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COURT FILE NO.	2310 01396
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	RED DEER
APPLICANT	MONIQUE LAGRANGE
RESPONDENT	THE BOARD OF TRUSTEES OF RED DEER CATHOLIC SEPARATE SCHOOL DIVISION
DOCUMENT	**WRITTEN BRIEF OF THE BOARD OF TRUSTEES OF RED DEER CATHOLIC SEPARATE SCHOOL DIVISION**

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SCHEDULED FOR HEARING MAY 1-3, 2024

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PART 1 INTRODUCTION

1. The Board of Trustees of Red Deer Catholic Separate School Division ("**Board**") hereby makes these submissions in response to the request of the Applicant, former Board trustee Monique LaGrange (the "**Applicant**" or "**Ms. LaGrange**") for judicial review of the November 14, 2023, Board Code of Conduct Decision ("**Board Decision"** or "**Decision**") supported by its November 24, 2023, reasons (**"Reasons"**). The Decision and the Reasons are collectively, the "**Decision 2**". The impugned decision was made following a Board trustee complaint under the Board's Code of Conduct (as defined in paragraph 4 below); the decision disqualified the Applicant as Trustee of the Board as a result of non-compliance with a September 26, 2023, Board decision ("**Board Decision 1**") censuring her conduct, as well as new breaches of Board policy and the Code of Conduct.

2. This judicial review is not consolidated with, but will be heard with, the separate judicial review relating to Decision 1. This prior decision and judicial review is the subject of a separate exchange of briefs.

3. The Board outlines in this brief two potential paths for this Honourable Court in these proceedings:

   a) The Court may wish to determine that the Applicant has not followed the proper statutory procedure in these circumstances. A school board trustee's choices under the governing legislation are to resign, or alternatively to refuse to resign, compel the Board to seek a Court Order disqualifying the trustee and then appeal that Order. An argument may be

made that it is not possible for a school board trustee to both resign and then judicially review the prior Board decision disqualifying her. To do so could result in a school board trustee no longer disqualified, yet still resigned; or

b) The second path is for this Honourable Court to review the reasonableness of Decision 2 pursuant to the principles applicable to judicial review of administrative decisions. It is submitted that the decision in question here was procedurally fair, substantively reasonable, and supported by intelligible, transparent and justifiable reasons.

A. Background

4. The Originating Application for Judicial Review in this proceeding (the "**JR**") relates to Decision 2. As discussed in more detail below, Decision 2 disqualified Ms. LaGrange as Trustee of the Board arising from non-compliance with Decision 1 and breaches of the Code of Conduct of the Board codified in Board Policy 4: Trustee Code of Conduct (the "**Code of Conduct**") and arising from the *Education Act*, SA 2012, c. E-0.3- (the "***Act***").

5. Decision 1 is the subject of a judicial review application in Action No. 2310 01422 filed December 11, 2023 ("**JR1**"). Decision 1 censured the Applicant following breaches of the Code of Conduct.

B. Scope of the Board's Participation

6. The Board acknowledges that it is the same decision-maker whose decisions are subject to review in these proceedings. Below, the Board sets out judicial guidance that clearly illustrates that, in circumstances such as these where

there is no other party capable of fulsomely responding to a judicial review, the decision-maker whose decision is impugned may respond in the interests of assisting the Court in making a fully informed adjudication. In so doing, however, the tribunal is obliged to maintain a tone that reflects the importance of impartiality and does not seek to bootstrap its decision.

C. Summary of the Board's Position

7. The Board submits that there is an argument that the remedy of judicial review is not available to a school board trustee to obtain the relief that is being sought in this case. While the Applicant is free to challenge Decision 2, even were she to be successful in having it quashed, she may still not be able to seek reinstatement as a Trustee or reimbursement of missed Trustee remuneration.

8. Subsequent to Decision 2 the Applicant resigned voluntarily, although under protest pursuant to section 90 of the *Act*. The *Act* expressly provides for that process; it also provides for an alternate situation where a disqualified school board trustee does not resign and then appeals the Board's disqualification. That latter process was not engaged here.

9. Rather, the Applicant resigned, though under protest, and then sought to challenge Decision 2 after her resignation. Even if successful, and Decision 2 were quashed, the Applicant would remain a resigned school board trustee. This Honourable Court would have to reverse the resignation in order to achieve the result the Applicant seeks.

10. In the alternative, the Applicant has failed to show:

(a) That the sanctions imposed by Decision 1 were unreasonable, invalid, or complied with;

(b) That Decision 2 was procedurally unfair; or

(c) That Decision 2 was substantively unreasonable or unsupported by intelligible, transparent and justifiable reasons.

11. The Applicant in her brief adopts a number of narrow, formalistic interpretations of Decision 1 and Decision 2 in support of her arguments. The Board, however, takes a broad and purposive approach to understanding its obligations and responsibilities to the Division community. Those obligations and responsibilities extend to protecting and caring for all members of the community. The Board stands behind both of its decisions.

PART 2 FACTS

A. First Code of Conduct Hearing

Background

12. The Applicant was elected as a Trustee of the Board in 2021. The School Division for which the Board is responsible serves over 10,650 students in twenty-one schools in Red Deer, Blackfalds, Sylvan Lake, Rocky Mountain House, Innisfail, and Olds, as well as an At-Home Learning Program, and supports the learning of over 1,095 students in a Traditional Home Education Program.

13. On September 25 and 26, 2023, the Board held a Special Board Meeting ("**First Code of Conduct Hearing**") during which the Board conducted an *in camera* hearing further to a September 7, 2023, Code of Conduct complaint ("**First Complaint**") against the Applicant.

Board Motion and Supporting Reasons dated October 13, 2023, CROP para. 1(d)(i)(B) p.39. **[TAB B]**

14. At the First Code of Conduct Hearing, the Board heard information, evidence, and argument submitted by the complainant and Ms. LaGrange, including their legal counsel.

Decision 1, CROP para 1(d)(i)(B) p.42. **[TAB B]**

15. At the First Code of Conduct Hearing, it was undisputed that, on or about August 27, 2023, the Applicant posted on her personal Facebook account a meme displaying two photographs which respectively showed:

    (a) a group of children holding Nazi flags with swastikas; and

    (b) a contemporary photograph of children holding rainbow Pride flags,

    and captioned "Brainwashing is brainwashing" ("**Original Meme**").

    Decision 1, I Background CROP para 1(d)(i)(B) p.42. **[TAB B]**

16. Statements of support for Ms. LaGrange's position were proffered into evidence by counsel for the Applicant. The Board received public statements expressing serious concerns with Ms. LaGrange's actions, including from the Simon Wiesenthal Centre of Holocaust Studies, as well as communications supportive of Ms. LaGrange. No rigorous polling or surveying work was undertaken and the Board, while taking careful note of the opinions provided to it, did not ultimately make its decision based upon the limited range of comments provided from the very large pool of students which the Board has under its care.

    Decision 1, II Procedure and IX Did the Meme Contravene the Code of Conduct? CROP para. 1(d)(i()(B) p.42 and 51. **[TAB B]**

17. After fulsome deliberations, on September 26, 2023, the Board determined that the Respondent had breached Board policy, the Code of Conduct and the *Act*.

Decision 1, IX Did the Meme Contravene the Code of Conduct? CROP para. 1(d)(i)(B) p.47. **[TAB B]**

18. Accordingly, on September 26, 2023, the Board passed a motion ("**First Motion**") censuring the Applicant, and these directions were set forth in detail in Board reasons dated October 13, 2023 ("**October 2023 Board Reasons**").

Decision 1, CROP para 1(d)(i)(B) p.39. **[TAB B]**

B. September 28, 2023, Posting

19. On September 28, 2023, the Respondent posted two items on her personal Facebook account:

(a) the first depicting a wolf wearing facial make-up and licking its lips, with the caption, "I just want to read some books to your chickens"; and

(b) a photograph of an individual with the caption, "'Parental rights really anger me' non-binary children books author pushes back against parents," which the Applicant's counsel advised the Board at the subsequent Code of Conduct hearing was a news article about an individual who identifies as non-binary.

Decision 2, II Background, CROP para. 1(a) p.5. **[TAB A]**

20. The materials referred to above at (a) and (b) are collectively referred to herein as the "**Social Media Posts**."

21. On September 29, 2023, the Board Chair emailed the Applicant regarding the Social Media Posts, and informed the Applicant of the seriousness of the issues

relating to her conduct as a school board trustee and her corresponding trustee responsibilities. The Board Chair further advised the Applicant that breach of the First Motion could result in further conduct hearings, a possible outcome of which was disqualification from acting as a trustee.

1:12 p.m. September 29, 2023, Email to the then Trustee Lagrange, CROP para. 1(d)(i)(C) p. 58. **[TAB C]**

22. On or around October 2, 2023, an online program "*Laura-Lynn Talks*" released an interview ("**Laura-Lynn Interview**") in which the Applicant appeared as a guest. It is the understanding of the Board that the Laura Lynn Interview was recorded sometime between September 26, when the First Motion was passed, and October 1, 2023. At the outset of the Laura-Lynn Interview, the Applicant identified herself as a Red Deer Catholic Regional Schools Trustee and spoke about the posting of the Original Meme that resulted in the First Code of Conduct Complaint.

Laura-Lynn Interview, CROP para. 1(d)(i)(D) p.61. **[TAB D]**

Decision 2, II Background, CROP para. 1(b) p.5. **[TAB A]**

23. On October 19, 2023, the "*Talk Truth*" talk show ("***Talk Truth* Interview**"), which aired on the same date, conducted by Corri and Allen Hunsperger, included an interview with the Applicant.

Talk Truth Interview, CROP para. 1(d)(i)(D) p.62. **[TAB E]**

Decision 2, II Background, CROP para. 1(b) p.5. **[TAB A]**

24. At the outset of the *Talk Truth* Interview, Corri Hunsperger identified the Applicant as a Red Deer Catholic School Trustee who is currently in the news and who got herself "into a little bit of hot water".

Talk Truth Interview, CROP para. 1(d)(i)(D) p.62. **[TAB E]**

Decision 2, II Background, CROP para. 1(b) p.5. **[TAB A]**

25. The Applicant spoke about the Original Meme that led to the Applicant being "brought up on a code of conduct" "in front of the Board". When asked if she could "rewind time", the Applicant stated that: she would "still post" the Original Meme again; "it is not offensive if you understand" "what is actually going on in the world."; it's thought-provoking; it's a warning of what could be. History likes to repeat itself. And so, where are we in that, that you know circle of history. So, you know people need to wake up. They seriously do and parents need to know what's going on."

Talk Truth Interview, CROP para. 1(d)(i)(D) p.62. **[TAB E]**

Decision 2, II Background, CROP para. 1(b) p.5. **[TAB A]**

26. The Respondent also indicated in the *Talk Truth* Interview that,

> teachers they're not in the profession to indoctrinate your children. They, they love children. They're there to make the world better, um, and so, you know, you have to understand that part of it. But most of us that have gone to university in the last 20 years, we have been victims of this indoctrination ourselves. And so, when you're indoctrinated, you don't think anything of what you're, you

> know, the way you're teaching it the words you're using. And so, it just becomes your normal, um, and so this filters down it's a very slow drip into our classrooms. And so, it's you know it's just being aware of how the process works and the whole agenda of how they're indoctrinating us, where that's coming from you have to understand that as well. So be aware, um, as a parent take your authority back. So, you are the primary educator and we can't forget that. We as parents, so I have a unique perspective here because I'm a parent, I have a background I was a teacher and I'm now a school trustee. So, I've seen the whole gambit basically and so I have a very interesting perspective and authority is huge. So, parents have given their authority away to something that maybe they perhaps didn't recognize. And so, it's getting that authority back and educating your kids. You should be educating your kids, you know, about relationships and sexuality, that's your job as a parent. That's between you, your child, and God. Not the teachers. And so, the teachers are there to do reading, arithmetic, you know that sort of thing right. And you know we need to just make sure that we are as a parent, we know what the boundaries are.
>
> Talk Truth Interview, CROP para. 1(d)(i)(D) p.62. **[TAB E]**

27. The Laura Lynn Interview and the Talk Truth Interview are collectively, the "**Interviews**."

28. The above events were undisputed at the Second Code of Conduct Hearing.

> Decision 2, CROP para. 1(a) p.4. **[TAB A]**

C. The Second Complaint

29. The Second Complaint related to both the Social Media Posts and the Interviews, and alleged that the Social Media Posts, and participation in and

commentary during the Interviews, contravened the Code of Conduct and the *Act*, and further, breached the First Motion.

October 16, 2023, Complaint Letter, CROP para. 1(d)(i)(F) p. 22. **[TAB F]**

30. Following receipt of the Second Complaint and in accordance with Appendix A of the Code of Conduct and with the *Act*, the Board scheduled the *in camera* Second Code of Conduct Hearing.

Minutes of a Special Meeting of the Board of Trustees of the Red Deer Catholic School Division held November 13, 2023, CROP para.1(e)(i) p.166. **[TAB G]**

D. The Second Code of Conduct Hearing

31. The Applicant was present (virtually) at the Second Code of Conduct Hearing and was provided with a full opportunity to make submissions; she was represented by counsel who submitted written and oral arguments to the Board.

Decision 2, VI Position of the Respondent, CROP para. 1(a) p.9. **[TAB A]**

32. Prior to the Second Code of Conduct Hearing, the complainant submitted the following materials to the Board, the Applicant and her legal counsel:

(a) The Second Complaint;

(b) The October 16, 2023, support letter for the matter to proceed to a hearing;

(c) The 8-page written Submissions of the complainant, which included:

(i) Board Policy 4;

(ii) First Motion and October 2023 Board Reasons;

(iii) Board Chair's September 29, 2023, 1:12 p.m. email to the Applicant;

(iv) Laura Lynn Interview;

(v) Board Chair's October 20, 2023, email (Trustees Only) re: Some New Information;

(vi) Complaint re LaGrange conduct 10.02.23;

(vii) Policy 1 – Division Foundational Statements;

(viii) Board Administrative Procedure 103 - Welcoming, Safe and Caring, Inclusive and Respectful Learning Environments ("**AP 103**");

(ix) Board Policy 3;

(x) TrueNorth and LifeSite news articles; and

(xi) Talk Truth Interview.

Decision 2, III Materials Submitted at the Second Code of Conduct Hearing, CROP para. 1(a) p.6. **[TAB A]**

33. The Applicant did not object to the Board's composition nor raise issues of procedural unfairness at the Second Code of Conduct Hearing.

Decision 2, III Materials Submitted at the Second Code of Conduct Hearing, CROP para. 1(a) p.7. **[TAB A]**

34. Pursuant to the Code of Conduct, during the *in camera* portion of the Second Code of Conduct Hearing submissions were made by the parties to the Board. Board members also posed questions at the Second Code of Conduct Hearing. Following the completion of their deliberations, the Board returned to a public session and, as earlier noted, voted 3-1 in favour of the Second Motion which reads:

> BE IT RESOLVED that further to the November 13 and 14, 2023, in camera discussions, and after having carefully considered all the points raised therein, and in accordance with Board Policy and the Education Act, Trustee LaGrange has violated sanctions issued on September 26, 2023, and had further violated Board Policy and the Education Act. As a result, Trustee LaGrange is hereby disqualified under section 87(1)(c) of the Education Act and Board Policy from remaining as a school board trustee. The Board will issue detailed reasons in support of this Board motion on or before November 24, 2023.

Motion, CROP para. 1(a) p.3.

35. Following passage of the Motion, the Applicant through her counsel resigned from her position as Trustee, although under protest, pursuant to section 90 of the *Act*.

Minutes of a Special Meeting of the Board of Trustees of the Red Deer Catholic Separate School Division held November 23, 2023, CROP para.1(e)(ii) p.171. **[TAB H]**

36. In her brief filed in response to JR1, the Applicant sought the following relief, *inter alia*, at para. 91:

> a) An order quashing the Decision;
>
> b) An order directing the unconditional and immediate reinstatement of the Applicant as a trustee of the Board;
>
> c) Payment to the Applicant of all missed payments due trustees during the period of time she was not a trustee as a result of the Decision.

37. In her brief in these proceedings, at paragraph 93 the Applicant seeks the same relief absent subparagraph c.

PART 3 ISSUES

38. Upon review of the Applicant's brief, the Board notes the following four issues to which it will offer comments in response:

    (a) Was Decision 2 procedurally fair?

    (b) Were the sanctions set out in Decision 1 reasonable? If yes, were they validly imposed? If yes, were they violated?

    (c) Was Decision 2 substantively reasonable?

    (d) Even if the Applicant did breach the Code of Conduct, is the sanction of disqualification reasonable?

39. To these issues, the Board adds a fifth question which the Board submits must be answered prior to proceeding with any analysis of the Applicant's submissions; namely, has the Applicant failed to follow the proper procedure in bringing this challenge to Decision 2?

40. This fifth question, as noted in the introduction, offers an alternative approach for this Honourable Court. If the Board's arguments are accepted, there is no need to proceed with the balance of the issues above. If the Court prefers to engage in a fulsome judicial review analysis, then the reasonableness analysis must be undertaken.

PART 4 ARGUMENT

A. Preliminary Issue: Role of the Board on Judicial Review

41. Prior to commencing its analysis of the issues set forth above, the Board wishes to comment upon its role in these proceedings.

42. The Supreme Court of Canada ("**SCC**") in *Ontario (Energy Board) v. Ontario Power Generation Inc* ("***Ontario Energy Board***") endorsed a discretionary approach when courts evaluate whether a tribunal is entitled to standing to participate in a judicial review. The majority held that employing a discretionary approach ensures that the principles of finality and impartiality are respected without "sacrificing the ability of reviewing courts to hear useful and important information and analysis".

Ontario (Energy Board) v. Ontario Power Generation Inc, 2015 SCC 44 at para 52 ("***Ontario Energy Board***"). [**TAB 1**]

43. The following non-exhaustive factors are considered relevant to the exercise of the court's discretion in relation to the tribunal's standing:

> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
>
> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

Ontario Energy Board at para 59. [**TAB 1**]

44. Underpinning the above factors is the requirement for courts that exercise their discretionary power to "balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality".

Ontario Energy Board at para 57. [**TAB 1**]

45. Having a fully informed adjudication looms largest where the judicial review application would otherwise be unopposed. In fact, in those circumstances, and where the court is concerned that something of importance will not be brought to their attention based on the particular context, "the desirability of fully informed adjudication may well be the governing consideration".

Children's Lawyer for Ontario v. Goodis, 2005 CanLII 11786 (ON CA) at paras 43-44. ("***Goodis***") [**TAB 2**]

46. An application may be "unopposed" where the tribunal's own decision is being challenged as seen in *Ontario Energy Board*, or, as touched on in factor (2)

above, where there is no other respondent "able and willing to defend the merits of an administrative decision".

CS v British Columbia (Workers' Compensation Appeal Tribunal), 2019 BCCA 406 at para 48. [**TAB 3**]

47. While impartiality remains an important consideration, it is lessened when the tribunal is the only named respondent in the review and where it is, amongst other things, tasked with regulating a specified group.

Sandhu v College of Physicians and Surgeons of Alberta, 2023 ABCA 61 at para 41. [**TAB 4**]

48. It is in such circumstances generally appropriate for a tribunal to argue the merits of its own decision because the need to "facilitate fully informed adjudication on review is more important than maintaining tribunal impartiality". The SCC also emphasized in *Ontario Energy Board* that the judicial review process is most effective and functions best when both sides of a dispute are "argued vigorously before the reviewing court". Allowing a tribunal to make substantive submissions on the merits of the judicial review ensures that the court hears the "best of both sides of a dispute".

Aghili v. British Columbia (Workers' Compensation Appeal Tribunal), 2022 BCSC 717 at para 16. [**TAB 5**]

Ontario Energy Board at para 54. **[TAB 1]**

49. It is appropriate for tribunals to "highlight what is apparent on the face of the record", introduce arguments that interpret or were implicit in the original

decision, explain established policies and practices, and "respond to arguments raised" by a counterparty to uphold and defend its reasoning and conclusions within the initial decision.

Ontario (Energy Board) at paras 46, 68, & 70. [**TAB 1**]

50. A tribunal that participates in a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. It is with this approach in mind, as well as the above legal considerations, that the Board makes these submissions to this Honourable Court to assist in its review of Decision 2.

Ontario (Energy Board) at para 71. [**TAB 1**]

Goodis at para 61. [**TAB 2**]

51. In the circumstances before this Honourable Court, there is no other party able and willing to oppose the review or able to provide the necessary knowledge and expertise to fully make and respond to arguments. Like *Ontario Energy Board*, the decision being reviewed here is the Board's own decision (i.e., Decision 2). To allow this application to proceed unopposed without the Board's submissions runs contrary to the very function of the judicial review process as outlined in *Ontario Energy Board*. Without the Board's full participation this Honourable Court will not see the best of both sides of the dispute, or the other side of the dispute at all.

52. Furthermore, Decision 2 is made in response to the Applicant's non-compliance with Decision 1 and breaches of the Code of Conduct. As in *Ontario Energy Board*, the Board's statutory role includes safeguarding the public interest. In these circumstances, the public interest arises in relation to Alberta's school system and in the context of a school board's obligation to maintain the public's confidence in the administration of the school system, among other related obligations as set out within the *Act*.

53. The Board's knowledge and expertise will assist this Honourable Court in understanding the implications of a decision in this judicial review as it relates to the various obligations of a school board and its trustees under the *Act*. This decision is a matter of significance to the parties, yet the application involves no other parties able to provide fulsome comments.

54. The Ontario Superior Court of Justice ("**ONSC**") has considered similar decisions by a school board. The ONSC heard submissions in the context of a judicial review from the responding school boards in three recent decisions. Notably, in two of those three decisions (*Del Grande v. Toronto Catholic District School Board* and *Ramsay v Waterloo Region District School Board*) the facts involved a current trustee who had breached the boards' existing code of conduct. With the submissions of the school board considered in each of these cases, the ONSC was able to make informed decisions to dismiss each application despite the procedural fairness and reasonableness arguments raised by the applicants. Although the role of a tribunal is not expressly discussed in these decisions, the SCC in *Ontario Energy Board* and the Ontario Court of Appeal in *Goodis* have both acknowledged that tribunals have in appropriate circumstances been permitted to participate as full parties.

Del Grande v. Toronto Catholic District School Board, 2023 ONSC 349 ("***Del Grande***") [**TAB 6**]

Ramsay v. Waterloo Region District School Board, 2023 ONSC 6508 **[TAB 7]**

Carolyn Burjoski v. Waterloo Region District School Board, 2023 ONSC 6506 [**TAB 8**]

Ontario Energy Board at para 45[**TAB 1**]

Goodis at para 24. [**TAB 2**]

55. In these circumstances, the Board submits it has no alternative but to defend Decision 2 on its merits. In so doing, the Board commits to being mindful of the importance of impartiality, and will not seek to bolster or bootstrap its prior decision.

B. Applicable Law and Policy

56. To understand the analysis set forth herein, it is necessary to first review the legislative and policy framework within which the Board operates.

57. The Board's conduct is governed by the *Act*, which grants the Board jurisdiction to review trustee-related complaints, consider trustee conduct, and determine appropriate responses and remedies. The Board has also enacted various policies further to that jurisdiction.

58. The Board's mission is as follows:

> The Red Deer Catholic Separate School Division is committed to supporting inclusive communities that foster care and compassion of students, families and staff with a

> complete offering of learning opportunities delivered within the context of Catholic teachings and tradition, and within the means of the Division.
>
> Policy 1: Division Foundational Statements, Mission, CROP para. 1(d)(i)(H) p.130. **[TAB I]**

59. The purpose of the mission statement is to govern the Board's interactions within the Division and among members of the Division, including Board members. Board Policy 1 sets forth beliefs that are meant to govern the interactions of the Division as stewards of Catholic education, including Belief 10 which reads:

> The schools will **foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students**, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values. **Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality**. [Emphasis added]
>
> Policy 1: Division Foundational Statements, Beliefs, CROP para. 1(d)(i)(H) p.131. **[TAB I]**

60. AP 103 details how the Policy 1: Division Foundational Statements are to be carried out by School Division staff. Among other things, a "Christ-centered, welcoming, caring, respectful and safe learning environment **that respects diversity, equity and human rights and fosters a sense of inclusion and belonging**" is to be maintained. [Emphasis added]

Administrative Procedure 103 – Welcoming, Safe and Caring, Inclusive and Respectful Learning Environments, Background, CROP para. 1(d)(i)(l) p.134. **[TAB J]**

61. The Code of Conduct states that the Board "commits itself and its members to conduct that meets the highest ethical standards." Board members are expected to conduct themselves, at all times, in a mutually respectful way which affirms the worth of each person, especially students:

> That trustees are the children's advocates and their first and greatest concern is the best interest of each and every one of these children without distinction as to who they are or what their background may be. [Emphasis added.]

Code of Conduct, CROP para. 1(d)(i)(A) p. 30. **[TAB K]**

62. Section 1 of the Code of Conduct requires that Trustees carry out their responsibilities as detailed in Board Policy 3 with reasonable diligence. The Board notes the following provisions of Board Policy 3 in particular:

> 6. Specific Responsibilities of Individual Trustees
>
> (…)
>
> 6.3 The trustee can engage with the public through a variety of communication methods, understanding that all communications and interactions must reflect the principles of the Trustee Code of Conduct.
>
> 6.4 Trustees will be cognizant that they are representing the interests of the Board while posting or commenting on social media, and aware of public perception that their posts, comments and social media engagement, are in accordance with their duties within the school division.

> (...)
>
> 6.7 The trustee will support the decisions of the Board and refrain from making any statements that may give the impression that such a statement reflects the corporate opinion of the Board when it does not.
>
> (...)
>
> 6.18 The trustee will contribute to a positive and respectful learning and working culture both within the Board and the Division.
>
> (...)
>
> 6.20 The trustee will adhere to the Trustee Code of Conduct.
>
> Policy 3: Trustee Role Description, CROP para. 1(d)(i)(J) p. 81. **[TAB L]**

63. Failure to adhere to these responsibilities is considered to be a breach of the Code of Conduct pursuant to section 1 of Policy 4: Trustee Code of Conduct, which Policy also states:

> 5. Trustees shall endeavour to work with fellow Board members in a spirit of harmony and cooperation in spite of differences of opinion that may arise during debate.
>
> 6. Trustees shall commit themselves to dignified, ethical, professional and lawful conduct.
>
> 7. Trustees shall reflect the Board's policies and resolutions when communicating to the public.
>
> ...
>
> 15. Work together with fellow trustees to communicate to the electorate.

> 16. Remember at all times that individual trustees have no legal authority outside the meeting of the Board, and therefore relationships with school staff, the community, and all media of communication is to be conducted on the basis of fact.
>
> ...
>
> 22. Represent the Board responsibly in all Board-related matters with proper decorum and respect for others.
>
> Code of Conduct, CROP para. 1(d)(i)(A) p. 31. **[TAB K]**

64. Consequences for the failure of an individual trustee to adhere to the Code of Conduct are specified in Appendix "A" to the Code of Conduct, which sets out a non-exhaustive and discretionary range of sanctions and remedial measures, all of which supplement the disqualification sanction in the *Act*:

> 87(1)(c) A person is disqualified from remaining as a trustee of a board if that person has breached the code of conduct of the board established under section 33, where the sanction for the breach under the code of conduct may be determined by the board to be disqualification
>
> *Act* s.87(1)(c) **[TAB 9]**

65. The statutory process on disqualification of a Trustee is set forth in the *Act* at sections 90 to 96, the relevant portions of which are as follows:

> **Resignation on disqualification**
>
> 90 If a person is disqualified under section 87 or 88 from remaining as a trustee of the board, the person shall immediately resign.
>
> **Refusal to resign on disqualification**

91 If the person does not resign as required under section 90,

(a) the board may by resolution declare that person to be disqualified from remaining as a trustee and the seat on the board to be vacant,

(b) the board may apply to the Court of King's Bench for

(i) an order determining whether the person is qualified to remain as a trustee, or

(ii) an order declaring the person to be disqualified from remaining as a trustee and the seat on the board to be vacant,

Appeal of board's resolution

92(1) Where a person is declared under section 91(a) to be disqualified from remaining as a trustee, that person may apply to the Court of King's Bench for an order declaring the person to be qualified to remain as a trustee.

(2) Where a person

(a) is declared under section 91(a) to be disqualified from remaining as a trustee, and

(b) makes an application to the Court under subsection (1),

that person remains disqualified unless the Court otherwise orders.

(3) An application under this section must be made within 30 days from the date that the resolution was passed under section 91(a).

(4) On hearing an application and any evidence, whether oral or by affidavit, that the Court requires, the Court may make an order, with or without costs,

> (a) declaring the person to be qualified to be a trustee, and
>
> > (i) reinstating the person as a trustee for any unexpired portion of the term of office for which the person was elected,
> >
> > (ii) requiring any person who has been elected to serve the balance of that term to vacate the office, and
> >
> > (iii) requiring the repayment to the reinstated person of any honorarium, salary or entitlement that was not paid to the person during the period of disqualification,
>
> or
>
> (b) declaring the person to be disqualified from remaining as a trustee and requiring the person to vacate the person's seat on the board.

Act ss. 90-92 **[TAB 9]**

C. Standard of Review

66. The Board does not dispute the position of the Applicant that the applicable standard of review of Decision 2 is reasonableness, in accordance with the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

67. The Board states that Decision 2 was reasonable.

D. First Issue: The Act Sets Out a Unique Statutory Procedure Regarding Disqualification

68. As noted, this is one of two possible approaches which this Honourable Court may take in reviewing this matter.

69. An argument may be made that the Applicant is unable to seek the relief of reinstatement, and repayment of missed Trustee remuneration, as she has elected not to employ the process set out in the *Act* to challenge a disqualification. Here, the Applicant resigned, although under protest. Given the language used in the *Act*, an act of resignation, even if under protest, could be viewed as an intervening and superseding act following Decision 2; as such, the quashing of either or both decisions could be effectively meaningless as the Applicant would still have resigned.

70. The Board, through its counsel, asked if the Applicant's resignation could be provided in writing. The Applicant, through her counsel, stated that she did so under protest. However, the *Act* contemplates a situation where a school board trustee does not resign, and is accordingly subject to a Board resolution to disqualify. A trustee subject to that disqualification is then entitled to appeal by bringing an application to the Court to seek reinstatement and reimbursement.

71. A trustee in that situation, as contemplated by the *Act*, would have taken no steps to resign and would have had to have been forced from their position, subject to statutory appeal. However, the statute makes no further mention, after section 90, of school board trustees who resigns. Does that mean that a school board trustee, who has taken the act of resigning, subsequent to the decision to disqualify, has essentially attorned to that decision, and therefore cannot take steps that are inconsistent with that decision?

Act ss. 90 and 91. **[TAB 9]**

Howell v. Grande Yellowhead Regional Division #35, 2006 ABQB 387, at para. 14. **[TAB 10]**

72. The Applicant challenges the Board decision to disqualify her. Posit that her challenge succeeds, and the decision is quashed. The Applicant is no longer disqualified – but she has resigned in the interim. Query how an intervening resignation, even if under protest, may be reversed.

73. It can be anticipated that the Applicant would say that her resignation was not voluntary, but mandated by the wording of section 90 of the *Act* – "shall" resign. However, the *Act* itself contemplates a school board trustee refusing to resign and details a process to address that.

74. The approach taken by the legislator at sections 90 and 91 of the *Act*, does appear consistent with the following established principles:

(a) Where a case raises a merely hypothetical or abstract question, the principle of mootness applies. An application is moot where the tangible and concrete dispute has disappeared, and the issues have become academic; and

Nassichuk Dean v University of Lethbridge, 2022 ABKB 629, at paras 8 & 9, relying upon *Borowski v Canada (Attorney General)* [1989] 1 SCR 342. **[TAB 11]**

The Alberta Teachers' Association v. Buffalo Trail Public Schools Regional Division No 28, 2022 ABCA 13, at paras 17-19 and 34. **[TAB 12]**

(b) Where a statutory appeal process is prescribed, a party is obliged to pursue and exhaust that process rather than seeking to circumvent it with a judicial review.

Chemtrade Logistics Inc. v Fort Saskatchewan (City), 2023 ABKB 434 at paras. 22 & 33. **[TAB 13]**

75. Accordingly, this Honourable Court may find that the JR is moot and thus dismissed JR2 its entirety.

E. Second Issue: In the Alternative, Decision 2 Was Procedurally Fair

76. In the event that this Honourable Court wishes to proceed with the JR, the Board submits that Decision 2 was both procedurally fair and substantively reasonable, and that the sanctions issued pursuant to Decision 1 were reasonable, justifiable, intelligible and transparent and breached by the Applicant.

77. At paragraph 28 of the Applicant's brief, the Applicant argues that Decision 2 was not procedurally fair because the Applicant says that Decision 1 was flawed, and Decision 2 has no "extricable" violations so as to independently justify disqualification. Respectfully, the Board disagrees on both counts. The Board's brief in JR1 responds to the various arguments of the Applicant on the validity of Decision 1 and the Board will not repeat them here. The Board's arguments with respect to additional violations found in Decision 2 are detailed below.

F. Third Issue: The Sanctions Issued Pursuant to Decision 1 Were Reasonable, Justifiable, Intelligible and Transparent and Were Violated by the Applicant

78. At paragraphs 29 and 30 of the Applicant's brief, the Applicant argues firstly that no sanctions could validly be imposed because the Applicant says Decision 1 in fact shows no breaches of the Code of Conduct; secondly, the Applicant says even if there were breaches of the Code of Conduct nevertheless Decision 1's sanctions were demonstrably unfit because they "… were, for the most part not within the Board's jurisdiction to issue." Respectfully, the Board disagrees. Again, and consistent with the Applicant's approach here, the Board will not reiterate its arguments on these points which are detailed in its brief in JR1.

Brief of the Board in JR 1 paras 72-100

79. At paragraphs 31 to 33 of the Applicant's brief, the Applicant next argues that even if the Decision 1 sanctions were valid, there was no violation. The Applicant in summary argues that the Applicant's activities were all in her personal capacity without purporting to represent the Board, and were directed at an ideology that the Applicant disagrees with rather than at any particular community.

80. Again with respect, the Board disagrees. Part of being an elected school board trustee is to uphold the high standards of conduct that reflect their position of influence and responsibility as set out in the *Act*, the Code of Conduct and Board policy, including accepting responsibility for their actions and not seeking to parse words to deflect from inappropriate trustee conduct. The Board's submissions are as follows.

81. Condition (b) of the First Motion stated:

> As a result, as of today's date [September 26, 2023] and up to and including the Trustee's Term of Office ("End Date"), the Trustee
>
> a. ....
>
> b. shall not represent the Board/School Division in any official capacity, including Board/School Division functions, events, award ceremonies, conferences, assemblies, school masses, graduation events, school council meetings and speaking with news/media outlets.

Motion 1, CROP para.1(d)(i)(B) p.39. **[TAB B]**

82. The Applicant knowingly engaged, in public fora, with topics of an explicitly educational nature. She allowed herself to be introduced as a Trustee at the outset of the Talk Truth Interview. She at no time, despite ample opportunity, even attempted to provide the "other side of the story" by acknowledging the Board and Division policies that are expressly contrary to her actions. It simply defies any reasonable interpretation to suggest that the Applicant was holding herself out as anything other than a school board trustee speaking on topics within her field of expertise. To interpret the Code of Conduct as apparently applying only in the context of Board-approved speaking engagements is to render the Code of Conduct's obligations is unreasonable. The Board submits that condition (b) was violated. This is consistent with Decision 2 at page 10 – Condition (b) of the First Motion.

Decision 2, VIII Reasons, CROP para. 1(a) p.13. **[TAB A]**

83. Condition (c) stated:

> As a result, as of today's date [September 26, 2023] and up to and including the Trustee's Term of Office ("End Date"), the Trustee
>
> a. ....
>
> c. shall cease making any public statements in areas touching upon or relating to,
>
> i. **the 2SLGBTQ+ community**; (emphasis added) and
>
> ii. the Holocaust
>
> Motion 1, CROP para.1(d)(i)(B) p.39. **[TAB B]**

84. The suggestion that the Applicant only attacked an ideology and not a community is equally untenable. LGBTQ2S+ identity and social practices are fundamental and defining characteristics of that community; arguably they are what makes that community a community. The LGBTQ2S+ members of the Division are indisputably a vulnerable community, and the Board rejects any suggestion that it should simply dismiss their experiences out of hand because the Applicant claims to have been engaged in a purely theory-based exercise.

85. These arguments are an example of a form before substance argument. The purpose of the Code of Conduct is ultimately to ensure that Trustees do their jobs and protect the students in their care. The Board submits that an expansive, not a tightly restricted, approach best achieves that important objective. Accordingly, the Board submits that condition (c) was also violated.

G. Fourth Issue: Decision 2 Was Substantively Reasonable

86. In the Board's submission, the Applicant clearly violated two validly imposed sanctions of Decision 1, and that alone is sufficient to justify the reasons and sanctions of Decision 2. However, in addition the Applicant committed a number of additional breaches of the Code of Conduct which further underpin the validity of Decision 2. The arguments below demonstrate the reasonableness of Decision 2 in relation to each of the headings set out. Furthermore, the reasons of the Board in support of Decision 2 were intelligible, justifiable and transparent.

(a) Policy 3, Section 6.3

87. At paragraphs 34 and 35 of the Applicant's brief, the Applicant argues that she did communicate in a way that reflected the principles of the Code of Conduct because of her interpretation of its underlying Roman Catholic principles. Further, the Applicant argues that the Code of Conduct does not prohibit communications challenging ideologies.

88. It is true that the Code of Conduct does not specifically prohibit the challenging of a particular ideology. However, a plain reading of section 6.3 clearly indicates that what it calls for is compliance with the Code of Conduct. The Applicant, however, seeks to have the Board opine and rule on compliance with Roman Catholic values. Expert evidence was not called on what constitutes Roman Catholic values.

89. Ultimately, the Board's statutory mandate is to create and administer a Code of Conduct and the Applicant did not comply with that Code of Conduct; the Board's findings in this respect were justifiable and intelligibly explained:

> Board Policy 3, Section 6.4: For the reasons noted, the Respondent's activity on/in relation to the Social Media Posts failed to reflect any recognition of her obligation to represent the interests of the Board, her duties as a trustee, or awareness of public perception.
>
> Decision 2, VIII Reasons, CROP para. 1(a) p.15. **[TAB A]**

(b) Policy 3, Section 6.4

90. The Applicant's response brief at paragraphs 36 to 41 again illustrates a narrow and impractical approach, which does not reflect the spirit and intent of section 6.4 of Board Policy 3. The Applicant apparently would have it that even if she was aware that she was perceived as representing the Board, it would be sufficient if she also believed that the Social Media Posts would not create an issue. With respect, this interpretation is not reasonable. The spirit and intent of the Code of Conduct is clearly that the members of the Board are to work together collaboratively and cooperatively. Further, as the Board observed in connection with JR1, the Board does not view its various Code of Conduct obligations in distinct silos, but rather takes a contextual and coherent approach. Such an approach is at odds with the narrow and formalistic interpretations for which the Applicant advocates. In this case, clearly the spirit and intent of this provision in the context of the Code of Conduct as a whole is for Trustees not to make public statements, perceived by the public as being on behalf or representative of the Board, which in some fashion either denigrate the Board or purport to represent that the Board holds opinions which it does not in fact hold.

91. Further on this point, the Applicant again raises the argument that she was promoting Roman Catholic values. The Board will not repeat its arguments above and from JR1.

(c) Policy 3, Section 6.7

92. At paragraphs 42 to 44 of her brief, the Applicant again argues that her statements were clearly personal and do not represent the opinion of the Board. The Applicant further argues that this provision only relates to decisions in which the Trustee implicated initially opposed the Board's position, but then was ultimately required to speak on behalf of the Board thereafter.

93. Again and with respect, the Applicant's statements do not accord with either a practical and contextual interpretation of the Code of Conduct, nor with the Trustee's actual actions. The Trustee's statements could easily be interpreted as indicating the Board as a whole held particular views of the 2SLGBTQ+ community. That is not the case. The Trustee has not complied with section 6.7 of Policy 3, plainly and obviously. This is consistent with Decision 2:

> Board Policy 3, Section 6.7: For the reasons given, the Respondent has failed to support the First Motion and October 2023 Board Reasons, indeed, the Respondent through her counsel has publicly denigrated them and indicated an intention not to comply. While the timeline for compliance has not yet expired such that the First Motion has not yet been breached with respect to these declarations, these expressions, as an obiter statement, nevertheless contradict section 6.7.
>
> Decision 2, VIII Reasons, CROP para. 1(a) p.15. **[TAB A]**

(d) Policy 3, Section 6.18

94. As with other provisions, the Trustee advances a particularly narrow and formalistic interpretation at paragraphs 45 to 50 of her brief. For example, at paragraph 48, the Applicant appears to be arguing that she can never breach this clause as long as she has made at least one positive contribution to the Board. The Board does not assert that the Applicant has never made such a contribution. However, a positive assertion – that the Trustee shall contribute to a positive and respectful learning and working culture – can equally be stated as a negative – in other words, that the Trustee will not take steps to create a negative and disrespectful learning and working culture. They are two sides of the same coin, with respect to the Trustee's argument at paragraph 48.

95. In response to paragraph 50, the Board was satisfied that students and parents within its Division were made to feel unwelcome. With respect, the fact that others may feel that these feelings were unjustified does not reflect that the Board has obligations to the entire community.

Decision 1 IX Did the Meme
Contravene the Code of Conduct?
CROP para. 1(d)(i)(B) p.9. **[TAB B]**

96. Further, the Board's mandate is to include and welcome all students, even those which the Applicant describes as living a "gravely depraved and intrinsically disordered" lifestyle. While the Applicant may hold these beliefs, the Board's mandate clearly requires it to create and maintain a positive and respectful working environment. All this is consistent with Decision 2:

> Board Policy 3, Section 6.18: For the reasons noted, the Respondent has failed to contribute to a positive and respectful learning environment; to the contrary, a community within the Division has been made to feel unwelcome and unsafe.
>
> Decision 2, VIII Reasons, CROP para. 1(a) p.15. **[TAB A]**

(e) Policy 3, Section 6.20

97. This clause simply requires Trustees to adhere to the Code of Conduct. The Board has offered ample reasons, in both Decision 1 and Decision 2, to clearly show that the Applicant did not adhere to the Code of Conduct.

(f) Policy 4, Section 1

98. At paragraphs 52 to 54 of the Applicant's brief, the Applicant argues that as, in the Applicant's view, no breaches of Policy 3 have been shown, no breach of section 1 of Policy 4 arises either. However, the Board has shown such breaches, in detail, in both Decision 1 and Decision 2. Accordingly, this section is also breached.

(g) Policy 4, Section 5

99. In paragraphs 55 to 57 of the Applicant's brief, the Applicant argues first that the Board truncated this clause. However, the full clause is set forth in Decision 2 at page 9. In any event, the Board does not dispute that differences of opinion may arise as between Trustees during a reasonable debate. Further, and in any event, the small omission of some wording at page 12 does not either minimize the Board's position nor in any way mislead the reader. The point made by the Board is that the Applicant disregarded the Board's

motion, disregarded policy of the Board, disregarded the position of the Division, and has denigrated and disrespected the other members of the Board. For instance, on pages 15 to 16 of Decision 2, numbered subparagraphs iv and v enumerate a number of gratuitous and disrespectful statements and interactions found in the written submissions of the Applicant. Once again, a plain reading of the section in question indicates indisputably that the Applicant's conduct was inconsistent with it.

(h) Policy 4, Section 6

100. At paragraphs 58 to 63 of the Applicant's brief, the Applicant argues that the Board is conflating a personal disagreement, and the feelings that arose from the disagreement, with whether the Applicant's conduct was dignified, ethical, professional or lawful. Here the judgement is made by fellow Trustees, who are best positioned to make that judgment. It is unreasonable to suggest that the Board is unable to review the professionalism and ethical behaviour of its members and the dignity of their behaviours. The Board's view is that its mandate and responsibilities include reviewing such important concepts. Professionalism and ethical behaviour are required in many contexts – for example, under the Code of Professional Conduct that binds lawyers practicing in Alberta. There is simply no reasonable basis to conclude that these commonly used and well understood terms are too vague or uncertain to be enforced. Behaviour in a professional, ethical and dignified manner by all Trustees is critical to engendering the respect that the important position of school board trustee should seek from the community. This is consistent with Decision 2:

> Board Policy 4, Section 6: For the reasons noted, the Respondent has not conducted herself in a dignified, professional and ethical manner. Rather, she has disrespected and denigrated the Board and a valued and respected community within the broader educational community that she was elected to serve
>
> Decision 2, VIII Reasons, CROP para. 1(a) p.16. **[TAB A]**

(i) Policy 4, Section 7

101. At paragraph 64 of the Applicant's brief, the Applicant argues that since she disagrees with the Board, she must be able to publicly communicate that disagreement. That is not the basis of the finding of non-compliance. The Applicant openly flouted the Board's Motion in communications to the media and other public fora. That is not consistent with this provision. This position is consistent with Decision 2:

> Board Policy 4, Section 7: For the reasons noted, the Respondent has not reflected Board policy and resolutions in her public communications, in fact, she has openly disregarded and/or expressed the intention to disregard them. While the time to comply with certain conditions of the First Motion has not yet passed and accordingly it has not yet been breached, repeated open affirmations of the intent not to comply are inconsistent with this provision.
>
> Decision 2, VIII Reasons, CROP para. 1(a) p.16. **[TAB A]**

(j) Policy 4, Section 15

102. In paragraph 65 of her brief, the Applicant engages in a narrow and formalistic interpretation. The obligation to work together with fellow Trustees to communicate with the electorate, the Applicant appears to be arguing, is met

as long as that has happened sometimes, not necessarily every time. The Board disagrees. The obligation to work together with fellow Trustees to communicate with the electorate is a duty that applies at all times to all Trustees, and is not complied with if the Trustee in question just does it once in a while. The Applicant's breach of this provision is effectively admitted by paragraph 65 of her brief.

(k) Policy 4, Section 22

103. In response to this finding of breach, the Applicant again argues at paragraphs 66 to 69 that her conduct was personal and did not represent the Board. The Applicant argues that there is no obligation on her to disclaim any representation of the Board, and clearly could not have been representing the views of the Board when speaking about something the Board did to her with which she did not agree.

104. Firstly, as has been outlined above and in the Board's brief in response to JR1, there is no reasonable basis to suggest that the Applicant's use of social media was personal. Secondly, the fact that nowhere in the Code of Conduct does it say that a Trustee must disclaim personal responsibility, is not relevant to this consideration. The Trustee's obligation is to ensure that there is no possibility that her comments are taken as being representative of the Board. Disclaiming responsibility is a way that this could be accomplished. The Board's point was that the Applicant in this case took no such steps, not that this specific suggestion was a required step. This is consistent with Decision 2:

> Board Policy 4, Section 22: For the reasons noted, the Respondent has failed to represent the Board responsibly and with proper decorum and respect for others in Board-related matters. In a public interview, in which the Respondent is identified as a trustee and does not state that she is speaking solely in her personal capacity, at which business of the Board is discussed, the Board finds this provision applicable. The Respondent failed to show respect for either the Board or the 2SLGBTQ+ community.
>
> Decision 2, VIII Reasons, CROP para. 1(a) p.16. **[TAB A]**

105. Lastly, the Board acknowledges that it is unlikely that statements of the Trustee critical of the Board's decision would be taken as being representative of the Board.

(l) Roman Catholic Values

106. At paragraphs 70 to 75 of the Applicant's brief, the Applicant again argues that the Board was unreasonable in not specifically taking into account "Roman Catholic values" in its review and interpretation of the Code of Conduct. The Board has already addressed this issue at some length both above and in its brief in JR1 at paragraphs 77 - 79.

107. Most significantly, however, the issue before the Board that led to Decision 1 was squarely within the Code of Conduct and did not engage a broader review of Roman Catholic values. The Board has explained this at some length in its brief in JR1, but in summary: the Applicant's position at the First Code of Conduct Hearing was that she wished to highlight her concerns with what she perceived to be an agenda of the United Nations and Planned Parenthood to indoctrinate our children. The Board did not expressly make determinations

on Roman Catholic values because it was not necessary to do so as part of its decision making process.

H. Fifth Issue: The Disqualification Sanction set Forth in Decision 2 is Fit and Appropriate

108. Finally, at paragraphs 76 through 82 of her brief, the Applicant argues that the disqualification sanction issued by the Board was inappropriate. The Board respectfully disagrees. In fact, after careful review of the Applicant's actions and her submissions and evidence, the Board determined that the sanction of disqualification was appropriate. This was in part because lesser sanctions had already been imposed and disregarded by the Applicant arising from Decision 1. In response to the Applicant's comments at paragraph 63 of her brief, the *Del Grande* case cited by the Board is distinguishable on this issue, as *Del Grande* did not involve a second set of breaches following a deliberate failure to comply with a first set of sanctions.

109. Further, and contrary to the Applicant's argument, the disqualification sanction is prescribed by both the *Act* and the Code of Conduct. As the Applicant herself notes at paragraph 79 of the Applicant's brief, the *Act* provides for disqualification where the sanction under the Code of Conduct is determined by the Board to be disqualification. That is precisely the case here.

110. The Code of Conduct states at clause 9 of Appendix A:

> A violation of the Code of Conduct may result in the Board instituting, **without limiting what follows**, any or all of the following sanctions....[Emphasis added].
>
> Code of Conduct, CROP para.1(d)(i)(A) p.36. **[TAB K]**

111. The Code of Conduct provides a broad discretion to the Board to act as it determines appropriate in the circumstances. In light of the continuing non-compliance of the Applicant coupled with the Applicant's refusal to accept responsibility for her actions, the Board determined that disqualification was the appropriate remedy, as explained at page 17 of Decision 2. The Board submits that that exercise of discretion is manifestly within the range of potentially reasonable outcomes and as a whole is a reasonable, transparent and intelligible outcome.

Decision 2, IX Conclusion, CROP para. 1(a) p.20. **[TAB A]**

PART 5 COSTS

112. The Board submits that it should be entitled to its costs for each of these proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 19th day of April, 2024.

McLENNAN ROSS LLP

Per: _____
Teresa Haykowsky, K.C.

