the Université du Québec à Trois-Rivières, with which the complainants had entered

Jugements

Tribunal d'arbitrage—décision préliminaire

Dans la décision préliminaire du 16 décembre 1986, l'arbitre a jugé qu'il avait juridiction totale, absolue et exclusive pour entendre et décider des griefs soulevés par les plaignantes. Il a donc rejeté l'objection formulée par le procureur de l'Université, à l'effet que le congédiement des professionnels sous octroi n'était pas arbitrable. L'arbitre a rappelé que la clause 2-1.03 A) de la convention collective, qui régit les professionnels sous octroi, les assujettit à la procédure de griefs pour réclamer les avantages prévus à la convention collective. Or, la clause 5-1.01 prévoit que l'engagement de tout professionnel se fait par contrat et que ce contrat doit préciser, entre autres éléments, le corps d'emploi, le classement, le traitement, la date d'embauche, la durée de probation et la durée probable de l'emploi dans le cas d'un professionnel sous octroi. Selon l'arbitre, il s'ensuit que si un désaccord d'interprétation ou d'application survient quant à l'un ou l'autre des éléments figurant au contrat d'engagement, ce désaccord est un grief au sens de la loi et de la convention collective. L'arbitre a affirmé que la solution contraire, c'est-à-dire, le fait de renvoyer les plaignantes se pourvoir devant les tribunaux de droit commun, irait à l'encontre de la volonté manifeste du législateur que tout grief soit soumis à l'arbitrage. Cette solution irait également à l'encontre, selon l'arbitre, de l'esprit de la décision de la Cour suprême dans l'affaire *St. Anne Nackawic Pulp & Paper Co. c. Syndicat canadien des travailleurs du papier, section locale 219*, [1986] 1 R.C.S. 704. L'arbitre a enfin affirmé qu'il aurait fallu une disposition très claire afin de soustraire un privilège conféré dans le cadre d'un contrat collectif de travail au mécanisme d'arbitrage prévu en cas de litige.

Tribunal d'arbitrage—décision au fond

Dans sa décision sur le fond des griefs rendue le 19 mars 1987, l'arbitre a d'abord affirmé que lorsque l'Université fait référence au manque de fonds, il ne saurait s'agir d'autres fonds que ceux de l'employeur, l'Université du Québec à Trois-Rivières, avec laquelle les plaignantes ont con-

into a contract. He noted that the University had the burden of establishing the lack of funds, and found that the University had not succeeded in showing that it lacked funds to pay the two employees up to the date of termination provided for in the contract. He observed that there was no evidence that the Government had broken its contract with the University and indicated that the University was under no obligation to offer 14-month contracts. He concluded that the University had not discharged its burden of proving the lack of funds and that accordingly there was no cause for interrupting the contracts.

The arbitrator added that even if there had been a lack of funds, that lack could not be a valid reason for breaching a term contract, since [TRANSLATION] "[i]t is a cause which is not within the employee's control, but is due to an agreement between the University and a third party". He stated that, in cases of dismissal for cause in the context of term contracts, the authors and cases require that the employer establish a breach of an essential condition of the contract of employment, a breach for which the employee is responsible. This is why he found that a [TRANSLATION] ". . . fact beyond the employee's control, such as the non-payment of money by a third party to the employer, and indeed the employer's poor economic situation, cannot be a cause for the breach of a contract of employment that relieves the employer of its obligations".

Superior Court

On the question of the arbitrator's jurisdiction Lebrun J., after recalling the principles set out by the Supreme Court in *St. Anne Nackawic Pulp & Paper*, *supra*, and listing the provisions of the collective agreement in effect between the parties and applicable to the complainants, held that:

[TRANSLATION] In deciding to hear the grievance, the respondent arbitrator applied what I would call the presumption that a grievance is arbitrable when, as here, everything tends to show that the individual contract of the parties is clearly subject to the provisions of the collective agreement and therefore to the arbitration mechanisms provided for therein.

tracté. Il a rappelé que l'Université avait le fardeau de démontrer le manque de fonds, et a jugé que l'Université n'avait pas réussi à établir qu'elle manquait de fonds pour payer les deux salariées jusqu'au terme prévu au contrat. Il a noté qu'il n'existait pas de preuve à l'effet que le gouvernement avait rompu son contrat avec l'Université et a indiqué que rien n'obligeait l'Université à offrir des contrats de 14 mois. Il a conclu que l'Université ne s'était pas acquittée de son fardeau de prouver le manque de fonds et qu'il n'existait par conséquent pas de cause justifiant l'interruption des contrats.

L'arbitre a ajouté que même s'il y avait eu manque de fonds, ce manque de fonds ne saurait constituer une raison valable pour la rupture d'un contrat à durée déterminée, puisque «[c]'est une cause qui ne relève pas du fait de l'employé, mais d'entente intervenue entre l'Université et un tiers». Il a affirmé que la doctrine et la jurisprudence exigent, en matière de congédiement pour cause dans le cas de contrats à durée déterminée, que l'employeur démontre la violation d'une condition essentielle du contrat de travail, violation qui doit relever du fait de l'employé. C'est pourquoi il a décidé qu'un «. . . fait indépendant de la volonté de l'employé, comme le non versement des argents d'un tiers à l'employeur, voire la mauvaise situation économique de l'employeur, ne saurait constituer une cause de rupture du contrat de travail qui libère l'employeur de ses obligations».

Cour supérieure

En ce qui a trait à la question de la compétence de l'arbitre, le juge Lebrun, après avoir rappelé les principes élaborés par la Cour suprême dans l'arrêt *St. Anne Nackawic Pulp & Paper*, précité, et énuméré les dispositions de la convention collective en vigueur entre les parties applicables aux plaignantes, a décidé que:

En décidant de se saisir du grief, l'arbitre intimé a appliqué ce que j'appellerais la présomption d'arbitrabilité d'un grief lorsque, comme en l'espèce, tout concourt à établir que le contrat individuel des parties est clairement sujet aux dispositions de la convention collective et partant aux mécanismes d'arbitrage y prévus.

However, Lebrun J. accepted the respondent's alternative argument. Referring to the arbitral award, he noted that the arbitrator had confined his ruling to the contractual relationship between the respondent and the *mis en cause* employees in deciding on the merits of the grievance and had refused to hear the evidence that the reason the respondent lacked funds was precisely the poor quality of the work done by the *mis en cause* employees. Accordingly, he was of the view that:

[TRANSLATION] On the one hand, by blaming [the respondent] for not establishing that the cause of dismissal was something for which the *mis en cause* employees were responsible, and on the other, by denying [the respondent] the opportunity to establish that very fact based on a narrow interpretation of the "cause" of dismissal, the [*mis en cause*] arbitrator was refusing to hear admissible and relevant evidence . . . .

Relying on the Supreme Court judgment in *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, [1982] 2 S.C.R. 888, the judge concluded that the arbitrator had exceeded his jurisdiction by refusing to hear relevant and admissible evidence.

Court of Appeal, [1990] R.J.Q. 2183

Baudouin J.A.

On the question of the arbitrator's jurisdiction, Baudouin J.A. agreed that the relevant provisions of the collective agreement were not [TRANSLATION] "crystal clear". However, he held that this document should be read as a whole and its purposes taken into account. He also referred to the general philosophy of Quebec labour law and concluded that the arbitrator had jurisdiction to decide the two grievances and so had not arrogated to himself jurisdiction exercisable only by the ordinary courts of law.

On the second issue, Baudouin J.A., for the majority, upheld the Superior Court's decision that the arbitrator had exceeded his jurisdiction. Noting first that the Superior Court had found in the respondent's favour mainly owing to the fact that

Le juge Lebrun a cependant accepté l'argument subsidiaire de l'intimée. Référant à la sentence arbitrale, il a souligné que l'arbitre s'était limité à la relation contractuelle entre l'intimée et les mises en cause pour décider du fond du grief et qu'il avait refusé d'entendre la preuve que l'intimée manquait de fonds justement à cause de la piètre qualité du travail fourni par les mises en cause. Par conséquent, il était d'avis que:

D'une part en reprochant à [l'intimée] de ne pas avoir fait la preuve que la cause du congédiement était le fait des employées mises en cause et d'autre part, en refusant à [l'intimée] de précisément faire cette preuve en se fondant sur une interprétation étroite de la «cause» du congédiement, l'arbitre [mis en cause] a alors refusé d'entendre une preuve admissible et pertinente. . .

S'appuyant sur l'arrêt de la Cour suprême dans *Roberval Express Ltée c. Union des chauffeurs de camions, hommes d'entrepôts et autres ouvriers, local 106*, [1982] 2 R.C.S. 888, le juge a conclu que l'arbitre avait excédé sa compétence en refusant d'entendre une preuve pertinente et admissible.

Cour d'appel, [1990] R.J.Q. 2183

Le juge Baudouin

Sur la question de la compétence de l'arbitre, le juge Baudouin a convenu que les dispositions de la convention collective pertinentes n'étaient pas d'une «lumineuse clarté». Il a toutefois jugé que ce document devait être interprété comme un tout en tenant compte des buts qu'il poursuit. Il s'est également référé à la philosophie générale du droit du travail québécois pour conclure que l'arbitre avait compétence pour décider des deux griefs et ne s'était par conséquent pas attribué une compétence qui n'appartient qu'aux tribunaux de droit commun.

En ce qui concerne la deuxième question en litige, le juge Baudouin, pour la majorité, a confirmé la décision de la Cour supérieure à l'effet que l'arbitre avait excédé sa compétence. Soulignant d'abord que la Cour supérieure avait conclu

the arbitrator had not observed the *audi alteram partem* rule, the judge went on to say (at p. 2187):

[TRANSLATION] With all due respect, it does not seem to me that that resolves the problem. It is still necessary to determine whether this evidence was relevant and admissible. There does not seem to be any doubt as to the relevance of the evidence, since it seeks to establish that the need to terminate the employment before the time specified was caused by what the two research assistants themselves did. I am of the view that its admissibility results from the very interpretation of the collective agreement between the parties. No provision is to be found in that agreement requiring the employer in cases of grant-aided professionals . . . to give the facts or reasons behind the dismissal. On the contrary, article 2-1.03 expressly excludes the application to this class of employees of clause 5-5.01 requiring the employer to do that. The university accordingly had no contractual obligation to give in writing the specific reasons for terminating the employment, subject to not being able to rely on them in the event of arbitration. The allegation of lack of funds was sufficient. Evidence of the reasons for this lack of funds was nonetheless not irrelevant or inadmissible.

Rousseau-Houle J.A. (dissenting on the main appeal)

Rousseau-Houle J.A. concurred with the reasons of Baudouin J.A. regarding the arbitrator's jurisdiction. However, she was of the view that the arbitrator had not exceeded his jurisdiction in not admitting evidence of the poor quality of the work done by the *mis en cause* employees.

Rousseau-Houle J.A. held that under s. 100.2 of the *Labour Code*, it is up to the arbitrator to decide on the relevance and admissibility of the evidence the parties intend to submit. His decisions are thus subject to judicial review only if there is a breach of natural justice or patently unreasonable error.