Per: _____
Kathleen Garbutt

LIST OF AUTHORITIES

LIST OF KEY EVIDENCE

Document Description	**Certified Record of Proceeding Reference (if applicable)**	**TAB**
Decision 2 of the Board of Trustees of the Red Deer Catholic Separate School Board	Para. 1(a)	A
Board Motion and Supporting Reasons dated October 13, 2023	Para. 1(d)(i)(B)	B
1:12 p.m. September 29, 2023, Email to the then Trustee Lagrange	Para. 1(d)(i)(C)	C
Laura-Lynn Interview	Para. 1(d)(i)(D)	D
Talk Truth Interview	Para. 1(d)(i)(D)	E
October 16, 2023, Complaint Letter	Para. 1(d)(i)(F)	F
Minutes of a Special Meeting of the Board of Trustees of the Red Deer Catholic School Division held November 13, 2023	Para. 1(e)(i)	G
Minutes of a Special Meeting of the Board of Trustees of the Red Deer Catholic Separate School Division held November 23, 2023	Para.1(e)(ii)	H
Policy 1: Division Foundational Statements, Mission	Para. 1(d)(i)(H)	I
Administrative Procedure 103 – Welcoming, Safe and Caring, Inclusive and Respectful Learning Environments, Background	Para. 1(d)(i)(I)	J

Code of Conduct	Para. 1(d)(i)(A)	K
Policy 3: Trustee Role Description	Para. 1(d)(i)(J)	L

Ontario Energy Board *Appellant*

v.

Ontario Power Generation Inc., Power Workers' Union, Canadian Union of Public Employees, Local 1000 and Society of Energy Professionals *Respondents*

and

Ontario Education Services Corporation *Intervener*

Commission de l'énergie de l'Ontario *Appelante*

c.

Ontario Power Generation Inc., Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 et Society of Energy Professionals *Intimés*

et

Corporation des services en éducation de l'Ontario *Intervenante*

Indexed as: Ontario (Energy Board) *v.* Ontario Power Generation Inc.

2015 SCC 44

File No.: 35506.

2014: December 3; 2015: September 25.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Public utilities — Electricity — Rate-setting decision by utilities regulator — Utility seeking to recover incurred or committed compensation costs in utility rates set by Ontario Energy Board — Whether Board bound to apply particular prudence test in evaluating utility costs — Whether Board's decision to disallow $145 million in labour compensation costs related to utility's nuclear operations reasonable — Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 78.1(5), (6).

Administrative law — Boards and tribunals — Appeals — Standing — Whether Ontario Energy Board acted improperly in pursuing appeal and in arguing in favour of reasonableness of its own decision — Whether

Répertorié : Ontario (Commission de l'énergie) *c.* Ontario Power Generation Inc.

2015 CSC 44

N° du greffe : 35506.

2014 : 3 décembre; 2015 : 25 septembre.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon.

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

Services publics — Électricité — Décision d'un organisme de réglementation des services publics relativement à l'établissement de tarifs — Demande d'un service public en vue d'obtenir le recouvrement de dépenses de rémunération faites ou convenues grâce aux tarifs établis par la Commission de l'énergie de l'Ontario — La Commission avait-elle l'obligation d'employer une méthode particulière axée sur la prudence pour apprécier les dépenses du service public? — Le refus de la Commission d'approuver 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public était-il raisonnable? — Loi de 1998 sur la Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, art. 78.1(5), (6).

Droit administratif — Organismes et tribunaux administratifs — Appels — Qualité pour agir — La Commission de l'énergie de l'Ontario a-t-elle agi de manière inappropriée en se pourvoyant en appel et en faisant valoir

Board attempted to use appeal to "bootstrap" its original decision by making additional arguments on appeal.

In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of the costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. The Board disallowed certain payment amounts applied for by Ontario Power Generation ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry. A majority of the Ontario Divisional Court dismissed OPG's appeal and upheld the decision of the Board. The Court of Appeal set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons.

The crux of OPG's argument here is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decision to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. The Board on the other hand argues that a particular prudence test methodology is not compelled by law, and that in any case the costs disallowed here were not committed nuclear compensation costs, but are better characterized as forecast costs.

OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision, arguing that the Board's aggressive and adversarial defence of its decision was improper, and the Board attempted to use the appeal to bootstrap its original decision by making additional arguments on appeal. The Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decision on appeal.

le caractère raisonnable de sa propre décision? — A-t-elle tenté de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale?

En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que le service public touche des paiements qui correspondent à ses dépenses. La Commission a refusé certains paiements sollicités par Ontario Power Generation (« OPG ») dans sa décision sur la demande d'établissement des tarifs pour la période 2011-2012. Elle a en fait refusé à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public au motif que ces dépenses étaient en rupture avec celles d'organismes comparables dans le secteur réglementé de la production d'énergie. Les juges majoritaires de la Cour divisionnaire de l'Ontario ont rejeté l'appel d'OPG et confirmé la décision de la Commission. La Cour d'appel a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs.

La thèse d'OPG en l'espèce veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence doit s'appliquer à son bénéfice. La Commission prétend pour sa part que la loi ne l'oblige pas à employer quelque méthode fondée sur le principe de la prudence et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses convenues, mais bien des dépenses prévues.

OPG exprime en outre des préoccupations sur la participation de la Commission à l'appel de sa propre décision et fait valoir que la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée et que l'organisme a tenté de se servir de l'appel pour s'auto-justifier en formulant de nouveaux arguments à l'appui de sa décision initiale. La Commission soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

Held (Abella J. dissenting): The appeal should be allowed. The decision of the Court of Appeal is set aside and the decision of the Board is reinstated.

Per McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.: The first issue is the appropriateness of the Board's participation in the appeal. The concerns with regard to tribunal participation on appeal from the tribunal's own decision should not be read to establish a categorical ban. A discretionary approach provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis. Because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. Further, some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. The following factors are relevant in informing the court's exercise of its discretion: statutory provisions addressing the structure, processes and role of the particular tribunal and the mandate of the tribunal, that is, whether the function of the tribunal is to adjudicate individual conflicts between parties or whether it serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest. The importance of fairness, real and perceived, weighs more heavily against tribunal standing where the tribunal served an adjudicatory function in the proceeding. Tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

Consideration of these factors in the context of this case leads to the conclusion that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. The Board was the only respondent in the initial review of its decision. It had no alternative but to step in if the decision was to be defended on the merits. Also, the Board was exercising

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli. La décision de la Cour d'appel est annulée et celle de la Commission est rétablie.

La juge en chef McLachlin et les juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon : Se pose en premier lieu la question du caractère approprié de la participation de la Commission au pourvoi. Les préoccupations relatives à la participation d'un tribunal administratif à l'appel de sa propre décision ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes. Vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Qui plus est, dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige. Les considérations suivantes permettent de délimiter l'exercice du pouvoir discrétionnaire de la cour de révision : les dispositions législatives portant sur la structure, le fonctionnement et la mission du tribunal en cause et le mandat du tribunal, à savoir si sa fonction consiste soit à trancher des différends individuels opposant plusieurs parties, soit à élaborer des politiques, à réglementer ou à enquêter, ou à défendre l'intérêt public. L'importance de l'équité, réelle et perçue, milite davantage contre la reconnaissance de la qualité pour agir du tribunal administratif qui a exercé une fonction juridictionnelle dans l'instance. Il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

L'application de ces principes à la situation considérée en l'espèce mène à la conclusion qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. La Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait d'autre choix que de prendre part à l'instance pour que sa décision

a regulatory role by setting just and reasonable payment amounts to a utility. In this case, the Board's participation in the instant appeal was not improper.

The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns the types of argument a tribunal may make, while the bootstrapping issue concerns the content of those arguments. A tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. A tribunal may not defend its decision on a ground that it did not rely on in the decision under review. The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, absent a power to vary its decision or rehear the matter, it cannot use judicial review as a chance to amend, vary, qualify or supplement its reasons. While a permissive stance towards new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. In this case, the Board did not impermissibly step beyond the bounds of its original decision in its arguments before the Court. The arguments raised by the Board on appeal do not amount to impermissible bootstrapping.

The merits issue concerns whether the appropriate methodology was followed by the Board in its disallowance of $145 million in labour compensation costs sought by OPG. The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less. In order to ensure the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and

soit défendue au fond. Aussi, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Sa participation au pourvoi n'avait rien d'inapproprié en l'espèce.

La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir, alors que l'autojustification touche à la teneur des prétentions. Un tribunal s'autojustifie lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire. Un tribunal ne peut défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle. Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire, un tribunal ne puisse profiter d'un contrôle judiciaire pour modifier, changer, nuancer ou compléter ses motifs. Même s'il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, la cour de révision étant alors saisie des arguments les plus convaincants à l'appui de chacune des thèses, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Dans la présente affaire, la Commission n'a pas indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant la Cour. Les arguments qu'elle a invoqués en appel n'équivalent pas à une autojustification inadmissible.

La question de fond est celle de savoir si la Commission a employé une méthode appropriée pour refuser à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération. L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins. Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en

utilities may be assured of an opportunity to earn a fair return for providing those services.

The *Ontario Energy Board Act, 1998* does not prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. However, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable. It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent. The Board has broad discretion to determine the methods it may use to examine costs — but it cannot shift the burden of proof contrary to the statutory scheme.

The issue is whether the Board was bound to use a no-hindsight, presumption of prudence test to determine whether labour compensation costs were just and reasonable. The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. However, there is no support in the statutory scheme for the notion that the Board should be required as a matter of law, under the *Ontario Energy Board Act, 1998* to apply the prudence test such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts.

Where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology. Here, the labour compensation costs which led to the $145 million disallowance are best understood

capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prescrit pas la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et du consommateur lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Suivant cette loi, il incombe cependant au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables. Il semble donc contraire au régime législatif de présumer que la décision du service public de faire les dépenses était prudente. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter la méthode à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

La question à trancher est celle de savoir si la Commission était tenue à l'application d'un critère excluant le recul et présumant la prudence pour décider si les dépenses de rémunération du personnel étaient justes et raisonnables. Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Toutefois, aucun élément du régime législatif n'appuie l'idée que la Commission devrait être tenue en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence de sorte que la seule décision de ne pas l'appliquer pour apprécier des dépenses convenues rendrait déraisonnable sa décision sur les paiements. Lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements.

Lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue. Dans la présente affaire, il convient mieux de voir dans

as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, the Board was not bound to apply a particular prudence test in evaluating these costs. It is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. Applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost.

In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs and disallowing them. Since the costs at issue are operating costs, there is little danger that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. Further, the costs at issue arise in the context of an ongoing repeat-player relationship between OPG and its employees. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The Board's decision in no way purports to force OPG to break its contractual commitments to unionized employees. It was not unreasonable

les dépenses de rémunération dont le recouvrement a été refusé à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux de ses syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conservait une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Cependant, la Commission n'était pas tenue d'appliquer un principe de prudence donné pour apprécier ces dépenses. Il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Présumer la prudence aurait été incompatible avec le fardeau de la preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses.

Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG de ces dépenses et en refusant le recouvrement de celles-ci. Puisque les dépenses en cause sont des dépenses d'exploitation, il est peu probable que le refus essuyé dissuade OPG de faire de telles dépenses à l'avenir, car les dépenses de la nature de celles dont le recouvrement a été refusé sont inhérentes à l'exploitation d'un service public. Aussi, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de

for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into one category or the other.

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

Per Abella J. (dissenting): The Board's decision was unreasonable because the Board failed to apply the methodology set out for itself for evaluating just and reasonable payment amounts. It both ignored the legally binding nature of the collective agreements between Ontario Power Generation and the unions and failed to distinguish between committed compensation costs and those that were reducible.

The Board stated in its reasons that it would use two kinds of review in order to determine just and reasonable payment amounts. As to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided, the Board explained that it would review such costs using a wide range of evidence, and that the onus would be on the utility to demonstrate that its forecast costs were reasonable. A different approach, however, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it would evaluate these costs using a "prudence review". The application of a prudence review does not shield

rémunération d'un service public. La Commission n'entend aucunement, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés syndiqués. Il n'était pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre de ces catégories.

Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il visait à signifier clairement à OPG qu'il lui incombe d'accroître sa performance. L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

La juge Abella (dissidente) : La Commission a rendu une décision déraisonnable en ce qu'elle n'a pas appliqué la méthode qu'elle avait elle-même établie pour déterminer le montant de paiements justes et raisonnables. Elle a à la fois méconnu le caractère contraignant en droit des conventions collectives liant Ontario Power Generation et les syndicats et omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles.

Dans ses motifs, la Commission a dit recourir à deux examens pour arrêter le montant de paiements justes et raisonnables. En ce qui concerne les « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter, la Commission a expliqué qu'elle examinait ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombait au service public d'en démontrer le caractère raisonnable. Cependant, une démarche différente était suivie pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission a expliqué

these costs from scrutiny, but it does include a presumption that the costs were prudently incurred.

Rather than apply the methodology it set out for itself, however, the Board assessed *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which there is no opportunity for the company to take action to reduce. The Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. The obligations contained in these collective agreements were immutable and legally binding commitments. The agreements therefore did not just leave the utility with limited flexibility regarding overall compensation or staffing levels, they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

The Board, however, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of all its compensation costs and concluded that it had failed to provide compelling evidence or documentation or analysis to justify compensation levels. Had the Board used the approach it said it would use for costs the company had no opportunity to reduce, it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast

qu'elle appréciait ces dépenses en se livrant à un « contrôle de la prudence ». L'application du principe de la prudence ne soustrait pas ces dépenses à tout examen, mais elle présume que les dépenses ont été faites de manière prudente.

Toutefois, au lieu d'appliquer la méthode qu'elle avait elle-même établie, la Commission a considéré *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables sans se demander s'il s'agissait en partie de dépenses pour lesquelles la société ne pouvait prendre de mesures de réduction. Par son omission d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission a méconnu à la fois son propre cadre méthodologique et le droit du travail.

Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire. Ces conventions ne laissaient pas seulement au service public peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

Or, en appliquant la méthode qu'elle avait dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission a en fait obligé Ontario Power Generation à prouver le caractère raisonnable de toutes ses dépenses de rémunération et a conclu que l'entreprise n'avait présenté ni preuve convaincante, ni documents ou analyses qui justifiaient les barèmes de rémunération. Si elle avait eu recours à l'approche qu'elle avait dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent

costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect.

Selecting a test which is more likely to confirm the Board's assumption that collectively-bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes the appearance of an ideologically-driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not. While the Board has wide discretion to fix payment amounts that are just and reasonable and, subject to certain limitations, to establish the methodology used to determine such amounts, once the Board establishes a methodology, it is, at the very least, required to faithfully apply it.

Absent methodological clarity and predictability, Ontario Power Generation would be unable to know how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was unreasonable.

donc être assimilées à juste titre à des dépenses prévues. La Commission n'a toutefois tiré aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation étaient fixes et dans quelle proportion elles demeuraient assujetties au pouvoir discrétionnaire du service public. Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce sens.

En choisissant un critère éminemment susceptible de confirmer l'hypothèse de la Commission selon laquelle les dépenses issues de négociations collectives sont excessives, on se méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas. Même si la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont justes et raisonnables et, à l'intérieur de certaines limites, de définir la méthode utilisée pour établir le montant de ces paiements, dès lors qu'elle a établi une telle méthode, elle doit à tout le moins l'appliquer avec constance.

En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation ne peut savoir comment déterminer les dépenses et les investissements à faire et de quelle manière les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

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

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Je serais donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et de renvoyer l'affaire à la Commission pour réexamen.

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

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

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

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

Mark Rubenstein, for the intervener.

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Glenn Zacher, *Patrick Duffy* et *James Wilson*, pour l'appelante.

John B. Laskin, *Crawford Smith*, *Myriam Seers* et *Carlton Mathias*, pour l'intimée Ontario Power Generation Inc.

Richard P. Stephenson et *Emily Lawrence*, pour l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000.

Paul J. J. Cavalluzzo et *Amanda Darrach*, pour l'intimée Society of Energy Professionals.

Mark Rubenstein, pour l'intervenante.

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

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

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

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

Version française du jugement de la juge en chef McLachlin et des juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon rendu par

[1] LE JUGE ROTHSTEIN — En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario (« Commission ») l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que l'entreprise touche des paiements qui correspondent à ses dépenses. Le présent pourvoi vise la décision de la Commission de refuser certains paiements à Ontario Power Generation Inc. (« OPG ») par suite de sa demande d'approbation de tarifs pour la période 2011-2012. Plus particulièrement, la Commission a refusé d'approuver des dépenses de 145 millions de dollars au titre de la rémunération du personnel affecté aux installations nucléaires au motif que le coût de la main-d'œuvre d'OPG était en rupture avec celui d'organismes comparables dans le secteur réglementé de la production d'énergie.

[2] OPG en a appelé devant la Cour divisionnaire de l'Ontario, dont les juges majoritaires ont rejeté l'appel et confirmé la décision de la Commission. OPG s'est alors adressée à la Cour d'appel de l'Ontario, qui a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs. La Commission interjette aujourd'hui appel devant notre Cour.

[3] OPG soutient que le refus de la Commission d'approuver ces dépenses de rémunération de ses employés est déraisonnable. Sa thèse veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence

methodology, OPG argues that its decision was unreasonable.

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

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

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

[7] In my opinion, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, I do not agree with OPG that the Board was bound to apply a particular prudence test in evaluating these costs. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, and associated regulations give the Board broad latitude to determine the methodology it uses in assessing utility

doit s'appliquer à son bénéfice. La Commission n'ayant pas eu recours à pareille méthode pour se prononcer sur la prudence d'OPG, sa décision serait déraisonnable.

[4] La Commission rétorque que la loi ne l'oblige pas à employer quelque méthode pour appliquer le « principe de la prudence » et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses « convenues », mais bien des dépenses prévues.

[5] OPG déplore par ailleurs que la Commission soit partie à l'appel de sa propre décision. Selon elle, la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée, et la Commission tente de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale.

[6] La Commission fait valoir que la Cour a circonscrit la faculté qu'elle avait de plaider en appel lorsqu'elle lui a reconnu tous les droits d'une partie au moment d'autoriser le pourvoi. Subsidiairement, elle soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

[7] Il convient mieux, à mon sens, de voir dans les dépenses de rémunération qui ont été refusées à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conserve une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Je ne crois cependant pas, malgré ce qu'affirme OPG, que la Commission était tenue d'appliquer un principe de prudence donné pour apprécier les dépenses. La *Loi de 1998 sur la*

costs, subject to the Board's ultimate duty to ensure that payment amounts it orders be just and reasonable to both the utility and consumers.

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

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

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

I. Regulatory Framework

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

1. (1) . . .

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

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

Accordingly, the Board must ensure that it regulates with an eye to balancing both consumer interests and the efficiency and financial viability of the

Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, et ses règlements connexes accordent à la Commission une grande latitude dans le choix d'une méthode pour apprécier les dépenses d'un service public, sous réserve de l'obligation de faire en sorte que, au final, les paiements qu'elle ordonne soient justes et raisonnables vis-à-vis à la fois du service public et du consommateur.

[8] Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en refusant de les approuver.

[9] En ce qui concerne la participation de la Commission au pourvoi, je ne crois pas qu'il soit inapproprié qu'elle défende la justesse de sa décision, ni que les arguments qu'elle invoque en appel équivalent à une « autojustification » inadmissible.

[10] Je suis donc d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir la décision de la Commission.

I. Cadre réglementaire

[11] La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* fait de la Commission un organisme de réglementation investi du pouvoir de surveiller, entre autres choses, la production d'électricité en Ontario. Son article premier énonce les objectifs de la Commission dans la réglementation de l'électricité, dont les suivants :

1. (1) . . .

1. Protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité.

2. Promouvoir l'efficacité économique et la rentabilité dans les domaines de la production, du transport, de la distribution et de la vente d'électricité ainsi que de la gestion de la demande d'électricité et faciliter le maintien d'une industrie de l'électricité financièrement viable.

La Commission doit donc s'acquitter de sa fonction de réglementation dans le souci d'établir un équilibre entre l'intérêt du consommateur, d'une part,

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

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

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

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

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

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

[15] This Court has had the occasion to consider the meaning of similar statutory language in *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186. In that case, the Court held that "fair and reasonable" rates were those "which, under the circumstances, would be fair to the consumer on

et l'efficacité et la viabilité financière du secteur de l'électricité, d'autre part. On lui attribue aussi un rôle de « substitut du marché » (2012 ONSC 729, 109 O.R. (3d) 576, par. 54; 2013 ONCA 359, 116 O.R. (3d) 793, par. 38). Sa fonction consiste alors à reproduire au mieux les forces auxquelles serait soumis un service public dans un contexte concurrentiel (*Toronto Hydro-Electric System Ltd. c. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, par. 48).

[12] L'un des leviers les plus puissants dont dispose la Commission pour atteindre ses objectifs réside dans son pouvoir de fixer le montant des paiements que touche l'entreprise pour la prestation du service. Voici l'extrait pertinent du par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* :

(5) La Commission peut fixer les autres paiements qu'elle estime justes et raisonnables :

a) dans le cadre d'une requête en vue d'obtenir une ordonnance prévue au présent article, si elle n'est pas convaincue que le montant du paiement qui fait l'objet de la requête est juste et raisonnable; . . .

[13] Le paragraphe 78.1(6) dispose pour sa part : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du présent article ».

[14] Suivant mon interprétation de ces dispositions, le service public demande des paiements pour une période à venir (appelée « période de référence »). La Commission fait droit à la demande, sauf lorsqu'elle n'est pas convaincue que les paiements demandés sont justes et raisonnables. Lorsqu'elle n'en est pas convaincue, le par. 78.1(5) lui permet de déterminer les paiements qui lui paraissent justes et raisonnables.

[15] Dans l'arrêt *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, la Cour a eu l'occasion de se prononcer sur le sens d'un libellé législatif semblable. Elle a alors statué que la tarification « juste et raisonnable » était celle [TRADUCTION] « qui, dans les circonstances, était juste pour le

the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested" (pp. 192-93).

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

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

consommateur, d'une part, et qui permettait à l'entreprise d'obtenir un juste rendement sur les capitaux investis, d'autre part » (p. 192-193).

[16] Dès lors, le service public doit pouvoir à long terme recouvrer, grâce à la tarification approuvée, ses dépenses d'exploitation et ses coûts en capital, ces derniers s'entendant alors de tous les coûts liés aux capitaux investis par le service public. Le pourvoi vise principalement les dépenses d'exploitation. Si leur recouvrement n'est pas autorisé, le service public n'obtient pas l'équivalent du coût du capital, soit le rendement exigé par les investisseurs pour investir dans le service public. Le rendement exigé équivaut à celui qu'ils pourraient réaliser sur un investissement comportant un risque comparable. À long terme, à moins que le service public réglementé ne puisse obtenir l'équivalent du coût du capital, les nouveaux investissements seront découragés et l'entreprise ne pourra accroître ses activités, ni même les poursuivre. Ce sont non seulement ses actionnaires, mais aussi ses clients, qui en souffriront (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149).

[17] Évidemment, la Commission n'est pas tenue pour autant d'accepter toute dépense avancée par le service public, et le rendement obtenu par les actionnaires n'est pas non plus garanti. À court terme, ce rendement peut fluctuer, notamment lorsque la consommation d'électricité est supérieure ou inférieure à celle prévue. De même, le refus d'approuver des dépenses d'exploitation dont le service public a convenu aura un effet défavorable sur le rendement des actions. Je n'entends pas me livrer à une analyse détaillée de la manière dont le coût du capital-actions devrait être considéré par les organismes qui réglementent les services publics, mais seulement faire observer que tout refus d'approuver une dépense dont un service public a convenu a un effet sur le rendement des actions. Cet effet justifie une grande attention au vu de la nécessité qu'un service public attire les investissements à long terme et réinvestisse ses bénéfices afin de survivre et de fonctionner de manière efficace et rentable, conformément aux objectifs légaux de la Commission applicables à la réglementation de l'électricité en Ontario.

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

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

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

II. Facts

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

[22] It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent of its employees in its regulated

[18] Rappelons qu'il incombe au service public de convaincre la Commission du caractère juste et raisonnable des paiements qu'il sollicite. S'il n'y parvient pas, la Commission peut rejeter la demande en partie à raison du montant qui, selon elle, n'est pas juste et raisonnable.

[19] En cas de refus d'approbation, le service public peut renoncer, si cela lui est possible, aux dépenses d'exploitation en cause. S'il ne peut y renoncer, ses actionnaires absorbent le déficit en touchant un rendement inférieur à celui prévu, c'est-à-dire le coût du capital-actions pour le service public. Il appartient dès lors à la direction de ce dernier de faire en sorte que ses dépenses correspondent à celles que la Commission tient pour justes et raisonnables.

[20] Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

II. Faits

[21] OPG est le plus grand producteur d'énergie de l'Ontario, et sa tarification est réglementée par la Commission. Elle a vu le jour en 1999 et fait partie des entreprises qui ont succédé à Ontario Hydro. Elle exploite des installations nucléaires et hydroélectriques soumises à la réglementation de la Commission qui produisent environ la moitié de l'électricité consommée dans la province. Son unique actionnaire est la province d'Ontario.

[22] Son effectif se compose d'environ 10 000 personnes pour ses activités réglementées, dont 95 p. 100 travaillent dans le secteur nucléaire. Environ 90 p. 100 des employés affectés à ses activités

businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

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

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

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

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

réglementées sont syndiqués, dont approximativement les deux tiers sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 (« STTSE »), et le tiers par Society of Energy Professionals (« Society »).

[23] Dès ses débuts en tant que service public indépendant, OPG a eu conscience de l'importance d'accroître sa performance d'entreprise. Dans le cadre de mesures générales prises à cette fin, elle a entrepris de comparer le rendement de son secteur nucléaire à celui de centrales comparables dans le monde. Dans un protocole d'accord intervenu avec la province d'Ontario le 17 août 2005, OPG a pris l'engagement suivant :

> [TRADUCTION] OPG visera l'amélioration constante de son secteur nucléaire et de ses services internes. Elle comparera sa performance dans ces domaines à celle de l'exploitation des réacteurs CANDU à travers le monde ainsi qu'à celle des producteurs privés et publics d'électricité d'origine nucléaire appartenant au quartile supérieur en Amérique du Nord. Sa priorité première sera d'améliorer l'exploitation de son parc nucléaire actuel.

(d.a., vol. III, p. 215)

[24] Dans la toute première demande qu'elle a présentée à la Commission en 2007 pour la période de référence 2008-2009, OPG a sollicité l'approbation de « recettes nécessaires » se chiffrant à 6,4 milliards de dollars; ce poste correspond [TRADUCTION] « aux recettes dont l'entreprise a besoin au total pour le paiement de toutes ses dépenses susceptibles d'approbation et, également, pour recouvrer tous les coûts liés aux capitaux investis » (L. Reid et J. Todd, « New Developments in Rate Design for Electricity Distributors », dans G. Kaiser et B. Heggie, dir., *Energy Law and Policy* (2011), 519, p. 521). Il s'agissait d'une majoration d'un milliard de dollars par rapport à ce qu'OPG avait demandé et obtenu en application du régime de réglementation en vigueur avant que la Commission ne soit investie de son pouvoir de réglementation vis-à-vis d'elle (EB-2007-0905, décision motivée, 3 novembre 2008 (« décision 2008-2009 de la Commission ») (en ligne), p. 5-6).

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

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

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

[25] La Commission a estimé qu'OPG ne satisfaisait pas aux attentes de son unique actionnaire quant à la performance de son secteur nucléaire et qu'elle avait peu fait pour comparer sa performance à celle de ses pairs, alors qu'elle s'y était engagée dès 2005. De fait, la seule preuve d'une démarche en ce sens présentée par OPG dans le cadre de sa demande d'approbation de tarifs était un rapport établi par Navigant Consulting Inc. en 2006 (« rapport Navigant ») et selon lequel l'effectif d'OPG dépassait de 12 p. 100 celui de ses pairs. La Commission a conclu qu'OPG n'avait pas donné suite aux recommandations du rapport Navigant, ni commandé d'études comparatives ultérieures pour évaluer sa performance (décision 2008-2009 de la Commission, p. 27 et 30). Elle a aussi jugé les coûts d'exploitation d'OPG aux installations nucléaires de Pickering [TRADUCTION] « bien supérieurs à la moyenne du secteur » (p. 29). Elle a donc refusé d'approuver 35 millions de dollars au chapitre des recettes nécessaires et enjoint à OPG de réaliser des études comparatives pour étayer ses demandes ultérieures (p. 31).

[26] Pour expliquer l'importance de la comparaison, la Commission dit ce qui suit : [TRADUCTION] « La raison pour laquelle le protocole d'accord insiste sur la conduite d'une étude comparative est qu'une telle étude peut faire et fait ressortir toute inefficacité ou absence d'accroissement de la productivité » (décision 2008-2009 de la Commission, p. 30).

[27] Le 5 mai 2010, peu avant qu'OPG ne dépose sa deuxième demande d'approbation de tarifs — qui est l'objet du pourvoi —, le ministre de l'Énergie et de l'Infrastructure de l'Ontario a écrit au président-directeur général du service public afin que ce dernier fasse état, dans sa demande, [TRADUCTION] « d'efforts concertés pour trouver des moyens de réaliser des économies et mette l'accent sur les postes de dépense qui sont essentiels à l'exploitation sûre et fiable de ses actifs existants et de ses installations projetées déjà en cours de réalisation » (d.a., vol. IV, p. 38).

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

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

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

[28] Le 26 mai 2010, OPG a déposé sa demande de paiements pour la période de référence 2011-2012. Elle a présenté à l'appui deux rapports de ScottMadden Inc., un cabinet-conseil en gestion générale spécialisé dans la comparaison et la planification opérationnelle d'installations nucléaires. Le rapport de la phase 1 compare la performance opérationnelle et financière d'OPG à celle d'autres entreprises à partir de mesures de la performance dans le secteur d'activité. Le rapport final de la phase 2 porte sur les objectifs d'accroissement de la performance dans l'optique d'une amélioration de l'exploitation du secteur nucléaire. OPG a collaboré avec ScottMadden pour l'établissement des rapports des phases 1 et 2, qui ont respectivement été publiés les 2 juillet et 11 septembre 2009.

[29] La demande visait la période allant du 1er janvier 2011 au 31 décembre 2012. OPG y demandait l'approbation de recettes nécessaires de 6,9 milliards de dollars, soit une augmentation de 6,2 p. 100 par rapport aux recettes d'alors compte tenu des tarifs approuvés pour la période précédente. Des 6,9 milliards de dollars sollicités au titre des recettes nécessaires, 2,8 milliards auraient été affectés à la rémunération, dont environ 2,4 milliards dans le secteur nucléaire.

[30] Une grande partie des dépenses d'OPG au chapitre des salaires et de la rémunération était déterminée par des conventions collectives intervenues avec les syndicats (STTSE et Society). Lors du dépôt de la demande, OPG était liée par une convention collective conclue avec le STTSE en vigueur d'avril 2009 à mars 2012, alors que la convention collective qui la liait à Society avait expiré le 31 décembre 2010. Ces conventions collectives prévoyaient des augmentations annuelles de salaires se situant entre 2 et 3 p. 100, auxquelles s'ajoutait 1 p. 100 pour les changements d'échelon et l'avancement. Après l'audition de la demande par la Commission dans la présente affaire, un arbitre a ordonné l'application d'une nouvelle convention collective liant OPG et Society à compter du 3 février 2011. La convention collective prévoyait des augmentations de salaires de 1 à 3 p. 100.

III. Judicial History

A. *Ontario Energy Board: 2011 LNONOEB 57 (QL) ("Board Decision")*

[31] In its decision concerning OPG's rate application for the 2011-2012 test period, the Board stated that it enjoyed broad discretion pursuant to Ontario Regulation 53/05 (*Payments Under Section 78.1 of the Act*) and s. 78.1 of the *Ontario Energy Board Act, 1998* to "adopt the mechanisms it judges appropriate in setting just and reasonable rates" (para. 73). The Board recognized that different tests could apply depending on whether its analysis concerned the recovery of forecast costs or an after-the-fact review of costs already incurred. In this rate application, it was appropriate to take into consideration all evidence that the Board deemed relevant to assess the reasonableness of OPG's revenue requirement.

[32] The Board rejected OPG's proposed revenue requirement of $6.9 billion, reducing it by $145 million over the test period "to send a clear signal that OPG must take responsibility for improving its performance" (para. 350). Key to its disallowance was the Board's finding that OPG was overstaffed and that its compensation levels were excessive.

[33] Regarding the number of staff, the Board pointed out that a benchmarking study commissioned by OPG itself, the ScottMadden Phase 2 final report, suggested that certain staff positions could be reduced or eliminated altogether. The Board suggested that OPG could review its organizational structure and reassign or eliminate positions in the coming years, as 20 percent to 25 percent of its staff were set to retire between 2010 and 2014 and it was possible to make greater use of external contractors. Regarding compensation, the Board found that OPG had not submitted compelling evidence justifying the benchmarking of its salaries of non-management employees to the 75th percentile of a survey of

III. Historique judiciaire

A. *Commission de l'énergie de l'Ontario (2011 LNONOEB 57 (QL) (« décision de la Commission »))*

[31] Dans sa décision relative à la demande d'approbation de tarifs d'OPG pour la période de référence 2011-2012, la Commission dit que le règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 ») et l'art. 78.1 de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* lui confèrent un vaste pouvoir discrétionnaire quant [TRADUCTION] « au choix d'une méthode indiquée pour fixer des tarifs justes et raisonnables » (para. 73). Elle reconnaît que différents principes peuvent s'appliquer selon qu'il s'agit du recouvrement de dépenses prévues ou de l'examen après coup de dépenses déjà faites. Pour statuer sur la demande dont elle était saisie, il convenait de tenir compte de tout élément de preuve que la Commission jugeait pertinent pour apprécier le caractère raisonnable des recettes nécessaires d'OPG.

[32] La Commission refuse d'approuver les 6,9 milliards de dollars demandés par OPG au titre des recettes nécessaires, les réduisant de 145 millions de dollars pour la période référence [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (par. 350). Cette décision défavorable tient surtout à l'opinion de la Commission selon laquelle OPG compte trop d'employés et ses niveaux de rémunération sont excessifs.

[33] Au sujet de la taille de l'effectif, la Commission relève que, selon une étude comparative qu'OPG a elle-même commandée (le rapport final de la phase 2 de ScottMadden), la dotation de certains postes peut être réduite, voire supprimée. Elle recommande à OPG de revoir sa structure organisationnelle et de réaffecter du personnel ou de supprimer des postes au cours des années suivantes. Vingt à vingt-cinq pour cent du personnel d'OPG devait en effet partir à la retraite entre 2010 et 2014 et il était possible de recourir davantage à la sous-traitance. Au chapitre de la rémunération, elle estime qu'OPG n'a pas présenté d'éléments convaincants pour justifier que les salaires de son personnel opérationnel

industry salaries conducted by Towers Perrin. Instead, the Board considered the proper benchmark to be the 50th percentile, the same percentile against which OPG benchmarks management compensation. In determining the appropriate disallowance, the Board acknowledged that OPG may not have been able to achieve the full $145 million in savings for the test period through the reduction of compensation levels alone because of its collective agreements with the unions.

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

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

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

> The collective agreements were concluded between a regulated monopoly, which passes costs on to consumers, not a competitive enterprise, and two unions which account for approximately 90 per cent of the employees and amount to a near, second monopoly, based on terms

se situent au 75e percentile des salaires versés dans le secteur selon une étude de Towers Perrin. Selon la Commission, ils devraient se situer au 50e percentile, soit le même que pour le personnel de direction. Pour décider de la réduction qui s'impose, elle reconnaît qu'OPG pourrait ne pas être en mesure, pendant la période de référence, de réaliser des économies de 145 millions de dollars par la réduction de sa seule masse salariale à cause des conventions collectives en vigueur.

B. *Cour supérieure de Justice de l'Ontario, Cour divisionnaire (2012 ONSC 729, 109 O.R. (3d) 576)*

[34] OPG a fait appel de la décision au motif que celle-ci était déraisonnable et mal motivée. Elle a soutenu que la Commission aurait dû appliquer le principe de l'investissement prudent, c'est-à-dire que, dans son examen des dépenses de rémunération, elle aurait dû seulement s'interroger sur la prudence de conclure, à l'époque, les conventions collectives qui commandaient ces dépenses. Elle a ajouté que la Commission aurait dû présumer que les dépenses étaient prudentes.

[35] La décision de la formation de trois juges de la Cour divisionnaire est partagée. Au nom des juges majoritaires, la juge Hoy (aujourd'hui Juge en chef adjointe de l'Ontario) conclut que la décision de la Commission est raisonnable, car il était possible à la direction d'OPG de réduire ultérieurement ses dépenses globales de rémunération dans le respect des conventions collectives. L'application stricte du principe de l'investissement prudent n'aurait pas permis à la Commission d'atteindre son objectif, d'origine législative, de favoriser la rentabilité de la production d'électricité. Vu la présence de « deux monopoles », il importait particulièrement que la Commission exerce son pouvoir de fixer des tarifs justes et raisonnables :

> [TRADUCTION] Les conventions collectives sont intervenues entre un monopole réglementé qui refile ses coûts au consommateur et qui n'est pas soumis à la concurrence, et deux syndicats qui représentent environ 90 p. 100 des salariés et qui constituent presque un second monopole

inherited from Ontario Hydro and in face of the reality that running a nuclear operation without the employees would be extremely difficult. [para. 54]

[36] Justice Aitken dissented, finding that,

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

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

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

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

étant donné les conditions héritées d'Ontario Hydro et le fait qu'il serait extrêmement difficile d'exploiter des installations nucléaires sans les salariés. [par. 54]

[36] Dissidente, la juge Aitken opine que,

[TRADUCTION] dans la mesure où les coûts [de rémunération des employés du secteur nucléaire] étaient déterminés à l'avance, c'est-à-dire qu'ils étaient arrêtés par des conventions collectives conclues avant la demande et la période de référence, OPG devait seulement prouver la prudence ou le caractère raisonnable de la décision de conclure ces conventions au vu des circonstances connues ou qui auraient pu raisonnablement être prévues au moment de prendre la décision. [par. 83]

Elle aurait statué que l'omission de la Commission d'appliquer séparément et expressément le principe de la prudence à la partie des dépenses de rémunération du secteur nucléaire dont elle avait convenu, jumelée à son appréciation avec le recul du caractère raisonnable de ces dépenses, a rendu la décision de la Commission déraisonnable.

C. *Cour d'appel de l'Ontario (2013 ONCA 359, 116 O.R. (3d) 793)*

[37] La Cour d'appel de l'Ontario infirme le jugement de la Cour divisionnaire et renvoie le dossier à la Commission. Elle établit une distinction entre les dépenses prévues et les dépenses convenues, ces dernières correspondant à celles que le service public [TRADUCTION] « a convenu d'acquitter pendant [la période de référence] » et qu'il « ne peut modifier ou réduire pendant cette période, généralement à cause d'obligations contractuelles » (par. 29). Même si les dépenses n'ont pas à être acquittées dans l'immédiat, comme en l'espèce, celles qui, « par contrat, doivent être acquittées pendant la période de référence constituent néanmoins des dépenses convenues, même si elles n'ont pas encore été acquittées » (par. 29). La Cour d'appel statue que la Commission doit, dans son examen de ces dépenses, appliquer le principe de la prudence énoncé dans *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4 (par. 15-16). En ne respectant pas ce précédent et en obligeant OPG à « modifier des dépenses qu'elle ne peut juridiquement modifier », la Commission a agi déraisonnablement (par. 37).

IV. Issues

[38] The Board raises two issues on appeal:

1. What is the appropriate standard of review?

2. Was the Board's decision to disallow $145 million of OPG's revenue requirement reasonable?

[39] Before this Court, OPG has argued that the Board stepped beyond the appropriate role of a tribunal in an appeal from its own decision, which raises the following additional issue:

3. Did the Board act impermissibly in pursuing its appeal in this case?

V. Analysis

[40] It is logical to begin by considering the appropriateness of the Board's participation in the appeal. I will next consider the appropriate standard of review, and then the merits issue of whether the Board's decision in this case was reasonable.

A. *The Appropriate Role of the Board in This Appeal*

(1) Tribunal Standing

[41] In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern Utilities*"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own decisions may give rise to concerns over tribunal impartiality. Estey J. noted that "active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and

IV. Questions en litige

[38] La Commission soulève deux questions dans le cadre du pourvoi :

1. Quelle est la norme de contrôle applicable?

2. Sa décision de retrancher 145 millions de dollars des recettes nécessaires d'OPG est-elle raisonnable?

[39] Devant notre Cour, OPG fait valoir que la Commission outrepasse le rôle qui sied à un tribunal administratif dans le cadre d'un appel de sa propre décision, ce qui soulève la question supplémentaire suivante :

3. La Commission a-t-elle agi de manière inacceptable en se pourvoyant en tant que partie à l'appel en l'espèce?

V. Analyse

[40] Il convient en toute logique d'examiner d'abord le caractère approprié de la participation de la Commission au pourvoi. J'examinerai ensuite la norme de contrôle applicable, puis la question de fond de savoir si la décision de la Commission est raisonnable.

A. *Le rôle qui sied à la Commission dans le cadre du pourvoi*

(1) La qualité pour agir d'un tribunal administratif

[41] Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern Utilities* »), sous la plume du juge Estey, notre Cour se demande pour la première fois en quoi la participation d'un décideur administratif à l'appel ou au contrôle de sa propre décision peut soulever des doutes sur son impartialité. Pour reprendre les propos du juge Estey, « [u]ne participation aussi active ne peut que jeter le discrédit sur l'impartialité d'un tribunal administratif lorsque l'affaire lui est renvoyée ou lorsqu'il est saisi d'autres procédures

issues or the same parties" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions: ". . . it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court" (p. 709).

[42] The Court in *Northwestern Utilities* ultimately held that the Alberta Public Utilities Board — which, like the Ontario Energy Board, had a statutory right to be heard on judicial appeal (see *Ontario Energy Board Act, 1998*, s. 33(3)) — was limited in the scope of the submissions it could make. Specifically, Estey J. observed that

> [i]t has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [p. 709]

[43] This Court further considered the issue of agency standing in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, which involved judicial review of a British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.

[44] This finding was supported by the need to make sure the Court's decision on review of the tribunal's decision was fully informed. La Forest J. cited *B.C.G.E.U. v. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), at p. 153, for the proposition that the tribunal is the party best equipped to draw the Court's attention to

concernant des intérêts et des questions semblables ou impliquant les mêmes parties » (p. 709). Il ajoute que le tribunal administratif avait déjà le loisir de s'expliquer clairement dans sa décision initiale et « [qu'il] enfreint de façon inacceptable la réserve dont [il doit] faire preuve lorsqu'[il] particip[e] aux procédures comme partie à part entière » (p. 709).

[42] Dans *Northwestern Utilities*, notre Cour statue finalement que la portée des observations que pouvait présenter l'Alberta Public Utilities Board — qui, à l'instar de la Commission de l'énergie de l'Ontario, jouissait légalement du droit d'être entendue en appel devant une cour de justice (voir la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 33(3)) — était limitée. Le juge Estey fait remarquer ce qui suit :

> Cette Cour, à cet égard, a toujours voulu limiter le rôle du tribunal administratif dont la décision est contestée à la présentation d'explications sur le dossier dont il était saisi et d'observations sur la question de sa compétence, même lorsque la loi lui confère le droit de comparaître. [p. 709]

[43] Dans *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983, qui porte sur le contrôle judiciaire d'une décision de la commission des relations de travail de la Colombie-Britannique, notre Cour approfondit la question de la qualité pour agir d'un organisme administratif. Même si les juges majoritaires qui ont entendu le pourvoi n'adoptent pas d'approche particulière pour se prononcer, le juge La Forest, avec l'appui du juge en chef Dickson, reconnaît qu'un tribunal administratif a qualité non seulement pour expliquer le dossier et faire valoir son point de vue sur la norme de contrôle applicable, mais aussi pour soutenir que sa décision est raisonnable.

[44] Cette conclusion repose sur la nécessité de faire en sorte que la cour de révision rende un jugement parfaitement éclairé sur la décision du tribunal administratif. Le juge La Forest invoque l'arrêt *B.C.G.E.U. c. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), p. 153, pour avancer que le tribunal administratif est le mieux placé pour attirer l'attention de la cour

those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.

(*Paccar*, at p. 1016)

La Forest J. found, however, that the tribunal could not go so far as to argue that its decision was correct (p. 1017). Though La Forest J. did not command a majority, L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of La Forest J.'s analysis (p. 1026).

[45] Trial and appellate courts have struggled to reconcile this Court's statements in *Northwestern Utilities* and *Paccar*. Indeed, while this Court has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment: see, e.g., *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; see also *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) ("*Goodis*"), at para. 24.

[46] A number of appellate decisions have grappled with this issue and "for the most part now display a more relaxed attitude in allowing tribunals to participate in judicial review proceedings or statutory appeals in which their decisions were subject to attack": D. Mullan, "Administrative Law and Energy Regulation", in G. Kaiser and B. Heggie, 35, at p. 51. A review of three appellate decisions suffices to establish the rationale behind this shift.

[47] In *Goodis*, the Children's Lawyer urged the court to refuse or limit the standing of the Information and Privacy Commissioner, whose decision

sur les considérations, enracinées dans la compétence ou les connaissances spécialisées du tribunal, qui peuvent rendre raisonnable ce qui autrement paraîtrait déraisonnable à quelqu'un qui n'est pas versé dans les complexités de ce domaine spécialisé.

(*Paccar*, p. 1016)

Toutefois, le juge La Forest conclut que le tribunal administratif ne peut aller jusqu'à défendre le bien-fondé de sa décision (p. 1017). Sa thèse ne convainc pas une majorité de ses collègues, mais la juge L'Heureux-Dubé, dissidente, qui se prononce elle aussi sur la qualité pour agir du tribunal administratif, souscrit à son analyse sur le fond (p. 1026).

[45] Juridictions de première instance et d'appel ont tenté tant bien que mal de concilier les opinions exprimées par les juges de la Cour dans les arrêts *Northwestern Utilities* et *Paccar*. De fait, même si notre Cour n'est jamais expressément revenue sur *Northwestern Utilities*, elle a parfois autorisé un tribunal administratif à participer à l'instance à titre de partie à part entière sans expliquer sa décision (voir p. ex. *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; *Ellis-Don Ltd. c. Ontario (Commission des relations de travail)*, 2001 CSC 4, [2001] 1 R.C.S. 221; *Tremblay c. Québec (Commission des affaires sociales)*, [1992] 1 R.C.S. 952; voir également *Ontario (Children's Lawyer) c. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) (« *Goodis* »), par. 24).

[46] Dans un certain nombre de décisions, les cours d'appel se sont attaquées à la question et, [TRADUCTION] « pour la plupart, elles sont désormais plus enclines à autoriser un tribunal administratif à participer au contrôle judiciaire ou à l'appel, prévu par la loi, de sa propre décision » (D. Mullan, « Administrative Law and Energy Regulation », dans G. Kaiser et B. Heggie, 35, p. 51). Le survol de trois arrêts de juridictions d'appel suffit à établir la raison d'être de ce revirement.

[47] Dans *Goodis*, le Bureau de l'avocate des enfants demandait à la cour de ne pas reconnaître ou de restreindre la qualité pour agir du Commissaire

was under review. The Ontario Court of Appeal declined to apply any formal, fixed rule that would limit the tribunal to certain categories of submissions and instead adopted a contextual, discretionary approach: *Goodis*, at paras. 32-34. The court found no principled basis for the categorical approach, and observed that such an approach may lead to undesirable consequences:

> For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, [2002] N.B.J. No. 114, 249 N.B.R. (2d) 93 (C.A.), at para. 32.

(*Goodis*, at para. 34)

[48] The court held that *Northwestern Utilities* and *Paccar* should be read as the source of "fundamental considerations" that should guide the court's exercise of discretion in the context of the case: *Goodis*, at para. 35. The two most important considerations, drawn from those cases, were the "importance of having a fully informed adjudication of the issues before the court" (para. 37), and "the importance of maintaining tribunal impartiality": para. 38. The court should limit tribunal participation if it will undermine future confidence in its objectivity. The court identified a list of factors, discussed further below, that may aid in determining whether and

à l'information et à la protection de la vie privée dont la décision faisait l'objet d'une demande de contrôle. La Cour d'appel de l'Ontario a refusé de se montrer formaliste et d'appliquer une règle fixe qui aurait obligé le tribunal administratif à s'en tenir à des observations d'un certain type et elle a adopté plutôt une approche contextuelle et discrétionnaire (*Goodis*, par. 32-34). Elle a conclu que l'approche catégorique n'avait pas de fondement rationnel et a fait remarquer qu'une telle approche pouvait avoir des conséquences fâcheuses :

> [TRADUCTION] Par exemple, la règle catégorique qui refuse au tribunal administratif la qualité pour agir lorsque la contestation allègue le déni de justice naturelle peut priver la cour d'observations capitales lorsque la contestation se fonde des défaillances alléguées de la structure ou du fonctionnement du tribunal administratif, car ce sont des sujets sur lesquels ce dernier est particulièrement bien placé pour formuler des observations. De même, la règle qui reconnaît à un tribunal administratif la qualité pour défendre sa décision au regard du critère de la raisonnabilité, mais non du critère de la décision correcte, permet le débat inutile et empêche le débat utile. Parce que le meilleur moyen d'établir la raisonnabilité d'une décision peut être de démontrer qu'elle est correcte, une règle fondée sur cette distinction semble au mieux ténue, comme l'affirme le juge Robertson dans *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 1386 c. Bransen Construction Ltd.*, [2002] A.N.-B. nº 114, 249 R.N.-B. (2e) 93 (C.A.), par. 32.

(*Goodis*, par. 34)

[48] La Cour d'appel statue qu'il faut voir dans les arrêts *Northwestern Utilities* et *Paccar* la source de [TRADUCTION] « considérations fondamentales » qui doivent guider l'exercice de son pouvoir discrétionnaire eu égard au contexte de l'affaire (*Goodis*, par. 35). Les deux considérations les plus importantes, selon ces arrêts, sont « la nécessité de faire en sorte que la cour rende une décision parfaitement éclairée sur les questions en litige » (par. 37) et « celle d'assurer l'impartialité du tribunal administratif » (par. 38). La cour doit limiter la participation du tribunal administratif lorsque cette participation est de nature à miner la confiance

to what extent the tribunal should be permitted to make submissions: paras. 36-38.

[49] In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.

[50] The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

[51] A third example of recent judicial consideration of this issue may be found in *Leon's Furniture Ltd. v. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110. In this case, Leon's Furniture challenged the Commissioner's standing to make submissions on the merits of the appeal (para. 16). The Alberta Court of Appeal, too, adopted the position that the law should respond to the fundamental concerns raised in *Northwestern*

ultérieure des citoyens dans son objectivité. La Cour d'appel énumère les considérations — sur lesquelles je reviendrai — qui jouent dans la décision d'autoriser ou non le tribunal administratif à présenter des observations et dans la détermination de la mesure dans laquelle il lui est permis de le faire, le cas échéant (par. 36-38).

[49] Dans *Canada (Procureur général) c. Quadrini*, 2010 CAF 246, [2012] 2 R.C.F. 3, le juge Stratas relève deux considérations qui, en common law, limitent selon lui la participation éventuelle d'un tribunal administratif à l'appel de sa propre décision : le caractère définitif et l'impartialité. Le principe du caractère définitif veut qu'un tribunal ne puisse se prononcer de nouveau dans une affaire une fois qu'il a rendu sa décision, motifs à l'appui. J'y reviendrai plus en détail, car j'estime que ce principe se rapporte plus directement à l'« autojustification » de sa décision par le tribunal administratif qu'à sa qualité pour agir comme telle.

[50] Le principe de l'impartialité entre en jeu lorsque le tribunal administratif défend une thèse en appel car, dans certains cas, sa décision peut lui être renvoyée pour réexamen. Le juge Stratas conclut que « [l]es observations que le tribunal administratif présente dans une instance en contrôle judiciaire et qui plongent trop loin, trop intensément ou trop énergiquement dans le bien-fondé de l'affaire soumise au tribunal administratif risquent d'empêcher celui-ci de procéder par la suite à un réexamen impartial du bien-fondé de l'affaire » (*Quadrini*, par. 16). Il conclut toutefois au final que les principes applicables n'imposaient pas de « règles absolues », et il souscrit à l'approche discrétionnaire de la Cour d'appel de l'Ontario dans *Goodis* (*Quadrini*, par. 19-20).

[51] L'arrêt *Leon's Furniture Ltd. c. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110, constitue un troisième exemple récent où une cour de justice est appelée à se pencher sur le sujet. Leon's Furniture a contesté la qualité du commissaire intimé de plaider sur le fond en appel (par. 16). La Cour d'appel de l'Alberta estime elle aussi que le droit applicable doit donner suite aux considérations fondamentales soulevées dans

Utilities but should nonetheless approach the question of tribunal standing with discretion, to be exercised in view of relevant contextual considerations: paras. 28-29.

[52] The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P.* 21.

[53] Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

[54] Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court

l'arrêt *Northwestern Utilities*, mais que la question de la qualité pour agir d'un tribunal administratif relève néanmoins d'un pouvoir discrétionnaire qu'il faut exercer eu égard aux éléments contextuels applicables (par. 28-29).

[52] Les considérations énoncées par notre Cour dans *Northwestern Utilities* témoignent de préoccupations fondamentales quant à la participation d'un tribunal administratif à l'appel de sa propre décision. Or, ces préoccupations ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire préconisée dans *Goodis*, *Leon's Furniture* et *Quadrini* offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes (voir N. Semple, « The Case for Tribunal Standing in Canada » (2007), 20 *R.C.D.A.P.* 305; L. A. Jacobs et T. S. Kuttner, « Discovering What Tribunals Do : Tribunal Standing Before the Courts » (2002), 81 *R. du B. can*. 616; F. A. V. Falzon, « Tribunal Standing on Judicial Review » (2008), 21 *R.C.D.A.P.* 21).

[53] Plusieurs considérations militent en faveur d'une démarche discrétionnaire. En particulier, vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Par exemple, il peut être en mesure d'expliquer en quoi une certaine interprétation de la disposition législative en cause peut avoir une incidence sur d'autres dispositions du régime de réglementation ou sur les réalités factuelles et juridiques de son domaine de spécialisation. Il pourrait être plus difficile d'obtenir de tels éléments d'information d'autres parties.

[54] Dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Le contrôle judiciaire se révèle optimal lorsque les deux facettes du litige sont vigoureusement défendues devant la cour de révision. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de

ensure it has heard the best of both sides of a dispute.

[55] Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

[56] The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, at para. 42.

[57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[58] In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.

partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige.

[55] Les tribunaux administratifs canadiens tiennent nombre de rôles différents dans les contextes variés où ils évoluent, de sorte que la crainte d'une partialité de leur part peut être plus ou moins grande selon l'affaire en cause, ainsi que la structure du tribunal et son mandat légal. Dès lors, les dispositions législatives portant sur la structure, le fonctionnement et la mission d'un tribunal en particulier sont cruciales aux fins de l'analyse.

[56] Le mandat de la Commission, comme celui des tribunaux administratifs qui lui sont apparentés, la différencie des tribunaux administratifs appelés à trancher des différends individuels opposant plusieurs parties. Dans le cas de ces derniers, [TRADUCTION] « l'importance de l'équité, réelle et perçue, milite davantage » contre la reconnaissance de leur qualité pour agir (*Henthorne c. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, par. 42).

[57] Par conséquent, je suis d'avis qu'il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

[58] Dans la présente affaire, le par. 33(3) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit à titre préliminaire que « [l]a Commission a le droit d'être représentée par un avocat lors de l'audition de l'appel » devant la Cour divisionnaire. Cette disposition ne confère pas expressément à la Commission une qualité pour agir qui permet de faire valoir le bien-fondé de sa décision en appel, ni ne limite expressément la thèse qu'elle peut défendre à la présentation d'arguments relatifs à la compétence ou à la norme de contrôle comme le fait la disposition en cause dans l'affaire *Quadrini* (voir par. 2).

[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[60] Consideration of these factors in the context of this case leads me to conclude that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. First, the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits. Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board — tasked by statute

[59] Au vu de cette analyse de la qualité pour agir d'un tribunal administratif, lorsque le texte législatif applicable n'est pas clair sur ce point, la cour de révision s'en remet à son pouvoir discrétionnaire pour délimiter les attributs du tribunal administratif en appel. Voici quelles sont, entre autres, les considérations — relevées par les juridictions et les auteurs précités — qui délimitent l'exercice de ce pouvoir discrétionnaire :

(1) lorsque, autrement, l'appel ou la demande de contrôle serait non contesté, il peut être avantageux que la cour de révision exerce le pouvoir discrétionnaire qui lui permet de reconnaître la qualité pour agir du tribunal administratif;

(2) lorsque d'autres parties sont susceptibles de contester l'appel ou la demande de contrôle et qu'elles ont les connaissances et les compétences spécialisées nécessaires pour bien avancer une thèse ou la réfuter, la qualité pour agir du tribunal administratif peut revêtir une importance moindre pour l'obtention d'une issue juste;

(3) le fait que la fonction du tribunal administratif consiste soit à trancher des différends individuels opposant deux parties, soit à élaborer des politiques, à réglementer ou enquêter ou à défendre l'intérêt public influe sur la mesure dans laquelle l'impartialité soulève des craintes ou non. Ces craintes peuvent jouer davantage lorsque le tribunal a exercé une fonction juridictionnelle dans l'instance visée par l'appel, et moins lorsque son rôle s'est révélé d'ordre plutôt réglementaire.

[60] Au vu de ces considérations, je conclus qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. Premièrement, la Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait donc d'autre choix que de prendre part à l'instance pour que sa décision soit défendue au fond. Contrairement à d'autres provinces, l'Ontario n'a nommé aucun défenseur des droits des clients des services publics,

with acting to safeguard the public interest — with few alternatives but to participate as a party.

[61] Second, the Board is tasked with regulating the activities of utilities, including those in the electricity market. Its regulatory mandate is broad. Among its many roles: it licenses market participants, approves the development of new transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

[62] The nature of utilities regulation further argues in favour of full party status for the Board here, as concerns about the appearance of partiality are muted in this context. As noted by Doherty J.A., "[l]ike all regulated bodies, I am sure Enbridge wins some and loses some before the [Board]. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the [Board]": *Enbridge*, at para. 28. Accordingly, I do not find that the Board's participation in the instant appeal was improper. It remains to consider whether the content of the Board's arguments was appropriate.

(2) Bootstrapping

[63] The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e.

si bien que la Commission — qui est légalement garante de l'intérêt public — n'avait pas vraiment d'autre avenue que celle de se constituer partie à l'instance.

[61] Deuxièmement, la Commission a pour mandat de réglementer les activités de services publics, y compris ceux qui appartiennent au domaine de l'électricité. Son mandat de réglementation est large. Au nombre de ses nombreuses fonctions, mentionnons l'octroi de permis aux participants du marché, l'approbation de nouvelles installations de transport et de distribution et l'autorisation des tarifs exigés des consommateurs. Dans la présente affaire, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Il s'agit d'une situation différente de celle où le tribunal administratif est habilité à trancher un différend entre deux parties, le souci d'impartialité pouvant alors militer davantage contre la qualité d'agir comme partie à part entière.

[62] L'objet de la réglementation est un autre élément qui milite en faveur de la pleine reconnaissance de la qualité pour agir de la Commission, puisque la crainte d'apparence de partialité est faible en l'espèce. Pour reprendre les propos du juge Doherty dans *Enbridge*, par. 28, [TRADUCTION] « [à] l'instar de tout organisme réglementé, je suis certain que [la Commission] donne parfois raison à Enbridge et lui donne parfois tort. J'ose croire qu'Enbridge comprend parfaitement le rôle de l'organisme de réglementation et sait que [la Commission] statue sur chaque demande en fonction des faits qui lui sont propres ». Je conclus donc que la participation de la Commission au pourvoi n'a rien d'inapproprié. Reste à savoir si les arguments de la Commission sont appropriés.

(2) L'autojustification

[63] La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif (ci-après le « tribunal ») est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la

jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

[64] As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

[65] The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

[66] By contrast, in *Goodis*, Goudge J.A. found on behalf of a unanimous court that while the Commissioner had relied on an argument not expressly set out in her original decision, this argument was available for the Commissioner to make on appeal. Though he recognized that "[t]he importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to

qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir (p. ex. des prétentions relatives à sa compétence ou à la justesse de sa décision), alors que l'« autojustification » touche à la teneur des prétentions.

[64] Suivant le sens attribué à cette notion par les cours de justice qui l'ont examinée dans le contexte de la qualité pour agir, un tribunal « s'autojustifie » lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire (voir p. ex. *United Brotherhood of Carpenters and Joiners of America, Local 1386 c. Bransen Construction Ltd.*, 2002 NBCA 27, 249 R.N.-B. (2e) 93). Autrement dit, un tribunal ne pourrait [TRADUCTION] « défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle » (*Goodis*, par. 42).

[65] Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, le tribunal ait statué définitivement et que son travail soit terminé, « à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire » (*Quadrini*, par. 16, citant *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848). Partant, la cour a conclu qu'un tribunal ne peut profiter d'un contrôle judiciaire pour « modifier, changer, nuancer ou compléter ses motifs » (*Quadrini*, par. 16). Dans l'arrêt *Leon's Furniture*, le juge Slatter affirme qu'un tribunal peut [TRADUCTION] « offrir différentes interprétations de ses motifs ou de sa conclusion, [mais] non tenter de remanier ses motifs, invoquer de nouveaux arguments ou se prononcer sur des questions de fait que ne soulève pas déjà le dossier » (par. 29).

[66] En revanche, le juge Goudge conclut, dans l'arrêt *Goodis*, avec l'accord de tous ses collègues, que même si la commissaire invoque un argument qui ne figure pas expressément dans sa décision initiale, elle peut le soulever en appel. Il reconnaît que [TRADUCTION] « [l']importance de décisions bien étayées pourrait être compromise si un tribunal pouvait simplement offrir, à l'appui de sa décision attaquée devant une cour de justice,

support its decision" (para. 42), Goudge J.A. ultimately found that the Commissioner was permitted to raise a new argument on judicial review. The new argument presented was "not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it": para. 55. "It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis": para. 58.

[67] There is merit in both positions on the issue of bootstrapping. On the one hand, a permissive stance toward new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides: Semple, at p. 315. This remains true even if those arguments were not included in the tribunal's original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is "ganging up" on one party. As discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal.

[68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also

des motifs différents, plus convaincants, voire opposés » (par. 42), mais il conclut finalement que la commissaire peut présenter un nouvel argument dans le cadre d'un contrôle judiciaire. Le nouvel argument n'est toutefois « pas incompatible avec les motifs formulés dans la décision, car on peut en effet affirmer qu'il en fait implicitement partie » (par. 55). « La commissaire pouvait donc soulever l'argument devant la Cour divisionnaire, et celle-ci pouvait en tenir compte pour se prononcer » (par. 58).

[67] Les deux thèses avancées sur l'autojustification se défendent. D'une part, il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, car la cour de révision est alors saisie des arguments les plus convaincants à l'appui de chacune des thèses (Semple, p. 315). Cela demeure vrai même si ces arguments ne figurent pas dans la décision initiale. D'autre part, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Permettre au tribunal de présenter de nouveaux arguments en appel ou dans le cadre du contrôle judiciaire de sa décision initiale peut aussi amener les parties à conclure que le processus n'est pas équitable. Il peut surtout en être ainsi lorsque le tribunal est appelé à trancher des différends opposant deux personnes privées, puisque la présentation de nouveaux arguments en appel peut donner l'impression que le tribunal « se ligue » contre l'une des parties. Or, je le rappelle, il ne convient généralement pas que le tribunal doté d'un tel mandat participe en tant que partie à l'appel.

[68] Je ne suis pas convaincu que la formulation en appel de nouveaux arguments qui interprètent la décision initiale ou qui l'étayaient implicitement, mais non expressément, va à l'encontre du principe du caractère définitif. De même, il n'est pas contraire à ce principe de permettre au tribunal d'expliquer à la cour de révision quelles sont ses politiques et pratiques établies, même lorsque les motifs contestés n'en font pas mention. Le tribunal n'a pas à les expliquer systématiquement dans chaque décision à la seule fin de se prémunir contre une allégation d'autojustification advenant qu'il

respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

[69] I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para. 29; *Goodis*, at para. 55.

[70] In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out — correctly, in my view — that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

[71] I would, however, urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions. As Goudge J.A. noted in *Goodis*:

> . . . if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone

soit appelé à les préciser en appel ou en contrôle judiciaire. Il peut aussi répondre aux arguments de la partie adverse dans le cadre du contrôle judiciaire de sa décision car il le fait dans le but de faire confirmer sa décision initiale, non de rouvrir le dossier et de rendre une nouvelle décision ou de modifier la décision initiale. L'effet de la décision initiale demeure inchangé même lorsque le tribunal demande sa confirmation en offrant une interprétation de cette décision ou en invoquant des motifs qui la sous-tendent implicitement.

[69] Cependant, je ne crois pas qu'un tribunal devrait avoir la possibilité inconditionnelle de présenter une thèse entièrement nouvelle dans le cadre d'un contrôle judiciaire, car lui reconnaître cette faculté pourrait l'exposer à des allégations d'iniquité et nuire au prononcé de décisions bien motivées au départ. Je suis d'avis qu'il y a un juste équilibre entre ces considérations et celles voulant que la cour de révision entende les arguments les plus convaincants de chacune des parties lorsqu'il est permis au tribunal d'offrir différentes interprétations de ses motifs ou de ses conclusions ou de présenter des arguments qui sous-tendent implicitement ses motifs initiaux (voir *Leon's Furniture*, par. 29; *Goodis*, par. 55).

[70] Je ne crois pas que, dans la présente affaire, la Commission a indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant notre Cour. Dans son mémoire en réplique, la Commission signale — à juste titre, selon moi — que ses observations mettent simplement en évidence ce qui ressort du dossier ou répondent aux arguments des intimées.

[71] J'exhorte toutefois la Commission et, de façon générale, tout tribunal qui se constitue partie à une instance à se soucier du ton qu'il adopte lors du contrôle judiciaire de sa décision. Comme le fait remarquer le juge Goudge dans l'arrêt *Goodis*,

> [TRADUCTION] le tribunal administratif qui veut faire valoir son point de vue lors du contrôle judiciaire de sa décision [doit] porte[r] une attention particulière au ton qu'il adopte. Bien qu'il ne s'agisse pas d'un motif précis pour lequel sa qualité pourrait être restreinte, il ne

of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. [para. 61]

[72] In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. However, I would sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (A.F., at para. 99). This type of statement may, if carried too far, raise concerns about the principle of impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle.

B. *Standard of Review*

[73] The parties do not dispute that reasonableness is the appropriate standard of review for the Board's actions in applying its expertise to set rates and approve payment amounts under the *Ontario Energy Board Act, 1998*. I agree. In addition, to the extent that the resolution of this appeal turns on the interpretation of the *Ontario Energy Board Act, 1998*, the Board's home statute, a standard of reasonableness presumptively applies: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35. Nothing in this case suggests the presumption should be rebutted.

[74] This appeal involves two distinct uses of the term "reasonable". One concerns the standard of review: on appeal, this Court is charged with evaluating the "justification, transparency and intelligibility" of the Board's reasoning, and "whether the

fait aucun doute que le ton des observations proposées offre une toile de fond à cet égard. Le tribunal qui désire contester une demande de contrôle judiciaire sera utile à la cour dans la mesure où ses observations permettront d'éclaircir les questions et où elles seront fondées sur ses connaissances spécialisées, au lieu d'être empreintes d'un parti pris agressif contre la partie adverse. [par. 61]

[72] En l'espèce, la Commission a généralement présenté des arguments utiles dans le cadre d'un débat contradictoire, mais respectueux. Une mise en garde s'impose toutefois selon moi en ce qui concerne l'affirmation de la Commission selon laquelle l'application du critère de l'investissement prudent [TRADUCTION] « ne changerait vraisemblablement pas l'issue de l'affaire » si la décision lui était renvoyée pour réexamen (m.a., par. 99). Une telle affirmation peut, si elle est poussée trop loin, faire douter de l'impartialité du tribunal au point où une cour de justice serait justifiée d'exercer son pouvoir discrétionnaire et de limiter la qualité pour agir du tribunal de manière à préserver son impartialité.

B. *Norme de contrôle*

[73] Les parties conviennent que la norme de contrôle qui s'applique aux actes de la Commission lorsqu'elle fait appel à son expertise pour fixer les tarifs et approuver des paiements sur le fondement de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* est celle de la décision raisonnable. Je suis d'accord. En outre, dans la mesure où l'issue du pourvoi repose sur l'interprétation de cette loi — la loi constitutive de la Commission —, l'application de la norme de la décision raisonnable doit être présumée (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 30; *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161, par. 35). Rien ne donne à penser en l'espèce que la présomption soit réfutée.

[74] Le pourvoi fait intervenir deux notions distinctes de ce qui est « raisonnable ». L'une est liée à la norme de contrôle : en appel, la Cour doit apprécier la « justification [. . .], [. . .] la transparence et [. . .] l'intelligibilité » du raisonnement de la

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

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

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

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

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

Commission et se demander si la décision appartient « aux issues possibles acceptables pouvant se justifier au regard des faits et du droit » (*Dunsmuir*, par. 47). L'autre est d'origine législative : la Commission doit utiliser son pouvoir de fixation des tarifs de manière à établir un équilibre qu'elle considère juste et raisonnable entre les intérêts du service public et ceux des consommateurs. Je m'efforce ci-après de respecter cette distinction.

C. *Choix de la méthode suivant la Loi de 1998 sur la Commission de l'énergie de l'Ontario*

[75] La question de savoir si le refus de la Commission d'approuver le recouvrement de certaines dépenses est raisonnable ou non dépend du lien de ce refus avec les pouvoirs légaux et réglementaires de la Commission d'approuver des paiements au service public et de répercuter ces paiements sur les tarifs exigés des consommateurs. Les pouvoirs généraux de la Commission en matière de fixation des tarifs et des paiements sont énoncés précédemment à la rubrique « Cadre réglementaire ».

[76] L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins.

[77] Or, la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prévoit ni à l'art. 78.1 ni à quelque autre article la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et des consommateurs lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Certes, sous réserve de certaines exceptions prévues au par. 6(2), le par. 6(1) du règlement 53/05 permet expressément à la Commission de [TRADUCTION] « définir la forme, la méthode, les hypothèses et les calculs utilisés pour rendre une ordonnance qui établit le montant du paiement aux fins de l'article 78.1 de la Loi ».

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

[78] En revanche, la disposition 4.1 du par. 6(2) du règlement 53/05 prescrit le recours à une méthode particulière lorsque la Commission examine [TRADUCTION] « les dépenses faites et les engagements financiers fermes pris dans le cadre de la planification et de la préparation relatives à la réalisation d'installations nucléaires projetées ». La Commission doit être convaincue que « les dépenses ont été faites de manière prudente » et que « les engagements financiers ont été pris de manière prudente » (la disposition 4.1 du par. 6(2)). La disposition établit donc un cadre précis où l'analyse de la Commission est axée sur la prudence de la décision de faire certaines dépenses ou de convenir de certaines dépenses. L'absence d'un libellé en ce sens dans la disposition générale qu'est le par. 6(1) constitue un autre motif de considérer que le règlement confère à la Commission un large pouvoir discrétionnaire quant à la méthode à employer pour ordonner un paiement lorsque les dispositions particulières du par. 6(2) ne s'appliquent pas.

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

[79] Pour ce qui concerne la question de savoir si la présomption de prudence doit s'appliquer aux décisions d'OPG de faire des dépenses, ni la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, ni le règlement 53/05 n'établissent expressément une telle présomption. D'ailleurs, suivant cette loi, il incombe au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables (par. 78.1(6) et (7)). Il semble donc contraire au régime législatif de présumer que la décision de faire des dépenses est prudente.

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

[80] La juge Abella conclut que l'examen des dépenses d'OPG par la Commission aurait dû consister à « contrôl[er] la prudence des dépenses après coup et [à] appliqu[er] la présomption réfutable selon laquelle elles étaient raisonnables » (par. 150). Or, une telle approche est contraire au régime législatif. La Commission jouit certes d'une grande marge de manœuvre quant au choix d'une méthode, mais elle n'a pas la faculté d'inverser le fardeau de la preuve établi au par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du

and reasonable. The Board has broad discretion to determine the methods it may use to examine costs — it just cannot shift the burden of proof contrary to the statutory scheme.

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

D. *Characterization of Costs at Issue*

[82] Forecast costs are costs which the utility has not yet paid, and over which the utility still retains discretion as to whether the disbursement will be

présent article ». Il ne s'ensuit pas, bien sûr, que le requérant doit systématiquement prouver le caractère juste et raisonnable de chacune de ses dépenses, individuellement. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter les méthodes à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

[81] La cour de justice appelée à contrôler la décision de la Commission d'approuver ou non des paiements à un service public doit se demander si la conclusion de la Commission selon laquelle un paiement d'un certain montant est « juste et raisonnable » tant pour le service public que pour le consommateur est raisonnable ou non. Cette approche concorde avec les décisions de notre Cour sur l'établissement de tarifs dans d'autres secteurs réglementés où l'organisme de réglementation dispose d'un pouvoir discrétionnaire qui lui permet de recourir à une méthode ou à une autre. Dans ces décisions, la Cour signale que « [l]'obligation d'agir est une question de droit, mais le choix de la méthode est une question relevant de l'exercice du pouvoir discrétionnaire et à l'égard de laquelle, selon le texte de loi, aucun tribunal judiciaire ne peut intervenir » (*Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764, par. 40 (tarification des télécommunications), citant *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (C.S.C.), p. 13 (tarification du transport ferroviaire des marchandises)). Certes, de nos jours, il faut voir dans ces propos la reconnaissance du pouvoir d'une cour de justice d'intervenir lorsqu'elle estime que l'exercice du pouvoir discrétionnaire a débouché sur une décision déraisonnable. Reste donc à décider si la méthode d'analyse retenue par la Commission pour refuser d'approuver les dépenses en l'espèce a rendu sa décision déraisonnable selon la norme du paiement « juste et raisonnable ».

D. *Qualification des dépenses en cause*

[82] Les dépenses prévues sont celles que le service public n'a pas encore acquittées et qu'un pouvoir discrétionnaire lui permet de renoncer à faire.

made. A disallowance of such costs presents a utility with a choice: it may change its plans and avoid the disallowed costs, or it may incur the costs regardless of the disallowance with the knowledge that the costs will ultimately be borne by the utility's shareholders rather than its ratepayers. By contrast, committed costs are those for which, if a regulatory board disallows recovery of the costs in approved payments, the utility and its shareholders will have no choice but to bear the burden of those costs themselves. This result may occur because the utility has already spent the funds, or because the utility entered into a binding commitment or was subject to other legal obligations that leave it with no discretion as to whether to make the payment in the future.

Lorsque leur approbation est refusée, le service public peut soit modifier ses plans et renoncer aux dépenses, soit les faire malgré le refus étant entendu qu'elles seront assumées par les actionnaires plutôt que par les consommateurs. À l'opposé, les dépenses convenues sont celles que ses actionnaires et lui n'auront d'autre choix que d'assumer si l'organisme de réglementation refuse de permettre leur recouvrement et d'approuver les paiements sollicités. Cela peut advenir lorsque le service public a déjà déboursé la somme en cause ou qu'il a pris un engagement contraignant ou était assujetti à d'autres obligations qui écartent tout pouvoir discrétionnaire lui permettant de ne pas acquitter la somme ultérieurement.

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

[83] Les parties ne s'entendent pas sur la qualification des dépenses que la Commission a refusé d'approuver. Selon cette dernière, les dépenses de rémunération pour la période de référence sont des dépenses prévues dans la mesure où elles n'ont pas encore été acquittées. OPG soutient plutôt qu'il s'agit de dépenses convenues puisqu'elle est tenue par contrat de verser les sommes en cause au moment où elles deviennent exigibles. Ce désaccord est important car le contrôle de la prudence « sans recul », sur lequel je reviendrai plus en détail, a vu le jour dans le contexte de dépenses « convenues ». Il est en effet absurde d'appliquer ce critère lorsque le service public peut encore décider, en fin de compte, de faire ou non les dépenses; la décision de convenir de ces dépenses n'a pas encore été prise. Par conséquent, lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue.

[84] In this case, at least some of the compensation costs that the Board found to be excessive were driven by collective agreements to which OPG had committed before the application at issue, and which established compensation costs that were, in aggregate, above the 75th percentile for comparable positions at other utilities. The collective agreements left OPG with limited flexibility

[84] En l'espèce, au moins une partie des dépenses de rémunération jugées excessives par la Commission était imputable à des conventions collectives qu'OPG avait conclues avant la présentation de sa demande et qui faisaient en sorte que sa masse salariale globale dépasse le 75e percentile pour des emplois comparables dans d'autres services publics. Les conventions collectives laissaient

regarding overall compensation rates or staffing levels — OPG was required to abide by wage and staffing levels established by collective agreements, and retained flexibility only over terms outside the bounds of those agreements — and thus those portions of OPG's compensation rates and staffing levels that were dictated by the terms of the collective agreements were committed costs.

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

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

E. *The Prudent Investment Test*

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

peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, OPG devait respecter ceux établis par les conventions collectives et elle ne jouissait d'une marge de manœuvre que pour les conditions qui n'étaient pas ainsi régies. Par conséquent, les dépenses liées aux barèmes de rémunération et aux niveaux de dotation imposés par les conventions collectives étaient des dépenses convenues.

[85] La Commission conclut cependant que les dépenses de rémunération pour la période de référence ne sont pas toutes déterminées par les conventions collectives et qu'elles ne sont donc pas toutes convenues, car OPG dispose d'une certaine marge de manœuvre pour gérer globalement les niveaux de dotation en fonction du départ prévu d'employés d'âge mûr. Toutefois, la décision de la Commission ne précise pas quel pourcentage exact des 145 millions de dollars refusés au chapitre de la rémunération pourrait être recouvré grâce à la réduction naturelle du nombre d'employés ou à d'autres ajustements, ni quel pourcentage serait nécessairement assumé par le service public et son actionnaire. Par conséquent, les dépenses refusées en l'espèce doivent être considérées comme des dépenses convenues, du moins en partie. Il est déraisonnable d'y voir en totalité des dépenses prévues étant donné l'effet contraignant des conventions collectives sur OPG.

[86] Après avoir établi que les dépenses refusées sont, du moins partiellement, des dépenses convenues, il faut déterminer si la Commission a agi de façon raisonnable en appliquant le critère de l'investissement prudent sans exclure le recul. J'examine donc maintenant l'historique jurisprudentiel du critère de l'investissement prudent et les données méthodologiques y afférentes.

E. *Le critère de l'investissement prudent*

[87] Décider si la méthode de la Commission était raisonnable en l'espèce exige de se pencher sur l'historique du critère de l'investissement prudent (parfois appelé « contrôle de la prudence » ou « critère de la prudence ») pour déterminer ses origines, le situer dans le contexte et savoir quelle portée lui

been understood by utilities, regulators, and legislators.

(1) American Jurisprudence

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

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

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

ont attribué les services publics, les organismes de réglementation et les rédacteurs législatifs.

(1) Jurisprudence américaine

[88] La jurisprudence américaine a joué un rôle important dans l'application du critère de l'investissement prudent aux services publics réglementés. Rappelons d'abord l'observation de notre Cour selon laquelle, « [b]ien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question » (*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 54).

[89] L'application du critère de l'investissement prudent aux services publics réglementés s'origine de l'opinion concordante du juge Brandeis, de la Cour suprême des États-Unis, datant de 1923 et selon laquelle les services publics ont droit à la déférence lorsqu'ils cherchent à recouvrer [TRADUCTION] « un investissement qui, normalement, serait considéré comme raisonnable » (*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1).

[90] Dans les décennies qui ont suivi, les organismes de réglementation américains chargés de l'examen de dépenses déjà faites par les services publics ont généralement appliqué soit le critère axé sur [TRADUCTION] « l'emploi et l'utilité », soit le critère de « l'investissement prudent » (J. Kahn, « Keep *Hope* Alive : Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs » (2010), 22 *Fordham Envtl. L. Rev.* 43, p. 49). À chacun de ces critères correspond une approche différente pour déterminer quelles dépenses peuvent équitablement et raisonnablement être refilées aux consommateurs. Le critère de l'emploi et de l'utilité permet au service public d'obtenir un rendement, mais seulement sur l'investissement qui est réellement employé et qui se révèle utile à l'exploitation de l'entreprise, étant entendu que les consommateurs ne doivent pas être tenus de payer pour un investissement dont ils ne bénéficient pas.

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

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

[91] Au critère de l'investissement prudent correspond l'approche retenue par le juge Brandeis et selon laquelle des dépenses peuvent être recouvrées si elles ne sont pas imprudentes compte tenu de ce qu'on sait au moment où est fait l'investissement ou la dépense (Kahn, p. 49-50). Bien qu'il puisse sembler problématique du point de vue de la protection des intérêts des consommateurs d'adopter le critère de l'investissement prudent — dans la mesure où il autorise un paiement pour un investissement qui n'a été ni employé ni utile —, ce critère permet aux organismes de réglementation d'atténuer les possibles effets draconiens du critère de l'emploi et de l'utilité, lequel impose un lourd fardeau au service public. Par exemple, refuser le recouvrement d'un mauvais investissement qui paraissait raisonnable au moment où il a été fait risque de compromettre la santé financière du service public et d'avoir un effet dissuasif sur l'investissement ultérieur de capitaux par ce dernier. Pareil résultat peut ensuite entraîner des conséquences négatives pour les consommateurs, dont les intérêts à long terme sont mieux servis si le secteur de l'électricité est à la fois dynamique, efficace et viable. Par conséquent, un organisme de réglementation peut recourir au critère de l'investissement prudent afin d'établir un juste équilibre entre les intérêts des consommateurs et ceux du service public (voir Kahn, p. 53-54).

[92] Les États ont eu recours à des approches différentes pour établir le fondement légal de la réglementation des services publics. Certains ont permis aux organismes de réglementation d'appliquer le critère de l'investissement prudent, alors que d'autres ont légiféré pour écarter le recouvrement de capitaux investis qui n'étaient [TRADUCTION] « ni employés ni utiles au public » (*Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), p. 302). Fait à signaler, dans cette affaire où on lui demandait si des paiements « justes et raisonnables » à un service public nécessitaient, sur le plan constitutionnel, que le critère de l'investissement prudent s'applique aux dépenses déjà faites, la Cour suprême des É.-U. a conclu que « [l']élévation d'une seule méthode de tarification au rang de norme constitutionnelle écarterait inutilement d'autres avenues dont pourraient bénéficier à la fois consommateurs et investisseurs » (p. 316).

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

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

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

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

(2) Canadian Jurisprudence

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

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

[93] Les cours de justice américaines ont aussi reconnu que, dans certains contextes, des aspects du critère de l'investissement prudent peuvent se révéler moins justifiables. Par exemple, saisie du contrôle judiciaire de coûts transférés à un service public par une entreprise affiliée non réglementée, la Cour suprême de l'Utah s'est demandé s'il était justifié de présumer que les coûts étaient raisonnables et elle a conclu par la négative :

> [TRADUCTION] . . . nous ne pensons pas que les dépenses de l'affiliée devraient être présumées raisonnables. Bien que la pression exercée par un marché concurrentiel puisse nous permettre de présumer, faute d'une preuve contraire, que les dépenses d'une entreprise non affiliée sont raisonnables, on ne peut en dire autant des dépenses d'une affiliée qui ne sont pas faites dans le cadre d'une opération sans lien de dépendance.

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

[94] Il appert donc de la jurisprudence américaine que le critère de l'investissement prudent s'est révélé utile pour arriver à un résultat juste et raisonnable, mais qu'il ne saurait constituer un élément obligatoire de la réglementation des services publics dont l'application s'impose même lorsqu'aucune disposition législative ne le prévoit.

(2) Jurisprudence canadienne

[95] Sous l'impulsion de la jurisprudence américaine, plusieurs organismes de réglementation et cours de justice du Canada se sont aussi penchés sur le rôle du contrôle de la prudence et ont parfois appliqué une variante du critère de l'investissement prudent. Je passerai en revue certaines de leurs décisions dans le but non pas de répertorier toutes les applications du critère, mais bien de faire état de la manière dont on l'a appliqué dans différents contextes.

[96] Dans l'arrêt *British Columbia Electric Railway Co. c. Public Utilities Commission of British Columbia*, [1960] R.C.S. 837, le juge Martland relève que, suivant la loi en cause, l'organisme de réglementation est tenu à ce qui suit lorsqu'il fixe des tarifs :

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

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

(Quoting *Public Utilities Act*, R.S.B.C. 1948, c. 277, s. 16(1)(*b*) (repealed S.B.C. 1973, c. 29, s. 187).)

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

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

. . . prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. . . . Hindsight is not applied in assessing prudence. . . . A utility's decision is

[TRADUCTION]

(*a*) . . . considérer tout élément qu'il juge susceptible d'influer sur les tarifs; [et]

(*b*) . . . tenir dûment compte, notamment, de la protection du public contre les tarifs excessifs qui excèdent ce qui est juste et raisonnable en contrepartie du service de la nature et de la qualité de celui fourni et de l'obtention par le service public d'un rendement juste et raisonnable sur les biens qu'il affecte à la prestation du service ou qu'il acquiert à cette fin de manière prudente et raisonnable, selon leur valeur d'expertise. [p. 852]

(Citant *Public Utilities Act*, R.S.B.C. 1948, c. 227, al. 16(1)*b*) (abrogé S.B.C. 1973, c. 29, art. 187).)

Le juge Martland conclut de ce libellé que l'organisme de réglementation [TRADUCTION] « appelé à se prononcer sur la fixation de tarifs jouit d'un pouvoir discrétionnaire absolu quant aux éléments qu'il juge susceptibles d'influer sur les tarifs, mais qu'il doit, lorsqu'il établit la tarification, satisfaire aux deux exigences expressément prévues à l'al. (*b*) » (p. 856). Ainsi, l'organisme de réglementation est tenu par cette loi de faire en sorte que le public ne paie que ce qui est juste et raisonnable et que le service public obtienne un rendement juste et raisonnable sur la valeur des biens qu'il a utilisés *ou acquis de manière prudente et raisonnable*. Cette protection légale expresse du recouvrement du coût des biens acquis avec prudence offre un exemple de libellé législatif sur le fondement duquel notre Cour a conclu à l'existence d'une obligation non discrétionnaire d'assurer au service public un rendement juste sur les immobilisations qu'il a utilisées ou acquises avec prudence.

[97] En 2005, la Nova Scotia Utility and Review Board (« NSUARB ») a examiné puis adopté la définition du critère de l'investissement prudent proposée par l'Illinois Commerce Commission :

[TRADUCTION] . . . la prudence est la norme de diligence qu'une personne raisonnable aurait respectée dans la situation rencontrée par la direction du service public au moment où elle a dû prendre les décisions. [. . .] Le recul est exclu lorsqu'il s'agit d'apprécier la prudence. [. . .]

prudent if it was within the range of decisions reasonable persons might have made. . . . The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.

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

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

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

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

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

La décision du service public est prudente si elle fait partie des décisions qu'une personne raisonnable aurait pu prendre. [. . .] La norme de la prudence reconnaît que des personnes raisonnables peuvent sincèrement différer d'opinions sans pour autant que l'une ou l'autre soit imprudente.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 (« *Nova Scotia Power 2005* »), par. 84 (CanLII))

La NSUARB conclut alors que, [TRADUCTION] « [a]près examen de la jurisprudence, [. . .] la définition d'imprudence proposée par l'Illinois Commerce Commission constitue un critère raisonnable susceptible d'application en Nouvelle-Écosse » (par. 90). Elle se demande notamment si la stratégie récente d'achat de carburant du service public a été prudente, et elle répond par la négative (par. 94). Elle ne se dit cependant pas tenue d'appliquer le critère de l'investissement prudent.

[98] En 2012, la NSUARB a renouvelé son adhésion au critère de l'investissement prudent (*Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 (« *Nova Scotia Power 2012* »), par. 143-146 (CanLII)). Dans cette affaire, le service public dont les arguments faisaient l'objet de l'examen [TRADUCTION] « a confirmé que, selon lui, il s'agit du critère que la commission devrait appliquer » (par. 146). La NSUARB a ensuite appliqué le critère de la prudence pour décider si plusieurs décisions opérationnelles du service public avaient été prudentes ou non, et elle a conclu que certaines d'entre elles ne l'avaient pas été (par. 188).

[99] En 2006, dans l'arrêt *Enbridge*, la Cour d'appel de l'Ontario se penche sur la teneur du critère de l'investissement prudent. Cet arrêt revêt un intérêt particulier pour deux raisons. Premièrement, la Cour d'appel y circonscrit précisément l'application du critère :

[TRADUCTION]

– La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.

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

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

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

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

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

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

[101] However, the question of whether the prudence test was a required feature of just-and-reasonable analysis in this context was not squarely before the Court of Appeal in *Enbridge*. Rather, the parties in that case "were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision" (para. 10), and the question at issue was whether

– Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.

– Le recul est exclu de l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.

– La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision. [par. 10]

[100] Deuxièmement, elle donne plusieurs fois à entendre que le recours au critère de l'investissement prudent est nécessaire pour se prononcer sur les dépenses convenues. Plus précisément, elle signale que pour décider du caractère juste et raisonnable de l'augmentation des tarifs demandée par Enbridge,

[TRADUCTION] la [Commission] était tenue de soupeser les intérêts opposés d'Enbridge et des consommateurs. Pour ce faire, elle devait appliquer ce qu'on appelle dans le domaine de la réglementation des tarifs des services publics le critère de la « prudence ». Enbridge était en droit de recouvrer ses coûts au moyen d'une augmentation de ses tarifs, mais seulement si la décision derrière ces coûts était « prudente ». [par. 8]

La Cour d'appel ajoute que la Commission a appliqué le [TRADUCTION] « bon critère » (par. 18). Ces affirmations tendent à indiquer que, selon la Cour d'appel, le contrôle de la prudence est fondamental et nécessaire afin que les paiements soient justes et raisonnables.

[101] Or, dans cette affaire, la Cour d'appel n'était pas directement saisie de la question de savoir si, dans ce contexte, l'application du critère de la prudence était nécessaire à l'appréciation du caractère juste et raisonnable des paiements. En fait, les parties s'entendaient [TRADUCTION] « pour l'essentiel sur la démarche qui devait être celle de la Commission pour apprécier la prudence d'une décision d'un

the Board had reasonably applied that agreed-upon approach. In this sense, *Enbridge* is similar to *Nova Scotia Power 2012*: both cases involved the application of prudence analysis in contexts where there was no dispute over whether an alternative methodology could reasonably have been applied.

(3) Conclusion Regarding the Prudent Investment Test

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

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

service public » (par. 10). La question en litige était celle de savoir si la Commission avait eu recours à cette démarche de manière raisonnable. En ce sens, l'affaire *Enbridge* s'apparente à *Nova Scotia Power 2012* : les deux concernent l'application du critère de la prudence lorsqu'aucune des parties ne soutient qu'une autre démarche aurait pu raisonnablement s'appliquer.

(3) Conclusion sur le critère de l'investissement prudent

[102] Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Il existe certes des formulations différentes du contrôle de la prudence, mais l'arrêt *Enbridge* précise en détail quelle peut être la démarche d'un organisme de réglementation appelé à décider si, au moment où le service public les a faites ou en a convenu, les dépenses étaient prudentes ou non. Le plus souvent, le contrôle de la prudence excluant le recul s'applique aux coûts en capital, mais l'arrêt *Enbridge* et les décisions *Nova Scotia Power* (*2005* et *2012*) montrent qu'il s'applique aussi aux dépenses d'exploitation. Je ne vois aucune raison de principe d'interdire à un organisme de réglementation d'appliquer le critère de la prudence aux dépenses d'exploitation.

[103] Toutefois, aucun élément du régime législatif ou de la jurisprudence applicable ne me paraît appuyer l'idée que la Commission devrait être *tenue* en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence énoncé dans l'arrêt *Enbridge*, de sorte que la seule décision de ne pas l'appliquer pour apprécier la prudence de dépenses convenues rendrait déraisonnable sa décision sur les paiements. Notre Cour n'est pas non plus justifiée de créer pareille obligation. Je le répète, lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers

amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts: O. Reg. 53/05, s. 6(1).

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

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

moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements (règlement 53/05, par. 6(1)).

[104] En résumé, il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Comme nous l'avons vu, présumer la prudence serait incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec le recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses. Je précise toutefois que la présente décision ne doit pas être interprétée de façon à permettre aux organismes de réglementation de refuser à leur guise d'approuver des dépenses convenues. Le contrôle de la prudence de dépenses convenues peut, dans bien des cas, constituer un bon moyen de faire en sorte que les services publics soient traités équitablement et demeurent aptes à obtenir les investissements de capitaux requis. Comme je l'explique plus loin, en ce qui a trait plus particulièrement aux coûts en capital convenus, le contrôle de la prudence offre le plus souvent un moyen raisonnable d'établir un équilibre entre les intérêts du consommateur et ceux du service public.

[105] Cette conclusion sur le pouvoir de la Commission de décider de sa démarche découle du régime législatif qui régit son fonctionnement. D'autres régimes législatifs prévoient expressément que l'organisme de réglementation en cause est tenu d'indemniser le service public de certaines dépenses découlant de décisions prudentes (voir l'arrêt *British Columbia Electric Railway Co.*). Selon ces autres cadres législatifs, le pouvoir discrétionnaire qui permet à l'organisme de réglementation de décider de sa démarche peut être plus restreint.

(4) Application to the Board's Decision

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

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

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

(4) Application à la décision de la Commission

[106] En l'espèce, la Commission refuse à OPG le recouvrement au total de 145 millions de dollars au titre des dépenses de rémunération dans le secteur nucléaire, sur deux ans. Rappelons qu'il faut considérer que ces dépenses constituent, du moins en partie, des dépenses convenues. Compte tenu de la nature de ces dépenses en particulier et des circonstances dans lesquelles le service public en a convenu, je ne saurais conclure que la Commission a agi déraisonnablement en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG à leur égard.

[107] Premièrement, il s'agit de dépenses d'exploitation, et non de coûts en capital. Les coûts en capital, en particulier ceux qui se rapportent par exemple à l'accroissement de la capacité ou à l'amélioration des installations actuelles, comportent souvent un risque et peuvent ne pas être nécessaires, à strictement parler, à la production à court terme du service public. Ces coûts peuvent néanmoins constituer un investissement judicieux pour le bon fonctionnement et la viabilité ultérieurs de ce dernier. Dès lors, le contrôle de la prudence, qui exclut le recul (et présume ou non la prudence, selon les dispositions législatives applicables), peut jouer un rôle particulièrement important pour faire en sorte que le service public ne soit pas dissuadé d'investir de manière optimale dans le développement de ses installations.

[108] Les dépenses d'exploitation, comme celles visées en l'espèce, diffèrent des coûts en capital. Il est peu probable que le refus de les approuver dissuade OPG d'en faire à l'avenir, car les dépenses de la nature de celles qui ont été refusées sont inhérentes à l'exploitation d'un service public. Certes, une décision comme celle rendue par la Commission en l'espèce peut faire hésiter OPG à convenir de dépenses relativement élevées au chapitre de la rémunération, mais tel était précisément l'effet voulu par la Commission.

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

[110] By contrast, OPG's committed compensation costs arise in the context of an ongoing relationship in which OPG will have to negotiate compensation costs with the same parties in the future. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. Prudence review is simply less relevant when the Board's focus is not solely on compensating for past commitments, but on regulating costs to be incurred in the future as well. As will be discussed further, the Board's ultimate disallowance was not targeted exclusively at committed costs, but rather was made with respect to the total compensation costs it evaluated in aggregate. Though the Board acknowledged that OPG may not have had the discretion to reduce spending by the entire amount of the disallowance, the disallowance was animated by the Board's efforts to get OPG's ongoing compensation costs under control.

[111] Having already given OPG a warning that the Board found its operational costs to be of concern (see Board 2008-2009 Decision, at pp. 28-32), it was not unreasonable for the Board to be more forceful in considering compensation costs to ensure effective regulation of such costs going forward. The Board's statement that its disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350) shows that it had the ongoing effects of its disallowance squarely in mind in issuing its decision in this case.

[109] Deuxièmement, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Le contrôle de la prudence tire son origine de l'examen de décisions d'effectuer certains investissements, notamment pour accroître la capacité; il s'agit souvent de décisions isolées prises à la lumière d'un ensemble de données alors connues ou supposées.

[110] À l'opposé de celles issues de telles décisions, les dépenses de rémunération convenues d'OPG découlent d'une relation continue dans le cadre de laquelle OPG devra négocier ultérieurement les barèmes de rémunération avec les mêmes parties. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Le contrôle de la prudence se révèle tout simplement moins indiqué lorsque la Commission n'entend pas seulement indemniser le service public des engagements déjà pris, mais aussi réguler les dépenses qui seront faites dans l'avenir. En fin de compte, le refus de la Commission ne vise pas que des dépenses convenues, mais bien la totalité des dépenses de rémunération considérées globalement. Même si la Commission reconnaît qu'OPG n'avait peut-être pas de pouvoir discrétionnaire lui permettant de réduire ses dépenses à raison du montant total refusé, le refus de la Commission vise à inciter OPG à la maîtrise constante de ses dépenses de rémunération.

[111] Après que la Commission eut signifié à OPG que ses dépenses d'exploitation lui paraissaient préoccupantes (voir la décision 2008-2009 de la Commission, p. 28-32), il n'était pas déraisonnable qu'elle se montre plus stricte dans l'examen des dépenses de rémunération du service public afin d'en assurer la régulation réelle à l'avenir. Le fait que la Commission dit refuser l'approbation [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350) montre qu'elle a bel et bien conscience des répercussions actuelles de son refus.

[112] The reasonableness of the Board's decision to disallow $145 million in compensation costs is supported by the Board's recognition of the fact that OPG was bound to a certain extent by the collective agreements in making staffing decisions and setting compensation rates, and its consideration of this factor in setting the total disallowance: Board Decision, at para. 350. The Board's methodological flexibility ensures that its decision need not be "all or nothing". Where appropriate, to the extent that the utility was unable to reduce its costs, the total burden of such costs may be moderated or shared as between the utility's shareholders and the consumers. The Board's moderation in this case shows that, in choosing to disallow costs without applying a formal no-hindsight prudence review, it remained mindful of the need to ensure that any disallowance was not unfair to OPG and certainly did not impair the viability of the utility.

[112] Le caractère raisonnable du refus de la Commission d'approuver des dépenses de 145 millions de dollars au titre de la rémunération tient à ce qu'elle reconnaît qu'OPG était liée dans une certaine mesure par les conventions collectives dans sa prise de décisions en matière de personnel et dans la fixation des barèmes de rémunération, et à ce qu'elle en tient compte pour déterminer la somme totale refusée (décision de la Commission, par. 350). La souplesse méthodologique dont bénéficie la Commission lui permet d'éviter les extrêmes. Lorsque le service public ne peut réduire ses dépenses, la prise en charge de celles-ci peut, si le dossier s'y prête, être modérée ou répartie entre les actionnaires du service public et les consommateurs. La modération opérée par la Commission en l'espèce montre que, en refusant d'approuver les dépenses sans recourir formellement à un contrôle de la prudence excluant le recul, elle ne perd pas de vue la nécessité de veiller à ce que tout refus ne soit pas injuste envers OPG ni, assurément, à ce qu'il ne nuise pas à sa viabilité.

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

[113] Dans ses motifs de dissidence, la juge Abella reconnaît que, lors du contrôle de la prudence, la Commission peut, du moins dans certaines circonstances, refuser des dépenses convenues (par. 152). Elle dit toutefois craindre qu'un tel refus puisse « mettre en péril la garantie d'un service d'électricité fiable » (par. 156). Le refus d'une somme importante ou opposé sans discernement pourrait exposer à un tel risque, mais il se peut aussi que l'organisme de réglementation fasse ce que la Commission fait en l'espèce, c'est-à-dire modérer son refus en tenant compte des réalités auxquelles fait face le service public.

[114] There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its

[114] Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public. La coexistence du droit à la négociation collective des employés du service public et du pouvoir de la Commission de fixer le montant des paiements pour les dépenses de rémunération indique que ni l'un ni l'autre n'a

obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

préséance. La Commission ne peut empiéter sur les conventions collectives en ordonnant au service public de manquer aux obligations qu'elles lui imposent, mais les conventions collectives ne priment pas l'obligation de la Commission d'assurer un équilibre juste et raisonnable entre le service public et les consommateurs.

[115] Justice Abella says that the Board's review of committed costs using hindsight evidence appears to contradict statements made earlier in its decision. The Board wrote that it would use all relevant evidence in assessing forecast costs but that it would limit itself to a no-hindsight approach in reviewing costs that OPG could not "take action to reduce": Board Decision, at para. 75. In my view, these statements can be read as setting out a reasonable approach for analyzing costs that could reliably be fit into forecast or committed categories. However, not all costs are amenable to such clean categorization by the Board in assessing payment amounts for a test period.

[115] La juge Abella affirme que l'examen des dépenses convenues auquel se livre la Commission à partir d'éléments de recul paraît contredire ce que l'organisme affirme précédemment dans sa décision. La Commission écrit en effet qu'elle prendra en compte tout élément de preuve pertinent pour apprécier les dépenses prévues, mais qu'elle s'en tiendra à un examen sans recul pour ce qui concerne les dépenses à l'égard desquelles OPG [TRADUCTION] « ne pouvait prendre de mesures de réduction » (décision de la Commission, par. 75). À mon sens, on peut en conclure qu'elle recourt à une démarche raisonnable pour l'analyse de dépenses que l'on peut assimiler avec assurance soit à des dépenses prévues, soit à des dépenses convenues. Cependant, toutes les dépenses ne sont pas susceptibles d'une distinction aussi nette par la Commission lorsqu'il s'agit d'apprécier le montant des paiements pour une période de référence.