The judge considered that the respondent had been allowed to present argument on the lack of funds and that it had only been prevented from establishing another ground of dismissal, namely the incompetence of the research assistants, a

en faveur de l'intimée principalement en raison du fait que l'arbitre n'avait pas respecté la règle *audi alteram partem*, le juge a ajouté (à la p. 2187):

Le problème, en tout respect, ne me semble pas résolu pour autant. Encore faut-il déterminer si cette preuve était pertinente et admissible. La pertinence de cette preuve ne me paraît pas faire de doute puisqu'elle vise à démontrer que la nécessité de la cessation d'emploi, avant le terme fixé, a été causée par le fait même des deux auxiliaires de recherche. Quant à son admissibilité, je suis d'avis qu'elle résulte de l'interprétation même de la convention collective liant les parties. On ne trouve, en effet, dans celle-ci aucune disposition qui oblige l'employeur dans le cas des professionnels sous octroi [. . .] à donner les faits ou les motifs à l'origine du congédiement. Bien au contraire, l'article 2-1.03 exclut explicitement l'application à cette catégorie d'employés de la clause 5-5.01 qui oblige l'employeur à le faire. L'université n'avait donc aucune obligation conventionnelle de donner par écrit les motifs précis à l'origine de la cessation d'emploi, sous peine de ne pouvoir les invoquer en arbitrage. L'allégation du manque de fonds était suffisante. La preuve des raisons de ce manque de fonds n'était pas pour autant non pertinente et inadmissible.

Le juge Rousseau-Houle (dissidente quant à l'appel principal)

Le juge Rousseau-Houle était d'accord avec les motifs du juge Baudouin concernant la compétence de l'arbitre. Elle a toutefois considéré qu'en ne permettant pas la preuve relative à la piètre qualité du travail des employées mises en cause, l'arbitre n'avait pas excédé sa compétence.

Le juge Rousseau-Houle a précisé que selon l'art. 100.2 du *Code du travail*, c'est à l'arbitre qu'il revient de décider de la pertinence et de l'admissibilité de la preuve que les parties entendent soumettre. Ses décisions ne sont donc sujettes au contrôle judiciaire qu'en cas de violation de la justice naturelle ou d'erreur manifestement déraisonnable.

Le juge a considéré que l'intimée avait eu le droit de faire valoir ses moyens quant au manque de fonds et qu'elle avait uniquement été empêchée de faire la preuve d'un autre motif de congédiement, à savoir, l'incompétence des auxiliaires de

ground which it had not mentioned in the employment termination notices.

Bearing in mind the limited purpose of the arbitrator's jurisdiction, namely to hear and decide the grievance before him, the judge was of the view that the arbitrator [TRANSLATION] "may consider the notion of relevance of the evidence more narrowly than a judge would when hearing witnesses" (p. 2188). She noted that the dispute submitted to the arbitrator here concerned the probable length of the contracts hiring the two *mis en cause* employees and the reason given by the respondent for terminating them.

The judge considered that the arbitrator's decision to refuse to admit the evidence on the ground that the respondent was actually trying to prove a cause of dismissal not mentioned in the notices was not unreasonable. She went on to say (at p. 2189):

[TRANSLATION] That decision does not seem arbitrary or illogical to me either, since it was a necessary part of determining the point at issue and noted that there was not really an adequate connection between that point and the evidence presented.

. . .

In adopting a strict interpretation of the cause of dismissal, rather than granting an adjournment or admitting the evidence under advisement, the arbitrator did not exercise his jurisdiction unreasonably.

The judge further held that the arbitrator's refusal to allow the evidence also should not be regarded as a refusal to exercise his jurisdiction contrary to the rules of natural justice, since it is only a refusal to hear relevant and admissible evidence which constitutes an excess of jurisdiction. She felt that the respondent here had had an opportunity to put forward evidence regarding the lack of funds. She noted that the arbitrator had to reconcile the demands of the decision-making process with the rights of all parties and pointed out that the *audi alteram partem* rule was intended essentially to give the parties a reasonable opportunity to respond to the evidence presented against them.

recherche, motif qu'elle n'avait pas invoqué aux avis de cessation d'emploi.

Étant donné l'objet limité de la compétence de l'arbitre, à savoir, entendre et trancher le grief dont il est saisi, le juge était d'avis que l'arbitre «peut apprécier la notion de pertinence de la preuve d'une façon plus restrictive que ne le ferait un juge lors de l'audition des témoins» (p. 2188). Elle a rappelé que la contestation soumise à l'arbitre concernait ici la durée probable des contrats d'engagement des deux employées mises en cause et la raison invoquée par l'intimée pour y mettre fin.

Le juge a estimé que la décision de l'arbitre de refuser d'admettre la preuve, au motif que l'intimée tentait en réalité de prouver une cause de congédiement non invoquée dans les avis, n'était pas déraisonnable. Elle a ajouté (à la p. 2189):

Cette décision ne m'apparaît pas non plus arbitraire et illogique puisqu'elle s'inscrivait dans l'appréciation de la question en litige et constatait l'insuffisance de lien véritable entre cette question et la preuve soumise.

. . .

En adoptant une interprétation stricte de la cause du congédiement plutôt qu'en accordant un ajournement ou encore en permettant la preuve sous réserve, l'arbitre n'a pas exercé sa compétence de façon déraisonnable.

Le juge a également décidé que le refus de l'arbitre de permettre la preuve ne devait pas non plus être considéré comme un refus d'exercer sa compétence en violation des règles de justice naturelle, puisque c'est uniquement le refus d'entendre une preuve pertinente et admissible qui constitue un excès de compétence. Or, elle a estimé que l'intimée avait ici eu la possibilité de présenter ses moyens de preuve relativement au manque de fonds. Elle a précisé que l'arbitre avait à concilier les exigences du processus décisionnel avec les droits de toutes les parties et a rappelé que la règle *audi alteram partem* vise essentiellement à donner aux parties une possibilité raisonnable de répliquer à la preuve présentée contre elles.

Issues

Though the appellant formulated six questions, in my opinion this appeal really only raises two. First, it must be determined whether the refusal by a grievance arbitrator to admit evidence is a decision subject to judicial review, and in particular whether the Superior Court was justified in exercising its review power in the case at bar. Secondly, the Court must decide whether the Superior Court erred in ordering that the new arbitration hearing would be before another arbitrator.

Analysis

(a) *Refusal to Admit Evidence and Judicial Review*

The question therefore is whether, in deciding not to admit the evidence offered by the respondent, the arbitrator committed an error giving rise to judicial review. In their consideration of this question, Lebrun J. of the Superior Court and Baudouin J.A. speaking for the majority of the Court of Appeal both referred to the following passage from Chouinard J.'s judgment in *Roberval Express*, *supra*, at p. 904:

> Appellant alleged a refusal by the arbitrator to hear admissible and relevant evidence. A refusal to hear admissible and relevant evidence is so clear a case of excess or refusal to exercise jurisdiction that it needs no further comment.

It should be noted, however, that *Roberval Express* did not involve a simple refusal by a grievance arbitrator to hear relevant evidence. The arbitrator, who was to hear four grievances, had refused to hear the first three and heard only the grievance relating to the dismissal of the employee in question. The first three grievances concerned disciplinary action leading up to that dismissal. The employer contended that the dismissal resulted from incidents which gave rise to the disciplinary action, and it was therefore necessary to hear all the grievances at the same time. Accordingly, it attacked the arbitrator not only for not hearing certain evidence, but more importantly, for refusing

Questions en litige

Bien que l'appelant ait formulé six questions, ce pourvoi à mon avis n'en soulève en réalité que deux. Il s'agit en premier lieu de déterminer si le refus d'un arbitre de griefs d'admettre une preuve est une décision sujette au contrôle judiciaire et plus particulièrement de décider si la Cour supérieure a exercé avec raison dans la présente affaire son pouvoir de révision. Il s'agit en deuxième lieu de décider si la Cour supérieure a erré en ordonnant que la tenue du nouvel arbitrage se fasse devant un autre arbitre.

Analyse

a) *Refus d'une preuve et contrôle judiciaire*

Il s'agit donc de déterminer si l'arbitre a commis, en décidant de ne pas recevoir les éléments de preuve offerts par l'intimée, une erreur donnant ouverture au contrôle judiciaire. Dans leur examen de cette question, le juge Lebrun de la Cour supérieure et le juge Baudouin exprimant l'opinion de la majorité en Cour d'appel, ont tous deux fait référence au passage suivant de la décision du juge Chouinard dans l'affaire *Roberval Express*, précitée, à la p. 904:

> L'appelante allègue le refus de la part de l'arbitre d'entendre une preuve admissible et pertinente. Le refus d'entendre une preuve admissible et pertinente est un cas si net d'excès ou de refus d'exercer sa juridiction qu'il ne nécessite aucune élaboration.

Il faut toutefois rappeler que l'affaire *Roberval Express* ne mettait pas en cause le seul refus par un arbitre de griefs d'entendre une preuve pertinente. L'arbitre, qui devait entendre quatre griefs, avait refusé d'entendre les trois premiers pour n'entendre que le grief relatif au congédiement de l'employé visé. Or, les trois premiers griefs portaient sur des mesures disciplinaires qui avaient précédé ce congédiement. L'employeur prétendait que le congédiement découlait des incidents à l'origine de ces mesures disciplinaires, d'où la nécessité d'entendre en même temps tous les griefs. Il reprochait donc à l'arbitre non seulement de ne pas avoir entendu certaines preuves, mais surtout

to exercise his jurisdiction over three of the grievances presented to him.

When thus seen in their context it is not clear that Chouinard J.'s remarks can be used to dispose of this case. Accordingly, this Court must examine the question presented to it on the basis of the particular circumstances of this case, the arguments made by the parties and the general principles governing judicial review in the field of grievance arbitration.

(i) Determining the Scope of This Case

The appellant first argued that the present appeal actually concerns not the *mis en cause* arbitrator's failure to admit the evidence submitted by the respondent, but the *mis en cause* arbitrator's understanding of the issue presented to him, a question over which the grievance arbitrator has exclusive jurisdiction, free from judicial review except in the case of a patently unreasonable error or a breach of natural justice. In other words, the appellant argued that the exclusion of the evidence resulted here from the *mis en cause* arbitrator's decision to confine himself to the cause mentioned in the notice of dismissal and that that decision could only be reversed once it was shown to be patently unreasonable or a breach of natural justice.

As far as this argument is concerned, in my opinion, there is no doubt that the *mis en cause* arbitrator had complete jurisdiction to define the scope of the issue presented to him, and that in this regard only a patently unreasonable error or a breach of natural justice could give rise to judicial review. The question is in no way one which could be characterized as jurisdictional in nature.

For some years, since the decision of Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, this Court has made an effort to limit the scope of the theory of preliminary questions. In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R.

d'avoir refusé d'exercer sa compétence en ce qui a trait à trois des griefs qui lui étaient soumis.

Ainsi replacés dans leur contexte, il n'est pas certain que les propos du juge Chouinard permettent de disposer du présent litige. Aussi est-ce en fonction des circonstances particulières de la présente affaire, des arguments soumis par les parties ainsi que des principes généraux gouvernant le contrôle judiciaire dans le domaine de l'arbitrage des griefs, que nous devons examiner la question qui nous est soumise.

(i) La détermination du cadre du litige

L'appelant a d'abord prétendu que l'objet véritable du présent pourvoi n'est pas le défaut par l'arbitre mis en cause d'avoir admis la preuve soumise par l'intimée, mais bien la compréhension par l'arbitre mis en cause du litige qui lui était soumis, question à l'égard de laquelle l'arbitre de griefs dispose d'une compétence exclusive, échappant au contrôle judiciaire sauf en cas d'erreur manifestement déraisonnable ou d'une violation de la justice naturelle. En d'autres termes, l'appelant a prétendu que l'exclusion de la preuve résultait ici de la décision de l'arbitre mis en cause de s'en tenir à la cause invoquée à l'avis de congédiement et que cette décision ne pouvait être renversée qu'une fois établis son caractère manifestement déraisonnable ou une violation de la justice naturelle.

En ce qui a trait à cet argument, il ne fait pas de doute, selon moi, que l'arbitre mis en cause avait pleinement compétence pour délimiter le cadre du litige qui lui était soumis, et qu'à cet égard, seule une erreur manifestement déraisonnable ou une violation de la justice naturelle pouvaient par conséquent donner ouverture au contrôle judiciaire. Il ne s'agit en effet aucunement d'une question qui puisse être qualifiée de question d'ordre juridictionnel.

Depuis quelques années, suite à la décision du juge Dickson dans l'affaire *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, notre Cour s'est appliquée à restreindre la portée de la théorie des questions préliminai-

1048, Beetz J. favoured instead a functional and pragmatic approach to identifying questions of jurisdiction. He said (at p. 1087):

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"

Applying this approach to the question of the grievance arbitrator's jurisdiction to define the scope of the issue presented to him, I am unable to conclude that the legislature intended such a matter to be beyond the arbitrator's exclusive jurisdiction. This is especially true in the instant case in that in order to determine the scope of the issue presented to him the arbitrator had primarily to interpret the collective agreement, the contracts concluded between the *mis en cause* Perreault and Guilbert and the respondent—contracts covered by clause 5-1.01 of the collective agreement—and the wording of the grievances filed by the appellant. Interpretation of such documents is clearly within the grievance arbitrator's exclusive jurisdiction.

This approach may seem to be at odds with the decision of this Court in *Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*, [1953] 2 S.C.R. 18. In that case, which also involved the exclusion of evidence, Kerwin J. suggested that, far from being non-reviewable by the courts, the error of an administrative tribunal in determining the questions which were the subject of its inquiry was on the contrary, depending on whether the tribunal was wrongly refusing to examine a question or concerning itself with a question not presented to it, a refusal by that tribunal to exercise its jurisdiction or an excess of jurisdiction justifying intervention by the courts.

This judgment, however, may be classified among the decisions of this Court which, as Wilson J. noted in *National Corn Growers Assn. v.*

res. Dans l'arrêt *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, le juge Beetz préconisait plutôt une approche fonctionnelle et pragmatique afin d'identifier les questions de compétence. Il affirmait (à la p. 1087):

> La notion de condition préalable détourne les tribunaux du véritable problème du contrôle judiciaire: elle substitue la question «S'agit-il d'une condition préalable à l'exercice du pouvoir du tribunal?» à la seule question qu'il faut se poser, «Le législateur a-t-il voulu qu'une telle matière relève de la compétence conférée au tribunal?»

Appliquant cette approche à la question de la compétence de l'arbitre de griefs pour délimiter le cadre du litige qui lui est soumis, je ne puis me convaincre que le législateur ait voulu qu'une telle matière échappe à la compétence exclusive de l'arbitre. Cela est d'autant plus vrai, dans la présente affaire, qu'afin de déterminer le cadre du litige dont il était saisi, l'arbitre avait principalement à interpréter la convention collective, les contrats conclus entre les mises en cause Perreault et Guilbert et l'intimée—contrats prévus à la clause 5-1.01 de la convention collective—ainsi que le texte des griefs formulés par l'appelant. Or, l'interprétation de tels documents relève clairement de la compétence exclusive de l'arbitre de griefs.

Ce point de vue peut paraître irréconciliable avec la décision de notre Cour dans l'affaire *Toronto Newspaper Guild, Local 87 c. Globe Printing Co.*, [1953] 2 R.C.S. 18. Dans cette affaire, qui mettait également en cause l'exclusion d'une preuve, le juge Kerwin laissait en effet entendre que l'erreur d'un tribunal administratif dans la détermination des questions faisant l'objet de son enquête, loin de constituer une erreur à l'abri du contrôle judiciaire, constituait au contraire, selon que le tribunal refusait erronément de se pencher sur une question ou s'intéressait à une question qui ne lui était pas soumise, un refus par ce tribunal d'exercer sa compétence ou un excès de compétence justifiant l'intervention des tribunaux supérieurs.

Cette décision peut pourtant être rangée parmi les arrêts de notre Cour qui témoignent, comme le faisait remarquer le juge Wilson dans l'arrêt *Natio-*

Canada (Import Tribunal), [1990] 2 S.C.R. 1324, demonstrates the reluctance Canadian courts had long shown "... to accept the proposition that tribunals should not be subject to the same standard of review as courts" (p. 1335). As Wilson J. explained, administrative law has developed considerably since that time, so that courts of law now allow administrative tribunals much greater independence. *New Brunswick Liquor Corp.*, *supra*, represents the culmination of this development.

In view of the foregoing, I have no hesitation in concluding that the arbitrator had complete jurisdiction to define the scope of the issue presented to him, and that only an unreasonable error on his part in this regard or a breach of natural justice could have constituted an excess of jurisdiction. I also think, though in my opinion it is not necessary to decide this point in the case at bar, that the necessary corollary of the grievance arbitrator's exclusive jurisdiction to define the issue is his exclusive jurisdiction then to conduct the proceedings accordingly, and that he may *inter alia* choose to admit only the evidence he considers relevant to the case as he has chosen to define it.

In my opinion, however, these comments do not dispose of the case at bar. The respondent is not complaining only, or even primarily, of the fact that in refusing to admit the evidence it had to offer the arbitrator erred in understanding the issue presented to him. Rather, it is arguing that even within the issue as defined by the arbitrator—that is, an issue limited to the cause relied on in the notices of dismissal, the lack of funds—this evidence was relevant since its very purpose was to establish the reason for this lack of funds. It maintained that the refusal to admit relevant and admissible evidence infringes the rules of natural justice and for that reason constitutes an excess of jurisdiction.

nal Corn Growers Assn. c. Canada (Tribunal des importations), [1990] 2 R.C.S. 1324, de la réticence dont ont longtemps fait preuve les cours de justice canadiennes «... à admettre la proposition selon laquelle les tribunaux administratifs ne devraient pas être soumis à la même norme qu'elles en matière de contrôle» (p. 1335). Comme l'expliquait encore le juge Wilson, le droit administratif a depuis beaucoup évolué, de sorte que les cours de justice accordent désormais une autonomie plus grande aux tribunaux administratifs. L'arrêt *Société des alcools du Nouveau-Brunswick*, précité, représente le point culminant dans cette évolution.

Compte tenu de ce qui précède, je n'hésite pas à conclure que l'arbitre avait pleine compétence pour délimiter le cadre du litige dont il était saisi et que seule une erreur déraisonnable de sa part sur ce point ou une violation de la justice naturelle auraient pu constituer un excès de compétence. Je crois aussi, même si à mon avis il ne m'est pas nécessaire de décider de cette question dans le cadre du présent litige, que la compétence exclusive de l'arbitre de griefs sur la délimitation du litige a nécessairement pour corollaire sa compétence exclusive pour ensuite diriger en conséquence le débat, et qu'il peut, entre autres choses, choisir de n'admettre que la preuve qu'il estime pertinente à l'égard du litige tel qu'il a choisi de le délimiter.

À mon avis, ces commentaires ne permettent toutefois pas de disposer du présent litige. L'intimée ne se plaint en effet pas uniquement, ni même surtout, du fait qu'en refusant d'admettre les preuves qu'elle avait à lui offrir, l'arbitre se soit trouvé à errer dans la compréhension du litige qui lui était soumis. Elle prétend plutôt que même à l'intérieur du litige tel que l'avait délimité l'arbitre—à savoir un litige limité à la cause invoquée aux avis de congédiement, le manque de fonds—cette preuve était pertinente, puisqu'elle visait justement à établir l'origine de ce manque de fonds. Or, elle affirme que le refus d'admettre une preuve pertinente et admissible enfreint les règles de la justice naturelle et constitue pour ce motif un excès de compétence.

In other words, the question now before this Court is not whether, after deciding wrongly but not unreasonably that he should limit his analysis to a single ground of dismissal, an arbitrator who then decides to exclude evidence of other possible reasons for dismissal commits an error that is beyond judicial review by the courts. The answer to this question is simple: it is yes. The arbitrator is then acting within his jurisdiction.

The question before this Court is instead whether, in erroneously deciding to exclude evidence relevant to the ground of dismissal which he has himself identified as being that which he must examine, the arbitrator necessarily commits an excess of jurisdiction. In my view the answer to this question must in general be no. It will be yes, however, if by his erroneous decision the arbitrator was led to infringe the rules of natural justice. I therefore now turn to considering this question.

(ii) Refusal to Admit Relevant Evidence and Natural Justice

The only rule of natural justice with which the Court is concerned here is the right of a person affected by a decision to be heard, that is, the *audi alteram partem* rule. The question is whether there is a breach of that rule whenever relevant evidence is rejected by a grievance arbitrator. In order to answer this question, we must determine whether judicial review should be available whenever an arbitrator errs, regardless of the seriousness of his error, in declaring evidence submitted by the parties to be irrelevant or inadmissible.

The difficulty of this question arises from the tension existing between the quest for effectiveness and speed in settling grievances on the one hand, and on the other preserving the credibility of the arbitration process, which depends on the parties' believing that they have had a complete opportunity to be heard. Professor Ouellette speaks in this regard of the [TRANSLATION] "... perpetual contradiction between freedom of operation and its

En d'autres termes, la question qui est posée à notre Cour ne consiste pas à savoir si, ayant décidé de façon erronée mais non déraisonnable qu'il devait limiter son examen à un seul motif de congédiement, l'arbitre qui décide en conséquence d'exclure une preuve relative à d'autres motifs possibles de congédiement commet une erreur qui échappe au contrôle judiciaire des tribunaux supérieurs. La réponse à cette question est simple: elle est positive. L'arbitre agit en effet alors dans le cadre de sa compétence.

Notre Cour doit plutôt déterminer si, en décidant de façon erronée d'exclure une preuve pertinente au motif de congédiement qu'il a lui-même identifié comme étant celui qu'il se devait d'examiner, l'arbitre commet forcément un excès de juridiction. À mon avis, la réponse à cette question, de façon générale, est négative. Elle sera toutefois positive si par sa décision erronée, l'arbitre s'est trouvé à violer les principes de la justice naturelle. Je passe donc à l'examen de cette question.

(ii) Refus d'une preuve pertinente et justice naturelle

Le seul principe de justice naturelle qui nous concerne en l'espèce est le droit de la personne concernée par une décision de se faire entendre pour faire valoir son point de vue, c'est-à-dire, la règle *audi alteram partem*. Il s'agit de savoir si, chaque fois qu'une preuve pertinente est rejetée par un arbitre de griefs, il y a violation de cette règle. Afin de répondre à cette question, il faut se demander s'il doit y avoir ouverture au contrôle judiciaire chaque fois qu'un arbitre se trompe, quelle que soit la gravité de son erreur, en déclarant non pertinente ou non admissible une preuve soumise par les parties.

La difficulté de cette question tient à la tension qui existe entre la recherche de l'efficacité et de la rapidité dans le règlement des griefs d'une part, et, d'autre part, le maintien de la crédibilité du processus d'arbitrage, qui dépend de la conviction des parties qu'elles ont pleinement eu la possibilité de faire entendre leur point de vue. Le professeur Ouellette parle à cet égard de la «... perpétuelle contradiction entre la liberté de fonctionnement et

necessary procedural aspects" (Y. Ouellette, "Aspects de la procédure et de la preuve devant les tribunaux administratifs" (1986), 16 *R.D.U.S.* 819, at p. 850). Professor Evans also states:

There is a certain tension between the proposition that an administrative tribunal, even if required to hold an adjudicative-type hearing, is not bound by the whole body of the law of evidence applied in proceedings in courts of law, and the imposition of a duty to decide in a procedurally fair manner.

(J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 452.)