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

[116] En ce qui a trait aux dépenses de rémunération en cause, la Commission refuse de préciser quelle partie de la somme totale refusée correspond à des dépenses prévues et quelle partie correspond à des dépenses convenues pour les besoins de son analyse. Le juge Hoy fait observer que, [TRADUCTION] « [v]u la complexité de l'activité d'OPG et l'autonomie de gestion dont elle jouit, [la Commission] n'a pas tenté de déterminer avec précision le montant dont les dépenses de rémunération prévues d'OPG auraient pu être réduites dans le contexte des conventions collectives en vigueur » (motifs de la C. div., par. 53). En somme, la Commission ne départage pas les dépenses de rémunération totales entre celles qui sont « prévues » et celles qui sont « convenues ». Elle considère plutôt que les dépenses de rémunération refusées se composent à la fois de dépenses prévues et de dépenses convenues sur lesquelles la direction conservait une certaine maîtrise, mais non une maîtrise totale.

[117] It was not unreasonable for the Board to proceed on the basis that predicting staff attrition rates is an inherently uncertain exercise, and that it is not equipped to micromanage business decisions within the purview of OPG management. These considerations mean that any attempt to predict the exact degree to which OPG would be able to reduce compensation costs (in other words, what share of the costs were forecast) would be fraught with uncertainty. Accordingly, it was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach is not inconsistent with the Board's discussion at paras. 73-75, but rather represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into the categories discussed in that passage.

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

[119] Finally, her observation that the Canadian Nuclear Safety Commission ("CNSC") "has . . . imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations" (para. 127) is irrelevant to the issues raised in this case. While the regime put in place by the CNSC surely imposes operational and staffing restraints on nuclear utilities (see OPG record, at

[117] Il n'est pas déraisonnable que la Commission considère que la prévision du taux d'attrition du personnel constitue en soi une entreprise incertaine et qu'elle n'est pas en mesure de microgérer les décisions d'affaires qui relèvent des dirigeants d'OPG. Dès lors, toute tentative de prédire la mesure exacte dans laquelle OPG pourrait abaisser ses dépenses de rémunération (autrement dit, quelle partie de ces dépenses est prévue) serait empreinte d'incertitude. Il n'est donc pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche est compatible avec l'analyse de la Commission figurant aux par. 73-75 de sa décision et correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre des catégories mentionnées dans cette analyse.

[118] Tout au long de ses motifs, la juge Abella rappelle que les dépenses découlant des conventions collectives ne peuvent être rajustées. Je n'en disconviens pas. Cependant, lorsqu'elle opine que les conventions collectives « rend[ent] *illégale* la modification par le service public [. . .] des barèmes de rémunération et des niveaux de dotation » à l'égard de son personnel syndiqué (par. 149 (en italique dans l'original)), d'aucuns pourraient en conclure que la Commission tente de quelque manière de s'immiscer dans l'exécution des obligations d'OPG suivant les conventions collectives. Il importe de ne pas oublier que la Commission n'entend pas, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés.

[119] Enfin, la remarque de ma collègue selon laquelle la Commission canadienne de sûreté nucléaire (« CCSN ») « [a] impos[é] [. . .] des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires » (par. 127) importe peu quant aux questions soulevées en l'espèce. Bien que le régime établi par la CCSN impose sûrement des conditions

pp. 43-46), there is nothing in the Board's reasons, and no argument presented before this Court, suggesting that the Board's disallowance will result in a violation of the provisions of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9.

[120] I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350). Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

VI. Conclusion

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

The following are the reasons delivered by

[122] Abella J. (dissenting) — The Ontario Energy Board was established in 1960 to set rates for the sale and storage of natural gas and to approve pipeline construction projects. Over time, its powers and responsibilities evolved. In 1973, the Board became responsible for reviewing and reporting to the Minister of Energy on electricity rates. During this period, Ontario's electricity market was lightly regulated, dominated by the government-owned

d'exploitation et de dotation aux installations nucléaires (voir dossier OPG, p. 43-46), nul élément des motifs de la Commission et nulle plaidoirie devant notre Cour n'indiquent que le refus de la Commission entraînera le non-respect des dispositions de la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9.

[120] Je rappelle qu'il est essentiel qu'un service public obtienne à long terme l'équivalent du coût du capital. Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il vise à [TRADUCTION] « signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350). L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

VI. Conclusion

[121] Je conclus que la Commission n'a pas agi de manière inappropriée en se pourvoyant en tant que partie en appel; elle n'a pas non plus agi déraisonnablement en refusant d'approuver les dépenses de rémunération en cause. Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir celle de la Commission.

Version française des motifs rendus par

[122] La juge Abella (dissidente) — La Commission de l'énergie de l'Ontario a été mise sur pied en 1960. Son mandat était alors d'établir les tarifs applicables à la vente et au stockage de gaz naturel et d'autoriser les projets de construction de pipelines. Au fil du temps, ses compétences et ses fonctions ont évolué. En 1973, le législateur lui a confié la responsabilité d'examiner les tarifs d'électricité puis de faire rapport au ministre de l'Énergie. Pendant cette

Ontario Hydro, which owned power generation assets responsible for about 90 per cent of electricity production in the province: Ron W. Clark, Scott A. Stoll and Fred D. Cass, *Ontario Energy Law: Electricity* (2012), at p. 134; *2011 Annual Report* of the Office of the Auditor General of Ontario, at pp. 5 and 67.

[123] A series of legislative measures in the late 1990s were adopted to transform the electricity industry into a market-based one driven by competition. Ontario Hydro was unbundled into five entities. One of them was Ontario Power Generation Inc., which was given responsibility for controlling the power generation assets of the former Ontario Hydro. It was set up as a commercial corporation with one shareholder — the Province of Ontario: Clark, Stoll and Cass, at pp. 5-7 and 134.

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

[125] Ontario Power Generation remains the province's largest electricity generator. It was unionized by the Ontario Hydro Employees' Union (the predecessor to the Power Workers' Union) in

période, en Ontario, le marché de l'électricité était peu réglementé. Il était dominé par la société d'État Ontario Hydro, qui possédait des installations de production d'énergie fournissant plus de 90 p. 100 de l'électricité dans la province (Ron W. Clark, Scott A. Stoll et Fred D. Cass, *Ontario Energy Law : Electricity* (2012), p. 134; *Rapport annuel 2011*, Bureau du vérificateur général de l'Ontario, p. 1 et 72).

[123] À la fin des années 1990, une série de mesures législatives a été adoptée en vue d'axer le secteur de l'électricité sur le marché et de le soumettre à la concurrence. Ontario Hydro a été scindée en cinq entités. L'une d'elles, Ontario Power Generation Inc., s'est vu confier l'actif de production d'électricité de l'ancienne société Ontario Hydro. Elle a été constituée en société commerciale dont le seul actionnaire est la province d'Ontario (Clark, Stoll et Cass, p. 5-7 et 134).

[124] Depuis le 1er avril 2008, la Commission est légalement investie du pouvoir de fixer les paiements pour l'électricité produite par les installations prescrites que possède Ontario Power Generation (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, L.O. 1998, c. 15, ann. B, par. 78.1(2); règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 », art. 3). Suivant le régime législatif, Ontario Power Generation est tenue de faire une demande à la Commission pour obtenir l'approbation de paiements « justes et raisonnables » (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 78.1(5)). La Commission établit sa propre méthode pour déterminer ce qui constitue des paiements « justes et raisonnables » au regard des objectifs législatifs qui consistent à maintenir une « industrie de l'électricité financièrement viable » et à « protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité » (règlement 53/05, par. 6(1); *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, dispositions 1 et 2 du par. 1(1).

[125] Ontario Power Generation demeure le plus grand producteur d'électricité de la province. L'Ontario Hydro Employees' Union (auquel a succédé le Syndicat des travailleurs et travailleuses du secteur

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

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

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

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

[129] In its decision, the Board explained that it would use "two types of examination" to assess the utility's expenditures. When evaluating forecast costs — costs that the utility has estimated for

énergétique) a été accrédité comme agent négociateur auprès de l'entreprise dans les années 1950, alors que Society of Energy Professionals l'a été à son tour en 1992 (Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (en ligne), art. 6.2). Le personnel d'Ontario Power Generation affecté à ses activités réglementées se compose aujourd'hui d'environ 10 000 personnes, dont 90 p. 100 sont syndiquées. Deux tiers de ces employés syndiqués sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, un tiers par Society of Energy Professionals.

[126] Le syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals avaient tous deux conclu des conventions collectives avec Ontario Hydro avant la création d'Ontario Power Generation. Lorsqu'elle a succédé à Ontario Hydro, Ontario Power Generation a hérité de la totalité des obligations issues de ces conventions (*Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, c. 1, ann. A, art. 69), qui la lient et l'empêchent de réduire unilatéralement les niveaux de dotation ou les barèmes de rémunération.

[127] La Commission canadienne de sûreté nucléaire, un organisme fédéral indépendant chargé de faire respecter la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9, impose également des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires.

[128] Le 26 mai 2010, Ontario Power Generation a demandé à la Commission d'approuver des recettes nécessaires se chiffrant à 6 909,6 millions de dollars pour la période allant du 1er janvier 2011 au 31 décembre 2012, dont 2 783,9 millions devaient être affectés à la rémunération du personnel — salaires, avantages sociaux, prestations de retraite et incitatifs annuels (EB-2010-0008, p. 8, 49 et 80).

[129] Dans sa décision, la Commission dit soumettre à [TRADUCTION] « deux types d'examen » les dépenses du service public. En ce qui concerne les dépenses prévues — par le service public, pour une

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

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

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

First, I consider any limitation on [Ontario Power Generation's] ability to manage nuclear compensation costs on a go-forward basis, due to binding collective agreements in effect prior to the application and the test period, to be costs previously incurred and subject to an after-the-fact, two-step, prudence review. Second, I conclude that, in considering [Ontario Power Generation's] nuclear compensation costs, as set out in its application, the [Board] in its analysis (though not necessarily in its final number) was required to differentiate between such earlier incurred liabilities and other aspects of the nuclear compensation cost package that were truly projected and

période ultérieure et qu'il est toujours possible de réduire ou d'éviter —, la Commission soutient qu'il incombe à Ontario Power Generation de démontrer leur caractère raisonnable. En revanche, pour ce qui est des dépenses à l'égard desquelles « [l]a société ne pouvait prendre de mesures de réduction », à savoir les dépenses convenues, la Commission dit qu'elle effectuera « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence », c'est-à-dire une présomption selon laquelle les dépenses du service public sont raisonnables (p. 19).

[130] La Commission ne fait aucune distinction entre les dépenses de rémunération qui sont réductibles et celles qui ne le sont pas. Elle soumet plutôt toutes les dépenses de rémunération à l'appréciation qu'elle réserve aux dépenses prévues réductibles et elle refuse d'approuver les paiements demandés à raison de 145 millions de dollars au motif que les barèmes de rémunération et les niveaux de dotation sont trop élevés.

[131] En appel, les juges majoritaires de la Cour divisionnaire confirment l'ordonnance de la Commission. Dans ses motifs dissidents, la juge Aitken conclut que la décision de la Commission est déraisonnable, car elle n'applique pas la bonne approche aux dépenses de rémunération, lesquelles constituent, par l'effet de conventions collectives contraignantes en droit, des dépenses fixes et non ajustables. Selon elle, la Commission [TRADUCTION] « regroupe » plutôt toutes les dépenses de rémunération et ne fait aucune distinction entre celles qui découlent d'obligations contractuelles obligatoires et celles qui n'en découlent pas. Comme elle l'affirme :

[TRADUCTION] Premièrement, j'estime que les dépenses de rémunération du secteur nucléaire [d'Ontario Power Generation], pour une période ultérieure, assujetties à une contrainte en raison de conventions collectives qui s'appliquaient avant la demande et la période de référence, constituent des dépenses déjà faites qui doivent faire l'objet d'un contrôle de la prudence après coup, en deux étapes. Deuxièmement, dans l'analyse (mais pas nécessairement dans l'appréciation finale) des dépenses de rémunération du secteur nucléaire dont fait état la demande, la [Commission] était tenue de faire une distinction entre les dépenses déjà effectuées et d'autres

not predetermined. Third, in my view, the [Board] was required to undergo a prudence review in regard to those aspects of the nuclear compensation package that arose under binding contracts entered prior to the application and the test period. In regard to the balance of factors making up the nuclear compensation package, the [Board] was free to determine, based on all available evidence, whether such factors were reasonable. Fourth, had a prudence review been undertaken, there was evidence upon which the [Board] could reasonably have decided that the presumption of prudence had been rebutted in regard to those cost factors mandated in the collective agreements. Unfortunately, I cannot find anywhere in the Decision of the [Board] where such an analysis was undertaken. The [Board] lumped all nuclear compensation costs together. It dealt with them as if they all emanated from the same type of factors and none reflected contractual obligations to which the [Ontario Power Generation] was bound due to a collective agreement entered prior to the application and the test period. Finally, I conclude that, when the [Board] was considering the reasonableness of the nuclear compensation package, it erred in considering evidence that came into existence after the date on which the collective agreements were entered when it assessed the reasonableness of the rates of pay and other binding provisions in the collective agreements. [para. 75]

réellement prévues, mais non préétablies. Troisièmement, à mon avis, la [Commission] devait soumettre à un contrôle de la prudence la partie des dépenses de rémunération du secteur nucléaire qui découlait de contrats obligatoires conclus avant la demande et la période de référence. Pour ce qui est des autres facteurs présidant à la rémunération globale du secteur nucléaire, la [Commission] pouvait, en se fondant sur toute la preuve disponible, décider s'ils étaient raisonnables ou non. Quatrièmement, si un contrôle de la prudence avait été effectué, des éléments de preuve auraient pu raisonnablement permettre à la [Commission] de conclure à la réfutation de la présomption de prudence en ce qui a trait aux éléments issus des conventions collectives qui influaient sur les dépenses. Malheureusement, je constate que nulle part dans sa décision la [Commission] ne se livre à une telle analyse. Elle regroupe sans distinctions toutes les dépenses de rémunération du secteur nucléaire. Elle considère qu'elles ont toutes la même origine et qu'aucune ne découle d'obligations contractuelles auxquelles [Ontario Power Generation] était tenue par une convention collective conclue avant la demande et la période de référence. Enfin, j'estime que, lorsqu'elle se penche sur le caractère raisonnable de la rémunération globale du secteur nucléaire, la [Commission] commet l'erreur de tenir compte d'éléments de preuve ayant vu le jour après la conclusion des conventions collectives pour apprécier le caractère raisonnable des barèmes de rémunération et d'autres dispositions contraignantes des conventions collectives. [par. 75]

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

[132] La Cour d'appel souscrit à l'unanimité à la conclusion de la juge Aitken et statue que [TRADUCTION] « les dépenses de rémunération en cause devant la [Commission] étaient des dépenses convenues » qu'il aurait donc fallu apprécier en présumant leur prudence. Elles reconnaissent toutes deux qu'il était loisible à la Commission de conclure que la présomption était réfutée en ce qui concerne les obligations contractuelles obligatoires, mais qu'elle a agi déraisonnablement en ne tenant pas compte de la nature immuable des coûts fixes.

[133] I agree. The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. Ontario Power Generation's compensation costs

[133] Je suis d'accord. Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les dépenses de rémunération

were therefore overwhelmingly predetermined and could not be adjusted by the utility during the relevant period. These are precisely the type of costs that the Board referred to in its decision as costs for which "[t]here is no opportunity for the company to take action to reduce" and which must be subjected to "a prudence review conducted in the manner which includes a presumption of prudence": para. 75.

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

Analysis

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

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

d'Ontario Power Generation étaient donc en très grande partie préétablies et ne pouvaient être rajustées par l'entreprise au cours de la période considérée. Il s'agit précisément du type de dépenses que la Commission qualifie, dans sa décision, de dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » et qui doivent faire l'objet d'un « contrôle de la prudence comportant l'application d'une présomption de prudence » (par. 75).

[134] Soit dit tout en respect, la Commission rend une décision déraisonnable en ne reconnaissant pas le caractère contraignant en droit et non réductible des dépenses auxquelles le service public s'était engagé lors de la signature des conventions collectives et en omettant de soumettre ces dépenses au contrôle qui s'imposait pourtant selon elle à leur égard.

Analyse

[135] Conformément au par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, sur demande d'Ontario Power Generation, la Commission fixe le montant des paiements « justes et raisonnables » auxquels a droit le service public. Dans le contexte de la réglementation des services publics, l'expression « justes et raisonnables » traduit l'objectif qui consiste à [TRADUCTION] « naviguer entre les récifs » que sont, d'une part, les tarifs excessifs imposés au consommateur et, d'autre part, la rétribution insuffisante du service public (*Verizon Communications Inc. c. Federal Communications Commission*, 535 U.S. 467 (2002), p. 481; voir aussi *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, p. 192-193).

[136] La méthode retenue par la Commission pour déterminer le montant des paiements « justes et raisonnables » auxquels a droit Ontario Power Generation prend en partie appui sur la notion de « prudence ». En droit réglementaire, la prudence offre un [TRADUCTION] « fondement juridique pour se prononcer sur le respect des obligations des services publics liées à l'intérêt public, plus particulièrement en ce qui concerne le processus de tarification » (Robert E. Burns et autres, *The Prudent Investment Test in the 1980s*, rapport NRRI-84-16, The National Regulatory Research Institute, avril 1985, p. 20). Apparue

used by regulators to determine "just and reasonable" amounts, and introduced a legal presumption that a regulated utility has acted reasonably: *Verizon Communications*, at p. 482. As Justice Brandeis famously explained in 1923:

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

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

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

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

au début du 20e siècle, cette notion jurisprudentielle visait à remédier à la [TRADUCTION] « complexité paralysante » des approches différentes utilisées par les organismes de réglementation pour arrêter des montants « justes et raisonnables », et elle présumait que le service public réglementé avait agi raisonnablement (*Verizon Communications*, p. 482). Ainsi, comme l'explique le juge Brandeis dans un extrait bien connu datant de 1923 :

> [TRADUCTION] L'emploi de l'expression « investissement prudent » n'est pas décisif. L'établissement de la base de tarification ne devrait pas exclure les investissements qui, dans des circonstances ordinaires, seraient considérés raisonnables. Cet emploi vise plutôt à exclure les dépenses qui pourraient être jugées malhonnêtes ou manifestement excessives ou imprudentes. On peut supposer que tout investissement considéré a été fait dans l'exercice d'un jugement raisonnable, sauf preuve du contraire. [Je souligne.]

(*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1, le juge Brandeis (dissident))

[137] La présomption de prudence constitue le point de départ de l'examen que la Commission appelle [TRADUCTION] « contrôle de la prudence ». Lorsqu'elle entreprend ce contrôle de la prudence, la Commission applique un « ensemble bien établi de principes » :

[TRADUCTION]

- La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.
- Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.
- Le recul est exclu dans l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.
- La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et

based on facts about the elements that could or did enter into the decision at the time.

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

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

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

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

reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision.

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

[138] Dans *Enbridge Gas Distribution Inc. (Re)*, par. 3.12.1 à 3.12.5, conf. par *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4, par. 8 et 10-12, la Commission et la Cour d'appel de l'Ontario considèrent ce contrôle — qui comporte l'application d'une présomption de prudence et exclut le recul — comme la méthode appropriée pour fixer des tarifs « justes et raisonnables ».

[139] Toutefois, dans la présente affaire, la Commission choisit de ne pas soumettre toutes les dépenses à un contrôle de la prudence. Elle dit plutôt recourir à deux examens. Le premier s'appliquerait aux « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter. Dans ses motifs, la Commission explique qu'elle examine ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombe au service public de démontrer le caractère raisonnable de ses dépenses :

[TRADUCTION] Lors de l'examen des dépenses prévues, il incombe à la société d'établir le bien-fondé de sa demande et d'étayer son allégation selon laquelle ces dépenses sont raisonnables. Elle doit fournir un large éventail d'éléments de preuve en ce sens, notamment des analyses de rentabilité et de tendances, des données de référence, etc. Le critère applicable n'est pas celui de la malhonnêteté, de la négligence ou de la perte menant au gaspillage, mais bien celui du caractère raisonnable. Et dans l'appréciation du caractère raisonnable, la Commission n'est pas tenue d'examiner uniquement les données qui intéressent [Ontario Power Generation]. Elle a le pouvoir discrétionnaire de conclure que les dépenses prévues sont déraisonnables au vu de la preuve, laquelle peut se rapporter à l'analyse coût/bénéfice, à l'incidence sur les consommateurs, aux comparaisons avec d'autres entités ou à autre chose.

The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by shareholders (unless the company decides to continue to spend at the higher level in any event). [paras. 74-75]

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

Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence. [para. 75]

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

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

[142] As the Board said in its reasons, the prudence review makes sense for committed costs because disallowing costs Ontario Power Generation cannot avoid, forces the utility to pay out of pocket

L'avantage d'une période de référence ultérieure est qu'elle permet à la société de connaître à l'avance la décision de la Commission concernant le recouvrement de dépenses prévues. Par exemple, lorsque des dépenses sont refusées, la société peut modifier ses plans en conséquence. Autrement dit, l'actionnaire n'a pas nécessairement à assumer un coût (à moins que la société ne décide, en tout état de cause, de maintenir les dépenses jugées excessives). [par. 74-75]

[140] Selon la Commission, une démarche différente serait suivie pour les dépenses à l'égard desquelles la société ne pouvait [TRADUCTION] « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission explique qu'elle jauge ces dépenses en se livrant à un « contrôle de la prudence » qui comporte l'application d'une présomption selon laquelle les dépenses ont été faites de manière prudente :

[TRADUCTION] Des considérations quelque peu différentes entreront en jeu lors d'un contrôle de la prudence après coup. La dépense que la Commission refusera alors d'approuver sera nécessairement assumée par l'actionnaire. La société ne pourra plus prendre de mesures de réduction à son égard. C'est pourquoi la Commission estime qu'il existe une différence entre les deux types d'examen, le contrôle après coup constituant un contrôle de la prudence assorti d'une présomption de prudence. [par. 75]

[141] À titre d'exemple, dans *Enersource Hydro Mississauga Inc. (Re)*, la Commission conclut qu'elle doit effectuer un contrôle de la prudence pour apprécier les dépenses qu'Enersource a déjà faites :

[TRADUCTION] Le présent dossier porte sur des dépenses que la société a déjà faites en grande partie. [. . .] Comme il est question de dépenses antérieures qui sont aujourd'hui contestées, la Commission doit effectuer un contrôle de la prudence. [par. 55]

[142] Comme le dit la Commission dans ses motifs, il est logique de soumettre à un contrôle de la prudence des dépenses convenues, car refuser d'approuver des dépenses auxquelles Ontario

for expenses it has already incurred. This could negatively affect Ontario Power Generation's ability to operate, leading the utility to restructure its relationships with the financial community and its service providers, or even lead to bankruptcy: see Burns et al., at pp. 129-65. These outcomes would "increase capital costs and utility rates above the levels that would exist with a limited prudence penalty", forcing Ontario consumers to pay higher electricity bills: Burns et al., at p. vi.

[143] The issue in this appeal therefore centres on the Board assessing *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which "[t]here is no opportunity for the company to take action to reduce" (para. 75). The Board did not actually call them forecast costs, but by saying that "collective agreements may make it difficult to eliminate positions quickly" and that "changes to union contracts . . . will take time" (paras. 346 and 352), the Board was clearly treating them as reducible in theory. Moreover, the fact that it failed to apply the prudence review it said it would apply to non-reducible costs confirms that it saw the collectively bargained commitments as adjustable.

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

Power Generation ne peut se soustraire oblige le service public à acquitter sur ses propres deniers des dépenses déjà faites. Cela pourrait nuire au bon fonctionnement d'Ontario Power Generation et l'amener à restructurer ses liens avec les milieux financiers et ses fournisseurs de services, voire à faire faillite (voir Burns et autres, p. 129-165). Dès lors, [TRADUCTION] « les coûts en capital et les tarifs seraient supérieurs à ce qu'ils auraient été si une sanction modérée avait résulté de l'application du principe de prudence », de sorte que le consommateur ontarien serait contraint de payer des tarifs d'électricité plus élevés (Burns et autres, p. vi).

[143] Le présent pourvoi a donc pour objet la décision de la Commission de considérer *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables, sans se demander s'il s'agit en partie de dépenses pour lesquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » (par. 75). La Commission ne les qualifie pas à proprement parler de dépenses prévues, mais lorsqu'elle affirme que « les conventions collectives peuvent rendre ardue l'élimination rapide de certains postes » et que « modifier des conventions collectives [. . .] prend du temps » (par. 346 et 352), elle considère clairement qu'il s'agit de dépenses théoriquement compressibles. De plus, l'omission de soumettre celles-ci au contrôle de la prudence qu'elle dit pourtant s'appliquer aux dépenses non réductibles confirme l'assimilation des obligations issues de négociations collectives à des obligations ajustables.

[144] La Commission ne dit pas pourquoi elle estime que les dépenses de rémunération issues des conventions collectives constituent des dépenses prévues ajustables, mais par l'adoption de son approche, elle empêche Ontario Power Generation de bénéficier de l'application de sa méthode d'appréciation qui considère différemment les dépenses convenues. À mon humble avis, en omettant d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission méconnaît à la fois son propre cadre méthodologique et le droit du travail.

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

[146] Its collective agreement with the Society of Energy Professionals, which required resolution by binding mediation-arbitration in the event of contract negotiations disputes, expired on December 31, 2010. As a result of a bargaining impasse, the terms of a new collective agreement for January 1, 2011 to December 31, 2012 were imposed by legally binding arbitration: *Ontario Power Generation v. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL).

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

[148] Similarly, Ontario Power Generation's collective agreement with the Society of Energy Professionals severely limited the utility's bargaining power and control over compensation levels. When the contract between Ontario Power Generation and

[145] Ontario Power Generation était partie à des conventions collectives obligatoires qui étaient intervenues avec le Syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals et qui s'appliquaient pendant la plus grande partie de la période considérée. À l'époque de la demande, elle avait déjà conclu une convention collective avec le Syndicat des travailleurs et travailleuses du secteur énergétique pour la période comprise entre le 1er avril 2009 et le 31 mars 2012.

[146] La convention collective intervenue avec Society of Energy Professionals et imposant la médiation-arbitrage pour le règlement des différends pendant des négociations collectives a expiré le 31 décembre 2010. Par suite d'une impasse dans les négociations, les conditions d'une nouvelle convention collective pour la période du 1er janvier 2011 au 31 décembre 2012 ont été imposées par voie d'arbitrage obligatoire (*Ontario Power Generation c. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL)).

[147] Les conventions collectives conclues avec les deux syndicats prescrivaient les barèmes de rémunération des employés syndiqués, réglementaient rigoureusement les niveaux de dotation aux installations d'Ontario Power Generation et limitaient le pouvoir du service public de réduire unilatéralement ses barèmes de rémunération et ses niveaux de dotation. Par exemple, la convention collective conclue avec le Syndicat des travailleurs et travailleuses du secteur énergétique prévoyait qu'il n'y aurait aucun licenciement pendant la durée de son application. Bien au contraire, Ontario Power Generation serait contrainte soit de réaffecter tout employé excédentaire, soit de lui offrir une indemnité de départ selon les barèmes établis au préalable par le service public et le syndicat (« Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union », 1er avril 2009 au 31 mars 2012, art. 11).

[148] De même, la convention collective conclue avec Society of Energy Professionals limitait grandement le pouvoir du service public de négocier et de déterminer les barèmes de rémunération. À l'expiration de cette convention le 31 décembre 2010,

the Society of Energy Professionals expired on December 31, 2010, the utility's bargaining position had been that its sole shareholder, the Province of Ontario, had directed that there be a zero net compensation increase over the next two-year term. The parties could not reach an agreement and the dispute was therefore referred to binding arbitration as required by previous negotiations. The resulting award by Kevin M. Burkett provided mandatory across-the-board wage increases of 3 per cent on January 1, 2011, 2 per cent on January 1, 2012, and a further 1 per cent on April 1, 2012: *Ontario Power Generation v. Society of Energy Professionals*, at paras. 1, 9, and 28.

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

[150] Instead, the Board, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of its costs and concluded that it had failed to provide "compelling evidence" or "documentation or analysis" to justify compensation levels: para. 347. Had the Board used the approach it said it would use for costs the company had "no opportunity . . . to reduce", it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

le service public défendait la position de son unique actionnaire, la province d'Ontario, à savoir l'exclusion de toute augmentation nette des salaires pendant les deux années suivantes. Les parties n'ont pu parvenir à un accord, de sorte que le dossier a été renvoyé à l'arbitrage obligatoire comme convenu lors de négociations précédentes. Dans sa décision, l'arbitre Kevin M. Burkett a ordonné une augmentation générale des salaires de 3 p. 100 le 1er janvier 2011, de 2 p. 100 le 1er janvier 2012 et, en sus, de 1 p. 100 le 1er avril 2012 (*Ontario Power Generation c. Society of Energy Professionals*, par. 1, 9 et 28).

[149] Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire (*Loi de 1995 sur les relations de travail*, art. 56). Il était donc interdit à Ontario Power Generation de réduire unilatéralement les niveaux de dotation, les salaires ou les avantages sociaux de ses employés syndiqués. Contrairement à ce qu'affirment les juges majoritaires (par. 84), ces conventions ne laissaient pas seulement « peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble », elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

[150] En appliquant la méthode qu'elle a dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission oblige en fait Ontario Power Generation à prouver le caractère raisonnable de ses dépenses et conclut que l'entreprise n'a présenté ni [TRADUCTION] « preuve convaincante », ni « documents ou analyses » qui justifient les barèmes de rémunération (par. 347). Si elle avait eu recours à l'approche qu'elle a dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

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

[151] Contrairement à ce que soutiennent les juges majoritaires, appliquer le contrôle de la prudence à ces dépenses de rémunération serait difficilement « incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ». Considérer que le par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit un fardeau de preuve aussi strict a essentiellement pour effet d'empêcher totalement la Commission d'effectuer des contrôles de la prudence, alors qu'elle en a effectués sans difficulté dans le passé et qu'elle a affirmé — comme dans ses motifs en l'espèce — qu'il y a lieu de soumettre les dépenses convenues à « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence ». Or, suivant le raisonnement des juges majoritaires, comme le contrôle de la prudence présume toujours la prudence, la Commission ne verrait pas seulement sa marge de manœuvre réduite sur le plan méthodologique, mais elle contreviendrait aussi à la Loi.

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

> does not mean that the [Board] is powerless to review the compensation rates for [Ontario Power Generation's] unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the [Board] cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review allows for such an outcome, and permits the [Board] both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between [Ontario Power Generation] and its customers. [para. 38]

[152] L'application du principe de la prudence ne soustrait pas les dépenses de rémunération du service public à tout examen. Comme le fait remarquer la Cour d'appel, le contrôle de la prudence

> [TRADUCTION] n'écarte pas la possibilité que la [Commission] puisse contrôler les barèmes de rémunération applicables aux employés syndiqués d'[Ontario Power Generation] ou le nombre de leurs postes. Lors d'un tel contrôle, il peut ressortir de la preuve, d'une part, que la présomption selon laquelle les dépenses ont été faites de manière prudente doit être écartée et, d'autre part, que les barèmes de rémunération et les niveaux de dotation convenus ne sont pas raisonnables; cependant, la [Commission] ne peut se prononcer avec le recul, mais doit tenir compte de ce qui était connu ou qui aurait dû l'être à l'époque. Le contrôle de la prudence admet un tel résultat et permet à la [Commission] de s'acquitter de son mandat légal et de jouer son rôle de substitut du marché tout en assurant un juste équilibre entre les intérêts d'[Ontario Power Generation] et ceux de ses clients. [par. 38]

[153] The majority's suggestion (at para. 114) that "if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant

[153] L'affirmation des juges majoritaires selon laquelle, « si le législateur avait voulu que les dépenses [. . .] issues [de conventions collectives] se répercutent inévitablement sur les consommateurs, il

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

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

[155] Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect. To use the majority's

n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public » (par. 114), laisse perplexe. Le législateur ne voulait pas que *toute* dépense se répercute « inévitablement » sur les consommateurs. Son intention était de donner à la Commission le pouvoir d'arrêter des paiements justes et raisonnables en fonction des engagements actuels et projetés d'Ontario Power Generation. Ni les conventions collectives ni aucune autre obligation contractuelle ne devaient « inévitablement » se répercuter sur qui que ce soit. Cependant, elles devaient inévitablement peser dans la balance. Or, c'est précisément la nature unique des engagements contraignants qu'a invoquée la Commission lorsqu'elle a affirmé qu'elle soumettrait ces dépenses à un contrôle différent.

[154] Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent donc être assimilées à juste titre à des dépenses prévues. La Commission ne tire toutefois aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation sont fixes et dans quelle proportion elles demeurent assujetties au pouvoir discrétionnaire du service public. La Commission ne tire pour ainsi dire aucune conclusion de fait quant à savoir dans quelle mesure l'entreprise pouvait réduire ses dépenses de rémunération issues des conventions collectives. Au contraire, comme le souligne la juge Aitken, la Commission [TRADUCTION] « regroupe » sans distinctions toutes les dépenses liées à la rémunération, reconnaît que la réduction de celles issues des conventions collectives « prend[rait] du temps » et « [serait] ardue », et considère qu'elles sont globalement ajustables.

[155] Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce

words, these costs are "legal obligations that leave [the utility] with no discretion as to whether to make the payment in the future" (para. 82). According to the Board's own methodology, costs for which "[t]here is no opportunity for the company to take action to reduce" are entitled to "a presumption of prudence": para. 75.

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

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

[158] In my respectful view, selecting a test which is more likely to confirm an assumption that collectively bargained costs are excessive, misconceives the point of the exercise, namely, to determine

sens. Pour reprendre les propos des juges majoritaires, ces dépenses correspondent à des « obligations qui écartent tout pouvoir discrétionnaire [. . .] permettant [au service public] de ne pas acquitter la somme ultérieurement » (par. 82). Selon la propre méthode de la Commission, les dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » bénéficient d'une « présomption de prudence » (par. 75).

[156] Refuser d'approuver des dépenses qu'Ontario Power Generation est juridiquement tenue d'acquitter en raison de ses conventions collectives obligerait le service public et son seul actionnaire, la province d'Ontario, à combler la différence en puisant ailleurs. Ontario Power Generation pourrait notamment être forcée de réduire ses investissements dans l'accroissement de sa capacité et dans l'amélioration de ses installations. Et, comme il s'agit du plus grand producteur d'électricité de l'Ontario, un tel refus pourrait non seulement nuire à la « viabilité financière » du secteur de l'électricité de la province, mais également mettre en péril la garantie d'un service d'électricité fiable.

[157] Les juges majoritaires tiennent cependant pour acquis que la relation continue entre Ontario Power Generation et les syndicats devrait conférer à la Commission, relativement aux dépenses de rémunération issues de négociations collectives, un pouvoir de refus plus grand que celui dont elle bénéficie dans le cadre d'une analyse qui exclut le recul et présume la prudence. Ils font droit également à la conclusion de la Commission selon laquelle les dépenses de rémunération issues de négociations collectives auxquelles Ontario Power Generation a participé pourraient être [TRADUCTION] « excessives » et concluent donc que la Commission a agi raisonnablement en écartant le principe de la « prudence » pour arriver à sa conclusion. Leur approche ne trouve aucun appui, pas même dans la méthode que la Commission établit elle-même pour déterminer le montant de paiements justes et raisonnables.

[158] En tout respect pour l'opinion contraire, en choisissant un critère éminemment susceptible de confirmer l'hypothèse que les dépenses issues de négociations collectives sont excessives, on se

whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes, with respect, the appearance of an ideologically driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not.

[159] I recognize that the Board has wide discretion to fix payment amounts that are "just and reasonable" and, subject to certain limitations, to "establish the . . . methodology" used to determine such amounts: O. Reg. 53/05, s. 6, *Ontario Energy Board Act, 1998*, s. 78.1. That said, once the Board establishes a methodology to determine what is just and reasonable, it is, at the very least, required to faithfully apply that approach: see *TransCanada Pipelines Ltd. v. National Energy Board* (2004), 319 N.R. 171 (F.C.A.), at paras. 30-32, per Rothstein J.A. This does not mean that collective agreements "supersede" or "trump" the Board's authority to fix payment amounts; it means that once the Board selects a methodology for itself for the exercise of its discretion, it is required to follow it. Absent methodological clarity and predictability, Ontario Power Generation would be left in the dark about how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets.

[160] In disallowing $145 million of the compensation costs sought by Ontario Power Generation on the grounds that the utility could reduce salary and staffing levels, the Board ignored the legally binding nature of the collective agreements

méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient, soit dit tout en respect, à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas.

[159] Je reconnais que la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont « justes et raisonnables » et, à l'intérieur de certaines limites, de [TRADUCTION] « définir la [. . .] méthode » utilisée pour établir le montant de ces paiements (règlement 53/05, art. 6; *Loi de 1998 sur la Commission de l'Énergie de l'Ontario*, art. 78.1). Cela dit, dès lors qu'elle a établi une méthode pour déterminer ce qui est juste et raisonnable, la Commission doit à tout le moins l'appliquer avec constance (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149 (CanLII), par. 30-32, le juge Rothstein). Pour autant, les conventions collectives ne « priment » pas le pouvoir de la Commission de fixer les paiements, mais une fois que la Commission a choisi une méthode pour exercer son pouvoir discrétionnaire, elle doit s'y tenir. En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation serait vouée à l'incertitude quant à la démarche à suivre pour déterminer les dépenses et les investissements à faire et quant à la manière de les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster.

[160] En refusant d'approuver des dépenses de 145 millions de dollars au motif qu'Ontario Power Generation pouvait réduire ses barèmes de rémunération et ses niveaux de dotation, la Commission a méconnu le caractère contraignant en droit des

and failed to distinguish between committed compensation costs and those that were reducible. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was, in my respectful view, unreasonable.

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

Appeal allowed, ABELLA J. *dissenting.*

Solicitors for the appellant: Stikeman Elliott, Toronto.

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

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

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

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

conventions collectives et a omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

[161] Je suis donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et, à l'instar de la Cour d'appel, de renvoyer l'affaire à la Commission pour qu'elle la réexamine à la lumière des présents motifs.

Pourvoi accueilli, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Stikeman Elliott, Toronto.

Procureurs de l'intimée Ontario Power Generation Inc. : Torys, Toronto; Ontario Power Generation Inc., Toronto.

Procureurs de l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 : Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs de l'intimée Society of Energy Professionals : Cavalluzzo Shilton McIntyre Cornish, Toronto.

Procureurs de l'intervenante : Jay Shepherd Professional Corporation, Toronto.

2005 CarswellOnt 1419
Ontario Court of Appeal

Children's Lawyer for Ontario v. Goodis

2005 CarswellOnt 1419, [2005] O.J. No. 1426, 138 A.C.W.S. (3d) 778, 17 R.F.L. (6th) 32, 196 O.A.C. 350, 253 D.L.R. (4th) 489, 29 Admin. L.R. (4th) 86, 75 O.R. (3d) 309

CHILDREN'S LAWYER FOR ONTARIO (Applicant / Appellant) and DAVID GOODIS, Senior Adjudicator, Information and Privacy Commissioner and JANE DOE, Requester (Respondents)

McMurtry C.J.O., Goudge, Blair JJ.A.

Heard: December 6-7, 2004
Judgment: April 18, 2005
Docket: CA C41313

Proceedings: affirming *Children's Lawyer for Ontario v. Goodis* (2003), 231 D.L.R. (4th) 727, 177 O.A.C. 1, *(*sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner))* 66 O.R. (3d) 692, 45 R.F.L. (5th) 285, 2003 CarswellOnt 3426, 8 Admin. L.R. (4th) 251 (Ont. Div. Ct.)

Counsel: Leslie M. McIntosh, Elaine Atkinson for Appellant
Freya Kristjanson, Christopher D. Bredt for Respondent
Mary M. Thomson, Christine Lonsdale, amicus curiae

Subject: Civil Practice and Procedure; Public; Family

Headnote

Administrative law --- Practice and procedure — On application for certiorari — Standing

Adult former client represented by Office of Children's Lawyer sought disclosure of her files in child protection case and two motor vehicle accident cases — Children's Lawyer treated request as request under Ontario Freedom of Information and Protection of Privacy Act and disclosed all but 933 of 3,700 pages, relying on s. 19 solicitor-client and Crown counsel exemptions — Client appealed to Information and Privacy Commissioner, who ordered Children's Lawyer to disclose most of outstanding records — Children's Lawyer applied unsuccessfully for judicial review of commissioner's decision — On judicial review application, applications judge dismissed Children's Lawyer's motion to refuse or limit standing of commissioner — Children's Lawyer appealed on issue of commissioner's role in Divisional Court — Appeal dismissed — Ordinary meaning of s. 9(2) of Judicial Review Procedure Act gave administrative tribunal right to be party to proceeding if it chose to do so — Scope of standing was left to judicial discretion — Context-specific approach to scope of tribunal standing was preferable to precise a priori rules depending on grounds being pursued in application or on applicable standard of review — Scope of tribunal's standing was to be considered in light of factors including importance of fully informed adjudication of issues before it and importance of maintaining tribunal impartiality — No error was made in decision to dismiss attempts of Children's Lawyer to deny or limit commissioner's standing in judicial review proceedings — In present case, full tribunal participation was significant factor in judicial review to ensure fully informed adjudication of issues — Children's Lawyer would be only party if tribunal were denied standing — With full standing, commissioner's expert familiarity with statute provided important assurance of fully informed adjudication — Circumstances of case were such that commissioner's impartiality would not be significantly compromised and integrity of decision-making process would not be undermined on allowing commissioner full standing in judicial review proceedings.

APPEAL by Children's Lawyer from judgment reported at *Children's Lawyer for Ontario v. Goodis* (2003), 231 D.L.R. (4th) 727, 177 O.A.C. 1, *(*sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner))* 66 O.R. (3d)

692, 45 R.F.L. (5th) 285, 2003 CarswellOnt 3426, 8 Admin. L.R. (4th) 251 (Ont. Div. Ct.), dismissing motion for declaration that Information and Privacy Commissioner lacked standing in context of judicial review proceedings.

***Goudge J.A.*:**

1 In the proceedings resulting in this appeal, the Children's Lawyer for Ontario sought judicial review of the decision of the Information and Privacy Commissioner who ordered the Children's Lawyer to disclose certain documents in her possession. Disclosure had been requested under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*") by a requester who has been given the pseudonym of Jane Doe in these proceedings.

2 The Divisional Court dismissed the application for judicial review. In the course of doing so, it dismissed the Children's Lawyer's request to refuse or limit the standing of the Commissioner. The Children's Lawyer now appeals, challenging the role that the Commissioner was permitted to play in the Divisional Court. We must therefore grapple with the vexing question of the scope of standing to be accorded by the court to an administrative tribunal whose decision is attacked by way of judicial review.

3 For the reasons that follow, I agree with the conclusion of the Divisional Court and would therefore dismiss the appeal.

Background

4 When Jane Doe was a child, the Children's Lawyer acted for her in three different legal proceedings. The Children's Lawyer represented her in a child protection case and acted as her litigation guardian in two motor vehicle accident cases.

5 Upon reaching majority and apparently dissatisfied with her representation, Jane Doe requested a copy of her "complete files". The Children's Lawyer, whose office operates as a branch of the Ministry of the Attorney General, treated this as a request for information under *FIPPA* rather than as a request from a client for her file. However reasonable it might be to analyze the interests at stake in this framework, this was not raised as an issue before us, and I will say nothing more about it.

6 The Children's Lawyer responded to the request by deciding that some 2,800 pages of records had to be disclosed, but that she had the right to deny access to 933 pages. She based this decision on s. 13 and s. 19 of *FIPPA*.

7 Section 13 creates an exemption from disclosure for records that reveal the advice and recommendations of a public servant. Section 19 is more important for these proceedings. It has two branches and provides that the head of the government agency may refuse to disclose a record either if it is subject to solicitor-client privilege or if it was prepared by or for Crown counsel to assist in giving legal advice or in contemplation of or for use in litigation. Section 19 reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

8 As *FIPPA* permits, the requester appealed the decision to deny access to 933 pages to the Commissioner. Except for a handful of these pages, the Commissioner allowed the appeal and ordered disclosure of these pages. The Commissioner found that s. 13 did not apply because the records were prepared by the Children's Lawyer for the purpose of representing the requester in legal proceedings rather than for the benefit of the government or the public at large. The first branch of s. 19 did not apply because solicitor-client privilege could not be asserted by the Children's Lawyer against a party she represented in litigation. The Commissioner found that the second branch of s. 19 did not apply because it does not protect the Children's Lawyer from a request from an individual she has represented.

9 The Children's Lawyer subsequently applied under *FIPPA* to have the Commissioner reconsider her decision. The result was that although the Commissioner permitted several additional documents to be withheld, she confirmed the essence of her prior decision.

10 The Children's Lawyer then applied for judicial review of the decision and the reconsideration on the grounds that the Commissioner erred in finding that neither s. 13 nor the second branch of s. 19 entitled the Children's Lawyer to withhold these records. She no longer asserted that she could deny disclosure based on the first branch of s. 19.

11 The Commissioner opposed the application for judicial review. In her factum, the Commissioner put the argument that the second branch of s. 19 was not available to the Children's Lawyer because the Children's Lawyer was not acting as Crown counsel when she represented the requester in the various pieces of litigation. This reason was not expressly set out in the Commissioner's original decision.

12 The Children's Lawyer responded to the Commissioner's factum by moving for an order that the Commissioner be denied standing, or at least be prohibited from arguing that her decision was correct on a basis that was not given in her original decision. The Children's Lawyer filed an affidavit saying that in her exchanges with the Commissioner prior to the decision, the Commissioner had not raised the "Crown counsel" issue and that, had she done so, the Children's Lawyer would have provided evidence and submissions on the question.

13 The requester did not respond to the judicial review application or to the preliminary motion and has played no part in the court proceedings. Because of the Children's Lawyer's objection to the Commissioner's standing, and the absence of the requester, the Divisional Court appointed *amicus curiae* to assist the court by making those submissions it deemed appropriate on all issues. Through the facilities of the Advocates' Society, Ms. Thomson and Ms. Lonsdale filled that role there and again in this court with great skill. That they have acted *pro bono* throughout reflects the best traditions of the bar.

14 The Divisional Court dismissed the preliminary motion, finding that s. 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 gives the Commissioner the right to be a party to the judicial review application and that the court ought not exercise its discretion to limit the Commissioner's participation because the court would thereby deny itself legitimate and helpful submissions.

15 The court then dismissed the application for judicial review in its entirety. The court found that the Commissioner was correct in denying the protection of the second branch of s. 19 of *FIPPA* because in representing the requester in litigation the Children's Lawyer could not be considered to be Crown counsel when it represented the requester. The court also found that, while this issue may not have been front and centre before the Commissioner, it was raised in the record and was open to be argued by both the Commissioner and the *amicus* on judicial review. Finally, the court found that the Commissioner's decision that s. 13 of *FIPPA* did not permit the Children's Lawyer to withhold disclosure of these records was not unreasonable.

16 In this court, the Children's Lawyer did not pursue the s. 13 argument but focused on the role that the Commissioner was permitted to play in the judicial review application. The Children's Lawyer raised two issues on this appeal:

> (a) Whether the Divisional Court erred in affording standing to the Commissioner, and
>
> (b) Whether the Divisional Court erred in permitting the Commissioner to raise the issue of whether lawyers employed or retained by the Children's Lawyer are "Crown counsel" for the purposes of s. 19 of *FIPPA* and then proceeding to decide the case on that basis.

17 The Children's Lawyer did not ask this court to decide the merits of the judicial review application or even to determine the Crown counsel issue but rather sought an order remitting the latter question back to the Commissioner for determination. The focus of argument in this court was almost entirely on the law applicable to determining the scope of standing of an administrative tribunal in a judicial review application.

Analysis

18 The last half-century has seen an explosion in the number and variety of administrative tribunals that are part of the broader justice system. One consequence has been the increasingly sophisticated law governing the courts' supervision of tribunals. However an aspect of that law that has lacked consistency concerns the extent of an administrative tribunal's role in an application for judicial review of its decision. The eminent administrative law scholar Professor David Mullan has described it as "a domain fraught with uncertainty". See David J. Mullan, *Essentials of Canadian Law: Administrative Law* (Toronto: Irwin Law, 2001) at 457.

19 Despite this uncertainty, a brief review of several cases that highlight the jurisprudential history of the issue is useful in clarifying the fundamental values at play.

20 The starting point is *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.). The decision under scrutiny was that of the Public Utilities Board for Alberta. Although the attack was commenced by way of statutory appeal, the principles enumerated by the Supreme Court have been applied without distinction to judicial review.

21 Writing for the court, Estey J. made it clear that, although the governing legislation would be determinative if it defined the role of the tribunal, if it did not do so, the tribunal could not go beyond explaining the record and making representations supporting its jurisdiction to make the order in question. He relied squarely on the importance of maintaining tribunal impartiality. He put it this way at 709:

> This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

22 Ten years after this decision, the Supreme Court again addressed the issue in *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.) [*Paccar* hereafter]. In that case, judicial review was sought of a British Columbia Labour Relations Board decision. LaForest J., writing for himself and Dickson C.J.C., accepted as beyond question a tribunal's standing to explain the record before the court and to advance its view of the appropriate standard of review. He also approved the tribunal's standing to explain why its decision was a reasonable approach to adopt and could not be said to be patently unreasonable. To this extent, the Board was free to argue the merits of its approach although not to the point of defending the decision as correct. The scope of the Board's standing was thus expanded considerably beyond the strict question of jurisdiction. L'Heureux-Dubé J., who was the only other member of the court to address the issue, essentially agreed with this approach.

23 LaForest J. was clearly moved to these conclusions by the importance of having a fully informed adjudication of the issues before the court. At 1016, he placed at the centre of his reasoning a passage from Taggart J.A. in *B.C.G.E.U. v. British Columbia (Industrial Relations Council)* (1988), 26 B.C.L.R. (2d) 145 (B.C. C.A.), at 153 that he adopted without reservation. It makes the point graphically:

> The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

24 Since *Paccar*, the fundamental values of maintaining tribunal impartiality and facilitating a fully informed adjudication have been employed in a number of cases — separately or together — to underpin decisions on this issue. Some have followed *Northwestern Utilities*. Some have followed *Paccar*. In other cases, the courts have simply given full standing as a matter of course to tribunals to defend their decisions without even broaching, let alone discussing, the limits of their standing. In a thoughtful article on the subject, Laverne Jacobs and Thomas Kuttner cite as two examples of this method *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.) and *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, [2001] 1 S.C.R.