For this reason, the question before the Court cannot simply be answered, as the appellant suggests, by reference to s. 100.2 of the *Labour Code*, which provides:

100.2 [Inquiry into grievance] The arbitrator shall proceed with all dispatch with the inquiry into the grievance and, unless otherwise provided in the collective agreement, in accordance with such procedure and mode of proof as he deems appropriate.

The appellant argued that this provision gave a grievance arbitrator exclusive jurisdiction to decide on the relevance of the evidence presented to him and that his decisions in this regard are consequently beyond the scope of judicial review except in the event of patently unreasonable error.

This argument cannot be accepted. Section 100.2 of the *Labour Code* does give a grievance arbitrator complete autonomy in dealing with points of evidence and procedure; but the rule of autonomy in administrative procedure and evidence, widely accepted in administrative law, has never had the effect of limiting the obligation on administrative tribunals to observe the requirements of natural justice. This is what Professor Ouellette says in this regard, *supra*, at p. 850:

[TRANSLATION] ... the major decisions which formulated the principle of the independence of administrative evidence from technical rules have in the same breath made it clear that this independence must be exercised in accordance with the rules of fundamental justice. It is

son encadrement nécessaire» (Y. Ouellette, «Aspects de la procédure et de la preuve devant les tribunaux administratifs» (1986), 16 *R.D.U.S.* 819, à la p. 850). Le professeur Evans affirme également:

[TRADUCTION] Il existe une certaine tension entre, d'une part, la proposition voulant qu'un tribunal administratif, même s'il doit tenir une audience de type décisionnel, ne soit pas lié par l'ensemble du droit de la preuve que les cours de justice appliquent dans leurs procédures et, d'autre part, l'imposition de l'obligation de rendre une décision de façon équitable sur le plan de la procédure.

(J. M. Evans et autres, *Administrative Law* (3e éd. 1989), à la p. 452.)

Pour cette raison, on ne saurait répondre à la question qui nous est posée en invoquant simplement, comme l'a suggéré l'appelant, l'art. 100.2 du *Code du travail*, qui prévoit:

100.2 [Instruction du grief] L'arbitre doit procéder en toute diligence à l'instruction du grief et, sauf disposition contraire de la convention collective, selon la procédure et le mode de preuve qu'il juge appropriés.

L'appelant a prétendu que cette disposition attribuait à l'arbitre de griefs une compétence exclusive pour juger de la pertinence des preuves qui lui sont soumises et que ses décisions à cet égard échappent par conséquent au contrôle judiciaire sauf en cas d'erreur manifestement déraisonnable.

Cet argument ne peut être retenu. L'article 100.2 du *Code du travail* consacre l'autonomie de l'arbitre de griefs en ce qui a trait aux questions de preuve et de procédure. Mais le principe de l'autonomie de la procédure et de la preuve administratives, qui est largement admis en droit administratif, n'a jamais eu pour effet de limiter l'obligation faite aux tribunaux administratifs de respecter les exigences de la justice naturelle. Voici comment s'exprime à cet égard le professeur Ouellette, *loc. cit.*, à la p. 850:

... les grands arrêts qui ont formulé le principe de l'autonomie de la preuve administrative par rapport aux règles techniques ont, du même souffle, énoncé que cette autonomie devait s'exercer dans le respect des principes de justice fondamentale. Il ne suffit pas que les

not sufficient for administrative tribunals to operate simply and effectively: they must attain this high ideal without sacrificing the fundamental rights of the parties.

It is true that the error of an administrative tribunal in determining the relevance of evidence is an error of law, and that in general the decisions of administrative tribunals which enjoy the protection of a complete privative clause are beyond judicial review for mere errors of law.

That is not true, however, in cases where, as occurred here in the submission of the respondent, the arbitrator's decision on the relevance of evidence had the effect of breaching the rules of natural justice. A breach of the rules of natural justice is regarded in itself as an excess of jurisdiction and consequently there is no doubt that such a breach opens the way for judicial review; but that brings us back to the point at issue in this case: was there a breach of natural justice as a result of the *mis en cause* arbitrator's refusal to admit the evidence submitted by the respondent?

The proposition that any refusal to admit relevant evidence is in the context of a grievance arbitration a breach of natural justice is one which could have serious consequences. It in effect means that the arbitrator does not have the power to decide in a final and exclusive way what evidence will be relevant to the issue presented to him. That may seem incompatible with the very wide measure of autonomy which the legislature intended to give grievance arbitrators in settling disputes within their jurisdiction and the attitude of restraint demonstrated by the courts toward the decisions of administrative bodies.

At the same time, it is clear that the confidence of the parties bound by the final decisions of grievance arbitrators is likely to be undermined by the reckless rejection of relevant evidence. A certain caution is therefore unquestionably necessary in this regard. As Professor Garant observes:

tribunaux administratifs fonctionnent avec simplicité et efficacité, ils doivent atteindre cet idéal élevé sans sacrifier les droits fondamentaux des parties.

Il est vrai que l'erreur d'un tribunal administratif dans l'évaluation de la pertinence d'une preuve est une erreur de droit et que, de façon générale, les décisions des tribunaux administratifs bénéficiant de la protection d'une clause privative complète échappent au contrôle judiciaire pour de simples erreurs de droit.

Il en va toutefois autrement dans les cas, où, comme cela s'est ici produit selon l'intimée, la décision de l'arbitre sur la pertinence d'une preuve a eu pour effet une violation des règles de la justice naturelle. La violation des principes de justice naturelle est en effet considérée, en soi, comme un excès de juridiction et il ne fait par conséquent aucun doute qu'une telle violation donne ouverture au contrôle judiciaire. Mais cela nous ramène à la question qui fait l'objet du présent litige: y a-t-il eu ici, en raison du refus de l'arbitre mis en cause de recevoir la preuve offerte par l'intimée, violation de la justice naturelle?

La proposition selon laquelle tout refus d'une preuve pertinente constitue dans le contexte de l'arbitrage des griefs une violation de la justice naturelle est une proposition susceptible d'avoir de graves conséquences. Elle signifie en réalité que l'arbitre n'a pas le pouvoir de décider de façon finale et exclusive quelles preuves seront pertinentes en regard du litige qui lui est soumis. Cela peut sembler incompatible avec la très large mesure d'autonomie que le législateur a voulu attribuer à l'arbitre de griefs dans le règlement des litiges relevant de sa compétence et l'attitude de retenue dont font preuve les tribunaux supérieurs à l'égard des décisions des organismes administratifs.

Par ailleurs, il est certain que la confiance des administrés, qui sont liés par les décisions finales des arbitres de griefs, est susceptible d'être amoindrie par le rejet inconsidéré de preuves pertinentes. Une certaine prudence, à cet égard, est donc indéniablement de mise. Comme l'affirme le professeur Garant:

[TRANSLATION] A tribunal must be cautious, however, as it is much more serious to refuse to admit relevant evidence than to admit irrelevant evidence, which may later be rejected in the final decision. The practice of a tribunal taking objections to evidence "under advisement" where possible, and when the party making them does not absolutely insist on having a decision right then, is usually advisable; it does not in any way contravene natural justice.

(P. Garant, *Droit administratif*, vol. 2, *Le contentieux* (3rd ed. 1991), at p. 231.)

For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

Accordingly, in the case before the Court there is no doubt, in my opinion, that there was a breach of natural justice. The respondent wished to present evidence of the poor quality of the work of the *mis en cause* Perreault and Guilbert. It sought to show that as a consequence of the poor quality of their work it had been forced to obtain other resources in order to meet the requirements of the granting organization, and that accordingly not enough money remained from the grant to pay the salaries of the *mis en cause* employees. In the context of a hearing involving a dismissal due to a lack of funds, such evidence is *prima facie* crucial. Its purpose is to establish the cause of the lack of funds. If there are still any doubts as to the significance of this evidence, they are dispelled by the following remarks by the *mis en cause* arbitrator:

[TRANSLATION] Even if there was a lack of funds, that lack could not be a valid reason for breaking a term contract. It is a cause which is not within the employee's

Un tribunal doit toutefois être prudent car il est beaucoup plus grave de refuser une preuve pertinente que d'admettre une preuve non pertinente, laquelle pourra être rejetée ultérieurement dans la décision finale. La pratique qui consiste pour un tribunal à prendre «sous réserve» les objections à la preuve, lorsque cela est possible, et lorsque la partie qui les formule ne tient pas absolument à avoir une décision sur-le-champ, est ordinairement sage; cela ne contrevient aucunement à la justice naturelle.

(P. Garant, *Droit administratif*, vol. 2, *Le contentieux* (3e éd. 1991), à la p. 231.)

Pour ma part, je ne suis pas prêt à affirmer que le rejet d'une preuve pertinente constitue automatiquement une violation de la justice naturelle. L'arbitre de griefs est dans une situation privilégiée pour évaluer la pertinence des preuves qui lui sont soumises et je ne crois pas qu'il soit souhaitable que les tribunaux supérieurs, sous prétexte d'assurer le droit des parties d'être entendues, substituent à cet égard leur appréciation à celle de l'arbitre de griefs. Il pourra toutefois arriver que le rejet d'une preuve pertinente ait un impact tel sur l'équité du processus, que l'on ne pourra que conclure à une violation de la justice naturelle.

Ainsi, dans le cas qui nous occupe, il ne fait pas de doute, à mon avis, qu'il y a eu violation de la justice naturelle. L'intimée cherchait à faire la preuve de la mauvaise qualité du travail des mises en cause Perreault et Guilbert. Elle cherchait à démontrer qu'en raison de la piètre qualité de leur travail, elle avait dû, afin de répondre aux exigences de l'organisme subventionnaire, engager une autre ressource, et qu'il ne restait en conséquence pas suffisamment de fonds à même la subvention pour défrayer le salaire des mises en cause. À première vue, cette preuve, dans le contexte d'un examen qui porte sur un congédiement dû à un manque de fonds, est cruciale. Elle vise en effet à établir la cause de ce manque de fonds. Si des doutes subsistent quant à l'importance de cette preuve, ils sont dissipés par les remarques suivantes de l'arbitre mis en cause:

Même s'il y avait eu manque de fonds, ce manque de fonds ne saurait constituer une raison valable de rupture de contrat à durée déterminée. C'est une cause qui ne

control, but is due to an agreement between the University and a third party.

In light of these remarks by the *mis en cause* arbitrator, one can only conclude that there was a breach of natural justice. As Lebrun J. pointed out, the *mis en cause* arbitrator adopted a paradoxical position:

[TRANSLATION] On the one hand, by blaming [the respondent] for not establishing that the cause of the dismissal was something for which the *mis en cause* employees were responsible, and on the other, by denying [the respondent] the opportunity to establish that very fact based on a narrow interpretation of the "cause" of dismissal. . . .

The consequence of this paradoxical position taken by the *mis en cause* arbitrator is that he found himself in the position of disposing of an extremely important point in the case before him—namely the lack of cause attributable to the employees—without having heard any evidence whatever from the respondent on the point, and even having expressly refused to hear the evidence which the respondent sought to present on the point. This quite clearly amounts to a breach of natural justice.

The appellant argued that the arbitrator's comments on the lack of any cause attributable to the *mis en cause* employees were only *obiter* and that the arbitrator would quite clearly have come to the same decision even if he had heard the evidence the respondent was seeking to present. It contended that the real reason for the arbitrator's decision was that the lack of funds itself had not been established in this case and moreover could never be a valid cause for dismissal.

This argument cannot be accepted. First, it is impossible to say with any certainty what the decision of the *mis en cause* arbitrator would have been if he had heard the evidence offered by the respondent. That evidence might have convinced him that in the particular circumstances of this case, and especially in view of the relationship existing between the respondent and the granting organization, the lack of funds could be a cause for dismissal attributable to the fault of the employees

relève pas du fait de l'employé, mais d'entente intervenue entre l'Université et un tiers.

À la lumière de ces remarques de l'arbitre mis en cause, l'on ne peut que conclure à l'existence d'une violation de la justice naturelle. Comme le fait remarquer le juge Lebrun, l'arbitre mis en cause adopte une position paradoxale:

D'une part en reprochant à [l'intimée] de ne pas avoir fait la preuve que la cause du congédiement était le fait des employées mises en cause et d'autre part, en refusant à [l'intimée] de précisément faire cette preuve en se fondant sur une interprétation étroite de la «cause» du congédiement . . .

La conséquence de cette position paradoxale de l'arbitre mis en cause est qu'il s'est trouvé à disposer d'une question extrêmement importante en regard du litige qui lui était soumis—à savoir, l'absence d'une cause imputable aux employées—sans avoir entendu quelque preuve que ce soit de la part de l'intimée sur cette question, et en ayant même expressément refusé d'entendre la preuve que cherchait à faire l'intimée sur ce point. Cela équivaut très certainement à une violation de la justice naturelle.

L'appelant a prétendu que les commentaires de l'arbitre sur l'absence d'une cause imputable aux mises en cause ne constituait qu'un *obiter* et que l'arbitre en serait très certainement venu à la même décision même s'il avait entendu la preuve que cherchait à faire l'intimée. Elle prétend en effet que le véritable motif de la décision de l'arbitre est que le manque de fonds lui-même n'avait pas été établi en l'espèce et ne pouvait d'ailleurs jamais constituer une cause valable de congédiement.

Cet argument ne peut être retenu. En premier lieu, il est impossible de deviner avec certitude quelle aurait été la décision de l'arbitre mis en cause s'il avait entendu les éléments de preuve offerts par l'intimée. Ces éléments de preuve auraient pu le convaincre que dans les circonstances particulières de la présente affaire, et en particulier en raison du rapport existant entre l'intimée et l'organisme subventionnaire, le manque de fonds pouvait constituer une cause de congédie-

and that this ground could accordingly justify the respondent in terminating the employment contracts.

Secondly, and more fundamentally, the rules of natural justice have enshrined certain guarantees regarding procedure, and it is the denial of those procedural guarantees which justifies the courts in intervening. The application of these rules should thus not depend on speculation as to what the decision on the merits would have been had the rights of the parties not been denied. I concur in this regard with the view of Le Dain J., who stated in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661:

> ... the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

For all these reasons, I conclude that by refusing to admit the evidence which the respondent was seeking to present the *mis en cause* arbitrator infringed the rules of natural justice. The Superior Court therefore did not err in ordering a new arbitration. Did the Superior Court however err in ordering that the new arbitration be held before another arbitrator?

(b) *Referral of Case to Another Arbitrator*

The appellant contended that the Superior Court had erred in ordering that the new arbitration be held before another arbitrator, since there was no real, objective reason for doubting the impartiality of the *mis en cause* arbitrator.

On this point, in my opinion, the appellant did not succeed in establishing that the Superior Court had erred in the exercise of its discretion so as to justify intervention by this Court. Though he did not actually say so, Lebrun J. was probably of the view that there could quite reasonably be doubt as

ment imputable à la faute des employées et que ce motif pouvait par conséquent justifier l'intimée de mettre fin aux contrats de travail.

En second lieu, et de façon plus fondamentale, les règles de justice naturelle consacrent certaines garanties au chapitre de la procédure, et c'est la négation de ces garanties procédurales qui justifie l'intervention des tribunaux supérieurs. L'application de ces règles ne doit par conséquent pas dépendre de spéculations sur ce qu'aurait été la décision au fond n'eût été la négation des droits des intéressés. Je partage à cet égard l'opinion du juge Le Dain qui affirmait, dans l'arrêt *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, à la p. 661:

> ... la négation du droit à une audition équitable doit toujours rendre une décision invalide, que la cour qui exerce le contrôle considère ou non que l'audition aurait vraisemblablement amené une décision différente. Il faut considérer le droit à une audition équitable comme un droit distinct et absolu qui trouve sa justification essentielle dans le sens de la justice en matière de procédure à laquelle toute personne touchée par une décision administrative a droit.

Pour tous ces motifs, je conclus qu'en refusant les éléments de preuve que cherchait à présenter l'intimée, l'arbitre mis en cause a enfreint les principes de justice naturelle. La Cour supérieure n'a donc pas erré en ordonnant la tenue d'un nouvel arbitrage. La Cour supérieure a-t-elle par ailleurs erré en ordonnant que la tenue de ce nouvel arbitrage se fasse devant un autre arbitre?

b) *Renvoi de l'affaire à un autre arbitre*

L'appelant a prétendu que la Cour supérieure avait erré en ordonnant que la tenue d'un nouvel arbitrage se fasse devant un autre arbitre, puisqu'il n'existait aucun motif sérieux et objectif de douter de l'impartialité de l'arbitre mis en cause.

Sur ce point, à mon avis, l'appelant n'a pas réussi à démontrer que la Cour supérieure avait erré dans l'exercice de sa discrétion, de manière à justifier l'intervention de notre Cour. Quoiqu'il ne l'ait point mentionné, le juge Lebrun fut probablement d'avis que l'on peut fort raisonnablement

to the ability of a grievance arbitrator to objectively hear evidence which he already thought was so lacking in significance as to declare it irrelevant.

Conclusion

For these reasons, the appeal is dismissed with costs.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J.—I agree entirely with the Chief Justice on the outcome of this case. However, I would adopt the approach taken by the trial judge, Lebrun J., and by Baudouin J.A. for the majority of the Court of Appeal, [1990] R.J.Q. 2183.

When faced with a privative clause an appellate court will be held to a high standard of deference toward an administrative tribunal. However, an error on a question of law which goes to jurisdiction will always be reviewable (see *Canada (Attorney General) v. Mossop*, [1993]1 S.C.R. 554, and the decisions cited therein).

Although the arbitrator in the case at bar had jurisdiction to dispose of the grievances before him, as the lower courts correctly held, he could not in so doing commit an excess of jurisdiction. In *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, Dickson J. (as he then was), speaking for the Court, made this point very clearly (at p. 389):

> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. [Emphasis added.]

douter de la capacité d'un arbitre de griefs à entendre objectivement une preuve qu'il a déjà estimé dépourvue d'intérêt au point de la déclarer non pertinente.

Conclusion

Pour tous ces motifs, le pourvoi est rejeté avec dépens.

Les motifs suivants ont été rendus par

LE JUGE L'HEUREUX-DUBÉ—Je suis entièrement d'accord avec le Juge en chef sur l'issue du présent litige. J'emprunte, cependant, la voie qu'ont choisie le juge Lebrun, en première instance, et le juge Baudouin pour la majorité de la Cour d'appel, [1990] R.J.Q. 2183.

Face à une clause privative, un tribunal d'appel sera tenu à un haut niveau de déférence vis-à-vis un tribunal administratif. Toutefois, une erreur sur une question de droit qui va à la juridiction sera toujours révisable (voir *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554, et les décisions y citées).

Quoique l'arbitre ait ici eu juridiction pour disposer des griefs dont il était saisi, comme les tribunaux d'instance l'ont à bon droit décidé, il ne pouvait, ce faisant, commettre un excès de juridiction. Dans l'arrêt *Union internationale des employés des services, local 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382, le juge Dickson (plus tard Juge en chef), au nom de la Cour, s'exprime clairement à cet égard (à la p. 389):

> Un tribunal peut, d'une part, avoir compétence dans le sens strict du pouvoir de procéder à une enquête mais, au cours de cette enquête, faire quelque chose qui retire l'exercice de ce pouvoir de la sauvegarde de la clause privative ou limitative de recours. Des exemples de ce genre d'erreur seraient le fait d'agir de mauvaise foi, de fonder la décision sur des données étrangères à la question, d'omettre de tenir compte de facteurs pertinents, d'enfreindre les règles de la justice naturelle ou d'interpréter erronément les dispositions du texte législatif de façon à entreprendre une enquête ou répondre à une question dont il n'est pas saisi. [Je souligne.]

Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence. That is the case here.

In my view, the formalism and inflexibility demonstrated by the arbitrator in this case have no place in the hearing of a grievance. If the arbitrator had doubts as to the relevancy of the evidence sought to be introduced, he could have taken it under advisement as courts regularly do. This would have facilitated and speeded up the hearing. Furthermore, as is often the case, the relevance or otherwise of the evidence in question would have become apparent during the proceedings. In these circumstances, the ends of justice would have been better served for all the parties involved.

In any event, I subscribe entirely to the reasons of the majority of the Court of Appeal that the evidence presented by the respondent was relevant to the consideration and disposition of the grievances before the arbitrator. The arbitrator's refusal to consider such evidence was an excess of jurisdiction.

For these reasons, I would dispose of the appeal as the Chief Justice suggests, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Lapierre, St-Denis & Associés, Montréal.

Solicitors for the respondent: Joli-Coeur, Lacasse, Simard, Normand & Associés, Trois-Rivières.

Refuser une preuve pertinente et admissible constitue une violation des règles de justice naturelle. C'est une chose que d'adopter des règles de procédure propres à une audition, c'en est une autre que de ne pas respecter une règle fondamentale, soit celle de rendre justice aux parties en entendant une preuve pertinente et, partant, admissible. C'est le cas ici.

À mon avis, le formalisme et la rigidité dont a fait preuve l'arbitre en l'instance ne sont pas de mise dans l'examen d'un grief. Si l'arbitre entretenait des doutes quant à la pertinence de la preuve que l'on voulait apporter, il aurait pu la prendre sous réserve, comme les tribunaux le font régulièrement. Ceci aurait facilité et accéléré l'audition. De plus, la pertinence ou non de la preuve ici en question, comme c'est souvent le cas, serait devenue évidente au cours du débat. Dans ces conditions, les fins de la justice auraient été mieux servies envers toutes les parties en cause.

À tout événement, je souscris entièrement aux motifs exprimés par la majorité de la Cour d'appel à l'effet que la preuve offerte par l'intimée était pertinente à l'examen et à la disposition des griefs dont l'arbitre était saisi. Le refus de l'arbitre de la considérer constituait un excès de juridiction.

Pour ces motifs, je disposerais de l'appel comme le suggère le Juge en chef, le tout avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant: Lapierre, St-Denis & Associés, Montréal.

Procureurs de l'intimée: Joli-Cœur, Lacasse, Simard, Normand & Associés, Trois-Rivières.

Appendix 7

Ontario Provincial Police v. The Cornwall Public Inquiry, 2008 ONCA 33

CITATION: Ontario Provincial Police v. The Cornwall Public Inquiry, 2008 ONCA 33

DATE: 20080118
DOCKET: C47951

COURT OF APPEAL FOR ONTARIO

DOHERTY, MOLDAVER and GILLESE JJ.A.

BETWEEN:

ONTARIO PROVINCIAL POLICE, ONTARIO PROVINCIAL POLICE ASSOCIATION, CORNWALL COMMUNITY POLICE SERVICE, MNISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES and THE EPISCOPAL CORPORATION OF THE DIOCESE OF ALEXANDRIA CORNWALL

Appellants

and

THE HONOURABLE G. NORMAND GLAUDE, COMMISSIONER THE CORNWALL PUBLIC INQUIRY

Respondent

Gina Saccoccio Brannan, Q.C. for the Ontario Provincial Police

W. Mark Wallace for the Ontario Provincial Police Association

David Rose for the Ministry of Community Safety and Correctional Services

Peter E. Manderville for the Cornwall Community Police Service

Brian J. Gover and Patricia M. Latimer for the respondent Commissioner

Leslie M. McIntosh for the Intervenor, the Attorney General for Ontario

Heard: December 13, 2007

On appeal from the order of the Divisional Court (James D. Carnwath and Colin L. Campbell JJ., Harvey Spiegel J. dissenting) dated September 17, 2007 and reported at (2007), 229 O.A.C. 238, dismissing the appellants' application for an order directing the Honourable Justice G. Normand Glaude, Commissioner, to state a case.