221 (S.C.C.). See Laverne A. Jacobs and Thomas S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing before the Courts" (2002) 8 Can. Bar. Rev. 616.

25 Against this rather clouded jurisprudential backdrop, I think the analysis of the scope of standing to be accorded to the Commissioner in this case must begin with the relevant legislation. Section 9(2) of the *Judicial Review Procedure Act* reads:

> For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.

26 The ordinary meaning of this provision gives the administrative tribunal the right to be a party to the proceeding if it chooses to do so. It leaves to the tribunal rather than the court the decision of whether to become a party to the application for judicial review.

27 However, once a party, the scope of a tribunal's standing is a subject not addressed by the legislation. Although the legislature could have pre-empted the debate by spelling out precise limits to a tribunal's participation, it has chosen not to do so. The legislation's silence necessarily leaves this issue to the court's discretion, as part of its task of ensuring that its procedures serve the interests of justice. Where the issue arises, the court must exercise this discretion to determine the scope of standing to be accorded to a tribunal that is a party to a judicial review proceeding.

28 This approach to s. 9(2) was well described by the Divisional Court in *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.* (1985), 51 O.R. (2d) 481 (Ont. Div. Ct.). In that case, judicial review was sought of a decision of the Ontario Labour Relations Board on the basis that the draft decision by the hearing panel was presented to the full Board for discussion of policy, thereby violating the principle of natural justice.

29 The applicant objected to counsel for the Board making submissions about its own procedure. However, the Divisional Court unanimously rejected this argument. It found that s. 9(2) entitled the Board to be a party to the proceedings and it then exercised its discretion to permit Board counsel full latitude to answer the submissions of the applicant.

30 When the case was appealed to the Court of Appeal for Ontario and then to the Supreme Court of Canada, Board counsel was again permitted to argue fully. In neither court was the scope of standing raised, let alone commented upon.

31 In the decision under appeal here, the Divisional Court adopted the approach used in *Consolidated Bathurst*, *supra*. It held that the scope of standing accorded to the Commissioner is best left to judicial discretion. In exercising that discretion to permit the Commissioner to respond fully to the applicant, the court appeared to be most moved by the desire to avoid denying itself legitimate, helpful submissions. On this basis, the Children's Lawyer's motion to deny or limit the Commissioner's standing was dismissed.

32 In this court, all parties took similar positions, at least at the broadest level of generality. They all argued that the court should approach the scope of standing issue contextually and should avoid the formalism of fixed rules that turn on whether the question before the court is one of jurisdiction, natural justice, or the applicable standard of review. They all urged the same "pragmatic and functional" label for this approach but disagreed on the considerations that should inform the court's decision.

33 As I have said, s. 9(2) of the *Judicial Review Procedure Act* entitles the administrative tribunal to be a party to the proceedings but leaves to the court's discretion the scope of its standing. Given the wide variety of administrative tribunals and types of decisions that are today subjected to judicial review, I agree that the court should exercise this discretion paying attention to the context presented in the particular application. However, I think it is both unnecessary and confusing to use the "pragmatic and functional" label. This phrase has developed a strong association with the quite different task of determining the proper standard of review and with the well-known factors embodied in that approach, which will not automatically be useful in determining the scope of standing.

34 However, I agree with the parties that a context-specific solution to the scope of tribunal standing is preferable to precise *a priori* rules that depend either on the grounds being pursued in the application or on the applicable standard of review. For

example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *Bransen Construction Ltd. v. C.J.A., Local 1386* (2002), 249 N.B.R. (2d) 93 (N.B. C.A.) at para. 32.

35 Nor do I think cases like *Northwestern* and *Paccar*, *supra*, dictate the use of precise rules of this sort. Particularly in light of the recent evolution of administrative law away from formalism and towards the more flexible practical approach exemplified by *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), I think these cases are best viewed as sources of the fundamental considerations that should inform the court's discretion in the context of a particular case. Resolving the scope of standing on this basis rather than by means of a set of fixed rules is likely to produce the most effective interplay between the array of different administrative decision makers and the courts.

36 If this is so, what are the important considerations that should guide the court in the exercise of its discretion? In my view, the two most important considerations are those reflected in the two seminal cases on this issue: *Paccar* and *Northwestern Utilities*, *supra*.

37 In *Paccar*, LaForest J. articulated the importance of having a fully informed adjudication of the issues before the court. Because of its specialized expertise, or for want of an alternative knowledgeable advocate, submissions from the tribunal may be essential to achieve this objective. In these circumstances, a broader standing adds value to the court proceedings. Because sound decision making is most likely to come from a fully informed court, this consideration will frequently be of most importance. Professor Mullan put it this way at Mullan, *supra*, at 459:

> Under a discretionary approach, the principal question should probably be whether the participation of the tribunal is needed to enable a proper defence or justification of the decision under attack. If that decision will almost certainly be presented adequately by the losing party at first instance or by some other party or intervenor such as the attorney general, there may be no need for tribunal representation irrespective of the ground of judicial review or appeal. On the other hand, where no one is appearing to defend the tribunal's decision, where the matter in issue involves factors or considerations peculiarly within the decision maker's knowledge or expertise, or where the tribunal wishes to provide dimensions or explanations that are not necessarily going to be put by a party respondent, then there should clearly be room for that kind of representation to be allowed within the discretion of the reviewing or appellate court. Indeed, in at least some instances, a true commitment to deference and restraint in intervention would seem to necessitate it.

38 In *Northwestern Utilities*, *supra*, Estey J. articulated the other significant consideration, namely the importance of maintaining tribunal impartiality. This obviously matters to the parties to the decision, particularly if the application results in the matter being referred back to the tribunal. More broadly however, in future cases before the tribunal where similar interests arise, or where the tribunal serves a defined and specialized community, there may be a risk that full-fledged participation by a tribunal as an adversary in a judicial review proceeding will undermine future confidence in its objectivity.

39 This risk may be enhanced where the tribunal's role is not to evaluate the interests of an applicant against a legislative standard but is to resolve private disputes between two litigants where the perception of favouring one side over the other may be felt more acutely.

40 I also agree with Jacobs and Kuttner, *supra*, that the nature of the issue under review may affect the apprehension of partiality arising from the unconstrained participation of the tribunal before the court. For example, if the question is whether the tribunal has treated a particular litigant fairly, impartiality may suggest a more limited standing than if the allegation is that the structure of the tribunal itself compromises natural justice.

41 Although these two considerations are primary and will have to be weighed and balanced in almost every case where the scope of a tribunal's standing is in issue, there will undoubtedly be other considerations that will be relevant in particular cases.

42 In this case the Children's Lawyer raises such a consideration. She says that the tribunal's standing should not extend to defending its decision on a ground that it did not rely on in the decision under review. The argument is that this "bootstrapping" undermines the integrity of the tribunal's decision-making process. It is akin to the impartiality concern in that a tribunal seeking to justify its decision in court on an entirely different basis than that offered in its reasons may well cause those adversely affected to feel unfairly dealt with. However, it goes beyond impartiality. The importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to support its decision. Where a tribunal takes such a course, this will become an important consideration in determining the extent of the tribunal's standing.

43 Ultimately, if the legislation does not clearly articulate the tribunal's role, the scope of standing accorded to a tribunal whose decision is under review must be a matter for the court's discretion. The court must have regard in each case, to the importance of a fully informed adjudication of the issues before it and to the importance of maintaining tribunal impartiality. The nature of the problem, the purpose of the legislation, the extent of the tribunal's expertise, and the availability of another party able to knowledgeably respond to the attack on the tribunal's decision, may all be relevant in assessing the seriousness of the impartiality concern and the need for full argument.

44 The last of these factors will undoubtedly loom largest where the judicial review application would otherwise be completely unopposed. In such a case, the concern to ensure fully informed adjudication is at its highest, the more so where the case arises in a specialized and complex legislative or administrative context. If the standing of the tribunal is significantly curtailed, the court may properly be concerned that something of importance will not be brought to its attention, given the unfamiliarity of the particular context, something that would not be so in hearing an appeal from a lower court. In such circumstances the desirability of fully informed adjudication may well be the governing consideration.

45 In addition to fully informed adjudication and tribunal impartiality, there may be other considerations that arise in particular cases, as the appellant argues here. In the end however, the court must balance the various considerations in determining the scope of standing that best serves the interests of justice.

46 It remains to apply these considerations to this case to assess whether the Divisional Court erred in exercising its discretion to dismiss the appellant's attempt to deny or limit the standing of the Commissioner in these judicial review proceedings.

47 Several aspects of this case clearly demonstrate the importance of full tribunal participation in the judicial review to ensure a fully informed adjudication of the issues.

48 From the beginning, the requester has played no part in the proceedings. As the Divisional Court noted, it would be left with only one party, the Children's Lawyer, if the tribunal were denied standing. There would be nobody charged with defending the decision under review, a problem not solved by the appointment of the *amicus*, whose appointment was for the purpose of making the submissions it deemed appropriate. Traditionally, an *amicus* does not act on behalf of any party nor is it meant to defend the position of the tribunal.

49 As well, the specialized nature of the statutory scheme administered by the Commissioner has long been recognized by this court. See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (Ont. C.A.), at 472 -73. The issues raised in the judicial review require the court to understand two specific provisions in that scheme (s. 13 relating to the advice of a public servant and s. 19 relating to Crown litigation privilege). With full standing, the Commissioner's expert familiarity with the statute provides an important assurance of a fully informed adjudication. This is not a role that an *amicus* could be expected to fill.

50 On the other hand, both the nature of the tribunal here and the nature of the issues suggest that the impartiality consideration is not a significant brake on full standing for the Commissioner.

51 Under *FIPPA*, the Commissioner sits on the appeal from a decision of the head of a government institution about whether the legislation requires disclosure of records to the public at the behest of a requester. On appeal, the head is not defending his or her private interest, or that of the institution, but his or her decision interpreting the legislation and applying it to the circumstances. Nor is the requester seeking private access but access for the public. *FIPPA* provides that the process used by the Commissioner to decide the appeal is inquisitorial not simply adversarial. All of this shifts the nature of the tribunal somewhat away from a court-like model and mutes the impartiality concern.

52 Similarly the issues raised by this judicial review application are fundamentally ones of statutory interpretation. Although they arise in a particular factual context, they are not applicable only to the Children's Lawyer and the requester. If the Commissioner were to address the court on these issues, its ability to act impartially in future cases, even ones involving this government head and this requester, would not be adversely affected any more than its original decision on the same issues could be said to carry that consequence.

53 The final consideration in this case is the importance of preserving the integrity of the administrative tribunal's decision making. The appellant argues that this is undermined if the Commissioner is given standing to defend her decision in court on an entirely different basis than that offered in her reasons for decision. There is no doubt that this is a valid consideration. The only question is whether in this case it warrants curtailing the scope of the Commissioner's standing.

54 In my view it does not. There is no doubt that the Commissioner's original decision that the second branch of s. 19 of *FIPPA* did not provide the Children's Lawyer with a basis to refuse to disclosure rested on her conclusion that this provision offered the Children's Lawyer no protection from the individual she represents. It did not rest on an express finding that the Children's Lawyer was not "Crown counsel" in the circumstances. In the Divisional Court that is the argument the Commissioner sought to put in defence of its decision.

55 Clearly an administrative tribunal must strive to provide fully reasoned decisions. However I do not think the absence of the "Crown counsel" argument in the decision should prevent the Commissioner from advancing it to the court on judicial review. It is not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it. If the Children's Lawyer was the legal representative of the requester in the proceedings for which records are sought (the reason relied upon by the Commissioner in her original decision) it could not have been Crown counsel in those proceedings.

56 Moreover, the Children's Lawyer was required by this section of *FIPPA* to positively establish that it was Crown counsel in order to take advantage of the protection offered by the second branch of s. 19. It appears that the Children's Lawyer did not seek to do so before the Commissioner either by evidence or argument. The result was that the decision under review was simply silent on the question.

57 Finally, if the Commissioner's standing were to preclude her from making this argument there would be no guarantee that the Divisional Court would hear it from anyone else with a resulting risk to a fully informed adjudication.

58 It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis.

59 In summary, I conclude that allowing the Commissioner full standing in the judicial review proceedings assures a fully informed adjudication of the issues without significantly compromising her impartiality or undermining the integrity of her decision-making process. The Divisional Court did not err in exercising its discretion to refuse the appellant's attempt to preclude or limit the Commissioner's standing.

60 Before leaving this appeal, I would add a word about procedure. Where a party to a judicial review application seeks to limit the standing of the administrative tribunal, it should do as the appellant did here. It should serve a notice of motion saying why, so that the issue can be properly joined. Although this may require additional factums and perhaps additional material, it ought not normally require a separate preliminary hearing. Submissions on this issue can be made at the hearing on the merits of the application. If the decision on the scope of standing is reserved, the written and oral submissions of the tribunal on the

merits that go beyond the scope of standing ultimately permitted will, of course, be disregarded. With this approach, the scope of standing issue ought not to unduly complicate judicial review proceedings.

61 Finally, I think it important that if an administrative tribunal seeks to make submissions on a judicial review of its decision, it pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary.

62 I hasten to add that before us all counsel were exemplary. We are grateful for their able submissions.

63 The appeal is dismissed. No party sought costs, and none are ordered.

***McMurtry C.J.O.*:**

I agree.

***Blair J.A.*:**

I agree.

Appeal dismissed.

2019 BCCA 406
British Columbia Court of Appeal

C.S. v. British Columbia (Workers' Compensation Appeal Tribunal)

2019 CarswellBC 3397, 2019 BCCA 406, 313 A.C.W.S. (3d) 290,
31 B.C.L.R. (6th) 1, 59 C.C.E.L. (4th) 1, 64 Admin. L.R. (6th) 163

C.S. (Appellant / Petitioner) And WCAT, WCB, C.K., L.K. and the Attorney General of British Columbia (Respondents / Respondents)

Bennett, MacKenzie, Dickson JJ.A.

Heard: March 14, 2019
Judgment: November 19, 2019
Docket: Vancouver CA45345

Proceedings: affirming *Stein v. British Columbia (Workers' Compensation Appeal Tribunal)* (2018), 2018 CarswellBC 1190, 2018 BCSC 778, A. Saunders J. (B.C. S.C.)

Counsel: C.S., Appellant, for herself
M. Bennett, for Respondent, Worker's Compensation Appeal Tribunal
B. Parkin, J. Mehat, for Respondent, Workers' Compensation Board
C.K., for himself
L.K., Respondent, for herself
K.A. Wolfe, for Respondent, Attorney General of British Columbia

Subject: Civil Practice and Procedure; Constitutional; Public; Employment; Labour; Human Rights; Occupational Health and Safety

Headnote

Constitutional law --- Procedure in constitutional challenges — Miscellaneous

Applicant cardiology technologist, suffering from bi-polar disorder and finding work stressful, reached written accommodation agreement with employer doctor that she would not be required to perform more than eight stress tests per day — Applicant also alleged that employer verbally agreed that she would not be required to perform five stress tests in row — Applicant did not return to work after day in which she performed five stress tests in morning and another in afternoon — Applicant's application to Workers' Compensation Board for benefits, based on claimed workplace mental health injury arising from breach of alleged further accommodation agreement and bullying by doctor's office manager wife and by co-worker, was denied — Applicant's appeals, ultimately to Workers' Compensation Appeal Tribunal, were dismissed — Applicant's application for judicial review, including claim under s. 15 of Canadian Charter of Rights and Freedoms, was dismissed — Applicant appealed — Appeal dismissed — Application judge made no reviewable error in finding that applicant raised constitutional challenge for first time on judicial review — Application judge's finding that applicant's references to discriminatory treatment of mental disorder injuries before Tribunal did not amount to formal constitutional challenge was available on record and unassailable on appeal — Application judge acted on correct principles and gave sufficient weight to all relevant considerations in exercising discretion not to hear constitutional challenge raised for first time on judicial review — Application judge carefully explained why highly contextual nature of weighty constitutional claim should be decided on properly developed record by Board in first instance — Applicant's claim that she could not, as self-represented litigant, be expected to bring explicit Charter challenge in Board proceedings could not be accepted given publicly available information about such procedures.

Labour and employment law --- Workers' compensation legislation — Judicial review — Miscellaneous

Applicant cardiology technologist, suffering from bi-polar disorder and finding work stressful, reached written accommodation agreement with employer doctor that she would not be required to perform more than eight stress tests per day — Applicant

also alleged that employer verbally agreed that she would not be required to perform five stress tests in row — Applicant did not return to work after day in which she performed five stress tests in morning and another in afternoon — Applicant's application to Workers' Compensation Board for benefits based on claimed workplace mental health injury, arising from breach of alleged further accommodation agreement and bullying by doctor's office manager wife and by co-worker, was denied — Applicant's appeals, ultimately to Workers' Compensation Appeal Tribunal, were dismissed — Applicant's application for judicial review, including claim under s. 15 of Canadian Charter of Rights and Freedoms, was dismissed — Applicant appealed — Appeal dismissed — Application judge made no reviewable error in finding that, before Tribunal, applicant did not argue that employer repeatedly and intentionally breached accommodation agreement and so he did not err in exercising discretion not to engage with this new issue — As applicant was now attempting to raise, for first time, applicability of Human Rights Code, it was inappropriate to consider issue — Application judge identified correct standard of review and applied it correctly to Tribunal decision, in which factual findings were amply supported by evidence and entitled to deference — Tribunal found that alleged agreement did not exist and so was not breached, that doctor's wife spoke to applicant encouragingly rather than abusively on last day, and that co-worker did not behave in intimidating, humiliating or degrading way — Accepting such factual underpinnings, Tribunal's conclusions were not patently unreasonable — Applicant did not demonstrate any breach of procedural fairness.

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Applicant cardiology technologist, suffering from bi-polar disorder, was accommodated by employer doctor but did not return to work after day in which she performed five stress tests in morning and another in afternoon — Applicant's application to Workers' Compensation Board for benefits based on claimed workplace mental health injury, arising from breach of alleged accommodation agreement and bullying by doctor's office manager wife and by co-worker, was denied — Applicant's appeals, ultimately to Workers' Compensation Appeal Tribunal, were dismissed — Applicant's application for judicial review was dismissed — Applicant appealed — Appeal dismissed — Given negative impact of personal identification for applicant, doctor, and his wife, and minimal impairment of open process of judicial proceedings by replacing names with initials, salutary effects of initialization order outweighed its deleterious effects — Sealing order sought by applicant would be granted only over her medical orders, as they related to her mental health and their publication posed serious risk to important public interest in confidentiality of such records — Such limited sealing order would not unduly limit public interest in open and accessible court proceedings.

Administrative law --- Practice and procedure — Judicial review — Evidence

Applicant cardiology technologist, suffering from bi-polar disorder, was accommodated by employer doctor with written agreement limiting number of stress tests she would be required to perform in day to eight with alleged verbal agreement for even fewer — Applicant did not return to work after day in which she performed five stress tests in morning and another in afternoon — Applicant's application to Workers' Compensation Board for benefits based on claimed workplace mental health injury, arising from breach of alleged further accommodation agreement and bullying by doctor's office manager wife and by co-worker, was denied — Applicant's appeals, ultimately to Workers' Compensation Appeal Tribunal, were dismissed — Applicant's application for judicial review, challenging factual findings and raising claim under s. 15 of Canadian Charter of Rights and Freedoms, was dismissed — Applicant appealed — Appeal dismissed — Applicant applied to adduce fresh evidence, consisting of various contemporaneous emails between her and her mother alluding to doctor's failure to abide by accommodation agreement and calendars reflecting her workload at time — Proposed fresh evidence did not satisfy requirements for admission as, even if it could be considered credible and relevant, it was previously available and was not adduced before Tribunal or application judge — Applicant's other material inserted in appeal book that was not before judge would also not be admitted as fresh evidence.

APPEAL by applicant from judgment reported at *Stein v. British Columbia (Workers' Compensation Appeal Tribunal)* (2018), 2018 BCSC 778, 2018 CarswellBC 1190 (B.C. S.C.), dismissing her application for judicial review from denial of workers' compensation benefits arising from alleged workplace mental health injury.

***Dickson J.A.*:**

1 The self-represented appellant, C.S., appeals from an order dismissing her petition for judicial review. The underlying proceedings concerned her claim for statutory benefits under s. 5.1 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 [*Act*], which provides for compensation for a mental disorder where certain conditions are met. C.S.'s claim was based on

allegations that she was bullied and harassed at work and had a mental breakdown precipitated by her employer's breach of an accommodation agreement. The Workers' Compensation Board ("WCB") denied the claim and the WCB Review Division ("WCBRD") and Workers' Compensation Appeal Tribunal ("WCAT") dismissed C.S.'s appeals, with the latter finding that the claim did not meet the requirements of the *Act* or Policy item C3-13.00.

2 C.S. brought a petition for judicial review of the WCAT decision, together with an application for a declaration that s. 5.1 of the *Act* and Policy item C3-13.00 contravened her s. 15 equality rights under the *Charter*. Justice Saunders refused to hear the *Charter* challenge because, he found, C.S. raised it for the first time in the judicial review rather than in the administrative proceedings, as intended by the Legislature. He went on to dismiss the petition on the basis that the WCAT decision was not patently unreasonable or procedurally unfair.

3 On appeal, C.S. contends that the judge should have heard her *Charter* challenge and that he erred in dismissing her petition. Among other things, she asks this Court to determine the *Charter* challenge and find that she suffered a compensable mental health injury within the meaning of the *Act*. For the reasons that follow, I would dismiss the appeal.

Background

4 C.S. is a cardiology technologist. The respondent, Dr. C.K., is a retired cardiologist. His wife, the respondent L.K., was the office manager of Dr. C.K.'s private practice.

5 In January 2012, C.S. began working part-time as a cardiology technologist in Dr. C.K.'s office. Her duties included performing stress tests and electrocardiograms on patients. A stress test is a cardiologic test that measures the heart's ability to respond to external stress in a controlled, clinical environment.

6 C.S. suffers from bi-polar disorder. She found her job stressful and obtained an accommodation from her employer, confirmed in writing, that she would not be required to perform more than eight stress tests per day (the "Accommodation Agreement"). Throughout the various proceedings C.S. maintained that her employer also agreed verbally that she would not be required to perform five stress tests in a row (the "No-Five-in-a-Row Alleged Agreement"), but Dr. C.K. and L.K. denied granting any such accommodation. From C.S.'s perspective, the existence of the No-Five-in-a-Row Alleged Agreement remains a point of contention which has never been satisfactorily resolved.

7 On March 13, 2013, C.S. was scheduled to perform five stress tests in the morning and required to report the results of the tests to the patients. She asked that one of the morning appointments be rescheduled to the afternoon, but L.K. did not agree to the request. C.S. performed the five morning stress tests and another in the afternoon, but when she went home she had what she described as a breakdown. Thereafter, she stopped working at Dr. C.K.'s office.

8 On March 18, 2013, C.S. applied to the WCB for statutory benefits based on a mental disorder under s. 5.1 of the *Act*. In her application, C.S. claimed that she developed a workplace mental health injury on March 13, 2013 as a result of the stress of having to conduct the five stress tests in breach of the No-Five-in-a-Row Alleged Agreement and having to report the results to patients, as well as the cumulative stress of bullying by L.K. and a co-worker, D.

Statutory Scheme

9 The *Act* provides for a comprehensive no-fault insurance scheme under which the WCB pays compensation for personal injury or death arising out of and in the course of a worker's employment. The WCB is an expert administrative body which is responsible for adjudicating and administering benefits to workers and their surviving dependents. The *Act* defines eligibility for compensation and its interpretation is aided by policies set by the board of directors and published in the *Rehabilitation Services and Claims Manual I and II*. Section 96(1) of the *Act* grants to the WCB "exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law" arising under Part 1 of the *Act*. Section 99(2) provides that the WCB must make its decision based upon the merits and justice of a case, but that, in doing so, it must apply a policy that is applicable to that case.

Internal Appeal Process

10 The statutory scheme includes an internal appeal process in relation to claims for compensation. The first level of appeal is to the WCBRD under sections 96.2 to 96.5 of the *Act*. As Justice Harris explained in *Denton v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 403 (B.C. C.A.); leave to appeal ref'd [2018] S.C.C.A. No. 12 (S.C.C.), the WCBRD has jurisdiction to decide *Charter* issues and it will not apply a legislative provision or policy that it finds to be in breach of the *Charter*. He also noted that the WCBRD's procedures for addressing issues under the *Charter* and the *Human Rights Code*, R.S.B.C. 1996, c. 120 [*HRC*] are posted on the WorkSafeBC website.

11 WCAT is a separate and independent administrative body established by s. 232 of the *Act*. As the final level of appeal within the statutory scheme, WCAT adjudicates appeals from many of the decisions made by the WCBRD. However, WCAT has a limited jurisdiction and, unlike the WCBRD, it is precluded by ss. 45 and 46.3 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] from considering questions relating to the *Charter* or the *HRC*. As Justice Harris observed in *Denton*, this results in a cumbersome process by which *Charter* challenges can be brought before the WCBRD and then judicially reviewed, with the petition for judicial review being heard, if necessary, in conjunction with a separate judicial review of a WCAT decision.

12 Pursuant to s. 250(1) of the *Act*, WCAT may consider all questions of fact and law that arise in an appeal, but it is not bound by legal precedent. Pursuant to s. 251(1), WCAT may refuse to apply a policy if it is so patently unreasonable that it cannot be supported by the *Act* and its regulations, in which case a process of suspension and referral is to be applied.

Compensation for Mental Disorder

13 Section 5.1 of the *Act* sets out the conditions that must be met for a mental disorder to be compensated. Pursuant to ss. 5.1(1)(a)(i) and (ii), a worker is entitled to compensation for a mental disorder arising out of and in the course of their employment where the mental disorder is either a reaction to a traumatic event or predominantly caused by a significant workplace stressor. Pursuant to s. 5.1(1)(b), the mental disorder must be diagnosed by a psychologist or psychiatrist as a mental or physical condition described in the most recent version of the Diagnostic and Statistical Manual of Mental Disorders. Pursuant to s. 5.1(1)(c), a mental disorder arising out of and in the course of employment is not compensable if it is caused by a decision of the employer relating to the worker's employment. Section 5.1(1)(c) is commonly referred to as the "Labour Relations Exclusion".

14 Section 5.1(1) of the *Act* provides:

> 5.1 (1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
>
> (a) either
>
> (i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
>
> (ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,
>
> (b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
>
> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

15 Policy item C3-13.00 includes five points for adjudicators to consider in determining whether a worker's mental health disorder is compensable under s. 5.1 of the *Act*:

> i. Does the worker have a diagnosed mental disorder?
>
> ii. Was there an identifiable event(s) or work-related stressor(s)?
>
> iii. Was the event(s) "traumatic" or work-related stressor(s) "significant"?
>
> iv. Was the mental disorder caused by the event(s) or work-related stressor(s) in that it was a reaction to a traumatic event(s) arising out of and in the course of the employment or predominantly caused by a significant work-related stressor(s) arising out of and in the course of the worker's employment?
>
> v. Was the mental disorder caused by a decision of the employer relating to the worker's employment?

16 Policy item C3-13.00 also deals with the meaning of "traumatic", "significant" and "predominant cause":

> ... a "traumatic" event is an emotionally shocking event, which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment...
>
> A work-related stressor is considered "significant" when it is excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment.
>
> Interpersonal conflicts between the worker and his or her supervisors, coworkers or customers are not generally considered significant unless the conflict results in behaviour that is considered threatening or abusive.
>
> . . .
>
> Predominant cause means that the significant work-related stressor, or cumulative series of significant work-related stressors, was the primary or main cause of the mental disorder.

Procedural History

WCB Decision

17 By decision letter dated April 26, 2013, a WCB case manager denied C.S.'s claim for statutory benefits. He accepted she was distressed that her employer decided not to adjust her work schedule on March 13, 2013, but found there was no violation of the Accommodation Agreement and the decision fell within the Labour Relations Exclusion under s. 5.1(1)(c) of the *Act*. He also found that the workplace conflict in question was not a "traumatic event" or a "significant workplace stressor" under Policy item C3-13.00. In particular, he stated, he could not conclude that the interpersonal conflict of which C.S. complained resulted in behaviour that was threatening or abusive.

WCBRD Decision

18 C.S. appealed the WCB decision to the WCBRD. She requested an oral hearing, but the WCBRD refused her request and conducted the review based on written submissions. Among other things, C.S. submitted that the employer failed to follow the No-Five-In-A-Row Alleged Agreement and she asked that the claim be adjudicated under Policy item C3-16.00, not Policy item C3-13.00, contending that the WCB decision was based on the wrong policy. Policy item C3-16.00 refers generally to personal injury claims and provides that pre-existing conditions may be compensable if aggravated by an employment-related incident or trauma.

19 On November 15, 2013 C.S. wrote a letter to the WCBRD. In the letter, among other things she stated:

> ... no distinction between physical and mental is made (both equal treatment-non constitutional otherwise).

20 On January 28, 2014, the WCBRD upheld the WCB decision. The review officer held that claims for mental disorders are to be adjudicated under Policy item C3-13.00 whether or not there is a pre-existing mental disorder, that C.S.'s claims were covered by the Labour Relations Exclusion and that the evidence failed to establish C.S. was exposed to a traumatic event, a significant work-related stressor or a cumulative series of such stressors. He also held that C.S.'s pre-existing condition did not fall within other categories of compensable claims.

WCAT Decision

21 Next, C.S. appealed the WCBRD decision to WCAT. On July 25, 2014, she and several others testified at an oral hearing conducted in the WCAT proceeding. C.S. argued that mental disorders should be treated "just as physical injury" and that "[i]t is wrong how the laws stand rights now and quite discriminatory towards mental disorders and the seriousness of them". She also asserted that she could prove the employer was misleading about the "real" No-Five-In-A-Row Alleged Agreement and failed to address the ongoing conflict with D appropriately.

22 On September 22, 2014, Vice Chair Murray dismissed C.S.'s appeal and confirmed the WCBRD decision. In summary, she concluded that C.S. suffered an aggravation of her pre-existing mental disorder and that the incidents of interpersonal conflict in question fell into three categories of work-related stressors: stressors associated with the events of March 13, 2013, stressors related to C.S.'s belief that the employer failed to handle D's behaviour appropriately and stressors arising from the conflict with D.

23 With respect to the events of March 13, 2013, the Vice Chair accepted Dr. C.K. and L.K.'s evidence that the No-Five-In-A-Row Alleged Agreement did not exist and L.K.'s evidence that she intended to be encouraging when she said "you can do it" to C.S. in denying her request to reschedule one of the morning stress test appointments. She reasoned that the March 13, 2013 scheduling decision fell within the Labour Relations Exclusion and held that L.K.'s conduct did not amount to employer misconduct which removed the events from its scope. She held further that any stressors associated with C.S.'s belief that the employer failed to handle D's behaviour appropriately would also fall within the Labour Relations Exclusion.

24 As to stressors arising from the conflict with D, the Vice Chair noted that interpersonal conflict is considered a "significant" stressor only when there is an element of abuse or threat involved in the impugned behaviour. She reviewed the evidence and concluded that D's behaviour, while rude and thoughtless, did not constitute a "series of significant workplace stressors":

> [136] While the worker interpreted Ms. D's comments and behaviour as bullying and harassment, I am unable to reach the same conclusion. Before August 24, 2012, I have no hesitation in characterizing Ms. D's behaviour as likely "bossy" and overbearing at time, and she was sarcastic and/or thoughtless in some of her comments. Nonetheless, even if Ms. D's conduct can be labeled as "bossy", being "bossy" is not, in my view, equivalent to her being a bully. She clearly was trying to get a message across that she had little time for the worker and she thought the worker was wasting her and the employer's time. However, I do not find that her comments, tone and gestures were of an abusive or threatening nature, as those terms were earlier defined, and they were not deliberately intended to or reasonably ought to be known would intimidate, humiliate or degrade the worker.

25 After the WCAT decision was issued, C.S. filed two applications for reconsideration. The first was put on hold when she failed to respond to correspondence from WCAT. The second was put on hold pending resolution of her petition for judicial review.

Judicial Review - [Stein v. British Columbia (Workers' Compensation Appeal Tribunal)] 2018 BCSC 778 (B.C. S.C.)

26 In the Court below, C.S. sought a declaration that s. 5.1 of the *Act* and Policy item C3-13.00 contravened her s. 15 *Charter* rights by subjecting those who suffer from work-related mental disorders to a more stringent test for compensation than the test applied to those who suffer from physical injuries. In support of her *Charter* challenge, C.S. quoted extensively from

Plesner v. British Columbia Hydro & Power Authority, 2009 BCCA 188 (B.C. C.A.), in which a majority of this Court held that the predecessor to s. 5.1 of the *Act* read together with then Policy item 13.30 contravened s. 15 of the *Charter*. She also contended that the WCAT decision was patently unreasonable and procedurally unfair and sought various remedies, including an order setting the decision aside, a change to WCB legislation and a finding that L.K. was not wholly truthful in her testimony before WCAT.

27 After summarizing the history of the case, the statutory framework and the applicable standard of review, the judge identified the s. 15 *Charter* challenge as the primary issue from C.S.'s perspective. He acknowledged that C.S. referred to allegedly discriminatory treatment of mental disorder injuries in her November 15, 2013 letter and in her submissions before the WCBRD and WCAT, but found she was raising the constitutionality of s. 5.1 of the *Act* and Policy item C3-13.00 for the first time on judicial review:

> [47] The constitutionality of these provisions was introduced into these proceedings for the first time on this Petition. [C.S.] had previously referred to discriminatory and unequal treatment of mental disorder injuries, as compared to physical injuries, and to the relative ease with which physical injury claims are adjudicated, in written materials and submissions before the Review Division and WCAT and in her testimony at the WCAT hearing; but there was no explicit challenge brought under the *Charter*, at any level. For that reason, the issue of constitutionality was not addressed by either the Review Division, or WCAT.
>
> [48] As I have noted, [C.S.]'s November 15, 2013 letter to the Review Division did make specific reference to the fact the Board's Policy item #C3-16.00 made "no distinction between physical and mental ... non constitutional otherwise". But this comment was presented as justification for her argument that her claim ought to be considered under #C3-16.00 instead of Policy 13.00, not as a *Charter* challenge to the latter policy or to s. 5.1 of the *Act*.

28 The judge noted that courts have a discretion to consider new matters raised for the first time on judicial review. He also noted that the Attorney General provided some evidence relating to the legislative history of the *Act*. However, he stated that he had "no assurance that the record before me is complete" and that, as a general rule, the discretion to consider new issues on judicial review should not be exercised, particularly in connection with alleged *Charter* breaches in WCB compensation claims.

29 The judge went on to distinguish this case from *Plesner* and declined to exercise his discretion to engage with C.S.'s *Charter* challenge. In explaining his decision, he cited the broad scope of the private clause under s. 96 of the *Act* and the absence of a clear evidentiary record or the WCB's views in respect of the *Charter* issues. He also cited this Court's analysis in *Denton* and the tangential relationship of C.S.'s *Charter* concerns to the Vice Chair's reasoning in the WCAT decision.

30 After declining to deal with the *Charter* challenge, the judge turned to whether the WCAT decision was patently unreasonable. He concluded that it was not. In doing so, he found that C.S. did not advance her claim before the WCB or WCAT on the basis of cumulative breaches of the Accommodation Agreement, that consideration of the Accommodation Agreement would not have changed the result of the WCAT decision in any event and that WCAT's factual findings were supported by the evidence:

> [64] First, [C.S.] submits that WCAT failed to consider the cumulative effect of the employer's breaches of her "no more than eight stress tests a day" accommodation. That is an entirely new issue; it is simply not how [C.S.]'s compensation claim was advanced before the Review Division or WCAT. Furthermore, given the Vice Chair's application of the Labour Relations Exclusion in the WCAT Decision, and given her findings as to the employer's credibility, it seem plainly apparent that any explicit consideration of that accommodation could have made no difference to the result.
>
> [65] Second, [C.S.] attacks a number of the WCAT Decision's findings of fact, including in particular: the credibility findings, the issue of whether there had been a "no five in a row" accommodation agreed to, the issue of whether the co-worker had knowledge of [C.S.]'s bipolar disorder, and the characterizations of the employer's and the co-worker's conduct. These findings were all supported by evidence, and accordingly must be given deference.

31 The judge also found that many of C.S.'s other arguments were merely attempts to reargue her case and that her submission that the WCAT decision was based on no medical or psychiatric opinion evidence was simply wrong (paras. 66-68). He found further that there was no procedural unfairness. In making this finding, he rejected C.S.'s complaint that the WCB did not interview her, noted the existence of the typed summary and commented that C.S. testified orally at the WCAT hearing (para. 69). He went on to comment that C.S.'s plea for changes to the WCB legislation was a matter for the Legislature, not a matter for the courts (para. 70).

32 Based on all of the foregoing, the judge dismissed C.S.'s petition for judicial review.

On Appeal

33 On appeal, C.S. advances many arguments regarding errors that she contends the WCB, WCAT and the judge committed. Her arguments reduce to the following issues:

a) What is the extent of WCAT's standing on the appeal?

b) Did the judge err in refusing to consider C.S.'s s. 15 *Charter* challenge regarding the validity of s. 5.1 of the Act and Policy item C3-13.00? If so, how did he err and should this Court consider the *Charter* challenge on appeal?

c) Did the judge err in refusing to consider C.S.'s arguments regarding the cumulative effect of breaches of the Accommodation Agreement and in concluding that consideration of the issue would have made no difference to the result of the WCAT decision?

d) Did the judge err in failing to recognize that the WCB and WCAT overlooked and failed to apply the *HRC*?

e) Did the judge err in finding the WCAT decision was not patently unreasonable because WCAT failed to recognize that C.S.'s injury arose from a "cumulative series of significant work-related stressors" and erroneously held that breaches of the Accommodation Agreement did not warrant compensation by virtue of the Labour Relations Exclusion?

f) Did the judge err in finding that the WCAT decision was not procedurally unfair because C.S. was not granted an oral interview by the WCB?

Preliminary Applications

Applications for Initialization and Sealing Orders

34 Shortly before the hearing of the appeal, C.S. filed a motion seeking an initialization order and a sealing order, together with affidavit materials. She submits that an initialization order is necessary to protect her health and relies on two letters from medical practitioners in support of the application. She also submits the same considerations justify a sealing order over the entire court file. In supplementary submissions, she describes anonymity as "imperative" and relies on additional medical information in support.

35 Dr. C.K. and L.K. also sought an initialization order. They submit that such an order is warranted because it would prevent further unwanted and unfair publicity. In response to C.S.'s supplementary submissions, they oppose her request for anonymity and draw our attention to two recent related decisions on the point in the court below.

36 Initialization orders provide anonymity by preventing litigants and others from being personally identified in reasons for judgment. Sealing orders prohibit access to all or part of the court record or other information. The framework developed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), *R. v. Mentuck*, 2001 SCC 76 (S.C.C.) and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), guides applications for non-statutory confidentiality orders, such as initialization orders and sealing orders. In *Sahlin v. Nature Trust of British Columbia Inc.*, 2010 BCCA 516 (B.C. C.A. [In Chambers]), Justice Tysoe summarized the applicable framework:

[6] The Supreme Court of Canada dealt with an application for a confidentiality order in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522. Mr. Justice Iacobucci expressed the test for a confidentiality order as follows at para. 53

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

It is to be noted the *Sierra Club* case did involve a public institution.

[7] In *Blue Line Hockey Acquisition Co v. Orca Bay Hockey Limited Partnership*, 2007 BCSC 1483 (CanLII), 78 B.C.L.R. (4th) 100, Madam Justice Wedge considered an application by the media for access to an exhibit in litigation between private parties in relation to private interests. She noted that the balancing of competing interests is somewhat different in such litigation as a result of reasonable expectations of privacy. Madam Justice Wedge discussed how the balancing of those interests should be determined in terms of the opening words of the reasons in *Toronto Star*:

> [49] I return then to the words of Fish J. in *Toronto Star*. Will a balancing of the competing interests in this case create a "cloud of secrecy" under which justice will wither? The answer must be "no".

I agree with the way in which Madam Justice Wedge has framed the issue.

37 Bearing in mind the foregoing, in my view this is an appropriate case for an initialization order in respect of C.S., Dr. C.K. and L.K. Replacing names with initials in reasons for judgment minimally impairs the openness of judicial proceedings because such an order relates only to a "sliver" of information: *G. (B.) v. British Columbia*, 2004 BCCA 345 (B.C. C.A.) at para. 26. Given the negative impact of personal identification for all three individuals and the minimal nature of the impairment, as well as the fact that C.S. has not been declared a vexatious litigant in this Court, the salutary effects of an initialization order outweigh its deleterious effects.

38 However, I would not grant a sealing order over the entire court file. In my view, a limited sealing order over C.S.'s medical records alone would accord with the governing principles and the usual practice of this Court: *N.E.T. v. British Columbia*, 2018 BCCA 22 (B.C. C.A.) at para. 44 (Fitch J.A. in Chambers); *Sierra Club* at para. 53. The medical records relate to C.S.'s mental health, their publication poses a serious risk to an important public interest in the confidentiality of such records and there are no reasonable alternative measures available: see *Osif v. College of Physicians & Surgeons (Nova Scotia)*, 2008 NSCA 113 (N.S. C.A.) at para. 22. A limited sealing order would restrict access to C.S.'s sensitive medical records, but without unduly limiting the public interest in open and accessible court proceedings.

Application to Adduce Fresh Evidence

39 C.S. also applied to adduce fresh evidence on appeal. The proposed fresh evidence consists of various emails exchanged by C.S. and her mother between September 2012 and March 2013 and exhibited to C.S.'s affidavits. In the emails, C.S. refers to the failure of Dr. C.K. and L.K. to abide by the Accommodation Agreement. Also exhibited to an affidavit are calendars that C.S. deposes reflect her workload for the months of September 2012 and March 2013. In her submission, this fresh evidence proves that the breaches of the Accommodation Agreement she alleges actually occurred.

40 In *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), Justice McIntyre set out the criteria to be considered on an application to adduce fresh evidence on appeal (at 775):

> a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: [citation omitted].
>
> b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> c) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> d) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

41 I would not grant C.S.'s application. The proposed fresh evidence does not satisfy the requirements of the *Palmer* test. Even if it could be considered credible and relevant, it was previously available, it was not part of the record before WCAT and the judge did not consider it. This Court's role is not to conduct a hearing *de novo* on appeal based on evidence that was not before the tribunal or the reviewing judge: *Albu v. University of British Columbia*, 2015 BCCA 41 (B.C. C.A.) at para. 36. Further, the judge found C.S.'s submissions regarding the Accommodation Agreement raised a new issue on judicial review which would, in any event, have made no difference to the result of the WCAT decision:

> [64] First, [C.S.] submits that WCAT failed to consider the cumulative effect of the employer's breaches of her "no more than eight stress tests a day" accommodation. That is an entirely new issue; it is simply not how [C.S.'s] compensation claim was advanced before the Review Division or WCAT. Furthermore, given the Vice Chair's application of the Labour Relations Exclusion in the WCAT Decision, and given her findings as to the employer's credibility, it seems plainly apparent that any explicit consideration of that accommodation could have made no difference to the result.

42 C.S. also inserted material in her Appeal Book that was not before the judge, such as letters which are not fully produced in the record, handwritten notes on several documents and an email between the parties. To the extent that she seeks to have this material admitted as fresh evidence on appeal, I would not admit it for the same reasons I would not admit the fresh evidence C.S. submitted in affidavit form.

Analysis

Standard of Review

43 This Court's role on appeal is to determine whether the judge identified the correct standard of review and applied it correctly to the WCAT decision. These are questions of law concerning which no appellate deference is owed. In addressing them, this Court is in the same position as the reviewing judge: *Decision No. WCAT-2004-04388-AD*, *(*sub nom. *Vandale v. Workers' Compensation Appeal Tribunal (B.C.))* 2013 BCCA 391 (B.C. C.A.) [hereinafter *Vandale*] at para. 43; *Northern Thunderbird Air Inc. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 60 (B.C. C.A.) at para. 14.

44 However, the correctness standard does not apply where a reviewing judge makes findings of fact or undertakes an original exercise of discretion: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 (B.C. C.A.) at para. 79; *Chen v. Surrey (City)*, 2015 BCCA 57 (B.C. C.A.) at para. 16. The judge's findings that C.S. did not raise her *Charter* challenge or her arguments regarding breaches of the Accommodation Agreement before the WCB were factual and this Court will not interfere with them unless he made a palpable (obvious) and overriding (material) error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at para. 10. In addition, the judge's decisions not to hear the *Charter* challenge or the Accommodation Agreement arguments were exercises of judicial discretion. Accordingly, this Court will not interfere with them unless he acted on a wrong principle or failed to give sufficient weight to all relevant considerations: *Lafontaine v. University of British Columbia*, 2018 BCCA 307 (B.C. C.A.) at para. 45.

45 As to the underlying WCAT decision, the applicable standard of review is patent unreasonableness: s. 58(2)(a), *ATA*; *Vandale* at para. 43; s. 245.1, *Act*. This is a highly deferential standard which is met when an administrative decision "is so flawed that no amount of curial deference can justify letting it stand": *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 (S.C.C.) at para. 52. The question for determination regarding the rules of natural justice and procedural fairness, is whether, in

the circumstances, WCAT acted fairly: s. 58(2)(b), *ATA*. Accordingly, this Court will not set aside the WCAT decision unless it is patently unreasonable or procedurally unfair.

What is the extent of WCAT's standing on the appeal?

46 Dr. C.K. and L.K. appeared at the hearing of the appeal, but limited their participation to seeking an initialization order. They were not represented by counsel, they did not file a factum and they did not present any argument on the merits of the appeal, including the merits of the WCAT decision. However, WCAT filed a factum addressing whether the judge erred in refusing to hear C.S.'s new arguments on judicial review (as distinct from her *Charter* challenge) or in finding that the WCAT decision was not patently unreasonable or procedurally unfair, as well as the standard of review that applies to the WCAT decision. Counsel for WCAT also made oral submissions on these issues at the hearing of the appeal.

47 WCAT may be a party to a judicial review proceeding, although the common law circumscribes the extent of its participation. Whether a tribunal has standing to defend the merits of its own decision is a matter for the discretion of the reviewing court. In exercising this discretion, the court must strike a balance between the two fundamental values which are implicated, namely, the need to maintain tribunal impartiality, on the one hand, and the need to facilitate fully informed adjudication on review, on the other: *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 15; *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 (B.C. C.A.), paras. 38-54.

48 Where there is no other respondent able and willing to defend the merits of an administrative decision, the need to facilitate fully informed adjudication is the more important of the two competing values. In such circumstances, as a general rule, it is appropriate to permit a tribunal to argue the merits of its own decision: *18320* at paras. 51-53. That is the situation on this appeal with respect to the WCAT decision. For this reason, I would grant WCAT standing to argue the merits of its decision on the issues addressed in its factum and in the oral submissions of its counsel.

Did the judge err in refusing to consider C.S.'s s. 15 Charter challenge regarding the validity of s. 5.1 of the Act and Policy item C3-13.00? If so, how did he err and should this Court consider the Charter challenge on appeal?

49 In oral submissions, C.S. focused primarily on her contention that the judge erred in refusing to consider her s. 15 *Charter* challenge. She submits this Court should do so on appeal because neither the WCB nor WCAT made it clearly known that she could bring a *Charter* challenge in the administrative proceedings. According to C.S. her case is unlike *Denton*, in which this Court upheld a judge's refusal to consider a *Charter* challenge for the first time on judicial review, because she was entirely self-represented whereas Ms. Denton was assisted by an experienced union labour relations officer. In addition, she says, unlike Ms. Denton she did not miss filing deadlines and she repeatedly referred to the constitutional issue throughout.

50 C.S. concedes that she did not bring a formal *Charter* challenge in the administrative proceedings. However, she argues, she drew the constitutional issue to the attention of the WCB and WCAT at least 17 times and it would be unreasonable to expect a self-represented party to do more to raise a *Charter* issue. In other words, C.S. challenges the judge's finding that she introduced the issue of the constitutionality of s. 5.1 of the *Act* and Policy item C3-13.00 for the first time on judicial review. She also suggests that the WCB wilfully keeps applicants in the dark regarding the need to bring a formal *Charter* challenge in that forum.

51 According to C.S., the judge decided not to hear her *Charter* argument on judicial review simply because "he did not want to tackle it". As a result, she contends, he disregarded *Plesner*, which confirmed that a *Charter* challenge such as hers can be determined by the Court even if it was not previously raised before the WCB. She contends further that, through no fault of hers, the judge made his decision in an "evidentiary vacuum" because the WCB failed to provide the "necessary record". Given that alleged failure, she asks this Court to order the WCB to produce the "necessary record" now.

52 C.S. goes on to submit that, as it did in *Plesner*, this Court should determine her *Charter* challenge despite the fact that it was not addressed by the WCBRD or the reviewing judge. In support of this submission, she emphasizes the importance of s. 15 *Charter* rights to individuals who struggle with mental disorders and seek equal treatment from the WCB relative to

those who suffer from physical injuries. She also emphasizes the important role this Court plays in guiding the legislature on constitutional matters, as illustrated, she says, by amendments made to the *Act* after *Plesner* was handed down.

53 As to the merits of her *Charter* challenge, C.S. repeats her submissions in the court below, namely, that the burden of proof imposed on those who suffer from mental health injuries is higher than that imposed on those who suffer from physical injuries, which she characterizes as starkly discriminatory. In particular, she submits, the requirement in s. 5.1(1)(a)(ii) of the *Act* that a "significant" work-related stressor be a "predominant" cause of the injury, combined with Policy item C3-13.00, subjects those who suffer from work-related mental health disorders to a more stringent standard for compensation, which renders their benefit from the statutory scheme less valuable.

54 I do not accept these submissions.

55 I see no palpable and overriding error in the judge's finding that C.S. introduced the constitutionality of s. 5.1 of the *Act* and Policy item C3-13.00 for the first time in the judicial review proceedings. He recognised that she referred to discriminatory treatment of mental disorder injuries before the WCBRD and WCAT, but concluded that she did not bring an explicit *Charter* challenge and that her statements in the November 15, 2013 letter related to her argument regarding Policy item C3-16.00, not to challenging the constitutionality of s. 5.1 and Policy item C3-13.00. In reaching this conclusion, the judge noted that C.S. did not appeal the WCBRD decision to WCAT on the basis that the WCBRD failed to address the constitutional issue and reasoned she would have done so had she actually intended to raise the issue in the administrative proceedings. In my view, his finding that C.S. raised the constitutional issue for the first time on judicial review was available on the record and it is unassailable on appeal.