MOLDAVER J.A.:

[1] On April 14, 2005, a Commission known as the Cornwall Public Inquiry was established pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P. 41 ("Act"). Mr. Justice G. Normand Glaude of the Ontario Court of Justice was appointed as the Commissioner.

[2] The Commission has been functioning for the better part of two years. After sorting out a host of preliminary matters, including the issue of which parties would be granted standing, the Commission began hearing evidence in mid-February 2006. As of mid-July 2007, the Commission had heard from sixty-four witnesses, including eleven contextual expert witnesses, nineteen corporate officials representing various public institutions, twenty-eight alleged victims and six relatives of alleged victims.

[3] Against that backdrop, it is hard to believe that the Commissioner, his counsel and the parties would, at this late stage, be involved in a debate about the subject matter of the Inquiry and the breadth of the Commissioner's mandate. And yet that is precisely the issue that lies at the core of this appeal.

[4] The issue has its genesis in the evidence of two witnesses, identified for privacy purposes as C12 and C13. Commission counsel seeks to lead their evidence before the Commissioner, while the appellants and the Attorney General for Ontario, as intervenor, seek to exclude it.

[5] In a nutshell, the impugned evidence arises from an allegation by C12 that on December 8, 1993, when she was sixteen years old and living with her mother in Alexandria, Ontario, she was sexually assaulted at knifepoint by two teenage boys. C12 reported the matter to the police in Alexandria the next day. If permitted to testify, C12 and her mother, C13, will speak about the abusive, insensitive and unprofessional treatment that C12 allegedly received at the hands of an officer of the Ontario Provincial Police who took her complaint and commenced the investigation. C12 will also speak about her loss of confidence in the police, her decision not to proceed with the charges and the emotional difficulties that she has suffered as a result of the incident.

[6] The appellants, led by the Ontario Provincial Police ("OPP"), and the intervenor submit that the proposed evidence falls outside the ambit of the Commission's mandate. They say that the phrase "allegations of historical abuse of young people" in the Order in Council ("OIC") establishing the Commission restricts the subject matter of the Commission to allegations of abuse of young persons in the Cornwall area by persons who were in positions of trust or authority, and which were reported to a public institution a considerable time after the abuse occurred. Commission counsel, on the other hand, submits that the subject matter of the Commission extends to all cases

involving allegations of abuse of young people in the Cornwall area, including allegations of sexual assault such as those made by C12, so long as the allegations were made before April 14, 2005, the date on which the Commission was established.

[7] Following a hearing in which the parties set out their respective positions, the Commissioner determined that the subject matter of the Commission was the more expansive one urged by Commission counsel. In his written reasons dated June 16, 2007, the Commissioner refused a request under s. 6(1) of the Act to state a case to the Divisional Court questioning his authority to receive the evidence of C12 and C13.

[8] The OPP and others then applied to the Divisional Court under s. 6(2) of the Act for an order directing the Commissioner to state such a case. In the application to the Divisional Court, the appellants posed the following questions:

> Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to "…inquire into and report on the institutional response of the justice system … to allegations of historical abuse of young people…"?
>
> Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?

[9] In a split decision, the Divisional Court dismissed the application to direct the Commissioner to state such a case. The majority concluded that the Commissioner did not err in construing his mandate broadly. They further held that it was open to him to find that the evidence of C12 and C13 was "reasonably relevant" to the subject matter of the Inquiry. Accordingly, they declined to direct the Commissioner to state a case.

[10] H. Spiegel J., in dissent, came to the opposite conclusion. In his view, the Commissioner misconstrued the subject matter of the Commission and exceeded his jurisdiction in concluding that the proposed evidence of C12 and C13 came within it. He would have allowed the application and answered the questions on the stated case as follows:[1]

[1] The first question on the stated case as set out by Spiegel J. is worded slightly differently than the first question as framed by the appellants. In the Commissioner's factum filed with the Divisional Court, he also framed questions that he would have stated in the event he were directed to do so by the Divisional Court. It is not necessary to set

> Question 1: Is evidence of sexual abuse of a young person reported at or near the time it was alleged to have occurred reasonably relevant to the Terms of Reference given the mandate of the inquiry to "… inquire into and report on the institutional response of the justice system… to allegations of historical abuse …?"
>
> Answer: No.
>
> Question 2: In deciding to hear the evidence of C12 and C13 did the Commissioner properly exercise his jurisdiction or exceed his jurisdiction?
>
> Answer: The Commissioner exceeded his jurisdiction.

[11] For reasons that follow, I am respectfully of the view that the Commissioner erred in finding that the proposed evidence of C12 and C13 comes within the subject matter of the Commission. In so concluding, the Commissioner impermissibly redefined and expanded the scope of his mandate and committed jurisdictional error. Accordingly, I would allow the appeal and would answer the questions on the stated case, as framed by the appellants, in the same manner as did Spiegel J.

RELEVANT STATUTORY PROVISIONS

[12] Section 6 of the Act states:

> 6. (1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.

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out these questions; although the Commissioner included much more detail, the ultimate questions he raised do not differ in any significant way from the questions posed by the appellants.

> (2) If the commission refuses to state a case under subsection (1), the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.
>
> (3) Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised.

[13] The relevant parts of the OIC dated April 14, 2005, which created the Cornwall Public Inquiry, state:

> WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded. Community members have indicated that a public inquiry will encourage individual and community healing;
>
> AND WHEREAS under the *Public Inquiries Act*, R.S.O. 1990, c. P.41, the Lieutenant Governor in Council may, by commission, appoint one or more persons to inquire into any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or the administration of justice therein or any matter of public concern, if the inquiry is not regulated by any special law and if the Lieutenant Governor in Council considers it desirable to inquire into that matter;
>
> AND WHEREAS the Lieutenant Governor in Council considers it desirable to inquire into the following matters. The inquiry is not regulated by any special law;
>
> THEREFORE, pursuant to the *Public Inquiries Act*:
>
> **Establishment of the Commission**
>
> 1. A Commission shall be issued effective April 14, 2005, appointing the Honourable G. Normand Glaude as a Commissioner.

Mandate

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:

   (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and

   (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse

in order to make recommendations directed to the further improvement of the response in similar circumstances.

3. The Commission shall inquire into and report on processes, services or programs that would encourage community healing and reconciliation in Cornwall.

4. The Commission may provide community meetings or other opportunities apart from formal evidentiary hearings for individuals affected by the allegations of historical abuse of young people in the Cornwall area to express their experiences of events and the impact on their lives.

ANALYSIS

[14] I begin my analysis by referring in more detail to the reasons of the Commissioner for refusing to state a case on the issue whether he had jurisdiction to hear the evidence of C12 and C13. The appellants' position before the Commissioner was that the term "historical abuse of young people" in para. 2 of the OIC restricts the scope of the Inquiry to situations where the abuse complained of occurred to a child, by a person in authority, and which was only reported to an institution much later. In contrast, Commission counsel took the view that the word "historical" means abuse that occurred prior to April 14, 2005, the date of the OIC.

[15] The Commissioner concluded that the proposed evidence came within the subject matter of the Inquiry and for that reason it was within his jurisdiction to admit it. This conclusion is made clear at p. 4 of his reasons where he defined the issue confronting him as follows:

> Finally, I should note that the parties did make submissions with respect to relevance of the evidence in question.
>
> In my view, the question before me is *one of jurisdiction only* as relevance would go to issues such as admissibility generally and the weight to be given to such evidence, which is not the subject matter of a section 6 application.[2] [Emphasis added.]

[16] In reaching this conclusion, the Commissioner expressed the opinion that both of the competing interpretations of "historical" that were advanced by the parties "have merit and that they are not mutually exclusive but are quite compatible." He acknowledged that "the main focus of Parliament" in appointing the Inquiry "was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse." More will be said later in these reasons about the nature of the cases that were in the spotlight in Cornwall at the time of the decision to convene the Inquiry. Suffice to say at this point that these cases involved allegations of historical abuse of young people by persons in authority or positions of trust.

[17] Having identified the main focus of his mandate, the Commissioner was of the view that such mandate should not be read as being limited to a consideration of those particular cases:

> I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.
>
> To interpret the mandate in such a way is unduly restrictive and contrary to the spirit of the preamble and to section 3 of the Order in Council.

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[2] The Commissioner's statement that matters of relevance, such as "admissibility generally and the weight to be given to such evidence" are "not the subject matter of a section 6 application" is not entirely accurate. As was held by this court in *Re Bortolotti et al. and the Ministry of Housing et al.*, discussed *infra*, such matters can give rise to jurisdictional error if the proposed evidence is not "reasonably relevant" to the subject matter of the inquiry.

[18] On the Commissioner's view of the expansive mandate created by the OIC, the proposed evidence of C12 and C13 came within the terms of reference and as such, it was clearly admissible.

[19] The majority of the Divisional Court, in dismissing the appellants' application to direct the Commissioner to state a case, correctly articulated the principles that govern applications under s. 6 of the Act. These principles were first set out by Morden J. in *Re Royal Commission into Metro Toronto Police Practices* (1975), 10 O.R. (2d) 113 (Div. Ct.) and were later approved by Howland J.A. in *Re Bortolotti et al. and Ministry of Housing et al.* (1977), 15 O.R. (2d) 617 (C.A.). Howland J.A. held at p. 623 that applications under s. 6(1) of the Act are confined to matters of jurisdiction only:

> Section 6(1) of the *Public Inquiries Act, 1971* no longer provides for a case to be stated as to the "validity of any decision, order, direction or other act of a commissioner". I am in agreement with the conclusion of Morden, J., in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113 at pp. 119-21, 64 D.L.R. (3d) 477 at pp. 483-5, 27 C.C.C. (2d) 31, that "authority" in s. 6(1) means "jurisdiction", and that *the statutory powers of the Court are now "supervisory only, i.e., confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction."* [Emphasis added.]

[20] Howland J.A. went on at pp. 623-24 to explain how the court on a s. 6 application is to assess whether the Commission has committed a jurisdictional error:

> *An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in Order in Council 2959/76.* In the exercise of its powers under s. 6(1) of the *Public Inquiries Act, 1971*, the Divisional Court has a supervisory role to perform respecting errors of jurisdiction. In considering whether the Commission has exceeded or has declined its jurisdiction, it is necessary to determine what evidence is admissible before the Commission...

> *In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry*, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the *Public Inquiries Act, 1971*. [Emphasis added.][3]

[21] *Bortolotti* thus directs that an error of jurisdiction occurs when the Commission admits evidence that is not reasonably relevant to the subject matter of the inquiry. Howland J.A. addressed the meaning of the phrase "reasonably relevant" at pp. 624-25:

> Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".
>
> The definition of "relevant" which has been commonly cited with approval by the Courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., art. I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". *In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in McCormick on Evidence, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value ... ".*
>
> *In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document.*…[Emphasis added.]

[22] Having correctly set out the applicable legal principles from *Bortolotti* at paras. 14-17 of their reasons, the majority did not go on to perform the review function that they

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[3] Section 11 reads:

> 11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

had identified, namely, "to scrutinize carefully the subject matter of the inquiry as set forth in the Order in Council". Instead, the majority took a deferential approach to reviewing the Commissioner's decision on the subject matter of the Inquiry and simply concluded that it was "open to him to place a different construction on 'historical' and 'abuse' as set out in the Terms of Reference in order to carry out his mandate" (at para. 20).