56 Given his finding that C.S. raised the constitutional issue for the first time on judicial review, the judge acted on correct principles and gave sufficient weight to all relevant considerations in exercising his discretion not to hear her s. 15 *Charter* challenge. It is well established that issues should generally be thrashed out at first instance to ensure that all relevant evidence is part of the record, that the expertise of the tribunal is brought to bear on the issues and that the legislative choice of the tribunal as the first instance decision-maker is respected: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 (B.C. C.A.) at para. 48; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at paras. 22-25. As the judge appreciated, these considerations are particularly weighty where, as here, the issue raised for the first time on judicial review is constitutional in nature: *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245 (F.C.A.) at para. 46.

57 In *Denton*, WCAT denied compensation for Ms. Denton's claim of work-related mental disorder. Her petition for judicial review was dismissed in part because, like C.S., she sought to challenge the constitutional validity of s. 5.1 of the *Act* and Policy item C3-13.00 pursuant to s. 15 of the *Charter* for the first time on judicial review. On appeal, this Court upheld the reviewing judge's decision not to hear the constitutional challenge, emphasizing the deference owed to exercises of judicial discretion, the WCBRD's expertise in factual and policy matters relevant to a *Charter* analysis and the importance of respecting the intention of the Legislature:

> [48] ... It is, in my view, indisputable that the grant of jurisdiction by the Legislature to the Review Division to decide constitutional issues evidences a legislative intent to have such issues decided in the first instance by the specialized tribunal charged with administering the scheme and expert in its purposes, application and the context in which it operates. Courts should be reluctant to ignore this intent, especially where the legislative and administrative scheme provide reasonable access to individuals to have their claims adjudicated.
>
> [49] This approach coheres with the preferred approach to a court's review of constitutional claims calling for a complete factual context and a developed record. The point here is both that such claims should be considered in the context of a developed record, and that the views of the administrative tribunal on those matters in respect of which it is expert are invaluable to a reviewing court.

58 Nor do I accept C.S.'s submission that the judge simply avoided tackling her *Charter* challenge. He carefully explained why he considered it inappropriate to deal with the constitutional validity of s. 5.1 and Policy item C3-13.00 for the first time on judicial review. For example, the judge considered the legislative intention that the WCB should determine *Charter* issues in the first instance, the highly contextual nature of *Charter* claims and the importance of deciding such claims based on a properly developed record. As is clear from *Denton*, he did not err taking these factors into account.

59 Moreover, the judge did not disregard *Plesner*. On the contrary, he expressly recognized that this Court decided a constitutional issue in *Plesner* which was not addressed first by the WCB and that the issue was similar, though not identical, to the constitutional issue C.S. sought to raise in this case. However, he also discerned significant differences between *Plesner* and this case. As a result, he distinguished *Plesner* and reached a different decision on whether to entertain the constitutional issue in question in the first instance.

60 In *Plesner*, a majority of this Court decided that an earlier version of s. 5.1 of the *Act*, read together with aspects of then Policy item 13.30, was discriminatory based on mental disability because the threshold for compensation for those suffering from work-related mental stress injuries was significantly higher than the threshold for those suffering from work-related physical injuries. In particular, when *Plesner* was decided workers with mental stress claims were required to show that they suffered a work injury that was caused by a "traumatic event", which Policy item 13.30 provided was akin to a "horrifying" event, but workers who suffered from physical injuries were required only to show that they suffered a work injury. In addition to finding that this gave rise to substantive discrimination, the majority concluded the offending aspects of Policy item 13.30 were not saved by s. 1 of the *Charter*. After *Plesner* was released, the Legislature amended s. 5.1 of the *Act* in an effort to address the Court's concerns.

61 In *Plesner*, the *Charter* challenge was the only live issue between the parties. The judge inferred that this Court exercised its discretion to hear that challenge even though it was not addressed below because the discriminatory effect of the existing legislation was readily apparent. However, he concluded that a *Charter* analysis of the legislation in its current form would require a more nuanced approach and thus a more well-developed evidentiary record. In my view, this conclusion was wellfounded, particularly given subsequent developments in the jurisprudence regarding s. 15 of the *Charter*: see, for example, *Withler v. Canada (Attorney General)*, 2011 SCC 12 (S.C.C.) and *Droit de la famille - 091768*, 2013 SCC 5 (S.C.C.).

62 As to C.S.'s application for an order directing the WCB to produce the "necessary record", its basis is unclear to me. WCAT provided the Court below with the certified record in the usual way. As discussed, C.S. did not bring a *Charter* challenge in the WCB proceedings and, therefore, no record with respect to the *Charter* issue was created in that forum. Accordingly, there is no "necessary record" in existence for the WCB to produce. To the extent she suggests that the WCB had an independent duty to produce evidence relevant to her *Charter* challenge or "make its views known" on the matter, C.S. is mistaken.

63 Further, I do not accept that, as she claims, C.S. should not have been expected to bring an explicit *Charter* challenge in the WCB proceedings because she was self-represented. This is particularly so given the existence of publicly available information on the WorkSafeBC website regarding the applicable procedures when *Charter* issues arise. Again, the comments of Justice Harris in *Denton* are apposite:

> [59] In this case, Ms. Denton had available to her an administrative structure capable of adjudicating her claim as mandated by the Legislature. The record does not support the argument that the system is impossible to navigate, is relatively too expensive, inefficient, incompetent, or slow. Indeed, to the contrary. The scheme provides a relatively accessible forum in which to seek timely and relatively cheap and efficient vindication of rights to compensation, including arguments that the *Act* or the Board policies are constitutionally invalid. Nothing supports an argument that somehow the court system is more accessible, cheaper, more efficient or quicker than the administrative scheme. Furthermore, it seems to me that the issue of the adequacy of a forum must turn on its institutional characteristics, not contingent facts about such matters as the capacity of a claimant or the choice of representative.

64 Finally, the importance of the s. 15 *Charter* rights of individuals who struggle with mental disorders cannot be doubted. As C.S. submits, they should be assiduously protected by all concerned. In my view, this underscores the importance of a full record properly developed in the forum of first instance designated for this purpose by the Legislature when a s. 15 *Charter* issue arises, as explained in *Denton* and by the reviewing judge.

65 For all of these reasons, I would not accede to this ground of appeal and I would decline to consider C.S.'s s. 15 *Charter* challenge on appeal.

Did the judge err in refusing to consider C.S.'s arguments regarding the cumulative effect of breaches of the Accommodation Agreement and in concluding that consideration of the issue would have made no difference to the result of the WCAT decision?

66 C.S. also submits the judge erred in finding that she did not raise the issue of whether she repeatedly performed over eight stress tests a day and whether the cumulative effect of these breaches of the Accommodation Agreement was causally related to her mental disorder in the WCB and WCAT proceedings. In consequence, she says, he erred in exercising his discretion not to consider the issue on judicial review. He erred further, she says, in concluding that, even if it was not a new issue, consideration of the breaches of the Accommodation Agreement would have made no difference to the result of the WCAT decision. According to C.S., this conclusion was absurd because repeatedly and intentionally breaking a work-related accommodation plainly amounts to "egregious behaviour", a "cumulative series of stressors" and "bullying and harassment". Therefore, she says, her injury was plainly compensable.

67 In support of her submission, C.S. points to several instances in the WCB and WCAT proceedings where she stated that she performed more than eight stress tests in a day during the course of her employment. She also relies on a decision of the Human Rights Tribunal ("HRT") reported at [*Stein v. Keebler*] 2015 BCHRT 79 (B.C. Human Rights Trib.), which dealt with her discrimination claim against Dr. C.K. and L.K. She contends the HRT found that she did perform more than eight stress tests a day, which she submits shows WCAT erred in failing to recognize that the employer breached the Accommodation Agreement. She also submits the HRT decision shows that the judge failed to recognize WCAT's error with respect to the repeated breaches of the Accommodation Agreement issue.

68 In my view, these submissions lack merit.

69 Again, I see no palpable and overriding error in the finding in question, namely, that C.S. did not advance her claim before WCAT on the basis that the employer repeatedly and intentionally breached the Accommodation Agreement and that the cumulative effect of the breaches was causally related to her mental disorder. The evidence was that C.S. occasionally performed nine stress tests per day after the Accommodation Agreement was reached and that she did not complain about the additional tests. The record amply supports the judge's conclusion that C.S. did not argue before WCAT that the employer intentionally breached the Accommodation Agreement or that such breaches amounted to egregious or harassing conduct and aggravated her mental disorder. Rather, she argued that the employer failed to accommodate her disability and recklessly breached the No-Five-in-a-Row Alleged Agreement, failed to appropriately address her concerns regarding D and disclosed her disability to D.

70 Nor does the HRT decision assist C.S. It was merely a preliminary determination on whether to dismiss C.S.'s complaint based on the doctrine of issue estoppel in relation to the WCAT decision. Contrary to C.S.'s submission, the HRT did not make findings on how many stress tests C.S. performed daily in the course of her employment or the impact of alleged breaches on her mental disorder. Rather, the HRT was unable to discern any analysis in the WCAT decision regarding breaches of the Accommodation Agreement, which led it to conclude that, as to that issue, issue estoppel did not apply.

71 C.S. points to no irrelevant considerations or wrong principles the judge applied in exercising his discretion not to engage with the issue of whether the employer repeatedly breached the Accommodation Agreement because it was a new issue. Seeing none, I conclude that he did not err. That being so, it is unnecessary to analyse his conclusion that, in any event, consideration of the issue would have made no difference to the result of the WCAT decision.

Did the judge err in failing to recognize that the WCB and WCAT overlooked and failed to apply the HRC?

72 Next, C.S. submits that the WCB, WCAT and the judge overlooked and failed to apply the *HRC*. Unfortunately, the precise nature of her submission on this issue is unclear. At some points she appears to argue that the WCB and WCAT were obliged to apply the *HRC* in determining her claim for compensation but failed to do so, which failure the judge erroneously failed to recognize. At others, she appears to argue that the WCB and WCAT discriminated against her on the basis of disability, perhaps by applying the Labour Relations Exclusion in her case, and thus they denied her a service contrary to the *HRC*.

73 On either view of the submission, I would decline to consider the *HRC* issue.

74 C.S. did not raise the applicability of the *HRC* to her claim for compensation as an issue in the WCB, WCAT or judicial review proceedings. Accordingly, she is attempting to raise this issue for the first time on appeal. As I have already explained, for the reasons expressed in *Alberta Teachers'* and *Denton* this Court is generally disinclined to entertain a new issue on appeal in the absence of a proper record on the issue developed in the designated forum of first instance. As I have also explained, the WCBRD has jurisdiction to determine human rights issues. That is the forum of first instance in which C.S. should have raised the *HRC* issue.

75 As previously noted, WCAT has no jurisdiction to hear matters arising under the *HRC*: s. 46.3, *ATA*; s. 245.1(r) of the *Act*. To the extent that C.S. contends the WCB and WCAT discriminated against her, I see nothing in the record to support such an allegation. In any event, if that is the nature of her complaint it should be made to the HRT.

Did the judge err in finding the WCAT decision was not patently unreasonable because WCAT failed to recognize that C.S.'s injury arose from a "cumulative series of significant work-related stressors" and erroneously held that breaches of the Accommodation Agreement did not warrant compensation by virtue of the Labour Relations Exclusion?

76 C.S. goes on to submit that the judge erred in finding the WCAT decision was not patently unreasonable. This is so, she says, because the employer's intentional and egregious breaches of her accommodations amounted to targeted harassment that aggravated her mental disorder. As such, she says, the breaches met the definition of a "cumulative series of significant work-related stressors", they were not subject to the Labour Relations Exclusion and her mental disorder injury was compensable. In her submission, it was absurd for WCAT to conclude otherwise and the judge erred in failing to recognise that absurdity.

77 In *Shamji v. Workers' Compensation Appeal Tribunal*, 2018 BCCA 73 (B.C. C.A.), this Court explained the meaning of patent unreasonableness:

> [37] The meaning of this highly deferential standard in relation to nondiscretionary decisions was discussed in *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 (S.C.C.) at para. 52:
>
> > ... a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, per Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, per Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> [38] This meaning continues to apply to the patent unreasonableness standard under the *Administrative Tribunals Act* post *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.): *Preast* at para. 28, citing *Pacific Newspaper Group Inc. v. CEP, Local 2000*, 2014 BCCA 496 (B.C. C.A.) at para. 48.
>
> [39] With respect to factual matters, it is not for a court on judicial review or on appeal to second guess the conclusions drawn from the evidence considered by WCAT and substitute different findings of fact or inferences drawn from those facts. As this Court held in *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 (B.C. C.A.) at para. 37:

> A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable.

78 I am not persuaded by this submission.

79 In my view, the judge identified the correct standard of review and applied it correctly to the WCAT decision. It was not his role to second guess WCAT's conclusions drawn from the evidence, nor is it the role of this Court. As the judge recognised, Vice Chair Murray made factual findings that were amply supported by the evidence. As such, they are entitled to deference.

80 Based on the witness testimony and documents presented at the hearing, Vice Chair Murray found that the No-Five-in-a-Row Alleged Agreement did not exist and thus the employer did not breach it. She also found that L.K. spoke to C.S. encouragingly, not abusively, on March 13, 2013. She found further that D did not behave toward C.S. in a subjectively or objectively intimidating, humiliating or degrading way. As previously discussed, C.S. did not argue that the employer intentionally breached the Accommodation Agreement by requiring her to perform more than eight stress tests a day, so, unsurprisingly, she made no findings on the point.

81 Unless it is clearly irrational, Vice Chair Murray's conclusion that the events of March 13, 2013 were subject to the Labour Relations Exclusion is also entitled to deference. The same is true of her conclusion that the cumulative series of stressors associated with C.S.'s conflict with D were not "significant" within the meaning of Policy item C3-13.00. C.S. submission that these conclusions were "absurd" is based on an unjustifiable rejection of their factual underpinnings. When those factual underpinnings are accepted, as they must be, given the terms of s. 5.1 of the *Act* and Policy item C3-13.00, in my view there is nothing clearly irrational about either conclusion.

Did the judge err in finding the WCAT decision was not procedurally unfair because C.S. was not granted an oral interview by the WCB?

82 Finally, C.S. repeats her assertion that she was not granted an oral interview by the WCB and argues that this was a breach of procedural fairness. In her submission, the judge erred in finding otherwise. However, C.S. does not explain how the judge's finding that she *was* interviewed by a WCB case manager, as evidenced by the typed summary, is open to challenge on appeal. Nor does she explain how the WCB's alleged procedural unfairness in connection with a failure to interview her tainted the WCAT proceedings in which she testified. In other words, C.S. makes no submission on how *WCAT* allegedly acted unfairly in adjudicating her appeal.

83 In my view, C.S. has failed to demonstrate a breach of procedural fairness. The judge's finding that she was interviewed by a WCB case manager is supported on the record and is unassailable. In addition, C.S. was provided with a full opportunity to be heard at the WCAT hearing when she testified. I would not accede to this ground of appeal.

Conclusion

84 I would grant an initialization order in respect of C.S., Dr. C.K. and L.K., grant a sealing order over C.S.'s medical records, decline to admit the fresh evidence and dismiss the appeal.

***Bennett J.A.*:**

I agree.

***MacKenzie J.A.*:**

I agree.

Appeal dismissed.

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In the Court of Appeal of Alberta

Citation: Sandhu v College of Physicians and Surgeons of Alberta, 2023 ABCA 61

Date: 20230223
Docket: 2101-0211AC
Registry: Calgary

Between:

Manjeet Sandhu

Appellant

- and -

College of Physicians and Surgeons of Alberta

Respondent

The Court:

The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Elizabeth Hughes
The Honourable Justice Bernette Ho

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice C.M. Jones
Dated the 28th day of June, 2021
Filed on the 17th day of August, 2021
(2021 ABQB 494, Docket: 2001 15663)

Memorandum of Judgment

The Court:

[1] The appellant appeals an order dismissing his application for judicial review of a decision of the Council Review Panel (the Panel) of the College of Physicians and Surgeons of Alberta (the College or CPSA).

[2] The appellant is an internationally trained family physician and surgeon who applied to practice as a family physician in rural Alberta. As part of the application process to become a regulated member, the appellant was required to complete a three-month clinical assessment. The appellant's assessment was terminated after two weeks. Two months later, the Assistant Registrar of the College informed the appellant that his application for registration as a regulated member was refused and that he would be required to complete further education before applying again. The appellant appealed the Assistant Registrar's decision to the Panel and it was upheld. On judicial review of the Panel's decision, the chambers judge upheld the Panel's decision: *Sandhu v College of Physicians and Surgeons of Alberta*, 2021 ABQB 494 (*Chambers Reasons*). The appellant now appeals to this court on the basis that he was denied procedural fairness and the Panel's decision was unreasonable.

[3] For the reasons that follow, the appeal is dismissed.

Background

Legislative Scheme

[4] Under the *Health Professions Act*, RSA 2000, c H-7 the College is responsible for establishing, maintaining, and enforcing standards for registration for those who practice medicine in Alberta. The *Physicians, Surgeons and Osteopaths Profession Regulation*, Alta Reg 350/2009 (the regulation in force at the relevant time) establishes several registers for regulated members. The appellant applied for registration on the "provisional register" for independent practice as a regulated member. The application for registration as a regulated member process is outlined in sections 28 to 30 of the *Health Professions Act*. The requirements for registration on the provisional register are outlined in section 6 of the *Regulation*.

The College's Registration Process

[5] An applicant must complete a Practice Readiness Assessment (PRA) satisfactory to the College to be registered on the provisional register for independent practice. The Practice Readiness Assessment is used to ensure that the applicant's "training and clinical skills are substantively equivalent to those of a Canadian trained physician entering independent practice in

Alberta." The Practice Readiness Assessment is made up of two components: a three-month Preliminary Clinical Assessment (PCA) (which the College may elect to waive) and a three-month Supervised Practice Assessment. The appellant was required to complete both components.

[6] The *Health Professions Act* and the *Regulation* provide no details about the Practice Readiness Assessment, indeed the Practice Readiness Assessment is not mentioned at all in the statute or the regulation. The College previously published a Practice Readiness Assessments Information Manual on its website (the "PRA Manual"), but it was removed in 2019 and has not been replaced.

The Appellant

[7] The appellant obtained his medical degree from India in 1986 and his Masters of Surgery and Specialty in General Surgery from India in 2003. He has been registered for independent practice in India since 1987 and practiced as a Family and Emergency Physician in India for about 20 years in the period between 1988 and 2012. From 2013 to 2014, the appellant completed a Practical Nursing Program in Ontario. From 2014 to 2016 he completed a two-year fellowship in Cardiovascular Surgery in Texas, and from 2017 to 2019 he completed two years of Postgraduate Training in Family Medicine in India.

[8] In 2018, the appellant completed the English Language Testing System academic module and while in Ontario and Texas he communicated with patients, classmates, and staff in English.

[9] In 2019, the College confirmed that the appellant was eligible to apply for the "Provisional Register Conditional Practice". The appellant obtained sponsorship from Alberta Health Services (AHS) North Zone to work as a general practitioner at a clinic in Mayerthorpe, starting December 1, 2019.

The Letter of Understanding

[10] On December 17, 2019, the appellant signed a Letter of Understanding with the College. The Letter of Understanding outlined the details of the Practice Readiness Assessment stating that it was not a "training experience" but rather a "high stakes assessment" (para 1). The Letter of Understanding listed several orientations an applicant was required to complete (para 5). To pass the Preliminary Clinical Assessment, a final rating of 'satisfactory' was required on all assessed competencies and the final decision regarding pass/fail was made by the Assistant Registrar and not the assessor (para 13). The Letter of Understanding further explained that an applicant has "a maximum of two attempts in any jurisdiction" to successfully complete a Practice Readiness Assessment - the College would consider a prior failed assessment in another jurisdiction in Canada as a failed attempt to apply for registration on the provisional register (para 14). In the case of an unsuccessful applicant, they are eligible to re-apply for a second Practice Readiness Assessment in Alberta if the following conditions are met:

> …the applicant must apply for registration and meet the current eligibility criteria for the provisional register, including Alberta Health sponsorship, the second attempt must take place within a five-year period of the end of the first failed assessment, and evidence of remediation or professional development acceptable to CPSA must be provided at the time of application for the second attempt and must be verifiable by the Assistant Registrar Registration or his/her designate.

[11] As for the length of the Preliminary Clinical Assessment, the Letter of Understanding provided that it will "typically be scheduled" for three months but can be "terminated at any point by the Assistant Registrar Registration or his/her designate if s/he feels there is sufficient evidence to support a practice readiness decision, be it a pass or a fail determination" (para 17). In addition, an applicant can be immediately removed from a Practice Readiness Assessment "in the event that concerns are identified about patient safety or inappropriate conduct by the Applicant" (para 16).

[12] Finally, the Letter of Understanding provided that during the course of the Preliminary Clinical Assessment, the applicant would be provided access to the "online assessment system" and the applicant is expected to view the online entries and raise any concerns with the assessor (para 20).

The January 6 Letter

[13] On January 6, 2020, the appellant received a letter from the College advising him that the Preliminary Clinical Assessment would begin 10 days later in Bonnyville (the "January 6 Letter"). The Preliminary Clinical Assessment was scheduled to run from January 16, 2020 to April 9, 2020 and a doctor had been contracted by the College to be the assessor. The letter indicated that two tools would be used to evaluate the appellant's performance during the Preliminary Clinical Assessment: the GroveWare online assessment system and the Direct Observation of Procedural Skills (DOPS) – Family Medicine.

[14] Appended to the letter was information about the GroveWare online assessment system and a list of "8 Sentinel Habits (Competencies)" that describe the "skills and habits that are important in a good physician". The letter and appendices also contained a number of links to other documents. The court record does not establish what information or documents were available at those links.

Registration Understanding and Acknowledgement

[15] On January 9, 2020, the appellant signed a "Registration Understanding and Acknowledgement" that he would be registered on the "Provisional Register Physician Undergoing Practice Assessment", and that this registration was only valid for the duration of the Preliminary Clinical Assessment. This document also contained a list of eight "Responsibilities of Physicians Undergoing Practice Readiness Assessment" that the appellant agreed to comply with.

The Preliminary Clinical Assessment

[16] Upon receipt of the January 6 Letter, the appellant relocated to Bonnyville.

[17] Prior to starting the Preliminary Clinical Assessment the appellant was required to, and did, complete the University of Calgary Practice Readiness Assessment Orientation for International Medical Graduate Candidates, the purpose of which is "to provide strategies to challenges faced when undergoing a PRA assessment and to help integrate applicants into the Alberta health care system."

[18] On the first day of the Preliminary Clinical Assessment, January 16, 2020, the appellant received less than a half hour introduction to patient charts.

[19] A total of 36 assessment notes were entered in GroveWare between January 18 and January 29, with almost half of the entries dated January 29. Each assessment note contained entries under the following headings: date, clinical presentation, sentinel habit, chart review, observation, feedback, clinical domain, assessment level (unsatisfactory, needs improvement or satisfactory), and event follow-up. Of the 36 assessment notes, 24 showed an assessment level of "unsatisfactory" and 7 showed "needs improvement".

[20] The College call-log shows that the assessor had concerns about the appellant's competence from the outset, raising concerns with the College on January 20.

[21] On January 30, 2020, the assessor advised the College that the appellant had "the medical knowledge" but was "unable to appropriately apply this knowledge" and "know how to prioritize medical concerns." The assessor advised the College that he was unable to continue the Preliminary Clinical Assessment as the appellant's assessor. That day, the College contacted the appellant and advised him that the Preliminary Clinical Assessment was being "placed on hold" [EKE(A) 182].

Assistant Registrar's Decision

[22] By letter dated February 5, 2020, the Assistant Registrar informed the appellant that the assessor had raised concerns. The Assistant Registrar advised that they were going to make a decision regarding the outcome of the Preliminary Clinical Assessment. The Assistant Registrar enclosed the Letter of Understanding, the Registration Understanding and Agreement, the GroveWare assessment notes, and the call-log summarizing discussions between the assessor and the College between January 15 and 30. The appellant was invited to review the information and respond in writing.

[23] On February 28, 2020, the appellant provided a written response to the Assistant Registrar responding to the concerns raised by the assessor. The appellant wrote, in part:

> I would humbly like to submit that the lack of provision of adequate orientation, introduction to [Electronic Medical Records], paper charts, and support staff has significantly contributed in creating a subpar impression about me in my assessor's mind. Further, introduction to a high volume work and unfamiliar environment from the get go of my assessment may have contributed to some of the negative observations regarding my skills. I greatly appreciate your favorable consideration to allow me to continue my PCA so that I can contribute in the rural Alberta.

[24] On April 9, 2020, the Assistant Registrar issued their decision concluding that the appellant's Preliminary Clinical Assessment was unsuccessful and refusing the appellant's application for independent practice registration. The Assistant Registrar also issued the following direction:

> In order for you to be eligible to apply again for licensure in Alberta, you will be required to have the successfully completed the following training [sic in original]:
>
> - Two years of an accredited postgraduate training program in Family Medicine that meets with the approval of the CPSA.

The Council Review Panel's Decision

[25] The appellant unsuccessfully appealed to the Panel under section 31 of the *Health Professions Act*. The appellant argued that the Preliminary Clinical Assessment was procedurally unfair, and that the reasoning and outcome of the Assistant Registrar's April 9, 2020 decision was unreasonable. The appellant's procedural fairness argument centred on a lack of orientation and the assessor's failure to review with the appellant how the assessment would be conducted. The appellant also argued that the assessor did not use the DOPS tool as described in the January 6 Letter, the assessor did not provide feedback and an opportunity for the appellant to incorporate that feedback, the assessor's notes were inaccurate and incomplete, and the assessor was biased and had pre-determined the outcome.

[26] Before the Panel, the appellant relied on two documents that he said demonstrated the College had failed to discharge its duty of procedural fairness. First, the PRA Manual (that had been removed from the College's website in 2019 and not replaced) that described the Practice Readiness Assessment process and the responsibilities of the applicant and the assessor. The appellant argued that without the PRA Manual there were no objective standards for the process that would be followed, and the PRA Manual was evidence of what the College understood to be a fair process. Second, the appellant pointed to the National Assessment Collaboration Family Medicine PRA Standards (the NAC Standards), a pan-Canadian model with a set of common standards, tools, and materials for Practice Readiness Assessment programs. Ultimately, however, the appellant argued that with or without these documents there was a basic expectation of fairness that the College was required to meet and failed to do so.

[27] The College submitted to the Panel that the PRA Manual had been removed from its website because it "had some inconsistencies about the process" that were noted in *Mohamed v College of Physicians and Surgeons of Alberta*, 2019 ABQB 657. The College further submitted that the PRA Manual may lead an applicant to think the Practice Readiness Assessment was a training process rather than a high stakes pass/fail assessment process, and that is why the document was no longer used.

[28] The Panel accepted the additional documents but placed little weight on them. The Panel held that the NAC document had not been adopted by the College and therefore it could not be used to determine the procedural safeguards or expectations the appellant had about the process. As for the PRA Manual, the Panel held that since the College no longer used it, applicants should not rely on it.

[29] The Panel concluded that the appellant was afforded the relatively high level of procedural fairness he was owed during the assessment process. The Panel found that the appellant received adequate information regarding how the assessment would be conducted and noted that the appellant had not requested further orientation. The Panel also found that there was sufficient feedback via the entries in GroveWare, and the fact that the DOPS tool was not used was not sufficient to constitute a breach of procedural fairness. The Panel found no evidence to substantiate the claims of bias or that the assessor made inaccurate or incomplete notes.

[30] As for the reasonableness of the outcome, the Panel held that the Assistant Registrar reached a reasonable decision and provided adequate justification. The Panel noted that the decision whether to terminate an assessment before the three-month timeline is at the discretion of the Assistant Registrar. The Assistant Registrar concluded that the appellant's competence posed a potential risk of serious harm to patients, and that the appellant's complaints about a lack of orientation did not explain the deficiencies observed by the assessor. The Panel also upheld the Assistant Registrar's decision to require the appellant complete two years of an accredited postgraduate training program in Family Medicine before applying again for licensure.

Chambers Reasons

[31] The appellant brought an application for judicial review of the Panel's decision, advancing the same two grounds of appeal: procedural unfairness and unreasonableness of the Panel's decision. The chambers judge dismissed the application.

[32] On procedural fairness, the chambers judge held that it was necessary to consider the statutory and social context as the College has a duty under the *Health Professions Act* to protect and serve the public interest. The chambers judge held that it was for the College to determine its own procedures and there was no merit to any of the appellant's specific complaints regarding lack of orientation, failure to use the DOPS tool, lack of feedback, early termination, or bias.

[33] As for the decision itself, the chambers judge held that the Assistant Registrar and the Panel's decisions bore the hallmarks of reasonableness as described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 and there was no basis to interfere with the College's decision to terminate the Preliminary Clinical Assessment, refuse the appellant's registration, and require that he take further education before being able to apply for licensure again.

Grounds of Appeal

[34] The appellant advances three grounds of appeal. The appellant argues that the chambers judge erred by:

a) allowing the College to exceed the proper role of a tribunal during the course of the judicial review;

b) finding that the College's Practice Readiness Assessment process was procedurally fair; and

c) finding that the decision to terminate the Preliminary Clinical Assessment, refuse the applicant's registration, and impose a further education requirement was reasonable.

Standard of Review

[35] The court's role on an appeal from a judicial review of an administrative decision is to determine whether the reviewing judge identified and applied the correct standard of review and, if not, to assess the administrator's decision in light of the correct standard: *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 45. No deference is owed to the reviewing judge's application of the standard of review, rather, the appellate court performs a *de novo* review of the administrative decision: *Agraira* at para 46; *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at para 10.

[36] Questions of procedural fairness are reviewed to determine if the party received the degree of procedural fairness to which they are entitled by law: *Baron Real Estate Investments Ltd v Edmonton (City)*, 2021 ABCA 64 at para 17. The parties agree that the appellant was owed a high degree of procedural fairness.

[37] On the question of the substance of the Panel's decision, the parties agree that decision is reviewed for reasonableness.

Analysis

Role of the College During the Judicial Review Process

[38] The appellant argues that the scope of the College's submissions raise concerns about the impartiality of the College if the matter is sent back for another assessment. The appellant argues that the College's tone crossed the line from helpful elucidation to aggressive partisanship, contrary to the direction from this court in *JK v Gowrishankar*, 2019 ABCA 316 at para 53. The appellant seeks further direction from this court on the proper scope of the College's participation because the College introduced new evidence to the chambers judge on judicial review that was not before the Panel and that did not form part of the Certified Record of Proceedings. The College relied on this evidence to undermine the appellant's credibility as it related to alleged inaccuracies in the training and work experience information provided by the appellant to the College. The appellant argued that this evidence was inadmissible, relying on *Alberta College of Pharmacists v Sobeys West Inc*, 2017 ABCA 306 at para 67, leave to appeal to SCC refused, 37864 (9 August, 2018) and the general rule that evidence that was not before the decision maker and relates to the merits of the decision is not permitted on judicial review.

[39] The chambers judge held that this new evidence was irrelevant, and he would disregard it: *Chambers Reasons* at para 70. However, the appellant submits it is apparent from the chambers judge's reasons that this new evidence was a factor in the chambers judge's assessment of the appellant's credibility because the chambers judge expressed doubt about the accuracy of the appellant's work and training experience: *Chambers Reasons* at paras 2-3.

[40] We do not view the chambers judge's statements at paragraphs 2-3 as factoring into his ultimate conclusions, and he was correct to disregard this new evidence - it was not on the record before the decision maker: *Alberta College of Pharmacists* at paras 67-70.

[41] As for the scope of the College's participation in an appeal or judicial review, the court must balance concerns about the need for the reviewing court to be fully informed against the importance of maintaining tribunal impartiality: *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at para 57. We agree with the College that impartiality concerns are lessened here because the College was the only named respondent in the initial review of its decision and it is, amongst other things, tasked with regulating physicians in Alberta. Unlike this court's finding in *Gowrishankar*, the chambers judge did not find the College to be acting improperly during the judicial review process. Rather, the chambers judge wrote at para 71:

> I did not find the CPSA's submissions, either orally or in writing, to be unduly aggressive or partisan. Those submissions sought to outline the practices and procedures underlying Dr. Sandhu's PRA and to explain the basis for the CPSA Decision and the Appeal Panel Decision. As they outline what the CPSA considered relevant in declining Dr. Sandhu's application for registration, they are,

> understandably, somewhat pejorative in nature, but that, in my view, does not render the CPSA partisan.

[42] We do not find that the College's submissions on appeal to be improper. As a result, it is not necessary for us to provide a direction as requested by the appellant. Prior appellate jurisprudence, including the Supreme Court's decision in *Ontario (Energy Board)* at paragraphs 59 to 72, already provides guidance on this issue.

Procedural Fairness

[43] The appellant submits that the College breached the "relatively high" duty of procedural fairness owed to him during preparation for and the conduct of his Practice Readiness Assessment.

[44] Specifically, he asserts that he was provided with insufficient information relating to: (i) how he would be evaluated and what standards and guidelines would be used; (ii) an orientation to the practice setting in which he would be working; (iii) how he would receive feedback on his performance during the Preliminary Clinical Assessment. Further, he argues that the lack of procedural fairness was exacerbated by the fact that the Preliminary Clinical Assessment was terminated when the assessor refused to continue after only two weeks.

[45] For the reasons set out below, we conclude that the chambers judge did not err in finding that the appellant received the degree of procedural fairness to which he was entitled.

The PRA Manual and NAC Document

[46] The appellant refers throughout his submissions to the PRA Manual that the College removed from its website in March 2019. He argues that the College cannot escape the duty of procedural fairness by simply removing the PRA Manual and refusing to refer to the NAC Document, because without these materials, the appellant is in a "vacuum" not knowing what to expect in terms of the Practice Readiness Assessment process.

[47] The chambers judge found that the Letter of Understanding and January 6 Letter set out what the Practice Readiness Assessment would and would not involve, and there was no need to have recourse to the PRA Manual or NAC Document. We agree that the College is permitted to determine its own procedures and, in this case, the College relied on the Letter of Understanding and January 6 Letter to provide information to, and outline expectations for, the appellant. Neither the PRA Manual nor the NAC Document were referred to by the College in its dealings with the appellant, and there was no basis for the appellant to rely upon the PRA Manual or NAC Document.

Evaluation Standards and Guidelines

[48] The appellant asserts that his assessment was procedurally unfair because he was not given information about how he would be evaluated and what standards or guidelines would be used.

[49] The January 6 Letter addressed evaluation tools and standards. It states:

> Your Assessor(s) has been asked to use the following tools to evaluate your performance during the assessment, please review this information **carefully** prior to your assessment:
>
> 1. **GroveWare online assessment system**: See pages 3-6 for instructions.
>
> 2. **Direct Observation of Procedural Skills (DOPS) - Family Medicine**: Click here for the information on this tool. This form will be completed on GroveWare.
>
> [emphasis in original]

[50] On pages 3 to 6, more information was provided about the GroveWare tool, which would be used to document assessment observations and findings. The appellant was provided with access to GroveWare to view assessment notes and reports and was advised that "the College will not notify the applicant about the status of current or recently added notes and it is left to the applicant to review GroveWare entries on a regular basis throughout the assessment."

[51] The following paragraph was included under the heading "Purpose of GroveWare":

> To help you better understand the expected level of care for a family physician practicing in Canada prior to beginning the practice readiness assessment, it is suggested that you familiarizes [sic in original] yourself with the College of Family Physicians of Canada 99 Priority Topics and Evaluation Objectives.
>
> [underlining indicates a link to a website]

[52] The 8 Sentinel Habits, identifying the skills and habits important in a good physician, were then listed. On the last page, the appellant was advised:

> Throughout your assessment, your Assessor will enter observations which will include a brief description, sentinel habit, clinical domain, feedback given about your performance and rating of level of competence. The findings for an assessment note can be a) satisfactory, b) needs improvement, or c) unsatisfactory.

[53] The January 6 Letter emphasized that the Sentinel Habits would be used as a baseline for evaluation and the assessor's notes in GroveWare would refer to the relevant Sentinel Habit observed. The January 6 Letter also provided links to the materials prepared by the College of

Family Physicians of Canada, though the information accessed through such links was not included in the record.

[54] We agree with the chambers judge that given the contents of the Letter of Understanding and the January 6 Letter, the appellant was provided with sufficient information respecting evaluation standards and guidelines. This ground of appeal is dismissed.

Orientation to Practice Setting

[55] The appellant submits that he was not provided with an orientation to the practice setting in which he would be doing his Preliminary Clinical Assessment. Although he completed the mandatory one-day orientation provided at the University of Calgary, he argues that did not provide him with an understanding of what to expect in the smaller clinical setting in Bonnyville. Further, although he was directed in the Letter of Understanding to contact his sponsor (AHS) for more orientation, he could not practically do so because he only received two-weeks' notice of the start of his Preliminary Clinical Assessment.

[56] Paragraph 5 of the Letter of Understanding addressed orientation and provided that the appellant was required to complete the following:

> a. The mandatory online PRA Orientation for International Medical Graduate (IMG) Candidates course hosted by the University of Calgary Office of Continuing Medical Education and Professional Development.
>
> b. The University of Calgary Office of Continuing Medical Education and Professional Development's one-day PRA IMG Orientation Workshop, which purpose is to provide strategies to challenges faced when undergoing a PRA assessment and to help integrate applicants into the Alberta health care system.
>
> c. The Applicant is responsible for engaging with his/her Sponsor to obtain an orientation to the Canadian healthcare system and to medical practice within the context of Alberta prior to starting a practice-readiness assessment.
>
> d. The online orientation program *Communication and Cultural Competence* hosted on physicansapply.ca prior to his/her practice-readiness assessment to start date and submit this Attestation Form. Neither CPSA, nor an assessor, has an obligation to provide the Applicant with an orientation to the Canadian healthcare system or medical practice within the context of Alberta.

[57] The appellant completed the one-day orientation workshop at the University of Calgary. The appellant also acknowledges that the assessor spent about thirty minutes reviewing charting practices with him. There is no evidence that the appellant asked for a more in-depth orientation from his assessor or his sponsor, AHS.

[58] While we appreciate that the appellant was provided with a short period of time to commence his Preliminary Clinical Assessment, we agree with the chambers judge and see no merit to this ground of appeal. The Letter of Understanding and January 6 Letter both referred to orientation that was required and the Letter of Understanding further made it clear that the onus was on the appellant to ask for more orientation from his sponsor if he wished. The Letter of Understanding also made it clear that neither the College nor the assessor were responsible for providing greater orientation. Therefore, we dismiss this ground of appeal.

Feedback Issues

[59] The appellant submits that his assessor did not provide feedback to him, and because the appellant's access to GroveWare was delayed, he did not have an opportunity to meaningfully consider it and respond, particularly given the early termination of his Preliminary Clinical Assessment. He further asserts that he was never provided feedback through the DOPS tool as indicated in the January 6 Letter and ought to have received feedback from multiple sources rather than just from the assessor.

[60] As already noted, the January 6 Letter provided information to the appellant regarding the GroveWare assessment tool and evaluation standards. The Letter of Understanding further provided:

> All Family Medicine Applicants undergoing a Preliminary Clinical Assessment will be provided confidential access to online assessment system to view the assessment notes and reports submitted by the assessor to [the] CPSA. The applicant understands that CPSA will not notify the applicant about the status of current or recently added notes and it is left to the Family Medicine Applicants to review online entries on a regular basis throughout the assessment. The applicant is expected to view all online entries and to treat access responsibly and professionally. The applicant is not permitted to request the assessor to make any modifications to the assessment notes or reports. Any concerns by the applicant should be first discussed with the assessor, and if the concern is not resolved, then the applicant may bring the matter to the attention of the Assistant Registrar Registration or his/her designate.

[61] While the assessor needed to be prompted to use the GroveWare tool, and the appellant initially did not have access to the system, the assessor's notes and reports were available to the appellant through GroveWare within 4 or 5 days of starting the Preliminary Clinical Assessment.

[62] With respect to use of the DOPS tool, the appellant completed two procedures for which the DOPS tool within GroveWare could have been used. Instead, the assessor completed the regular GroveWare form and marked the appellant as "satisfactory" for both procedures. Notably, there is little difference between the information already provided in GroveWare and the information that would have specifically been required on the DOPS tool.

[63] Finally, while it is true that most of the appellant's feedback was provided by the assessor, some of what the assessor reported in GroveWare is reflective of comments received from third parties. For example, a consultant reported that the appellant conveyed information in a disorganized and hard to understand fashion, and the assessor then reviewed with the appellant "the importance of structuring consults outlining the most pertinent and important features": [EKE(A) 142]. In addition, nursing staff reported having to seek clarification regarding charting instructions and the assessor repeatedly reviewed with the appellant "the importance of putting date and time with medical orders and to sign off after each order" [EKE(A) 150].

[64] Therefore, this ground of appeal is dismissed.

[65] To conclude, we see no basis for appellate intervention on grounds of procedural unfairness.

Reasonableness of the Decision

[66] The appellant argues that the chambers judge appeared to identify reasonableness as the proper standard but failed to apply it correctly.

[67] In *Vavilov*, the Supreme Court indicated that a principled approach to a reasonableness review puts the decision maker's reasons first, and noted at paragraph 85 that:

> …a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[68] Further, any shortcomings or flaws relied upon by the party challenging the decision must be "sufficiently central or significant to render the decision unreasonable": *Vavilov* at para 100.

Termination of the Preliminary Clinical Assessment

[69] The appellant submits that the College's decision to terminate the Preliminary Clinical Assessment after two weeks and refuse his application for registration was unreasonable having regard for the circumstances of this case and the governing statutory framework. Specifically, he asserts there was no reasonable basis for the College to conclude there was a substantive risk to the public and for the College to cite patient safety as the basis for terminating the Preliminary Clinical Assessment. He argues that there was only one instance of a minor injury being inflicted on a patient and other concerns related to charting and communication issues, and that the outcome was determined by the assessor's unwillingness to continue after two weeks.

[70] The Assistant Registrar's decision refers to the evidence relied on to conclude that the appellant had posed potential risk of serious harm to patients. For example, the Assistant Registrar

relied on a January 30, 2020 conversation between the assessor and a representative of the College and noted the following:

> [The assessor] stated that there had been a number of incidences where your performance was deficient or had caused harm to a patient. [The assessor] provided the following examples:
>
> - Trauma to the external canal as a result of examining a 6 year old patient with an otoscope and not accurately reporting it in the patient record
> - Inability to do a complete well baby exam or to do Pap tests
> - Inaccurate diagnoses for common general practice conditions such as mononucleosis, viral exanthema
> - Not making a referral to an oncologist for a patient with prostate cancer and lymphadenopathy who was suspected to have metastatic disease
> - Incomplete charting and lack of familiarity with SOAP format
> - [The assessor] reported that you were functioning at the level of a second year medical student
> - For a patient with a potential diagnosis of alcohol withdrawal seizures, you didn't perform an examination of the patient and you told [the assessor] that an acetaminophen level had been done and that it was fine. This test had not been done. …

[71] In the Analysis portion of the Assistant Registrar's decision, it was noted that the assessor was an experienced rural family physician and assessor. The Assistant Registrar found the assessor's documentation was objective and balanced in that the assessor reported on the appellant's clinical strengths and deficiencies. The Assistant Registrar wrote:

> It is significant that **31/36 (86%)** of your assessment notes were rated as **unsatisfactory or needs improvement**. The deficiencies noted occurred in 7 of the 8 sentinel habits and in both the hospital and community practice settings. [emphasis in original]

[72] The Assistant Registrar again reviewed several examples of concerns that were identified in both the rural hospital and community practice setting including one interaction between the appellant and assessor that led to the assessor feeling that he could not rely upon the appellant's assessments or trust what the appellant was telling him.

[73] The Assistant Registrar also reviewed the responses provided by the appellant and provided reasons as to why the appellant's deficiencies could not have been accounted for based on the absence of an orientation to the hospital or clinic. Ultimately, regarding the termination of the Preliminary Clinical Assessment, the Assistant Registrar wrote:

> I made the decision to discontinue your PCA after two weeks because of the overwhelming evidence that you did not demonstrate competence in either the hospital or community practice setting and that there was substantive risk to the public. Your assessor was no longer willing to continue the assessment because of the potential risk to his patients and that you were functioning at the level of a medical student and required training rather than an assessment.

[74] We do not accept the appellant's characterization of the record and consider the Assistant Registrar's identified concern for patient safety to be supported by several GroveWare notations. In one notation, the assessor expressed a concern about the appellant not having reassessed the need to administer IV fluids to a patient and wrote, "[t]his patient became unstable and required transfer to tertiary hospital, it is possible that the continuous IV fluids contributed to his deterioration" [EKE(A) 159]. In another, the assessor described the appellant's suggested approach to diagnoses and treatment of a patient as "a very dangerous and inappropriate therapeutic option…" [EKE(A) 169].

[75] Given the record, we see no basis to interfere with the chambers judge's conclusion that the Panel's decision upholding the Assistant Registrar's decision to terminate the Preliminary Clinical Assessment early and refuse registration based on patient safety concerns was reasonable.

Imposition of a Further Education Requirement

[76] The appellant argues that the imposition of a further training requirement is unreasonable because the Assistant Registrar failed to consider the evidence from the call-logs that the assessor found that the appellant had the necessary medical knowledge.

[77] The Assistant Registrar's decision reviewed several examples of concerns arising in both the hospital and community practice setting. As already noted, she concluded there was overwhelming evidence that the appellant posed a substantive risk to the public and pointed to the assessor's conclusion that the appellant was functioning at the level of a medical student and needed further training. The Assistant Registrar also noted that observerships are not equivalent to accredited postgraduate training and would not be an acceptable option to address the deficiencies noted in the Preliminary Clinical Assessment. It was within that context that she determined that for the appellant to apply again for licensure in Alberta, he would first be required to successfully complete two years of an accredited postgraduate training program in Family Medicine that meets the approval of the College.

[78] Given the patient safety concerns outlined in the record, we decline to interfere with the Assistant Registrar's exercise of discretion in imposing the two-year educational requirement in this case.

[79] It is important to note that in response to a question from the Court, near the conclusion of the oral hearing of this matter, counsel to the respondent stated, " ... and I will acknowledge, the *Regulations* and the statute do not provide that authority—do not say that the College can say 'you have to meet this additional criteria before a second attempt at a PRA'." The jurisdiction and authority of the Assistant Registrar to impose the two-year educational requirement was not raised as a ground of appeal before the Panel or the chambers judge. Although we requested supplemental submissions from the parties regarding this issue, we are not satisfied that we have an adequate record to address this issue and decline to do so in this appeal.

Conclusion

[80] The appeal is dismissed.

Appeal heard on December 6, 2022

Memorandum filed at Calgary, Alberta
this 23rd day of February, 2023

Strekaf J.A.

Hughes J.A.

Ho J.A.

Appearances:

S.M. Shawa, K.C.
R.M. Phillips
for the Appellant

C.D. Boyer
for the Respondent

2022 BCSC 717
British Columbia Supreme Court

Aghili v. British Columbia (Workers' Compensation Appeal Tribunal)

2022 CarswellBC 1155, 2022 BCSC 717, 2022 A.C.W.S. 3200

Mohammad Seyed Aghili (Petitioner) and Workers' Compensation Appeal Tribunal (Respondent)

D. MacDonald J.

Heard: April 4, 2022
Judgment: May 4, 2022
Docket: Vancouver S218431

Counsel: M. Aghili, Petitioner, for himself
D. Morrison, for Respondent

Subject: Public; Employment; Occupational Health and Safety

Headnote

Labour and employment law --- Workers' compensation legislation — Judicial review — Denial of natural justice

In June 2020, applicant filed claim for compensation for injury allegedly suffered in workplace accident in May 2019 — Workers' Compensation Board denied claim on basis it had not been filed within one year as required by s. 151(3) of Workers Compensation Act — When Board offered applicant opportunity to demonstrate special circumstances warranting exercise of discretion afforded by s. 151(4) to accept claim filed within three years, applicant claimed he had been unfamiliar with claims process, unaware of one-year limitation period and believed he required diagnosis before making claim — Board declined to exercise discretion on basis applicant had made previous claims, demonstrating awareness of claims process, and had received diagnosis, torn tendon requiring surgery, following MRI in March 2020, well before expiration of one year — Decision was confirmed by Board's Review Division — On appeal to Workers' Compensation Appeal Tribunal, panel consisting of single vice-chair agreed there had been no special circumstances precluding applicant from filing claim within one year — Applicant brought application for judicial review — Although his affidavit was treated as written submission, exhibits included in certified record were treated as new evidence and not admissible — Application dismissed — There was no merit to applicant's contention use of word "panel" in s. 285 of Act created legitimate expectation appeal would be determined by multi-person panel — There was also no merit to allegation of bias — Allegation vice-chair had been influenced by "Jewish money" was serious and discriminatory — Claims there had been interference in assignment of workers' advisors, appeal had been denied as cost-cutting measure and decision reflected prejudice, discrimination and racism were without foundation — Although vice-chair had been entitled to retain independent health professional, such as psychologist, to assist with decision, suggestion raised by applicant for first time on appeal, there was nothing patently unreasonable, no evidence of arbitrariness, bad faith or improper purpose, in discretionary decision not to do so — There was, in any event, no evidence vice-chair had failed to take personal challenges faced by applicant into consideration .

APPLICATION for judicial review of Workers' Compensation Appeal Tribunal's decision, dated July 28, 2021 (Decision Number: A2100291), upholding denial applicant's claim.

***D. MacDonald J.*:**

Introduction

1 This is an application by Mr. Aghili, the petitioner, for judicial review of a decision of the respondent, the Workers' Compensation Appeal Tribunal ("WCAT"). The Decision number is A2100291 and it is dated July 28, 2021 (the "WCAT Decision").

Background

2 On May 1, 2019, Mr. Aghili, who was working as a computer numerical control (CNC) machinist for Wesgar Inc., was allegedly injured while lifting heavy metal tubing at work. He felt a crack in his left elbow accompanied by sharp pain. Mr. Aghili was laid off from the company the following day for unrelated reasons.

3 Section 151(3) of the Workers Compensation Act, R.S.B.C. 2019, c. 1 [“WCA“], requires an application for compensation to be made within one year after the date of injury. However, s. 151(4) gives the Workers' Compensation Board (the "Board") discretion to accept an application filed up to three years after the date of injury if special circumstances precluded the worker from filing within one year.

4 Mr. Aghili filed a claim application with the Board on June 25, 2020, more than one year after his injury. On July 16, 2020, the Board issued a letter to the petitioner explaining that his application was late. The letter requested that Mr. Aghili provide a detailed explanation of any special circumstances that precluded him from filing within the one-year limitation period.

5 The petitioner provided a written explanation on July 28, 2020. Mr. Aghili advised the Board that he did not file a claim earlier because he thought the root cause of the problem had to be known or pinpointed first. He also claimed that he did not have any experience with the application process and was unaware of the one-year time limit.

6 On August 7, 2020 the Board issued a decision to the petitioner. The Board denied his application on the ground that his explanation did not establish that special circumstances had precluded him from applying within the one-year limitation period.