[23] In my respectful view, the majority erred in taking a deferential approach. No deference is owed to the Commissioner on the issue of the definition of the subject matter of the Inquiry. The Commissioner's jurisdiction is limited to that subject matter, which is prescribed by the legislature in the OIC creating the Commission. If the Commissioner defines the subject matter too broadly or too narrowly, he or she will have rewritten the OIC and redefined the terms of reference. That, of course, is impermissible and constitutes jurisdictional error.

[24] In my view, the Commissioner misconstrued the OIC and in so doing he enlarged the subject matter of the Inquiry and conferred a much wider jurisdiction upon himself than the legislature contemplated. In interpreting the OIC as he did, I believe that the Commissioner committed four errors:

(1) he failed to consider the context and circumstances in which the Commission was established;

(2) he failed to consider relevant wording in the preamble to the OIC that provided valuable insight into the nature and type of allegations at issue;

(3) he failed to construe wording used in the OIC harmoniously and with reference to the document as a whole;

(4) by reason of the first three errors, he misidentified the subject matter of the Inquiry and ascribed to himself a mandate that is beyond anything contemplated by the legislature.

[25] I now propose to address each of the four errors.

(1) Failure to consider the context and circumstances leading to the creation of the Commission

[26] The starting point for interpreting the Commissioner's mandate is a consideration of the terms of the OIC: *Bortolotti*, p. 623. In this case, however, the words of the OIC are not plain and obvious and do not admit of only one meaning. The Commissioner essentially acknowledged this difficulty at the outset of his analysis with his comment

that the parties' competing interpretations of the word "historical" as used in the OIC both "have merit" and are "quite compatible". Likewise the word "abuse" - which appears in the paragraphs describing the mandate of the Commissioner and in the preamble - is capable of being broadly or narrowly construed, and yet the term is not defined in the OIC.

[27] Given the unclear language used in the OIC, the Commissioner was entitled to and should have looked beyond the four corners of the document for assistance in interpreting its meaning. Had he done so, he would have gained valuable insight into the scope of his mandate from the background circumstances and context in which the Commission was created.

[28] In upholding the Commissioner's interpretation of the subject matter of the Commission, the majority of the Divisional Court also failed to consider the background circumstances that led to the establishment of the Inquiry. With respect, I believe that it was necessary to have careful regard to these circumstances when defining the subject matter of the Inquiry.

[29] The background circumstances that gave rise to calls for this public inquiry are referred to in summary form in the first two sentences of the preamble to the OIC as follows:

> WHEREAS *allegations of abuse of young people* have surrounded the City of Cornwall and the citizens for many years. *The police investigations and criminal prosecutions relating to these allegations have concluded*.[4] [Emphasis added.]

[30] The factual matrix surrounding "the allegations of abuse of young people" in the City of Cornwall and the details of the completed "police investigations and criminal prosecutions relating to them" is described in the affidavit of acting Detective Superintendent Colleen McQuade of the OPP, dated July 18, 2007. In her affidavit, Det. Supt. McQuade details the background and history of allegations of historical sexual abuse involving children in the Cornwall area by persons in authority or positions of trust and how those allegations ultimately came to public attention. She refers to an initial complaint made in 1992 by a thirty-four year old Cornwall resident who claimed that, as a child, he had been sexually abused by a priest and a probation officer. She comments on the charges that were laid in relation to those allegations and how those charges eventually came to be withdrawn. She then details steps taken in 1994 by a member of

[4] More will be said about these two sentences shortly. For now, I note that in his reasons purporting to identify the subject matter of the inquiry, the Commissioner made no mention of the second sentence.

the Cornwall Police Service that resulted in the public exposure of the original allegations, including the circumstances surrounding the withdrawal of charges relating to them, as well as further allegations of historical sexual abuse involving the priest made by two other adult complainants.

[31] Det. Supt. McQuade's affidavit also outlines the repercussions arising from these allegations, including charges that were laid "under the *Police Act*" against the Cornwall police officer who disclosed the pertinent information, as well as an ensuing civil action that the officer brought against a number of "named individuals and organizations including the former and current Chiefs of Police of the Cornwall Police Service". According to Det. Supt. McQuade, in the context of his civil suit, the Cornwall police officer and his lawyer "began to collect information regarding other alleged victims of child sexual abuse, a clan of pedophiles in the Cornwall area, a conspiracy [by the priest and the probation officer] and their lawyer… in the fall of 1993, to murder [the officer] and the members of his family, and a conspiracy to obstruct justice in late summer 1993 by prominent members of the Cornwall community including, amongst others, [the lawyer of the priest and the probation officer], the Crown Attorney, the Bishop of the Diocese and the Chief of Police".

[32] Det. Supt. McQuade explains that this information was delivered to the Chief of Police of the London Police Service in late 1996 and, by early 1997, it had found its way to the OPP and the Ministry of the Attorney General. Eventually, the Regional Director of Crown Attorneys for the Eastern Region of Ontario "requested that the OPP investigate the myriad of allegations contained in the information which [the Cornwall police officer] had provided". This in turn led to the commencement in July 1997 of an investigation by the OPP "into allegations of historic sexual abuse in the Cornwall area known as 'Project Truth'". That project ultimately resulted in "fifteen (15) persons being charged with one hundred and fifteen (115) offences involving thirty-four (34) alleged victims". All criminal proceedings arising from the project concluded on October 18, 2004. On November 4, 2004, the Premier of Ontario "announced that the Government of Ontario was committed to calling a public inquiry into 'Project Truth'".

[33] In my view, this information fleshes out the meaning of the first two sentences of the preamble to the OIC and makes it clear that the "allegations of abuse of young people" that had "surrounded the City of Cornwall and its citizens for many years" refer to the allegations of historical sexual abuse of young people by persons in authority or positions of trust that were the focus of Project Truth and the "police investigations and criminal prosecutions" in relation to those allegations that had now concluded.

[34] I am fortified in this interpretation of the preamble to the OIC by various Hansard extracts that both pre-date and post-date the formation of the Commission on April 14, 2005. Three of the relevant extracts pre-date the OIC and the other post-dates it.

[35] The first relevant Hansard extract is from April 20, 2004, when the MPP for Stormont-Dundas-Charlottenburgh, Mr. Jim Brownell, posed the following question to the Attorney General:

> *During the past decade in my riding of Stormont-Dundas-Charlottenburgh, there have been numerous cries for an independent public inquiry into childhood sexual abuse allegations and cover-ups in Cornwall.* As a candidate in the last election, I wholeheartedly supported a public inquiry. The lives of many people have been touched by the issues surrounding these allegations. The citizens, police forces, public organizations and those who work in the judiciary system are in need of a sense of worth and community. A thorough investigation will have positive consequences for those who work to uphold pride, sensibility and the spirit of community in my riding.

[36] The Attorney General Michael Bryant responded:

> There is right now a criminal proceeding that is underway. … A public inquiry cannot be held at this time, while this criminal proceeding is underway.
>
> …
>
> When the criminal proceeding is complete, at that point, we will be relying upon that member to continue to be an advocate on behalf of his community.…

[37] Another Hansard extract of significance is from November 4, 2004, when MPP Peter Kormos from Niagara Centre posed the following question to the Premier:

> *A cloud continues to hang over the city of Cornwall because you haven't kept your promise to hold a full public inquiry into the Project Truth investigation.* It's a troubling story because, as you know, a citizens' committee itself uncovered evidence of sexual assaults on close to 50 victims, some of them as young as 12 years old. The OPP subsequently laid 115 charges against 15 people, yet only one person was ever convicted, and most of the cases were stayed by the crown because of prosecutorial delay.

[38] In response to MPP Kormos' query, Premier Dalton McGuinty expressed his commitment to holding such an inquiry after the expiry of the appeal period in the criminal proceedings.

[39] In Hansard from November 18, 2004, MPP Bronwell made the following remarks:

> …*On November 4, 2004, the Premier stood before this House and committed to the people of my riding that a full public inquiry would be called in the Project Truth investigations once all criminal proceedings were concluded.*
>
> I'm happy to announce today that on Monday, November 15, 2004, the last of the criminal proceedings were concluded, and yesterday the Premier, myself and the Attorney General, Michael Bryant, committed to holding a full public inquiry in this case….
>
> *The Project Truth investigations and subsequent criminal proceedings have clouded over the Cornwall area for the past decade. With the announcement of this public inquiry, the truth of allegations of misconduct and alleged cover-ups will be able to come to light. The people of Cornwall and area will be able to lift this cloud of allegations and have these investigations come to a conclusion.* [Emphasis added]

[40] The final relevant Hansard extract is from April 19, 2005, when MPP Brownell expressed his thanks to the Attorney General and Premier for ordering the Inquiry:

> *First let me congratulate and thank you and the Premier for the realization of a full public inquiry into the sex abuse scandal that has shaken the community of Cornwall and area.* I was proud to be with you yesterday at city hall in Cornwall to see the looks of relief on the faces of the victims as it became clear that the McGuinty team was fulfilling its promise to hold an inquiry. From the formation of this government, you have worked tirelessly with me and with those involved in the community and area to see that this long-standing concern was addressed.

[41] The Attorney General responded as follows:

> Yes, with the public inquiry, under the *Public Inquiries Act*, he has all the tools at his disposal to leave no stone unturned and to provide recommendations that ultimately, we hope, will lead to some reconciliation and healing for the people of Cornwall. Along the way, we will work with the commission, as the commissioner sees fit, to ensure that victims get the services they need during what will inevitably be a very painful time for them. *Ultimately, with this public inquiry, we will finally get to the bottom of what happened and will get recommendations so we can proceed better in the future, in a way that not only can everybody have confidence in the system, but the victims can feel that justice has been done.* [Emphasis added.]

[42] In my view, these extracts are telling. They provide valuable insight into the background and purpose of the OIC. They were available to the Commissioner and the Divisional Court as an interpretative aid and should have been used in determining the legislative purpose for creating the Commission: see *Re Canada 3000 Inc.; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865 at paras. 57-59*; Bruker v. Marcovitz*, 2007 SCC 54 at paras. 3-8.

[43] Considered in conjunction with the factual matrix outlined by Det. Supt. McQuade in her affidavit, these Hansard extracts provide clear evidence of the context and circumstances in which the Commission was created. I would summarize them as follows:

- a clan of pedophiles allegedly operated in the Cornwall area for a very long period of time;

- prominent local citizens allegedly conspired to cover up the activities of the clan of pedophiles; and

- Project Truth and the prosecutions it spawned failed to generate satisfactory results and a cloud of suspicion and mistrust continues to hang over the citizens of Cornwall.

[44] Had the Commissioner or the majority of the Divisional Court referred to the Hansard extracts and the factual matrix as outlined by Det. Supt. McQuade in her affidavit filed with the Divisional Court, they would have recognized that the legislative intention in appointing the Inquiry was not to investigate the institutional response to all allegations of abuse in the Cornwall area that pre-date April 14, 2005, including

allegations of sexual assault such as those made by C12. Rather, the legislative intention in ordering the Inquiry was more focused: the legislature sought to have the Commissioner investigate the institutional response to allegations of historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust and recommend ways in which those institutions could better respond to this type of allegation.

(2) Failure to consider relevant wording in the preamble

[45] As set out above, the first two sentences of the preamble to the OIC state:

> WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded.

[46] In defining the subject matter of the Inquiry in broad terms, the Commissioner paid particular attention to the first sentence of the preamble. He mentioned this sentence in his reasons with a view to substantiating his conclusion that the legislature had chosen to give him a wide mandate. Thus, he noted that there was no reference in the preamble to "allegations of abuse at the hands of persons in authority" and that "the preamble clearly contemplates a general inclusive statement, not limited to historical allegations, but referring to 'allegations of abuse of young people [that] have surrounded the City of Cornwall'…".