7 The Board's reasoning was as follows:

> • You did not apply within the one year time limit as set out under Section 151 of the Workers' Compensation Act.
>
> • You have two prior claims with WorkSafeBC that both have Teleclaim Applications. The claim prior to this was for an injury April 17, 2019 and you submitted a Teleclaim Application April 23, 2019. This was only two weeks prior to your May 1, 2019 injury indicating you are aware of the reporting process and how to submit a claim.
>
> • Your injury occurred on May 1, 2019, meaning you had until May 1, 2020 to apply for compensation. In that time you saw multiple practitioners, including an Orthopedic Surgeon. You had an X-ray, Ultrasound and MRI. You also received seven trigger point injections. You indicated you did not apply in the one year time frame because you thought a diagnosis was needed. Your MRI on March 10, 2020 diagnosed you with a torn tendon in your elbow, at which point you had just under two months to apply for compensation. I understand your surgery was delayed due to the COVID-19 pandemic, however the date of the surgery did not preclude you from applying. You were aware in March that you had a torn tendon in your elbow and were aware surgery was necessary in May.

8 The Board also found the injury was not reported to Mr. Aghili's employer at the time of the injury.

9 Mr. Aghili asked for a review of the decision by the Board's Review Division. His former employer did not participate in the review despite being invited to do so. The petitioner was represented by a workers' adviser from the Workers' Advisers Office. [1] Both the workers' adviser and the petitioner made submissions to the Review Division. On January 21, 2021, the Review Division confirmed the Board's decision.

10 Mr. Aghili appealed the Review Division's decision to WCAT. He noted on his form that he was now self-represented. At Mr. Aghili's request, the appeal proceeded by way of written submissions rather than an oral hearing.

11 Mr. Aghili's appeal was considered and determined by a panel consisting of a single vice chair, pursuant to s. 285(4) of the WCA. Pursuant to s. 295(3) of the WCA, the Board provided Mr. Aghili and WCAT with the Board's records respecting the matter under appeal. This consisted of the Board's claim file and its review file, which included the submissions made by Mr. Aghili and his adviser on the review.

12 Mr. Aghili was to provide his submissions to WCAT by April 19, 2021. At his request, this deadline was extended until June.

13 On July 28, 2021, the vice chair issued her decision dismissing Mr. Aghili's appeal. She held there were no special circumstances that precluded him from filing an application for compensation within one year of his injury as required under the *WCA*. She confirmed the Review Division's decision.

14 Mr. Aghili now seeks judicial review before this Court.

Standing

15 Pursuant to s. 15 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, WCAT is entitled to be a party to an application for judicial review. The extent to which a tribunal may participate in a judicial review proceeding is a matter to be determined by the court in accordance with a principled exercise of its discretion. A court seeks to balance the competing interests of impartiality and of fully informed adjudication: Ontario (Energy Board) v. Ontario Power Generation Inc.,2015 SCC 44, at paras. 41–62.

16 When the employer appears to respond to the petition for judicial review, a tribunal does not normally wade into the merits of the dispute. However, where a tribunal is the only respondent to a petition it is generally appropriate for the tribunal to argue the merits of its own decision: C.S. v. British Columbia (Workers' Compensation Appeal Tribunal),2019 BCCA 406 at paras. 47–48. This is because the need to facilitate fully informed adjudication on review is more important than maintaining tribunal impartiality. It ensures the court has heard both sides of a dispute: *Ontario (Energy Board)* at para. 54.

17 As WCAT is the only respondent to the petition, I find it is appropriate for WCAT to argue the merits of the appeal. It has standing to do so.

Legislative and Procedural Framework

18 The Board is the first-level decision-maker on matters arising under the *WCA*. Pursuant to s. 268 of the WCA, most Board decisions are reviewable by the Review Division of the Board. Pursuant to s. 288, most Review Division decisions are appealable to WCAT. WCAT is an independent appellate body whose primary responsibility is to decide appeals from the Review Division. It is comprised of the chair and vice chairs. WCAT is not part of the Board and does not answer to the Board.

19 Section 303 of the WCA provides that WCAT may consider all questions of fact and law arising in an appeal, but it is not bound by legal precedent. WCAT must make its decision based on the merits and justice of the case. In doing so it must apply any applicable policy of the board of directors of the Board. The standard of proof is on a balance of probabilities. If the evidence in an appeal is evenly weighted between the worker and the Board, the issue must be resolved in the worker's favour.

20 WCAT may confirm, vary, or cancel the decision under appeal: s. 306(1). WCAT does not consider matters which were not raised in the decision under appeal.

21 Pursuant to s. 280 of the WCA and s. 11 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [“ATA”], WCAT has created rules of procedure, called the *Manual of Rules of Practice and Procedure* (the "MRPP"). WCAT's routine correspondence advises parties to an appeal of the MRPP, its significance, and the fact that it is published on WCAT's public website.

22 Section 319 of the WCA requires the board of directors to set and revise policies. These policies are binding on the Board and WCAT: ss. 339(2) and 303(2). The key policy applied in the present case is Policy Item #93.22, "Application Made Out of Time", in the *Rehabilitation Services and Claims Manual* Volume II ("RSCM II") located on the WorkSafe BC website.

New Evidence on Judicial Review

23 The petitioner filed an affidavit dated September 27, 2021. The petitioner attached a document in the nature of a written argument. Despite being unsworn, there are exhibits interspersed and appended to this argument. Most of the exhibits to the document are included in the Certified Record. However there are some exhibits containing evidence that was not before the WCAT panel.

24 New evidence is generally not accepted on a judicial review. Judicial reviews take place on the basis of the record that was before the tribunal: Goulding v. Workers' Compensation Appeal Tribunal,2015 BCCA 223 at paras. 6–7; Corcoran v. Workers' Compensation Appeal Tribunal,2014 BCSC 1087 at paras. 9–10. A reviewing court wrongly usurps the role of the tribunal when it receives new evidence and embarks upon a *de novo* hearing: Actton Transport Ltd. v. British Columbia (Employment Standards),2010 BCCA 272 at paras. 21–23.

25 I have treated the document from the petitioner as his written submissions. I have not considered the attached exhibits which contain new evidence.

Standard of Review

26 WCAT has exclusive jurisdiction to determine all questions of law, fact, and discretion on an appeal: WCA s. 308. WCAT's decisions are final and conclusive: WCA s. 309. These provisions together constitute a privative clause: Ahluwalia v. Workers' Compensation Appeal Tribunal,2020 BCSC 1717 at para. 21; Singla v. Workers' Compensation Appeal Tribunal,2020 BCSC 1227 at paras. 8–9. Accordingly, s. 58 of the ATA applies. It provides:

> **Standard of review with privative clause**
>
> **58** (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion:
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

27 A finding of fact, law, or an exercise of discretion is reviewed using the standard of patent unreasonableness. The patently unreasonable standard is highly deferential to the original tribunal. The decision must be "clearly irrational or evidently not in accordance with reason" before it will be disturbed: Shamji v. Workers' Compensation Appeal Tribunal,2018 BCCA 73 at para. 37. In West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal),2018 SCC 22, the Court articulated the standard as follows:

> [28] A legal determination like the interpretation of a statute will be patently unreasonable where it "almost border[s] on the absurd": *\/oice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 18. In the workers' compensation context in British Columbia, a patently unreasonable decision is one that is "openly, clearly, evidently unreasonable": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, at para. 33; *Vandale v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 391, 342 B.C.A.C. 112, at para. 42 (emphasis deleted).
>
> [29] By stipulating the standard of patent unreasonableness, the Legislature has indicated that courts should accord the utmost deference to the Tribunal's interpretation of the legislation and its decision.

28 The standard of patent unreasonableness in the *ATA* clearly differs from the common law standard of reasonableness. Under the patently unreasonable standard, I must accept WCAT's reasoning and its interpretation of the governing legislation unless it "almost borders on the absurd": *West Fraser Mills Ltd.*

29 Section 58(2)(b) of the ATA provides that the standard of review for procedural fairness is whether, in all of the circumstances, the tribunal acted fairly. Where a reviewing court concludes the procedures meet the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures: Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.,2013 BCCA 55 at para. 52.

30 The object of procedural fairness is not to achieve "procedural perfection". It is to achieve a balance between the need for fairness, efficiency, and predictability of outcome: Knight v. Indian Head School Division No. 19,[1990] 1 S.C.R. 653 at 685, 69 D.L.R. (4th) 489.

Petitioner's Position

31 The petitioner has a number of grounds for review. First, he accuses WCAT of replacing the workers' adviser who represented him at the Review Division with another adviser who declined to represent him on the appeal.

32 Second, the petitioner states he inferred from WCAT's use of the word "panel" that his appeal would be determined by a group of three or more decision-makers. He alleges he had a legitimate expectation of a multi-person panel.

33 Third, the petitioner accuses WCAT and the vice chair of several types of bias. Mr. Aghili alleges that WCAT and the vice chair were influenced by "Jewish money" and WCAT denied his appeal as a cost-saving measure. Mr. Aghili also accuses the vice chair of prejudice, discrimination, and racism, implying that it is reflected in the vice chair's handling of evidentiary issues.

34 Fourth, the petitioner argues that the vice chair should have retained an independent health professional for advice on the effects of systemic discrimination and to assist in reaching the decision.

35 Lastly, Mr. Aghili argues his injury is significant, he required surgery, and in a country like Canada he should be compensated.

Respondent's Position

36 The respondent argues that Mr. Aghili's claims with respect to bias are baseless. The respondent submits that Mr. Aghili has offered no support for his allegations that WCAT has engaged in prejudice, discrimination, and racism. In particular, the respondent contends that Mr. Aghili's claim that WCAT was influenced by "Jewish money" is a reprehensible anti-Semitic smear that has no foundation in truth.

37 The respondent argues that Mr. Aghili's claim that WCAT interfered with his representation by his workers' adviser is unfounded since the Board and WCAT are independent from the Workers' Advisers Office.

38 The respondent further argues that there is insufficient evidence to establish that Mr. Aghili had a legitimate expectation that the WCAT panel would be made up of three or more decision-makers.

39 Finally, the respondent argues that Mr. Aghili did not ask the panel to engage an independent health professional to assist in reaching a decision. He has raised this issue for the first time on review.

Analysis

General

40 Canada (Minister of Citizenship and Immigration) v. Vavilov,2019 SCC 65 [, is the leading case from the Supreme Court of Canada with respect to judicial review. Because the *ATA* governs the judicial review of tribunal decisions, *Vavilov* is of limited value in the case before me. Nevertheless, *Vavilov* emphasizes that respect for the "institutional design choices" of legislatures requires a reviewing court to adopt a posture of restraint: at paras. 24, 36. Here, as set out by the *ATA*, the legislature has determined that the standard of patent unreasonableness applies. The Court in *Vavilov* directs me to adopt a principled approach by beginning my inquiry into the reasonableness of the WCAT Decision by examining the reasons provided with "respectful attention". I must seek to understand the reasoning process the decision-maker followed to arrive at its conclusion: at para. 84.

Was the Decision Procedurally Unfair?

41 Mr. Aghili alleges two grounds of procedural unfairness: (i) that he had a legitimate expectation of a multi-person panel and (ii) that WCAT and the vice chair were biased.

42 In regard to the first ground of procedural unfairness, the petitioner understood the word "panel" to mean there would be a group of three or more vice chairs hearing his review. He argues that he had a legitimate expectation of a multi-person panel.

43 If a government official makes representations within the scope of their authority to an individual about an administrative process that the government will follow, the government may be held to its word so long as the representations are clear, unambiguous, and unqualified. Further, the representations must be procedural in nature and not conflict with the decision maker's statutory duty: Canada (Attorney General) v. Mavi,2011 SCC 30 at para. 68.

44 Section 285 of the WCA provides that "panels must consist of the chair sitting alone or a vice chair sitting alone" unless the chair determines that a panel of three or more members is required. If the matter is of special interest or significance to the workers' compensation system as a whole, the chair may appoint a panel of up to seven members. Chapter 2.7.1 of the MRPP, a non-binding guideline, also states that the chair may appoint a multi-person panel depending on the complexity and significance of the issues raised in an appeal. The respondent advises that in practice multi-person panels are infrequent.

45 According to para. 17 of the *Decision of the Chair, Workers' Compensation Appeal Tribunal #30*, only three WCAT officers have the authority to appoint multi-person panels: tribunal counsel, the registrar, and the vice chair responsible for quality assurance. None of the communications between the petitioner and WCAT involved any of these officers.

46 Although Mr. Aghili appeared to be unaware of the legislation, procedures, and decisions, I do not find that the use of the word "panel", alone, was a clear and unambiguous representation to him. Accordingly, the doctrine of legitimate expectations does not arise in this case. In any event, I am not persuaded that having more vice chairs on the panel would have changed the panel's decision or that Mr. Aghili suffered any prejudice as a result of his appeal being heard by one vice chair. I do not accept that the underlying proceeding was procedurally unfair on this ground.

47 In regard to the second ground of procedural unfairness, Mr. Aghili alleges bias. A person alleging bias must support the allegation with evidence. The petitioner's argument regarding interference with the Workers' Advisers Office is not supported by any evidence. The Workers' Advisers Office is independent of the Board and WCAT. According to the respondent, WCAT plays no part in, and exerts no influence on, the selection or assignment of workers' advisers. Moreover, there is no evidence

before me suggesting WCAT replaced Mr. Aghili's original workers' adviser with another representative. The petitioner has not persuaded me that there is any procedural unfairness under this ground.

48 In terms of Mr. Aghili's claim that the vice chair was influenced by "Jewish money", he offered no evidence to support this serious and discriminatory allegation. He simply implied that prejudice, discrimination, and racism are reflected in the vice chair's handling of the evidentiary issues. His allegation has no foundation.

49 In terms of Mr. Aghili's claim that WCAT denied his appeal as a cost-cutting measure, I note that claims benefits are the responsibility of the Board. As such, there is no gain for WCAT in denying a worker's appeal just as there is no loss in allowing an appeal. There is no evidence before me that WCAT denied the petitioner's appeal as a cost-cutting measure.

50 I understand the petitioner is disappointed with the outcome of the WCAT Decision. A ruling on an issue will generally favour one party over the other. While the petitioner's disappointment with the outcome is understandable, it cannot serve as a sound basis for an allegation of reasonable apprehension of bias.

51 The petitioner has not established procedural unfairness on the basis of bias.

Was the Decision Patently Unreasonable?

52 The petitioner did not request that the vice chair retain an independent health professional, specifically a psychologist. He is raising this issue for the first time in this judicial review proceeding.

53 I accept that s. 302 of the WCA provides that a panel may retain an independent health professional if it determines that assistance or advice from such a health professional would assist in reaching a decision. However, this Court will generally not review an issue that could have been, but was not, raised before the tribunal: Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 at para. 22. In Yadav v. British Columbia (Superintendent of Motor Vehicles),2019 BCSC 350, Justice Baird explained this as follows:

> [19] Generally speaking on a review such as this a judge should not find an anterior administrative decision to be unreasonable based on a submission that the statutory decision-maker never heard: *Gorenshtein v. British Columbia*, 2016 BCCA 457at para. 47. The reasons for this are set out in *Vandale v. British Columbia*, 2013 BCCA 391at para. 54, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61at para. 24, as follows:
>
> > To allow a party a new hearing before an administrative tribunal because it overlooked raising an issue or making an argument at the original hearing would unduly interfere with the role entrusted to such tribunals . . . In effect, the tribunal's decision would be set aside not because it failed to pass scrutiny under the applicable standard of review, but because it did not address a point it was not asked to address.

54 I am not prepared to depart from the general rule that I should not address issues arising for the first time on the judicial review.

55 Moreover, the decision of the vice chair regarding whether to retain an independent health professional was discretionary. Discretionary decisions of a tribunal are owed deference by a reviewing court. A discretionary decision is patently unreasonable only if the discretion is exercised arbitrarily or in bad faith, is exercised for an improper purpose, is based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account: ATA s. 58(3). None of these factors are present here.

56 I find it was not patently unreasonable for the vice chair, on her own motion, not to exercise her discretion to retain an independent health professional.

57 The petitioner argues that there were special circumstances that precluded him from filing his claim within one year because he was under a tremendous amount of stress and psychological pressure during the years 2019 and 2020. He was unable to think straight and he was not mindful of the passage of time. Further, he was unaware of the one-year time limit to

file his claim. The petitioner asserts that the vice chair grossly downplayed his circumstances and the amount of stress he was experiencing during the relevant time period.

58 The vice chair acknowledged that Mr. Aghili faced several hardships and challenges over the past few years. These hardships included his daughter being bullied at school, difficulties with his landlord (including limited access to the Internet and having to look for a new home), and being laid off or dismissed from employment on several occasions (which caused him to have difficulties earning an income during this time).

59 The vice chair made the following observations regarding the impact the petitioner's circumstances may have had on his ability to file his claim:

> While I appreciate that these posed challenges to the worker and created a great deal of stress in his life, there is no evidence to suggest that he was suffering from a psychological impairment as a result of these challenges or was unable to face these challenges . . .

60 The vice chair was aware of Mr. Aghili's challenges and she considered his psychological state when she made her ruling.

61 The vice chair emphasized that a worker must file a claim within one year of the date of the worker's injury: WCA s. 151(3). She relied on the applicable Board policies. She correctly noted that before the Board can consider an application outside the one-year timeframe, two requirements must be satisfied: (i) there must have existed special circumstances which precluded the application from being filed within one year and (ii) the Board must exercise its discretion to pay compensation despite the delay: ATA s. 151; RSCM II Policy Item #93.22.

62 In determining whether special circumstances were present, the vice chair found it was irrelevant whether the claim itself is valid. She relied on previous decisions for the principle that the appropriate approach is to consider whether unusual and extraordinary circumstances existed and, if so, whether such circumstances made it difficult or hindered the worker from pursuing their claim. She noted a worker does not have to establish it was impossible to undertake their claim.

63 The vice chair further noted that special circumstances could include language difficulties, a worker relying on the advice of others (such as a physician or employer), limited education, or a lack of knowledge that their injury might be work-related. She noted the list is not exhaustive. Judgment is made in the circumstances of the particular case.

64 The vice chair emphasized the fact that Mr. Aghili had two prior claims with the Board and was therefore not completely unfamiliar with the claims process. Further, the vice chair noted that during the material time period Mr. Aghili was able to pursue a complaint against his landlord with the Residential Tenancy Branch in a timely way, he was able to apply for employment insurance to assist with the gaps in his income, and he made an application for workers' compensation for another injury. The application for workers' compensation was made just weeks before the injury upon which his current claim is based.

65 The vice chair concluded that "the worker had the knowledge and skill to seek benefits from different governmental bodies and could have done so with the Board in relation to his left elbow injury given his prior experience with the Board and his knowledge of the extent of his left elbow injury": at para. 46. Based on the other applications, the vice chair concluded that Mr. Aghili could have made an application to the Board for wage loss benefits.

66 At the outset the employer took the position that Mr. Aghili never advised it about this workplace injury at the relevant time. The vice chair found it important that the petitioner took no steps, reasonable or otherwise, to contact the Board and advise it of his injury even when his injury became more severe than he initially believed. Mr. Aghili was aware that his injury was significant by March 10, 2020 when an MRI report revealed that he had torn a tendon in his left elbow. His surgery was on June 16, 2020 and he would have known in advance of that date of the seriousness of his injury. Finally, the vice chair noted that Mr. Aghili did not inform any of his treating physicians that he had suffered a workplace injury, even after he was no longer working for the employer where he was allegedly injured.

67 The vice chair concluded that despite Mr. Aghili's relative inexperience with the Board system, he provided no reasonable explanation as to why he could not file his claim earlier. The evidence did not support the finding that special circumstances precluded Mr. Aghili from filing his application within the one-year time limit. As a result, the vice chair denied Mr. Aghili's appeal and confirmed the Review Decision.

68 In Speckling v. British Columbia (Workers' Compensation Board),2005 BCCA 80 at para. 37, the court held: "A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is 'openly, clearly, evidently unreasonable', can it be said to be patently unreasonable."

69 The petitioner asserts that the vice chair ignored the submission of his original workers' adviser. This submission forms part of WCAT's appeal record. While the vice chair's decision does not specifically refer to the submission, it is not required that an adjudicator refer to all the parties' evidence and arguments. As stated in Byelkova v. Fraser Health Authority,2021 BCSC 1312 at para. 20, "the court should presume that the tribunal considered all of the evidence and argument, even if not all are recited in the reasons . . . ".

70 The standard of review is patent unreasonableness within the meaning of s. 58(2)(a) of the ATA. I must give respectful attention to the reasons provided by the vice chair. As emphasized in *West Fraser Mills Ltd.* , WCAT is entitled to the highest degree of deference when this Court is reviewing a decision to deny a late-filed complaint.

71 There was evidence before the vice chair to support her conclusions. It was not patently unreasonable for the vice chair to find that the petitioner did not have special circumstances which precluded him from filing an application for workers' compensation within one year of his injury. I find that the vice chair addressed the relevant points raised in Mr. Aghili's submissions and she appropriately considered his reasons for delay. Her decision certainly does not "almost border on the absurd".

72 The vice chair's Decision is not patently unreasonable, nor is it procedurally unfair.

Costs

73 Based on Laursen v. Director of Crime Victim Assistance,2017 BCCA 8 at para. 95, WCAT does not seek its costs against the petitioner.

Disposition

74 I dismiss the petition.

75 No costs are awarded to either party.

Application dismissed.

Footnotes

1 The Workers' Advisers Office and workers' advisers are established under ss. 350 to 353 of the WCA as a resource for workers with claims under the *WCA*.

CITATION: Del Grande v. Toronto Catholic District School Board, 2023 ONSC 349
DIVISIONAL COURT FILE NO.: 139/21
DATE: 20230113

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

R. Smith, Stewart and Nishikawa JJ.

B E T W E E N:	
Michael Del Grande Applicant	*Charles Lugosi*, for the Applicant
- and –	*Christine Muir and Adrian Pel,* for the Respondent
Toronto Catholic District School Board Respondent	*David Tortell and Waleed Malik*, for the Intervener, the Attorney General of Ontario
	HEARD: in Toronto by videoconference on October 19, 2022

REASONS FOR DECISION

NISHIKAWA J.

Overview

[1] The Applicant, Michael Del Grande, a Trustee of the Toronto Catholic District School Board ("TCDSB"), seeks judicial review of four decisions of the Board of Trustees (the "Board") finding that he breached the code of conduct for trustees, imposing certain sanctions on him and confirming those decisions.

[2] The Applicant was found to have breached the code of conduct for trustees when he made certain comments, as further detailed in these reasons, during a Board meeting to discuss an amendment to the TCDSB's code of conduct to include gender identity, gender expression, family status, and marital status as additional protected grounds.

[3] The Applicant's main argument is that the Board lacked authority and was precluded from reconsidering an initial decision, which had failed to obtain the two-thirds majority required for a finding that he breached the code of conduct. The Applicant submits that the initial decision ought to be reinstated. The Applicant further submits that because his comments were constitutionally protected, the subsequent decisions contravene *Charter* values and principles of fairness.

[4] For the reasons set out below, the application is dismissed.

Background

The Parties

[5] The Applicant has been an elected Trustee of the TCDSB since 2014. The Applicant originally served as a trustee from 1994 to 2003, and as Chair in 2000. From 2003 to 2014, the Applicant served as an elected councillor of the City of Toronto.

[6] The TCDSB is a school board constituted as a corporate body under the *Education Act*. The TCDSB serves approximately 90,000 students in 196 elementary and secondary schools. The Board consists of 12 trustees, who must be Catholic and are elected to the Board during each municipal election. The Board makes decisions through resolutions at formal meetings, which are recorded in written minutes.

Codes of Conduct for Trustees Under the *Education Act*

[7] In 2009, after several reports calling for a review of school board governance in Ontario, the legislature enacted amendments to the *Education Act* to strengthen school board governance: *Student Achievement and School Board Governance Act, 2009*, S.O. 2009, c. 25. The following provisions were added to the *Education Act* and are relevant to this application: ss. 169.1, 218.1, 218.2 and 218.3.

[8] Section 169.1 imposes statutory duties on school boards to: (i) "promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any… sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability"; (ii) promote the prevention of bullying; (iii) promote student achievement and well-being; and (iv) "develop and maintain policies and organizational structures that promote" these goals.

[9] Since 2018, it has been mandatory for school boards to have a code of conduct for their trustees: *Education Act*, s. 218.2(2)(a), O. Reg. 246/18, s. 1(1). Section 218.1 imposes certain statutory duties on school board trustees, including duties to "maintain focus on student achievement and well-being" and to comply with a school board's code of conduct for trustees.

The TCDSB Code of Conduct for Trustees

[10] The TCDSB adopted a Code of Conduct for Trustees in September 2010 (the "Code of Conduct").[1] The Code of Conduct recognizes that Trustees "represent all citizens in the Catholic community in the City of Toronto" and that the public "is entitled to expect the highest standard

[1] The Code of Conduct was amended in April 2012 and February 2016.

from the school trustees that it elects." Trustees are expected to "respect differences in people, their ideas, and their opinions", and to "respect and treat others fairly, regardless of, for example, race, ancestry, place of origin, colour, ethnic origin, citizenship, religion, gender, sexual orientation, age, or disability."

[11] The Code of Conduct requires trustees to "ensure the affairs of the board are conducted with openness, justice and compassion" and "share in the responsibility for creating a positive environment that is safe, harmonious, comfortable, inclusive and respectful.[]" The Code of Conduct further requires that "when performing their duties as trustees and in… meetings with staff, parents and other stakeholders, appropriate language and professionalism are expected[.]"

[12] The Code of Conduct sets out a range of sanctions and remedial measures, which supplement the sanctions enumerated in s. 218.3(3) of the *Education Act*. The Code of Conduct stipulates that a vote "on any resolutions of determination or sanctions will be made by a 2/3 majority of all Trustees on the board not including the accused Trustee."

The Applicant's Comments

[13] On August 29, 2019, the Minister of Education issued Policy/Program Memorandum 128 ("Memorandum 128") which communicated that the Minister had revised the provincial code of conduct, an instrument with which all school board codes of conduct must conform. Among other changes, the Memorandum specifies gender identity, gender expression, family status, and marital status (the "Additional Grounds") as enumerated grounds that "all members of the school community" must respect and not discriminate based upon.

[14] In response to the Memorandum, the TCDSB Trustees considered whether to add gender identity, gender expression, family status and marital status as enumerated grounds under the TCDSB Code of Conduct. On October 30, 2019, the Board's Catholic Education and Living Our Catholic Values Subcommittee voted 4-1 against a proposal to add the Additional Grounds to the TCDSB Code of Conduct. The Applicant voted with the majority.

[15] On November 7, 2019, at a public meeting of the Student Achievement and Well Being, Catholic Education and Human Resources Committee, the Trustees considered a motion to direct the Governance and Policy Committee to approve the addition of gender identity, gender expression, family status and marital status as enumerated grounds under the TCDSB Code of Conduct. Two days before the meeting, the Archdiocese of Toronto had advised the Board that it accepted the addition of the Additional Grounds to the TCDSB Code of Conduct.

[16] At the meeting, several delegations made submissions regarding the motion to add the Additional Grounds to the TCDSB Code of Conduct. A former student trustee of the Board who identifies as a member of the LGBTQ+ community spoke about his personal experience at a Board-operated high school, including the suicide of a friend who did not feel accepted because he was gay.

[17] During the debate, the Applicant proposed an amendment to the motion. The Applicant moved to add to the Additional Grounds numerous fetishistic behaviours including pedophilia, gerontophilia, bestiality and vampirism, among others. The Applicant spoke at length describing more than 20 types of such behaviours, some of which are offences under the *Criminal Code*. The

Applicant characterized his proposal as showing the "slippery slope" of adding the Additional Grounds.

[18] The Director of Education for the TCDSB, Rory McGuckin, advised the Board that the Applicant's remarks could result in a contravention of the *Education Act* or policy guidelines and that some of the terms were contrary to the *Criminal Code*. The Chair, Garry Tanuan, then ruled the Applicant's proposed amendment out of order on the basis that it would be contrary to the *Human Rights Code*, the *Education Act*, the Memorandum and, in some cases, the *Criminal Code*.

[19] As the meeting continued, the Applicant continued to inquire about opinions provided by the Catholic Archdiocese on the matter. The Board ultimately voted to direct the Governance and Policy Committee to approve the addition of the Additional Grounds into the TCDSB Code of Conduct.

The Investigation

[20] After the meeting, the TCDSB received over a dozen formal complaints about the Applicant's comments. The Ontario Catholic School Trustees' Association repudiated the Applicant's remarks.

[21] On February 24, 2020, the Board sought an independent review of the matter. At the Applicant's request, the initial investigator was replaced by an investigator with knowledge of Catholic teachings. The investigator reviewed the written complaints, interviewed the Applicant and three complainants, reviewed documents provided by the parties, and reviewed relevant portions of a recording of the meeting.

[22] On May 29, 2020, the investigator issued her report which found that the Applicant had violated the Trustees' Code of Conduct by creating an "unwelcoming and harmful environment for certain members of the Catholic school board community." The investigator found that while debating the motion was within the Applicant's role, he "crossed the line" through the "inflammatory language" of his proposed amendment and the "flippant (to use his own word) manner in which he addressed concerns about that language[.]"

The First Decision

[23] On August 20, 2020, at held a regularly scheduled meeting, the full Board of Trustees considered, among other things, the Applicant's Code of Conduct matter. At the start of the meeting, the Applicant requested that it be recorded and argued that the agenda item relating to the Code of Conduct proceeding was unlawful and abusive. The Chair ruled that the item was in order. The Applicant appealed and the Board voted to uphold the ruling. The Applicant alleges that the Chair did not allow the Applicant's counsel to respond to submissions made by the Board's external counsel and that the Applicant's counsel's Zoom connection was terminated and not restored.

[24] During an *in camera* session, the Trustees considered the investigation report and discussed whether the Applicant had violated the Code of Conduct. The Applicant recused himself from the discussion and vote. The Trustees then returned to the public session and voted on a resolution finding that the Applicant was in breach of the Code of Conduct. The Board voted 7-4 in favour

of the resolution (the "First Decision"). This was one vote short of the two-thirds majority required under the Board's By-law 175 (the "By-law") to find that a Trustee has breached the Code of Conduct.

[25] On September 8, 2020, the Board's legal counsel advised an investigator for the Ontario College of Teachers that the Board determined that the Applicant did not breach the "Code of Conduct.

Reconsideration and Subsequent Decisions

[26] The First Decision was followed by a strong negative response from the community. The Board decided to convene a special meeting on November 11, 2020 to debate whether it should reconsider the First Decision, pursuant to Article 10.11 of the By-law (the "Reconsideration Provision.") Counsel for the TCDSB and counsel for the Applicant attended. The Applicant had sent a 46-page legal submission to the Trustees in advance of the meeting. During an *in camera* session, his counsel was invited to respond to questions. In the public part of the session several delegations made submissions. The meeting lasted for over eight hours.

[27] At 12:30 a.m. on November 12, 2020, the Board voted 8-1 in favour of a motion to use the Reconsideration Provision to reconsider the First Decision (the "Reconsideration Decision").

[28] The Board then voted 8-1 in favour of finding that the Applicant, by his comments and proposed amendment at the November 7, 2019 Board meeting, had engaged in misconduct and breached the Code of Conduct by making comments that were offensive and inappropriate (the "Merits Decision").

[29] The Board proceeded to debate the appropriate sanctions to apply to the Applicant. After a couple of amendments, the Board voted 8-1 to sanction the Applicant, under s. 10(a) of Policy T.04 (Trustees Code of Conduct) and s. 218.3 of the *Education Act* (the "Sanctions Decision"), as follows:

(1) That the Board censure Trustee Del Grande for behavior which was disrespectful to the LGBTQ community as a whole, as well as the TCDSB community;

(2) That the Board request that Trustee Del Grande present a public apology;

(3) That Trustee Del Grande be barred from sitting on a number of committees of the Board for a three-month period;

(4) That the Board refrain from appointing Trustee Del Grande to any representative position or role on behalf of the Board for a period of three months; and

(5) That Trustee Del Grande immediately undertake and complete within a month an Equity Training program, to be recommended by the Board's Human Rights and Equity Advisor.

The Decisions Are Confirmed

[30] On December 3, 2020, the Applicant sought to appeal the Merits and Sanction Decisions and delivered a 440-page affidavit and 36-page legal submission. The Board's external legal counsel provided a summary to the Director of Education on December 11, 2020. On December 14, 2020, the Applicant then delivered a purported "reply" submission (the "Reply"). The Respondent takes the position that the Reply is not a proper reply but that it simply rehashes arguments made in the Applicant's initial submission.

[31] On December 16, 2020, as required under s. 218.3(6) of the *Education Act*, a special meeting of the Board was held to confirm, vary or revoke the determination that the Applicant had breached the Code of Conduct. In a private session, the Board considered a report and a legal opinion from the Board's external counsel which concluded that the determination that the Applicant breached the Code of Conduct was legally sound. The Board considered the Applicant's initial submission but did not consider the Reply. In a public session, the Board confirmed the prior determination by a vote of 8-1 (the "Confirmation Decision"). On December 17, 2020, the Chair of the Board sent the Applicant a letter confirming the Merits and Sanctions Decisions.

[32] The Applicant seeks to quash the Reconsideration Decision, the Merits Decision, the Sanctions Decision and the Confirmation Decision (collectively, the "Decisions") and to have the First Decision reinstated.

Issues

[33] This application for judicial review raises the following issues:

(a) What is the applicable standard of review?

(b) Was the Reconsideration Decision reasonable?

(c) Were the Merits, Sanctions and Confirmation Decisions reasonable?

(d) Was the Applicant denied procedural fairness because of the Board's failure to consider his Reply?

Analysis

Standard of Review

[34] The Applicant submits that the standard of correctness applies to the Decisions because the application raises issues of the Board's jurisdiction to reconsider the First Decision, as well as the application of the principles of *res judicata*, issue estoppel, abuse of process and *functus officio*. He submits that those issues are of central importance to the legal system as a whole.

[35] I disagree. Pursuant to *Canada (Minister of Immigration and Citizenship) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 16-17, the presumptive standard of review is reasonableness. The issues raised in this application do not displace that presumption. First, the issue of whether the Board had authority to reconsider the First Decision did not require that the

Board resolve an issue of conflicting jurisdiction between two administrative decision-makers. The issue was simply whether the Board had authority under the *Education Act* and its By-law, to reconsider its decision. To the extent that this issue can be characterized as a jurisdictional question, it is one that the Supreme Court of Canada clarified in *Vavilov* would attract a reasonableness review: *Vavilov*, at paras. 65-68.

[36] Second, the application raises no issue of central importance to the legal system as a whole or pertaining to the rule of law. In this case, the Board applied the well-established principles of *res judicata*, issue estoppel, abuse of process and *functus officio* within a particular factual context and in light of the Reconsideration Provision. The Board was not required to articulate a general doctrine or resolve a complex legal issue of broader application. See: *Vavilov*, at paras. 60-62; *Victoria University (Board of Regents) v. GE Canada Real*, 2016 ONCA 646, at paras. 88-93. As a result, the standard of reasonableness applies.

[37] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov*, at para. 85. The reasonableness standard requires that a reviewing court defer to such a decision.

[38] The parties agreed that no standard of review analysis is required on matters of procedural fairness, which are determined with reference to the non-exhaustive list of considerations set out in *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817, at para. 23. More recently, the Supreme Court of Canada has clarified in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 DLR (4th) 328, at para. 30, that the standard of review applicable to matters of procedural fairness is correctness.

Was the Reconsideration Decision Reasonable?

Was the Board's Application of the Reconsideration Provision Reasonable?

[39] The Applicant submits that the Decisions must be quashed because any reconsideration must be authorized by statute and the *Education Act* contains no such authority. The Applicant submits that the Reconsideration Provision, Article 10.11 of the By-law, is inferior to the statutory scheme set out in s. 218.3 of the *Education Act* and is not intended for use in Code of Conduct proceedings. The Applicant's position is that the Board was not entitled to use the Reconsideration provision to hold a fresh vote to get the result that it was seeking, a process that he characterizes as "reverse engineering." In support of his position, the Applicant relies on the following paragraph from *Vavilov*, at para. 121:

> The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior – albeit plausible – merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[40] The Respondent submits that the Reconsideration Decision was reasonable. The *Education Act* gives the Board broad authority to control and determine its own processes. Because the *Education Act* does not prohibit reconsideration, the Board was entitled to use the Reconsideration Provision to reconsider the First Decision. The Respondent relies on the following contextual factors to support its position: (i) the board was interpreting its home statute and its own codes of procedure and conduct; (ii) the legislative scheme favours deference to the Board; (iii) the Trustees have a unique perspective on the Applicant's comments; and (iv) the Trustees are elected representatives and the Board is democratically accountable to the community.

The Reconsideration Provision

[41] Article 10.11of the By-law reads as follows:

> 10.11 Reconsideration by the Board of Trustees
>
> > Any matter which has been decided upon by the Board of Trustees, for a period of three months thereafter, may be reconsidered by the Board of Trustees only on an affirmative vote of two-thirds of all Trustees of the Board of Trustees entitled to vote, thereafter only on an affirmative vote of a majority of all Trustees of the Board of Trustees entitled to vote thereon. Thereafter a matter may be reconsidered only on a vote of a majority of all Trustees of the Board of Trustees entitled to vote thereon.

[42] The Applicant accepts that under s. 169.1(d) of the *Education Act*, the Board had authority to enact the By-law and consequently Article 10.11. He submits, however, that the Board was not entitled to circumvent or read-in new procedure to s. 218.3 of the *Act*. The Applicant further submits that the Reconsideration Provision is only intended to be used on appeal when a Trustee has been found "guilty" of misconduct and not when a Trustee has been "acquitted."

Section 218.3 of the *Education Act*

[43] The procedure for enforcing a school board's code of conduct for trustees is set out in s. 218.3 of the *Education Act*. In brief, where a potential breach of a code of conduct has come to the board's attention, the board is required to make inquiries and determine whether the code of conduct has been breached (s. 218.3(2)); to take certain actions if the board determines that a trustee has breached the code of conduct (s. 218.3(3)); and to give the trustee notice and provide an opportunity to make written submissions regarding the finding of misconduct or sanction (s. 218.3(6)). The board is required to make a determination as to whether misconduct has occurred, the sanctions to be imposed, and the confirmation/revocation of the decisions by resolution at a public meeting of the board (s. 218.3(11)).

[44] Subsection 218.3(3) specifies the sanctions that may be imposed in the event of a breach of the code of conduct. The sanctions include censure of the member and barring the member from attending meetings and/or sitting on committees of the board for a specified period of time.

[45] A trustee's opportunity to make submissions takes place after a finding of breach and the imposition of a sanction under s. 218.3(6), which states as follows:

(6) If a board determines that a member has breached the board's code of conduct under subsection (2),

(a) the board shall give the member written notice of the determination and of any sanction imposed by the board;

(b) the notice shall inform the member that he or she may make written submissions to the board in respect of the determination or sanction by a date specified in the notice that is at least 14 days after the notice is received by the member; and

(c) the board shall consider any submissions made by the member in accordance with clause (b) and shall confirm or revoke the determination within 14 days after the submissions are received.

Findings

[46] The modern principle of statutory interpretation requires that the words of an Act be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature: *Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27.

[47] In my view, the Board's application of the Reconsideration Provision to reconsider the Applicant's Code of Conduct matter was reasonable because it is supported by the text, context and purpose of the *Education Act*. I reject the Applicant's submission that because the Board was not entitled to reconsider the First Decision, the Reconsideration Decision was "illegal."

[48] Beginning with the text of the provision, nothing in the language of s. 218.3, or the *Education Act*, precludes reconsideration of a code of conduct matter by a board. There is no provision in the *Act* stating that a determination under s. 218.3(6) is final. Section 218.3 prescribes a process for determining whether a trustee has breached a code of conduct. As noted above, under s. 218.3(6), the trustee does not have an express right to make submissions before a finding of a breach is made. The trustee has an opportunity to make written submissions before the meeting at which the determination will be confirmed, revoked or varied. Moreover, s. 218.3 does not require that a board provide a trustee with a full hearing or participatory rights; it provides only for written submissions. Subsection 218.3(14) reinforces this by specifically stating that the *Statutory Powers Procedures Act* does not apply.

[49] Similarly, the Reconsideration Provision itself contains no limits as to the subject matter to which it applies. In fact, the wording of the provision is broad, and states that "[a]ny matter which has been decided upon by the Board of Trustees… may be reconsidered by the Board of Trustees…[.]" The Reconsideration Provision does not exclude its application to Code of Conduct matters. There is no basis on which to read-in such a limit where none exists. The provision stipulates that a two-thirds majority vote is required to reconsider a decision of the Board within three months but that after that, a simple majority is sufficient. This requirement is logical to ensure that policy matters are not constantly revisited once they have been decided. The fact that the Reconsideration Provision has not previously been used in relation to a Code of Conduct matter does not mean that it cannot be.

[50] As is evident from the process provided under s. 218.3, the process for determining whether a trustee has breached a code of conduct is not akin to a criminal process. The potential sanctions under the *Education Act*, including censure and the inability to participate in committees, are correspondingly weak. An individual facing a criminal prosecution has, for good reason, stronger, constitutionally protected participatory and procedural rights than a trustee facing a code of conduct proceeding under the *Education Act*. It follows that the Applicant's use of criminal law concepts, such as a "finding of guilt," "acquittal" and "double jeopardy" have no place in a code of conduct proceeding under s. 218.3. The process under s. 218.3 leads to a determination as to whether a trustee has breached the code of conduct and an appropriate sanction, and nothing more.

[51] The statutory scheme provides further support for the Board's interpretation of the Reconsideration Provision and s. 218.3. Under s. 58.5(1) of the *Education Act*, a school board is permitted to function as a corporation and "has all the powers and shall preform all the duties that are conferred or imposed on it under this or any other Act." That provision reflects a legislative intent that school boards not be limited in conducting their affairs to those functions that are specified in the *Education Act.* Moreover, the *Act* does not dictate to the Board how it must conduct its affairs, rather, the Board is the primary determinant of its own processes.

[52] This court has previously held that school boards should be free to act as modern, democratic, dynamic legal personalities. Provided there is some statutory foundation for the process in question and no express statutory prohibition against it, they have the freedom to control their own internal processes: *In the Matter of s. 10 of the Education Act*, 2016 ONSC 2361, at para. 56. The *Education Act* vests a virtually unrestricted statutory authority to act, provided only that there be some basis for the board's actions in a valid statute. While school boards may only exercise the powers expressly or impliedly conferred on them by statute, included in this authority are any general powers conferred by the legislation: *In the Matter of s. 10 of the Education Act*, at para 55.

[53] In addition, while the *Education Act* requires that a board enact a code of conduct, it does not prescribe the standards or content. This demonstrates that the legislature intended for conduct issues to fall within the Board's authority, which enables the Board to act in a flexible and dynamic manner, responsive to the community it serves.

[54] The purpose of the *Education Act* is to foster a strong public education system, which is the foundation of a "prosperous, caring and civil society." *Education Act*, s. 0.1(1). Subsection 0.1(2) further states that the "purpose of education is to provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to their society." The Board, as a "partner[] in the education sector" has "a role to play in enhancing student achievement and well-being, closing gaps in student achievement and maintaining confidence in the province's publicly funded education systems." *Education Act*, s. 0.1(3).

[55] The focus of the *Education Act* is thus the public education system and the well-being and achievement of the students who participate in it, with the goal of ensuring they develop into caring, contributing citizens. It is the Board, and therefore its Trustees, who are in service to these objectives and not the public education system that serves a trustee's objectives. This is made clear by the responsibilities of the Board under s. 169.1(1) of the *Education Act*, which includes, among

others, promoting student achievement and well-being; the prevention of bullying; and "a positive school climate that is inclusive and accepting of all pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability[.]" The responsibilities under s. 169.1(1) of the *Act* are reinforced under s. 218.1, which requires that board members carry out their responsibilities in a manner that assists the board in fulfilling its duties, including under s. 169.1 of the *Act*, to maintain focus on student achievement and well-being, and to comply with the board's code of conduct.

[56] The Board's role in enhancing student well-being and maintaining public confidence under s. 0.1(3) of the *Act* is best served by ensuring good governance and adherence to the Code of Conduct. The preamble to the Code of Conduct recognizes that TCDSB Trustees have been entrusted with the education of all students in the community they serve and that the public is "entitled to expect the highest standard from the school trustees that it elects." The Board should be responsive to the community and students it serves. In view of the legislative objectives, the Board and Trustees' duties and the need for public confidence in the public education system, it was reasonable for the Board to apply the Reconsideration Provision to the Applicant's Code of Conduct matter and to consider whether it might have got it wrong the first time.

[57] The Applicant's submission, that the Board could apply the Reconsideration Provision to a finding of a breach but not a finding of no breach of the Code of Conduct has no basis in the statutory language of s. 218.3 or the Reconsideration Provision.

[58] Moreover, the Applicant's submission that once a motion fails to obtain the requisite two-thirds majority to find a Code of Conduct breach, it can only be challenged by an application for judicial review, is impractical and cumbersome. Such a process would make it more difficult to ensure compliance with the Code of Conduct and would be contrary to the objectives of the legislation.

[59] Further, I would note that if the *Education Act* provided, as the Applicant suggests, a complete procedural code for Code of Conduct matters, the Board would not have had the authority to require a two-thirds majority to find a breach of the Code of Conduct under the By-law. The requirement of a two-thirds majority is also an aspect of the Board's ability to govern its own processes. Had a simple majority been sufficient, the First Decision would have resulted in a determination that the Applicant breached the Code of Conduct.

[60] Accordingly, the Board's application of the Reconsideration Provision to reconsider the First Decision was reasonable in view of the text, context and purpose of s. 218.3 of the *Education Act* and was not an exercise in reverse-engineering to obtain the desired result.

Was the Reconsideration Decision Reasonable in Light of the Doctrines of* Res Judicata, *Issue Estoppel, Abuse of Process and* Functus Officio*?

[61] The Applicant further submits that it was improper and contrary to the principles of *res judicata*, issue estoppel, abuse of process, *functus officio* and double jeopardy for the Board to reconsider the First Decision, which was, in his words, an "acquittal."

[62] The Respondent submits that the principles of *res judicata*, issue estoppel, abuse of process, *functus officio* and double jeopardy have no application because the Board had authority to reconsider the First Decision. The Respondent further submits that even if those principles applied, the Board's decision to reconsider was a reasonable exercise of its discretion.

Res Judicata and Issue Estoppel

[63] In my view, the Board's conclusion that it was not precluded from reconsidering the First Decision by the principles of *res judicata* or issue estoppel was reasonable. As discussed above, the Reconsideration Provision authorizes the Board to reconsider its decisions, including in relation to Code of Conduct matters. Where such reconsideration is authorized, "[t]here is no finality to a tribunal's decision for the purpose of issue estoppel": D.J. Lange, *The Doctrine of Res Judicata in Canada*, 5th Ed., Ch. 2.6.

[64] Moreover, the Board's decision not to apply the doctrine of issue estoppel is an exercise of discretion to achieve fairness in the circumstances: *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, 293 O.A.C. 248 at para. 81. As a result, the Board's decision not to apply the doctrine or *res judicata* is entitled to deference.

Abuse of Process

[65] The Applicant submits that it was an abuse of process for the Board to reconsider the First Decision and that the Board was "corrupted by political influences" to substitute its initial decision with a finding that he breached the Code of Conduct.

[66] Like the issue of *res judicata*, given that the Reconsideration Provision authorized the Board to reconsider the First Decision, its finding that reconsideration was not an abuse of process was reasonable. Contrary to the Applicant's submission, it was not improper for the Board to reconsider.

[67] Moreover, in my view, the nature of the decision-maker and process are relevant to this issue. Given the nature of the Board as a body of democratically elected Trustees responsible to their constituencies, teachers, students and staff, the Board is different from a court or an adjudicative tribunal. When the Board considers a Code of Conduct matter, it is acting in a more adjudicative role than it does when ordinarily considering matters of policy. However, pursuant to s. 218.3, such a decision is nonetheless made at a public meeting by resolution of the Board and not at an adversarial hearing with processes akin to courts or adjudicative tribunals. As a result, it is not unreasonable for the Board to be responsive to the community as opposed to entirely insulated from it.

[68] The evidence is that there was a public outcry in response to the First Decision. As a responsive body, the Board called a special meeting to address the issue. At that meeting, over the course of eight hours, numerous delegations including former students spoke to the impact of the First Decision on them. The Applicant's counsel made both written and oral submissions. The Board took all of those submissions into consideration when it deliberated on the motion to reconsider the First Decision. The Board did not simply bend to public pressure and reverse the First Decision upon receiving a negative response.

[69] As a result, the Board's decision that it was not an abuse of process to reconsider the First Decision was a reasonable one.

Functus Officio

[70] The general common law rule is that a decision-maker is *functus officio* when they make a final decision in respect of the matter before it": *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 861. In *Chandler*, the Supreme Court held that:

> As a general rule, once a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within [certain] exceptions…."

[71] The Supreme Court went on to say that the principle should not operate strictly in the administrative law context "where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation": *Chandler*, at p. 862. See also: *Canadian Union of Public Employees, Air Canada Component v. Air Canada*, 2014 ONSC 2552, at para. 6.

[72] Where the administrative decision-maker has authority to reconsider, it would not be *functus officio*: *Stanley v. Office of the Independent Police Review Director*, 2020 ONCA 252, at paras. 62, 67-68. In that case, the Court of Appeal found that the express statutory authority to reconsider unsubstantiated complaints implied that there was no authority to reconsider substantiated complaints.

[73] Moreover, in *Gratton-Masuy Environmental Technologies Inc. v. Building Materials Evaluation Commission* (2002), O.R. (3d) 245 (Div. Ct.) at paras. 26-27, this court found that the Building Materials Evaluation Commission had an implied legislative authority to reconsider decisions where public health and safety issues warranted. In doing so, the court cited the following paragraph from David Mullan:

> [T]he prohibition on reconsiderations or rehearings was in the past explained as *functus officio*, *res judicata*, or estoppel by record. However, the rule applicable to administrative authorities is much more flexible than the doctrine of *functus officio* in regular court proceedings. Rather, it is more a general operating principle or rebuttable presumption. Finality in administrative proceedings is in general desirable but that may have to give way to other indicators either in statutory language, the nature of the process, or derived from the considerations of justice.

[74] In this case, the doctrine of *functus officio* did not apply to preclude reconsideration because the Reconsideration Provision provided the Board with the authority to reconsider. Based on the analysis above regarding the Reconsideration Provision, s. 218.3 and the duties of the Board under

the *Education Act*, it was reasonable for the Board to find that it was not prohibited by the doctrine of *functus officio* from reconsidering the First Decision.