[47] With respect, the Commissioner's analysis ignores the second sentence of the preamble. As noted, that sentence narrows the so-called "general inclusive" allegations of abuse referred to in the first sentence to those that formed the subject matter of "police investigations and criminal proceedings related to these allegations [that] have concluded." Such allegations related to historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust that were the subject of the Project Truth investigations.

[48] The Commissioner's failure to consider the second sentence of the preamble was serious and in my view it skewed his subsequent analysis of the subject matter of the Commission.

(3) Failure to construe the wording of the OIC harmoniously and with reference to the document as a whole

[49] In determining that his mandate entitled him to look into institutional responses relating to any and all allegations of sexual assault involving young people in the

Cornwall area prior to April 14, 2005, the Commissioner focused heavily on para. 2(b) of the OIC. For convenience, para. 2 is again reproduced:

> **Mandate**
>
> 2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
>
> (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
>
> (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse
>
> in order to make recommendations directed to the further improvement of the response in similar circumstances.

[50] The Commissioner noted that para. 2(b) contains no reference to "historical" abuse; rather, it refers to "policies and practices that were designed to improve the response to allegations of abuse". In the Commissioner's view, that provision, properly construed, calls for a "broad and liberal interpretation" as opposed to one that is restricted to "complaints [of historical abuse] reported by adults."

[51] With respect, I believe that the Commissioner erred in reading para. 2(b) in isolation and in construing the words "allegations of abuse" differently from the words "allegations of historical abuse" used elsewhere in para. 2 and in other provisions of the OIC. In my view, he should have construed those phrases harmoniously and with reference to the document as a whole. Had he done so, I am satisfied for several reasons that he would have treated the words "allegations of historical abuse" and "allegations of abuse" synonymously.

[52] First, as I have already pointed out, the Commissioner misconstrued the words "allegations of abuse" in the first sentence of the preamble. Had he read those words in conjunction with the second sentence of the preamble, he would have realized that the "allegations of abuse" were the allegations of abuse that formed the subject matter of

Project Truth, i.e. allegations of historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust.

[53] Second, it must be noted that para. 2, although divided into sub-paragraphs, is one complete sentence. Paragraph 2(b) must be read together with the language in para. 2(a) and with the concluding words in that provision, which refer both explicitly and implicitly to allegations of historical abuse. Paragraph 2(a) speaks of "allegations of *historical* abuse … including *the policies and practices then in place* to respond to such allegations" [Emphasis added.]. The concluding language of para. 2 speaks of "recommendations directed to further improvement of the response *in similar circumstances*" [Emphasis added.]. Surely "similar circumstances" refers to allegations of historical abuse, as the appellant suggests, and not allegations of sexual assault of any kind, as Commission counsel suggests.

[54] Third, the Commissioner failed to have regard to para. 4 of the OIC. Paragraph 4 is a free-standing provision that provides for informal opportunities "for individuals affected by *the allegations of historical abuse* of young people in the Cornwall area" to express their views and feelings [Emphasis added.]. That provision dovetails with the third sentence in the preamble to the OIC and it reflects the view of community members that "a public inquiry will encourage individual and collective healing". If the subject matter of the inquiry were meant to include allegations of sexual assault such as those made by C12, it is illogical that the legislature would have restricted the community meetings and other informal opportunities to "individuals affected by allegations of historical abuse of young people in the Cornwall area". And yet, para. 4 is clearly restricted in that fashion.

[55] When para. 2 of the OIC is read as a whole and in conjunction with the other provisions of the OIC including the preamble, it is apparent that the legislature was directing the Commissioner to look at institutional policies and practices – past, present and future – in responding to allegations of historical abuse of young people in the Cornwall area. Such allegations would include those that were the subject of the Project Truth investigation as well as any similar allegations of historical abuse of young people by persons in authority or positions of trust that were not investigated by Project Truth or that came to light after the Project Truth investigation ended. This interpretation harmonizes the meaning of the word "allegations" throughout the OIC, including its meaning in the preamble, para. 2 and para. 4.

[56] In contrast, reading para. 2(b) as the Commissioner does leads to the untenable conclusion that, by virtue of this clause, the legislature intended the Commissioner to compare and contrast present-day institutional responses to any and all allegations of abuse, including but not limited to the allegations of historical abuse, with past institutional responses limited solely to allegations of historical abuse under para. 2(a).

With respect, that interpretation is not logical. Moreover, it isolates para. 2(b) and promotes it from a clause that describes one discrete component of the Commissioner's mandate into a clause that single-handedly broadens his mandate beyond all proportions – something which in my view, the legislature did not contemplate. That leads me to the fourth error.

(4) Failure to interpret the OIC in a manner that was reasonable and within the contemplation of the legislature

[57] The Commissioner identified the primary focus of his mandate as follows:

> In reviewing the mandate, it is clear that the main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse.
>
> …
>
> I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.

[58] The Commissioner further observed that the Commission was "nearing the end of the victims' evidence and it is not the intention of this Inquiry to now open the floodgates, or to widen the mandate that I have set to date."

[59] With respect, these words of the Commissioner do not sit well with the expansive view he took of his mandate. As already indicated, by interpreting the OIC as he did, the Commissioner ascribed to himself a mandate that is truly breathtaking in its scope. By defining the words "historical" as he did, the Commissioner gave himself jurisdiction to assess the response of various institutions (past, present and future), including the justice system, the police, Children's Aid Societies and the like, to any and all allegations of sexual abuse made by young people in the Cornwall area, including historical allegations of abuse such as those investigated by Project Truth and allegations of sexual assault, such as those reported by C12, presumably from the date of Cornwall's inception in 1834 to April 14, 2005, the date on which the Commission was formed.

[60] Such a wide-ranging mandate is inconsistent with the Commissioner's acknowledgement that the "main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry;

hence, the reference to allegations of historical abuse." I fail to see how, on the Commissioner's view of his mandate, he could reasonably hope to keep the floodgates from opening. If C12's evidence (which falls outside the Commissioner's view of the main focus of the Inquiry) were to be admitted, it would open the door to similar testimony from hundreds of complainants and their family members who might wish to come forward and speak of their experiences with the police and other institutions, both pro and con, not to mention the hundreds of judicial officers, police officers, CAS workers and the like who would no doubt wish to respond.

[61] In short, the Commissioner's view of his mandate runs the risk of standing the so-called "main focus" of the Inquiry on its head and creating an unwieldy, if not unmanageable, mega-inquiry that could go on for years at great public expense. Such an outcome would diminish the value to be gained from the important work that the legislature had assigned to the Commissioner.

Conclusion on the Subject Matter of the Commission

[62] Properly construed, the OIC empowers the Commissioner to look into and report on institutional responses – past, present and future – relating to allegations of historical abuse of young people in the Cornwall area by persons in authority or positions of trust, including the allegations investigated in Project Truth as well as similar such allegations. Allegations that were reported at the time of the abuse, or years later, or both, would fall within this mandate. In other words, the Commissioner can look at the response of various institutions to allegations made and reported in the 1950s, as well as their response to allegations made for the first time or renewed in the 1990s.[5]

[63] C12's evidence does not come within the subject matter assigned to the Commissioner by the terms of the OIC. With respect, the Commissioner erred in holding otherwise. The same holds true for C13's evidence. For these reasons, Questions 1 and 2 of the stated case should be answered as Spiegel J. did in his dissenting opinion.

Is the evidence of C12 and C13 reasonably relevant to the subject matter of the Inquiry?

[64] Although the evidence of C12 and C13 falls outside the subject matter of the Inquiry, it could nevertheless be admissible if it were found to be "reasonably relevant to the subject matter of the inquiry": *Bortolotti* at p. 624. It would meet that test if it had a bearing on an issue to be resolved and could reasonably, in some degree, advance the

[5] I do not agree with the dissenting opinion of Spiegel J. to the extent that he concluded at para. 31 that the term "historical" in para. 2(a) of the OIC imports a requirement that there must necessarily be a lapse of time between the time of the abuse and the time of reporting for the allegation to be considered as historical.

inquiry. A decision to admit evidence on this basis will attract a high degree of deference from a reviewing court and will be judged against a standard of reasonableness.

[65] Affording a high degree of deference to such a ruling makes eminent good sense. Otherwise, Commissions would constantly be in a state of "stop and go" as disgruntled parties trundled off to the Divisional Court to challenge evidentiary rulings with which

they disagreed. If the Commissioner believes that an item or body of evidence, though peripheral to the subject matter of the Commission, bears on an issue to be resolved and will in some degree advance the inquiry, so long as the Commissioner's view is reasonably based, the admission of the evidence will not constitute jurisdictional error. (For a general discussion of the standard of reasonableness see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 56-62 and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paras. 46-56).

[66] The Commissioner made no finding on whether the evidence of C12 and C13 was reasonably relevant to the subject matter of the Inquiry. To be precise, he did not turn his mind to the issue, having concluded that their evidence came within his mandate and was thus clearly admissible.

[67] In circumstances where the Commissioner has not ruled on whether the proffered evidence is reasonably relevant to the subject matter of the Inquiry, I would normally refrain from commenting on whether the evidence is capable of passing the deferential test of "reasonably relevant" as set out in *Bortolotti*. However, the issue was canvassed by the parties in oral argument and I think it would be helpful to address it, in an effort to avoid further delays.

[68] Assuming that the evidence of C12 and C13 stands alone and is not the prelude to an avalanche of other such evidence from like complainants and their family members, I fail to see how it could reasonably advance the inquiry that the Commission had been asked to perform. Without wishing to minimize the seriousness of C12's complaint or the gravity of her allegations against the investigating officer, her evidence, if true, essentially comes down to one person having been treated inappropriately by a police officer in a case where she allegedly was sexually assaulted by other teenagers. Her evidence does not speak to systemic problems that may or may not exist in the way police respond to allegations of sexual abuse of young people by persons in a position of trust or authority. In other words, it has no probative value in relation to the Commissioner's mandate.

[69] On the other hand, if C12's evidence does not stand alone but is a prelude to an avalanche of similar evidence − the reception of which is likely to be very time-

consuming, hotly contested and liable to deflect the Commissioner from the task at hand − any marginal probative value that such evidence might have would, in my view, be greatly outweighed by its prejudicial effect. As such, it would likewise not pass the "reasonably relevant" test.

[70] In so concluding, I do not wish to leave the impression that there can be no meaningful overlap, in so far as institutional responses are concerned, between cases such as the one described by C12 and the cases such as those investigated by Project Truth. Nor am I suggesting that allegations of historical sexual abuse of young people by persons in authority or positions of trust are a breed apart and entirely distinct from all other allegations of sexual abuse, including allegations of sexual assault committed by teenagers. By way of example, studies that have explored the systemic responses of institutions such as the police to general allegations of abuse made by young people might well pass the reasonable relevance test, even though the subject matter of the study will not be precisely the same as the subject matter of this Inquiry.

[71] For these reasons, I am of the view that the proposed evidence of C12 and C13 is not reasonably relevant to the subject matter of the Inquiry and should therefore not be received.

[72] In conclusion, I would answer the questions in the stated case as framed by the appellants as follows:

> Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to "…inquire into and report on the institutional response of the justice system … to allegations of historical abuse of young people…?
>
> Answer: No.

Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?

Answer: The Commissioner exceeded his jurisdiction.

Signed: "M.J. Moldaver J.A."
"I agree Doherty J.A."
"I agree E.E. Gillese J.A."

RELEASED: "DD" JANUARY 18, 2008