[75] Accordingly, for all the foregoing reasons, the Reconsideration Decision was reasonable.

Were the Decisions Reasonable?

The Parties' Positions

[76] The Applicant's main argument regarding the Merits, Sanctions and Confirmation Decisions is that they are "illegal" because the Board had no authority to reconsider the First Decision. The Applicant further submits that the Decisions "run afoul of *Charter* values, including the values underlying ss. 2(a), 2(b), 7, 11(a), 11(d), 11(h), 12 and 26 of the *Charter*."[2] The Applicant submits that the Board contravened the *Charter* by, among other things, punishing him for exercising his freedom of conscience, religion, thought, belief, opinion and expression and by imposing a mandatory penalty to "re-educate him to conform to politically correct speech that will not offend the sensitivities of those in opposition to Catholic teachings."

[77] The Applicant takes the position that his comments constituted "rhetorical hyperbole" which does not violate the Code of Conduct. The Applicant relies on American case law to argue that such statements are constitutionally protected. The Applicant further submits that the purpose for which he used the statements was to fulfil his obligation as a Catholic Trustee to uphold and defend the s. 93 constitutional rights of his constituents.

[78] The Respondent's position is that the Merits, Sanctions and Confirmation Decisions were reasonable in that pursuant to the applicable *Doré/Loyola*[3] analysis, they reflect an appropriate balancing between the statutory objectives of the Board under the *Education Act* and the *Charter* values at play.

Findings

[79] In *Doré v. Barreau du Québec*, 2012 SCC 12, the Supreme Court of Canada clarified the approach to be used when administrative decision-maker applies *Charter* values in the exercise of statutory discretion. The decision-maker must balance the *Charter* values with the statutory objectives, first by identifying the statutory objectives and then asking how the *Charter* values at stake will best be protected in view of the statutory objectives. The question for this court on judicial review is whether, when assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balance of the *Charter* protections at play. If the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[2] For the reasons given above, the Code of Conduct proceeding was not a criminal proceeding and ss. 7, 11(a), 11(d), 11(g) and 12 have no application.
[3] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

[80] In my view, the Applicant, who did not address the applicable analysis under *Doré/Loyola*, has failed to demonstrate that the Board did not properly balance the *Charter* values at issue with its statutory objectives.

[81] As noted above, the Board has a statutory obligation to promote student well-being and a positive and inclusive school climate. The Board also has an obligation to enforce a minimum standard of conduct expected of its Trustees. All Trustees have an obligation to comply with the Code of Conduct and to assist the Board in fulfilling its duties. Sanctioning the Applicant for making disrespectful comments was not contrary to the *Education Act*, but consistent with the *Act*'s statutory objectives.

[82] Before making the Decisions, the Board had ample opportunity to consider the findings of the investigation report, the submissions from delegations who attended the meeting, and the Applicant's lengthy written submissions as well as his counsel's oral submissions. The Applicant's submissions detailed his rationale for proposing the amendment and the legal arguments against reconsidering the First Decision. Those submissions included the *Charter* grounds upon which the Applicant relies. The Board was thus alert to the need to balance the statutory objectives, including its own obligations, against the Applicant's Charter-protected interests.

[83] The investigation report was also alert to the *Charter* values at stake. The investigator accepted the Applicant's submission that he was using rhetorical hyperbole to advance an argument. She found, however, that the Applicant's inflammatory language crossed the line because it was disrespectful, not inclusive and lacking in compassion. The investigator specifically noted that the Applicant made his remarks knowing that members of the LGBTQ+ community were present at the meeting and that others who were not present would be able to access his remarks. In that context, the investigator found that by his remarks, the Applicant suggested that including criminal activity such as cannibalism and rape in the TCDSB Code of Conduct was somehow similar to including the Additional Grounds. In choosing the words that he did, the Applicant created an unwelcoming and harmful environment for certain members of the Catholic school board community. The investigator found that there was ample room for the Applicant to hold and act on his religious beliefs without using language that was distressing and demeaning to others, including students and the community he was entrusted with serving.

[84] The Applicant submits that he made the comments in order to fulfil his fiduciary duty as a Trustee of the TCDSB to ensure that the constitutionally protected denominational rights of Catholic electors are not infringed. However, the Applicant's submissions disregard that the Decisions do not sanction him for holding certain religious beliefs or for debating the issue of extending the protected grounds under the TCDSB Code of Conduct. Rather, the Applicant was sanctioned for using extreme and derogatory rhetoric that fell below the standard of conduct required of a Trustee. In his factum, the Applicant characterizes the grounds that he proposed as "rare, deviant, illegal, immoral, repulsive, unusual behaviours[.]" The Applicant's remarks did not reflect any sincerely held religious beliefs, as demonstrated by his own admission that he was using a rhetorical device, absurdity to try to demonstrate, in his view, absurdity. The Decisions thus did not interfere with the Applicant's ability to hold or manifest a religious belief or to act in accordance with, practice or believe in a more than trivial manner. *See: Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386.

[85] The Merits Decision reflects an appropriate balance between the statutory objectives and the *Charter* values at stake. The Applicant made his comments in his capacity as a Trustee, in a public meeting that included at least one delegate from the LGBTQ+ community who expressed vulnerability and alienation in the Catholic school system. The Applicant had a duty to "represent all the citizens in the Catholic community" in Toronto and to create a "positive environment that is safe, harmonious, comfortable, inclusive and respectful." The Board's determination that the Applicant breached the Code of Conduct by engaging in extreme, disrespectful and demeaning language was reasonable.

[86] Moreover, the Trustees who voted in favour of the Decisions are also Catholic trustees who are well-acquainted with their obligations, including to ensure that the mission of Catholic education is fulfilled. The Board is presumed to have expertise as to its processes and standards of behaviour: *Dupont v. Port Coquitlam (City)*, 2021 BCSC 728, at para. 42 (regarding a city council). The Decisions are entitled to deference.

[87] I further note that the Applicant's reliance on the concurring reasons of Kerans J.A. in *Achtem v. Law Society of Alberta*, 1981 ABCA 145, is misplaced. In that case, a majority of the Alberta Court of Appeal held that a provision authorizing the disbarment of a lawyer convicted of an offence, after a previous discipline proceeding, did not run afoul of the principle of double jeopardy.

[88] In respect of the Sanctions Decision in particular, this court has held that to overturn a penalty imposed by a regulatory tribunal, "it must be shown that the tribunal made an error in principle or that the penalty was clearly unfit, which is to say that it manifestly is deficient or excessive and is a substantial and marked departure from penalties in similar cases." *Khan v. Law Society of Ontario*, 2022 ONSC 1951, at para. 77.

[89] In a pre-*Doré* case, *Kempling v. College of Teachers (British Columbia)*, 2005 BCCA 327, 255 DLR (4th) 169, the British Columbia Court of Appeal upheld the suspension of a teacher who, while off-duty, published a newspaper article and several letters to the editor associating homosexuality with "immorality, abnormality, perversion and promiscuity[.]" The Court of Appeal, conducting a s. 1 analysis, found that the suspension infringed on the teacher's *Charter* rights but that the "deleterious effects of the infringement are, nonetheless, relatively limited when compared to the salutary effects, namely, restoring the integrity of the school system and removing any obstacles preventing access for students to a tolerant school environment":*Kempling.*, at para. 82.

[90] In my view, the Applicant has not met the high burden of establishing that the sanctions determined by the Board were manifestly excessive. The majority of the sanctions are provided for in s. 218.3(3) of the *Education Act.* The remainder are authorized by Article 10 of the Code of Conduct, which provides for a progressive approach to sanctions including "personal contact, clarification, redirection, request for an apology, reprimand, censure and or other sanctions as per board motion[.]"

[91] The Merits Decision, Sanctions Decision and Confirmation Decision reflect an appropriate balancing of the statutory objectives under the *Education Act* and the *Charter* values at issue. Accordingly, the Decisions are reasonable.

Was the Applicant Denied Procedural Fairness?

[92] The Applicant submits that he was denied procedural fairness because the Board did not accept or consider the December 14, 2020 Reply delivered by his counsel before making the Confirmation Decision. The Applicant submits that pursuant to s. 218.3(6)(c) of the *Education Act* and Article 2.10.6.3 of the By-Law, the Board was required to consider the Reply.

[93] Section 218.3(6)(c) of the *Education Act* states that "the board shall consider any submissions made by the member in accordance with clause (b) and shall confirm or revoke the determination within 14 days after the submissions are received." Under s. 218.3(6)(b), the notice must "inform the member that he or she may make written submissions to the board in respect of the determination or sanction by a date specified in the notice…[.]" As a result, the Board was only required to consider written submissions submitted by the date specified in the notice. It was not required to consider submissions made after that date.

[94] In addition, Article 2.10.6.3 of the By-law requires that, if the Board determines that a member has breached the Code of Conduct, the Board consider "any submissions made by the member in accordance with Article 2.10.6.2…" That provision allows the member to make written submissions within a period of at least 14 days after they receive notice.

[95] Neither the *Act* nor the By-law provide for reply submissions. In addition, the timelines under s. 218.3(6) do not contemplate an extended exchange of material. The Board was required under s. 218.3(6)(c) to confirm or revoke the determination within 14 days after it received the Applicant's written submission on December 3, 2020.

[96] At the December 16, 2020 meeting of the Board, the Applicant did not object to his Code of Conduct matter proceeding. In fact, he voted to approve the agenda for the meeting and did not object to the motion regarding the Code of Conduct matter being put forward, even though he knew that the Reply was not before the Trustees. Had the Applicant believed that he would be prejudiced by the Board's inability to consider his Reply, he could have objected to the matter proceeding or brought a motion to postpone the matter to a future meeting. That he did not do so indicates that he was content for the motion to proceed.

[97] In any event, the Applicant raised no new substantive points in the Reply. The Reply repeated arguments made in his earlier written submissions, including *res judicata*, double jeopardy, abuse of process, the application of the *Charter* to school boards, and the lack of statutory authority to reconsider the First Decision. The Reply quoted excerpts from *Vavilov* to support an argument that a correctness standard of review would apply to the issue of whether the decision was *res judicata*. The applicable standard of review was unlikely to have an impact on the Board's consideration of the motion.

[98] The Applicant was given a full opportunity to present his arguments to the Board. He was represented by counsel and filed a 440-page affidavit and 30-page legal submission. The Board's failure to consider his Reply did not result in a denial of procedural fairness to him.

Conclusion

[99] Accordingly, the application for judicial review is dismissed.

[100] Given the outcome, I need not address the Applicant's request for full indemnity costs. As the successful party, the Respondent would normally be entitled to costs. However, no cost outlines were uploaded to CaseLines or forwarded to the panel despite the parties having been given ten days after the hearing to do so. As a result, there will be no costs of the application.

"Nishikawa J."

I agree: "R. Smith J."

I agree: "Stewart J."

Released: January 13, 2023

CITATION: Del Grande v. Toronto Catholic District School Board, 2022 ONSC 349
DIVISIONAL COURT FILE NO.: 139/21
DATE: 20221213

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Smith, Stewart and Nishikawa JJ.

B E T W E E N:

Michael Del Grande

Applicant

- and -

Toronto Catholic District School Board

Respondent

REASONS FOR DECISION

Nishikawa J.

Released: January 13, 2022

CITATION: Ramsay v. Waterloo Region District School Board, 2023 ONSC 6508
DIVISIONAL COURT FILE NO.: Hamilton, DC-22-141-JR
DATE: 20231207

ONTARIO SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

E. Stewart, Lococo and Williams JJ.

BETWEEN:	
MICHAEL RAMSAY Applicant	*Hatim Kheir*, Counsel for the Applicant
- and -	
WATERLOO REGION DISTRICT SCHOOL BOARD Respondent	*Kevin McGivney and Natalie D. Kolos*, Counsel for the Respondent
	Heard at Hamilton by videoconference on June 6, 2023

REASONS FOR DECISION

E. STEWART J.

Nature of the Application

[1] Michael Ramsay has brought this application for judicial review of the decision of the Waterloo Region District School Board (the "WRDSB") on June 6, 2022 which found that he had breached its Code of Conduct for Trustees ("Code of Conduct") and imposed sanctions upon him as a result.

[2] On June 27, 2022, following receipt of a reconsideration request from Ramsay, the WRDSB confirmed its decision and the sanctions that had been imposed.

[3] Ramsay seeks an order quashing the decision. He also asks for a declaration that the decision infringed his right to freedom of expression under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter").

[4] Ramsay also takes the position that the complete and unredacted versions of the Record of Proceedings in this matter should be included in the court file and made available to the public.

[5] The Respondent WRDSB asks that the application be dismissed.

Background Facts

[6] The WRDSB is a public school board that exercises statutory authority under the *Education Act*, R.S.O. 1990, c. E.2 (the "*Act*"). The WRDSB is composed of 11 trustees who are responsible for serving the interests and needs of the general public, and for advocating for a strong public education system that benefits the learners and communities served within the local community.

[7] Ramsay has served as a WRDSB trustee since 1989. Indeed, he was a member of the WRDSB committee that drafted the current version of the Code of Conduct.

[8] On January 17, 2022 the WRDSB held a public meeting called a Committee of the Whole Meeting. One of the topics on the agenda was a proposed "Library Review". During an oral delegation that digressed from the topic at hand, the Chair warned the delegate that she risked being in violation of human rights legislation. When she nevertheless continued with her presentation and refused to adhere to the scope of the agenda item, the Chair stopped her presentation because of concerns that its content was potentially harmful to the school and the LGBTQ+ community.

[9] Ramsay was one of the trustees presiding at the public meeting who felt that the presenter ought to have been permitted to proceed. However, by a majority, the WRDSB voted to support the Chair's ruling.

[10] The delegate whose presentation had been terminated then brought an application for judicial review of the decision of the WRDSB which was dismissed by this Court on November 29, 2023 (see: *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506). She also has brought a civil action claiming damages against the WRDSB and its Chair.

[11] On January 24, 2022 at the next meeting of the WRDSB, Ramsay repeatedly interrupted the discussion of the Board's business and was ruled out of order by the Chair. Ramsay accused the Chair of having incited "moral panic" in the community by his handling of the delegation issue at the January 17, 2022 public meeting and he demanded that an apology be issued to the entire community.

[12] On February 14, 2022 at a further WRDSB meeting, Ramsay again strongly criticized the WRDSB and the Chair, saying that they had unfairly forced staff to abandon any balanced approach to these issues and had ordered them to disregard directives from the Ministry of Education as well as the law on human rights applicable to these issues and to vaccination and masking mandates.

[13] As these events were unfolding, Ramsay also used social media to communicate his views about this controversy. In his online activity, Ramsay amplified, agreed with and "re-tweeted" commentary that (among other things) described the WRDSB as a "farce," and made strong

criticisms of the Chair's handling of the delegation issue at the January 17, 2022 meeting. He also appeared to downplay the threats of bodily harm that had been made against the Chair after the public meeting.

[14] On February 24, 2022 the WRDSB received a formal complaint from a another WRDSB trustee (not the Chair) about Ramsay's conduct regarding this delegation issue. Specifically, the complaint alleged that Ramsay had failed to uphold the dignity and integrity of his office, had failed to act in a manner that would inspire public confidence in the abilities and integrity of the WRDSB, and had engaged in unprofessional behaviour, among other alleged breaches of the Code of Conduct.

[15] In order to handle and deal with the complaint, the WRDSB retained Barry Bresner of ADR Chambers as Integrity Commissioner to investigate the allegations made against Ramsay contained in it and to provide a report, as provided by the Code of Conduct.

[16] The Integrity Commissioner summarized the breaches of the Code of Conduct alleged in the complaint as follows:

(a) The refusal of Ramsay to accept and respect the decisions of the Chair and the WRDSB;

(b) Accusations by Ramsay of unlawful conduct by fellow trustees; and

(c) Disclosure of confidential information by Ramsay.

[17] The Integrity Commissioner invited any trustees who wished to speak to him to provide their comments. Among the information provided to the Integrity Commissioner were comments in writing from the Chair. This was considered to be a "written statement of witness" under section 48 of the Code of Conduct. A copy of this written statement was provided to Ramsay but was not shared with any of the other trustees.

[18] Ramsay was invited to provide, and did provide, his detailed response to the complaint to the Integrity Commissioner in the following way:

(a) The Integrity Commissioner received a call from Ramsay on March 29, 2022 for a preliminary discussion;

(b) On April 22, 2022 Ramsay submitted his written response to the complaint;

(c) A private meeting between the Integrity Commissioner and Ramsay took place via telephone on April 27, 2022; and

(d) On April 28, 2022 Ramsay delivered a "Response to Request for Clarification and Summary of Telephone Visit of April 27, 2022" by email to the Integrity Commissioner.

[19] On May 31, 2022 the Integrity Commissioner submitted a report. Pursuant to the WRDSB's Code of Conduct, the Integrity Commissioner's report did not make any specific

recommendation as to consequence, but simply presented his findings of fact to the WRDSB. It was up to the WRDSB to decide whether Ramsay had breached its Code of Conduct and, if so, to determine whether any of the sanctions applicable to trustees should be imposed upon him.

[20] The Integrity Commissioner confirmed that Ramsay's conduct that had formed the basis for the making of the complaint had arisen because of the delegation issue. The complaint against Ramsay was based on his strong negative reaction to the WRDSB decision to stop the delegate's presentation, and his alleged ongoing failure to respect that decision despite his disagreement with it.

[21] Among several other findings contained in his report, the Integrity Commissioner found that Ramsay had "retweeted" an online posting by a journalist following the meeting on January 17, 2022 that was misleading in that it did not "accurately portray what occurred at the meeting, unfairly insinuated that the Chair is misogynist and racist, and failed to note that the majority of the other trustees, all of whom are female, supported that decision." The Integrity Commissioner also noted that at the time Ramsay's Twitter "handle" was @Trustee_Ramsay, which he considered could give the impression to members of the public that he was communicating in his official capacity as a trustee.

[22] The Integrity Commissioner noted that Ramsay acknowledged that the basic facts forming the foundation of the conduct alleged in the complaint occurred and are reflected in the recordings of the meetings and in his tweets and emails. There seems to be little dispute that Ramsay said and did what was alleged in the complaint against him, with the exception of the allegation of disclosure of confidential information, which had not been substantiated by the investigation.

[23] Ramsay's basic response to the complaint was that he felt strongly that his right to freedom of expression as guaranteed by the *Charter* trumps any obligation he may have under the Code of Conduct to fetter or restrain that freedom, including any requirement to fulfil conduct expectations arising from his position as a school board trustee.

[24] On June 6, 2022 the trustees deliberated *in camera* the issues of whether to find Ramsay in breach of the Code of Conduct based on the findings of the Integrity Commissioner's report, and to determine whether any resulting sanctions should be imposed.

[25] Following that meeting, a public meeting was held at which the trustees voted 6-3 that Ramsay had breached the Code of Conduct. The WRDSB voted, by the same 6-3 margin, to impose sanctions on Ramsay. These sanctions included a formal censure, and the suspension of his entitlement to attend WRDSB meetings or to receive *in camera* materials until September 30, 2022. The Chair cast a vote in these determinations.

[26] On June 8, 2022, Ramsay was provided with written notice of the decision. He was informed that he could provide written submissions to request the WRDSB to reconsider its decision. On June 24, 2022 Ramsay submitted his request for reconsideration.

[27] On June 27, 2022 the WRDSB deliberated *in camera* whether to confirm or revoke its decision that Ramsay breached the Code of Conduct. At the public meeting immediately following, the trustees voted 6-3 to confirm its finding of a breach, and to confirm the sanctions imposed.

Jurisdiction

[28] The Divisional Court has jurisdiction to hear and determine this application for judicial review under sections 2 and 6 of the *Judicial Review Procedure Act*, R.S.O. 1990 c. J.1.

Standard of Review

[29] The standard of review applicable to this subject matter for judicial review is that of reasonableness (see: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653). For an issue of procedural fairness, the standard is that of correctness (see: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 79; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328, at paras. 26-20).

Discussion

[30] Ramsay raises the following principal issues on this application:

A. Denial of Procedural Fairness

B. Unreasonableness of the Decision

Was Ramsay Denied Procedural Fairness?

[31] Ramsay argues that the procedural fairness he was owed was breached because he had not been fully apprised of the specific allegations against him. He also claims that the deliberations concerning whether he had breached the Code of Conduct as well as what sanctions should be ordered were held *in camera*, contrary to the legislation governing meetings of the WRDSB. He further submits that the participation of the Chair in the process was unfair and tainted the result.

[32] The undisputed evidence of the course of the investigation conducted by the Integrity Commissioner reveals that Ramsay was given all pertinent details of the complaint against him and was provided with a full opportunity to respond. As already noted, there was little or no dispute but that all of the events alleged had occurred and that the statements attributed to Ramsay had been uttered or otherwise communicated by him.

[33] The description of the investigation carried out by the Integrity Commissioner and the process leading up to the decision made by the WRDSB provide an ample basis to conclude that Ramsay was given a fair and full opportunity to refute or explain the allegations contained in the complaint against him.

[34] With respect to his concern with the use of *in camera* proceedings, Ramsay submits that a key factor in determining the scope of the content of the duty of fairness is the nature of the statutory scheme and the terms of the statute pursuant to which the body operates. In this case, s. 207 of the *Act* requires that meetings of the WRDSB be open to the public, subject only to specific statutory exceptions that permit the use of *in camera* proceedings. These are:

(a) the security of the property of the board;

(b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;

(c) the acquisition or disposal of a school site;

(d) decisions in respect of negotiations with employees of the board; or

(e) litigation affecting the board.

[35] Ramsay argues that none of these exceptions applied to the complaint against him or were otherwise engaged. Hence, the principle of openness was not followed and his right to procedural fairness was breached.

[36] The WRDSB maintains that Ramsay was afforded adequate procedural fairness throughout. As articulated by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration),* [1999] 2 S.C.R. 817, at para. 27, considerable weight must be given to the choice of procedures made by the agency itself and its institutional constraints when assessing the requirements of procedural fairness.

[37] The WRDSB submits that decisions of a purely administrative nature, where a board is not acting as a tribunal which must deliberate and decide upon the rights of others, minimal procedural fairness is required. Decisions related to the enforcement of the Code of Conduct with respect to members of a school board, such as this decision of the WRDSB dealing with the conduct of one of its trustees, are predominantly administrative in nature.

[38] The WRDSB argues that, assuming that procedural fairness was owed to Ramsay, the factors set out in *Baker* would suggest that such fairness is on the lower end of the spectrum in these circumstances. The impact of the decision on Ramsay is nominal, and the sanctions imposed on him were minimal. The decision was not quasi-judicial in nature so as to require a very high level of procedural fairness. As the WRDSB points out, the Code of Conduct is explicit in stating that no formal trial-type hearing is to be conducted in enforcing the Code of Conduct. Rather, this process was designed to be an administrative one carried out by an elected WRDSB of Trustees empowered by statute to govern its own internal affairs.

[39] The WRDSB further submits that the use of *in camera* proceedings for deliberations was permissible under the applicable legislation. Section 207(2) of the *Education Act* allows for meetings to be closed to the public when, among other exceptions, the subject matter under consideration involves litigation affecting the school board. Since the delegate who was prevented from finishing her presentation commenced an application for judicial review as well as a civil action for damages against the WRDSB and its Chair, the facts involved with the complaint about the Ramsay were involved in litigation affecting the WRDSB. Further, the heart of the decision-making took place in the public sessions, where trustees publicly voted to find a breach of the Code of Conduct and to sanction Ramsay.

[40] The reasons for the decision in *Del Grande v Toronto Catholic District School Board*, 2023 ONSC 349 (Div. Ct.) illustrates the degree of procedural fairness a school board owes one of its trustees when enforcing its code of conduct in the context of alleged inappropriate trustee conduct. The Court stated (at paras 50-51):

> As is evident from the process provided under s. 218.3, the process for determining whether a trustee has breached a code of conduct is not akin to a criminal process. The potential sanctions under the *Education Act*, including censure and the inability to participate in committees, are correspondingly weak…The process under s. 218.3 leads to a determination as to whether a trustee has breached the code of conduct and an appropriate sanction, and nothing more…
>
> Under s. 58.5(1) of the *Education Act*, a school board is permitted to function as a corporation and "has all the powers and shall preform all the duties that are conferred or imposed on it under this or any other Act." That provision reflects a legislative intent that school boards not be limited in conducting their affairs to those functions that are specified in the *Education Act*. Moreover, the *Act* does not dictate to the Board how it must conduct its affairs, rather, the Board is the primary determinant of its own processes.

[41] In my view, the June 6, 2022 meeting was permitted to be held *in camera* as the subject matter under consideration involved litigation affecting the WRDSB that stemmed from the delegation incident and its aftermath. This formed a significant part of the subject matter under consideration at the *in camera* meeting. It was "the triggering event [which gave] rise to the conduct which forms the primary basis for the Complaint" as found by the Integrity Commissioner to be the case.

[42] For this same reason, the WRDSB has filed a redacted Record of Proceeding with which Ramsay takes issue. The report of the Integrity Commissioner directly acknowledges that its contents arise from the delegation event which forms the subject matter of the related court application for judicial review and the civil action for damages against the WRDSB and the Chair. Similarly, the minutes of the *in camera* meetings were removed from the materials filed with the Court. There is no unfairness to Ramsay that results from this approach, nor any impediment to his raising of any argument on his own application for judicial review of the WRDSB decision in his case.

[43] Ramsay further submits that the Chair's involvement in the investigation process and his participation in casting votes tainted the decision with bias, or a reasonable apprehension of bias.

[44] Ramsay argues that by making submissions to the Integrity Commissioner the Chair was acting as both investigator and advocate which are roles that are incompatible with his ultimate role as a decision-maker. Ramsay argues that where a decision is made by multiple decision makers and one is disqualified on the basis of bias, the question becomes whether the entire panel is tainted. The Court must therefore evaluate the role of the decision-makers and whether the biased decision-maker had case the deciding vote (see: *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 31, [2019] 8 W.W.R. 67).

[45] In this case, the Chair was the deciding vote since a majority of two-thirds is required to confirm any finding that the Ramsay breached the Code of Conduct. But for the casting of the Chair's vote, the finding could not have been confirmed and the decision would not have been made. Ramsay argues that the Chair's role as author of the reasons and the necessity of his vote to the decision mean that his reasonable apprehension of bias taints the whole decision.

[46] The WRDSB points out that the Integrity Commissioner invited all of the trustees to make written submissions and that is why the Chair did so. The WRDSB submits that there was nothing wrong with the Chair's providing of his submission to the Integrity Commissioner after having been invited to do so.

[47] The WRDSB argues that it cannot be said that the Chair's submissions constituted bias that tainted the entire group of trustees when making the decision. It is evident from the Integrity Commissioner's report that the Chair's submissions were not shared with the other WRDSB trustees. The decision-maker in this case was the panel of the WRDSB as a whole, made up of nine voting trustees. There is no evidence that five other trustees who comprised the majority were biased or tainted by the alleged apprehension of bias of the Chair, nor does the Chair's submission in response to the invitation from the Integrity Commissioner raise any reasonable apprehension that they were biased (see: *R. v. Roberts*, 2005 SCC 3, [2005] 1 S.C.R. 22).

[48] I agree with the approach taken by the WRDSB to this issue in its argument. Ramsay's concerns of bias must be evaluated against the particular structure of the board of trustees and its processes for the handling of complaints against any individual trustee. Indeed, it is only a trustee who is able to bring a formal complaint against another trustees. The Code of Conduct prohibits the trustee who filed the complaint from voting on the disciplinary resolution, but does not otherwise prohibit other trustees from being witnesses, providing such information as they may have to the Integrity Commissioner, and participating in the decision-making process. The very nature of many of the requirements of expected conduct of trustees as contained in the Code of Conduct makes it likely that other trustees may often be 'witnesses" to such conduct. This does not raise any spectre of bias in such a setting.

[49] Accordingly, given the nature of the complaint, the observation that the basic facts underlying it were not disputed, and the context of the decision itself, I conclude that there is no basis for a finding of bias here nor any denial of procedural fairness to Ramsay.

Was the Decision Unreasonable?

[50] Ramsay submits that the reasons for the decision fail to meet the requisite standard of justification, transparency and intelligibility required by *Vavilov*. Because of that failure, Ramsay submits that the decision was unreasonable.

[51] This standard of reasonableness requires that the reasons for the decision must reveal an internally coherent and rational chain of analysis. Reasons that are transparent and intelligible draw a line of analysis that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived (see: *Vavilov*, para 102).

[52] Ramsay argues that the reasons for the decision do not stand up to scrutiny and do not make it possible to understand how the WRDSB arrived at its finding. Ramsay argues that the decision simply repeats statutory and Code of Conduct language but does not reveal any sort of chain of logic.

[53] Alternatively, Ramsay argues that the decision was unreasonable because the WRDSB failed to balance his *Charter* right to free expression against other relevant considerations, as required by the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, insofar as the decision held Ramsay in breach of the Code of Conduct for comments made by him in meetings and online.

[54] The WRDSB argues that the reasons provided were sufficient. The Supreme Court has held that there is no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process. It submits that a school board's reasoning may be deduced from the debate, deliberations and the statements of policy (see: *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5). The *Act* does not require the provision of reasons in writing for a decision. The only statutory requirement it imposes is to provide written notice of the result and applicable sanctions. This was done.

[55] The context within which the decision was made was an administrative one, where the WRDSB was enforcing its Code of Conduct as part of the discretion granted to it by statute to manage its own affairs. The trustees had ample opportunity to review and consider the factual findings contained in the Integrity Commissioner's report, as well as the submissions made by Ramsay. They were well positioned to balance statutory and policy objectives in coming to a decision. The notice of the decision references the findings of the Integrity Commissioner's report which implicitly accepts the findings of fact made by the Integrity Commissioner.

[56] The WRDSB argues that the decision reflects an appropriate balancing between the statutory objectives under the *Education Act* and the *Charter* values at play. Given the context within which the decision was made, specific reference to the *Doré* framework was not required.

[57] Pursuant to the *Act*, the WRDSB is permitted to adopt its own Code of Conduct that applies to its board members, and to carry out procedures to enforce its Code. Trustees are required to comply with the Code of Conduct. The Code of Conduct outlines expectations of trustees with respect to their behaviour to maintain the integrity and dignity of their office, civil behaviour, compliance with legislation and upholding of decisions of the board.

[58] In making its decision, the WRDSB properly considered its own governing Bylaws, its Code of Conduct and the statutory objectives of the *Act*, as well as Ramsay's *Charter* rights. In particular, the WRDSB was alive to Ramsay's right to free expression pursuant to the *Charter* which had been addressed at length by the Integrity Commissioner in his report as well as in Ramsay's own comprehensive submissions. In reaching its decision with respect to finding that Ramsay breached the Code of Conduct, and by imposing fairly minimal sanctions, the WRDSB effectively attempted to achieve a reasonable balance between Ramsay's *Charter* rights and the WRDSB's responsibilities of both the WRDSB and Ramsay under its Code of Conduct, its Bylaws and the requirements of the *Act*.

[59] I am therefore of the view that the decision is reasonable and the reasons for it are adequate. When viewed against the backdrop of the sequence of events giving rise to the complaint, the contents of the report of the Integrity Commissioner, and Ramsay's own acknowledgment of his conduct, the issue before the WRDSB was clear. Its finding that Ramsay breached its Code of Conduct is rational and wholly reasonable.

[60] As pointed out by the Integrity Commissioner in his report, the right to freedom of expression is neither absolute nor unqualified. Although the WRDSB decision was debated and was not unanimous, it is one which on the facts before it was available to the required majority of the WRDSB to make. I see no basis upon which interference with that decision by this Court would be justified.

Conclusion

[61] For these reasons, the application for review of the decision of the WRDSB is dismissed.

[62] In the circumstances, and given the result on the main aspect of the application, I see no compelling reason to disturb the decision of the WRDSB to maintain confidentiality of those portions of the report of the Integrity Commissioner or those parts of the record of its *in camera* proceedings that, in its discretion, have been redacted. Similarly, the arguments of mootness and available remedies if Ramsay had been successful raised on behalf of the WRDSB need not be addressed.

Costs

[63] The WRDSB has been successful in responding to this application and seeks its costs as a result.

[64] Although the issues dealt with on this application may be of some public interest, I do not consider the magnitude of same to be great enough to affect the usual determination of costs in an application of this nature. The decision under review primarily affects an interest that is specific to Ramsay, being the negative finding that he breached the WRDSB's Code of Conduct. I consider that the public interest is better served by directing that Ramsay, as the unsuccessful party, pay to the WRDSB, the publicly-supported successful party, a contribution toward its costs of responding to this application.

[65] Accordingly, costs of the application, fixed in the amount of $7,500 inclusive of all disbursements and applicable taxes, shall be paid to WRDSB by Ramsay, if demanded.

E. Stewart J.

I agree:

Lococo J.

I agree:

Williams J.

Released: December 7, 2023

CITATION: Ramsay v. Waterloo Region District School Board, 2023 ONSC 6506
DIVISIONAL COURT FILE NO.: Hamilton, DC-22-141-JR1
DATE: 20231207

ONTARIO SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

E. Stewart, Lococo and Williams, JJ.

B E T W E E N :

MICHAEL RAMSAY
Applicant

- and –

WATERLOO REGION DISTRICT
SCHOOL BOARD
Respondent

REASONS FOR DECISION

Released: December 7, 2023

CITATION: *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506
DIVISIONAL COURT FILE NO.: Hamilton, DC-22-126-JR
DATE: 20231129

ONTARIO SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

E. STEWART, LOCOCO AND WILLIAMS JJ.

BETWEEN:	
Carolyn Burjoski Appellant	*Jorge Pineda* and *Rob Kittredge*, counsel for the Appellant
– and –	
Waterloo Region District School Board Respondent	*Kevin McGivney* and *Natalie D. Kolos*, counsel for the Respondent
	Heard at Hamilton via videoconference: June 5, 2023

REASONS FOR DECISION

STEWART J.

Nature of the Proceeding

1. Carolyn Burjoski ("Burjoski") applies for judicial review of the decision of the Waterloo Region District School Board (the "WRDSB") to uphold the Chair's decision to stop Burjoski's presentation to a Committee of the Whole Meeting on January 17, 2022.

2. Burjoski seeks an order quashing the decision, a declaration that the decision was unreasonable and a breach of the duty of fairness and in violation of the principles of natural justice, and an order requiring the WRDSB to allow her to make her presentation in full at a future meeting to be scheduled.

3. Burjoski also seeks a declaration pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11 (the "*Charter*"), on the basis that the decision unreasonably breached her right to freedom of expression under s. 2(b) of the *Charter*.

4. The WRDSB asks that this application be dismissed.

Background Facts

5. Burjoski is a resident of the Waterloo Region. She is an elementary school teacher who taught English as a second language with the WRDSB until she retired about two years ago.

6. The WRDSB is a public school board that exercises statutory authority under the *Education Act*, R.S.O. 1990, c. E.2., composed of 11 trustees. The WRDSB is responsible for serving the interests and needs of the general public and for advocating for a strong public education system that benefits the Waterloo Region.

7. On January 17, 2022, the WRDSB held a Committee of the Whole Meeting to which members of the public were invited. One of the topics for consideration at the meeting was a proposal for a "Library Review".

8. Burjoski sought registration as a delegate to speak at the meeting. In her request form, Burjoski indicated that she wished to speak on the topic of transparency in the library review process and to offer recommendations in that regard. Specifically, Burjoski in her request form stated the following:

> I would like to address the Board on issues of transparency regarding the library and classroom teacher's collections culling project. I would also like to express my concern regarding Board Policy 1235 Section 4 which states that we teachers must not disclose a student's transgender status to their parents.

9. Bujoski's proposed recommendations included the following:

> Be more transparent in general. The Board should have been ready to answer the reporter's questions about criteria for the library cull for the National Post's October 8, 2021 article.
>
> From the subsequent November 8 memo "Reviewing Our Library Collections", the Board listed the CREW method and the MUSTIE criteria for reviewing collections. Be transparent about the criteria for titles that will be considered "Misleading, Superseded, Trivial or Irrelevant" when using the CREW method, or keep lists of titles that are being removed from the library.
>
> Do not cull teacher collections.
>
> Create committees which include diverse thinkers when making decisions. Be ready to share how the Board arrived at decisions and explain why the people who were on the committee were chosen. Include people from both within and outside of the LGBT banner when you create committees and include diversity of thought in your criteria.
>
> Strike a committee that properly represents parents and teachers to discuss the intersection of biology and gender and clarify which direction teachers should follow. For example, the Living Things strand of the Science curriculum teaches children to classify living things based on physical characteristics of their bodies. This differs from the Gender Lessons which teach children that they can choose if they are a boy or a girl or something in between.

> Demonstrate more respect for the role of parents when making policy decisions. Change policy 1235 to state that schools must inform parents if their child asks to be called a different name, pronoun, etc. It is their right to know this information.

10. Burjoski did not include in her request form any indication that she would be advocating for the removal of any specific books.

11. On December 20, 2021, Burjoski was advised that, while her delegation request was for two separate topics, only her request for a delegation regarding the need for transparency in the library review was approved. Accordingly, Burjoski was permitted to appear at the meeting solely to address her first issue, which she had described as addressing the WRDSB "on issues of transparency regarding the library and classroom teacher's collections culling project".

12. At the beginning of the meeting, the Chair made a statement that indicated that each delegation would have up to ten minutes to make their submissions and that all presentations were to be confined to the issue that the delegate was registered to address. Any discourteous language or statements that might contravene human rights legislation would not be tolerated.

13. It is not difficult to understand why the Chair considered it necessary and advisable to deliver this early warning to all persons in attendance at the meeting. It is the Chair's responsibility to maintain decorum and order at meetings and to ensure that the available time is used effectively for the purposes at hand.

14. Soon after Burjoski began her delegation, she digressed from the scope of the issue that had been approved. She embarked instead upon an outline of her views about what she perceived to be books that discuss gender identity, shifting rapidly toward a critique of specific books that were available in school libraries. This went well beyond the "transparency" concerns that had been represented and approved in her request form as being the core subject of her presentation.

15. Burjoski stated that some books in the school libraries were inappropriate for young children and further argued that certain books make it "seem simple or even cool take puberty blocks or opposite sex hormones." At this stage, the Chair expressed his concern that the contents of Burjoski's delegation may be problematic and cautioned her to make sure that she would not say anything that would violate human rights legislation.

16. Burjoski was allowed to continue her delegation. Despite the Chair's admonition, she continued to persist in commenting on the appropriateness for students of specific books about gender identity issues. She described these books as misleading and stated that at least one of them "makes very serious medical interventions seem like an easy cure for emotional and social distress".

17. The Chair again interrupted Burjoski's presentation and required its conclusion because he considered that it could violate human rights legislation and WRDSB policies for delegations, as he noted that gender identity and gender expression are protected grounds under the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Human Rights Code*").

18. One of the trustees challenged the Chair's decision to stop Burjoski's presentation. The Chair again explained his reasons for stopping her presentation. The WRDSB took a vote on the issue and, by a majority, voted to sustain the Chair's decision to end Burjoski's delegation.

19. Burjoski now asks this Court, among other things, to quash the WRDSB's decision.

Jurisdiction

20. The Divisional Court has jurisdiction to hear this application for judicial review under ss. 2 and 6 of the *Judicial Review Procedure Act*, R.S.O. 1990 c. J.1.

Standard of Review

21. The standard of review applicable to this subject matter for judicial review is that of reasonableness (see: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653). For an issue of procedural fairness, the standard is that of correctness (see: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 79; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328, at paras. 26-20).

Discussion

22. This judicial review application raises three issues:

A. Was the decision unreasonable?

B. Was there a breach of procedural fairness?

C. Was there a reasonable apprehension of bias in the decision?

Was the decision unreasonable?

23. Burjoski submits that the WRDSB's decision was unreasonable because the WRDSB failed to consider her *Charter* right to freedom of expression and failed to engage in a "robust balancing exercise". She also claims that the WRDSB did not have the authority to find that Burjoski engaged in improper conduct, and the WRDSB did not have the authority to find that she breached the *Human Rights Code*.

24. Burjoski argues that the contents of her delegation were protected under s. 2(b) of the *Charter* and submits that the decision of the WRDSB required a robust explanation as a prerequisite. The decision cannot be fair or reasonable if the WRDSB did not engage in the balancing exercise as set out in the prevailing legal authorities (see: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395).

25. Burjoski submits that the WRDSB does not have the authority to end a presentation, or censor a presenter, that it deems or perceives to be a violation of the *Human Rights Code*. She submits that the only option available to the WRDSB, pursuant to the *Education Act*, is the removal of the presenter from a meeting. She argues that the *Education Act* does not provide the WRDSB with the authority to curtail speech on the basis that such speech is misconduct. She submits that the improper conduct contemplated by the *Act* must be something that interferes with the WRDSB's ability to conduct a proper meeting and carry out its functions. She submits that, as such meetings are supposed to be open to the public, the decision to stop her delegation was unreasonable.

26. Burjoski also argues that the WRDSB did not provide adequate reasons to indicate how Burjoski breached the *Human Rights Code*, and therefore the decision was unreasonable.

27. I agree with the submission of the WRDSB that the decision was not unreasonable. The WRDSB has codified certain operational matters in its Bylaws that include procedures for delegations, for its committees and committee members, for public meetings, and for WRDSB meetings. The Bylaws

identify duties of the Chair to maintain order in WRDSB meetings and, in particular, to preserve order and decorum and decide upon all questions of order, subject to an appeal to the WRDSB. The Bylaws also set out procedures for delegations to make submissions at meetings which include the requirement to make written submissions ahead of time that provide a summary of the points being presented.

28. The WRDSB has multiple policies that commit to providing working and learning environments free of discrimination and harassment as well as ensuring that individuals are treated with respect and dignity. The WRDSB policy on Equity and Inclusion identifies the WRDSB's mandate to "identify and remove systemic and attitudinal barriers and biases to learning and employment opportunities that have a discriminatory effect on any individual" as well as the WRDSB's duty "provide a safe, inclusive environment free from inequity, discrimination and harassment…." including by incorporating "the principles of equity and inclusive education into all aspects of its operations…" The Policy further acknowledges that all "partners in education" "have a critical role to play in leading the identification and removal of bias [and] discrimination." The Policy commits to "the principle that every person within the school community is entitled to a respectful, positive school climate… free from all forms of discrimination and harassment."

29. In the context of decisions made by elected decision-makers like the WRDSB, a high degree of deference must be given. The WRDSB trustees are accountable to their community and are well-versed in the goals of the education system and the boundaries of proper debate at meetings. School boards should be free to act as modern, democratic, dynamic legal personalities, provided only that there be some statutory foundation for, and no express statutory prohibition of, their conduct (see: *Radio CHUM 1050 Ltd. v. Toronto (City) Board of Education*, [1964] 2 O.R. 207 (C.A.)).

30. The WRDSB made no finding that Burjoski breached the *Human Rights Code*. The Chair merely referenced that statute and expressed concerns that Burjoski's comments were becoming problematic. It was reasonable for him to do so.

31. There is no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process. A school board's reasoning may be deduced from the debate, deliberations and the statements of policy that give rise to the decision in question (see: *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293). Accordingly, given that the decision was reached through a democratic process by elected trustees, it was not necessary for the WRDSB to give detailed formal reasons for the decision. In any event, the Chair made known to Burjoski the reasons for his ruling. In my view, the explanation when taken in context was adequate.

32. The written materials Burjoski submitted expressed her concerns about the WRDSB being transparent in how the "library cull" was to be conducted. Her written materials did not indicate she intended to address the WRDSB about specific books within the WRDSB collection. Burjoski was permitted to continue with her presentation after receiving a warning that she refused to abide. There is nothing preventing Burjoski from voicing her opinion on these library books in another forum. The decision was ultimately about Burjoski's choice of words, which were, in the opinion of the WRDSB, derogatory and contrary to its Bylaws, the objectives of the *Education Act*, and potentially the *Human Rights Code*, as gender identity and expression are both explicitly listed as protected grounds under both the *Education Act* and the *Human Rights Code*.

33. In making its decision, the WRDSB sought to achieve, and did achieve, a reasonable balance between Burjoski's *Charter* right to free expression and the objectives of its Bylaws, its Equity and Inclusion Policy, the *Education Act*. It prioritized the maintenance of a safe and inclusive school environment for its community members and was in accordance with the requirements of reasonableness as set out in *Vavilov*.

34. Accordingly, I consider the decision of the WRDSB to be reasonable and would not give effect to this ground of review.

Was there a breach of procedural fairness?

35. Burjoski also argues that there is no doubt that the WRDSB owed her a duty of procedural fairness because it made a decision that "affects the rights, privileges, or interests" of individuals is enough to trigger the duty of fairness. She maintains that she was denied such procedural fairness (see: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817).

36. If any procedural fairness was owed to Burjoski, it was on the low end of the spectrum and it was not breached. The impact of the decision on Burjoski was relatively minimal. She was given an opportunity to speak about the library review process itself, as she requested to do in her request for delegation. It was only when she began to speak of topics irrelevant to those outlined in her request for a delegation that her presentation was interrupted with a warning. When she continued expressing her opinion about the content of books, and not the library review process, she was stopped by the Chair. In these circumstances and in this context, I consider that the restriction on her freedom of expression was minimal.

37. Like every administrative body, a school board such as WRDSB is "the master of its own procedure and need not assume the trappings of a court." Important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.

38. The WRDSB followed its own procedures in coming to a resolution to end Burjoski's presentation. Although the Bylaws do not specify how the board may stop a delegation, even where a mode of procedure is not prescribed by statute, any reasonable mode not expressly forbidden by law may be adopted (see: *Knight v. Indian Head School Division No 19*, [1990] 1 S.C.R. 653). The Chair did provide brief reasons when he referenced the delegation procedure and his concern that Burjoski's comments may have violated the *Human Rights Code*.

39. I consider that the process that was afforded to Burjowski was not unfair. She was given more than one opportunity to deliver her delegation on the topic approved in advance, but declined to do so even after she was reminded of its scope. I therefore would not give effect to this ground of review.

Was there a reasonable apprehension of bias in the decision?

40. Burjoski submits that the statements made by the Chair subsequent to the meeting can leave no doubt that the decision was motivated by bias. She submits that the Chair disparaged her comments as "transphobic"; inexplicably stated that she "questioned the right to exist of trans people"; claimed she had not been "respectful and courteous"; that she engaged in "hate" and "derogatory speech"; and that she had in fact caused "harm."

41. She argues that these comments are not reflective of a sober and impartial decision maker. She argues that a reasonable person would perceive that the decision maker in this case formed a biased opinion against Burjoski based on his own personal perspective on the issue. Because of this bias, Burjoski submits that the decision should be quashed.

42. The test for bias is objective. In this case, the question that must be answered is whether a reasonable, informed and right-minded person viewing all the facts would believe that the WRDSB had a "closed mind" before making the decision because they were not amenable to persuasion (see: *Citizens for Accountable and Responsible Education Niagara Inc v. Niagara District School Board*, 2015 ONSC 2058, 335 O.A.C. 101 (Div. Ct.)).

43. The only evidence of bias raised by Burjoski are statements that were made after the meeting. The WRDSB submits that the comments that Burjoski takes issue with merely support the decision that was made after the fact and do not in any way leave a reasonable person to believe that the Chair had a closed mind before he voted in support of the decision. In addition, the decision was made by five members of the elected WRDSB. The Chair also specifically passed the chair position to the Vice-Chair to preside over the vote. Having formed a reason for voting a certain way is not the same as being biased before the vote is cast.

44. I see no basis established upon which any finding of a reasonable apprehension of bias, or any actual bias, on the part of the WRDSB could be justified.

Conclusion

45. For these reasons, this application is dismissed.

Costs

46. The WRSDB has been successful in its response to this application and seeks its costs as a result.

47. Burjoski submits that the WRDSB should not receive any award of costs. Instead, she submits that the issue she has raised is of such public interest that no costs should be ordered.

48. I see no compelling reason why the usual approach as to awarding costs to the successful party should be departed from in this case. Although Burjoski's perspective on what students should and should not read may be shared by others, it is not of such a nature as to operate to insulate her from an order that she contribute to the costs of the opposing party when she initiates a court proceeding.

49. Costs fixed at $5000, inclusive of disbursements and applicable taxes, shall be paid by Burjoski to the WRDSB if demanded.

E.Stewart J.

I agree:
Lococo J.

I agree:
Williams J.

Released: November 29, 2023

CITATION: *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506
DIVISIONAL COURT FILE NO.: Hamilton, DC-22-126-JR1
DATE: 20231129

ONTARIO SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

E.Stewart, Lococo and William, JJ.

B E T W E E N :

Carolyn Burjoski

Appellant

- and –

Waterloo Region District School Board

Respondent

REASONS FOR DECISION

Released: November 29, 2023

Province of Alberta

EDUCATION ACT

Statutes of Alberta, 2012
Chapter E-0.3

Current as of December 7, 2023

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Disqualification of trustees

87(1) A person is disqualified from remaining as a trustee of a board if that person

(a) other than a person appointed under section 84(1), ceases to be qualified for nomination as a trustee under the *Local Authorities Election Act*;

(b) is an auditor or employee of the board for which the person is a trustee;

(c) has breached the code of conduct of the board established under section 33, where the sanction for the breach under the code of conduct may be determined by the board to be disqualification;

(d) is a party to a subsisting contract for the construction, maintenance or repair of real property over which the board has administration other than a contract for the provision of goods or services in an emergency;

(e) beneficially owns more than 10% of the issued shares of a corporation that has a pecuniary interest in a subsisting contract for the construction, maintenance or repair of real property over which the board has administration other than a contract for the provision of goods or services in an emergency;

(f) has a pecuniary interest in a contract with the board, other than

(i) a contract for the provision of goods or services in an emergency,

(ii) a contract for the sale of goods or services to the board at competitive prices by a dealer in those goods or services incidental to and in the ordinary course of the dealer's business,

(iii) a contract of employment with the trustee's spouse or adult interdependent partner, child, parent or spouse's or adult interdependent partner's parent, or

(iv) a contract approved by the board pursuant to disclosure;

(g) uses information gained through the person's position as a trustee of the board to gain a pecuniary benefit in respect of any matter in which the person has a pecuniary interest;

Resignation on disqualification

90 If a person is disqualified under section 87 or 88 from remaining as a trustee of the board, the person shall immediately resign.

Refusal to resign on disqualification

91 If the person does not resign as required under section 90,

(a) the board may by resolution declare that person to be disqualified from remaining as a trustee and the seat on the board to be vacant,

(b) the board may apply to the Court of King's Bench for

(i) an order determining whether the person is qualified to remain as a trustee, or

(ii) an order declaring the person to be disqualified from remaining as a trustee and the seat on the board to be vacant,

or

(c) an elector of the school division in respect of which the person was elected may apply to the Court of King's Bench for an order declaring the person to be disqualified from remaining as a trustee and the seat on the board to be vacant, by

(i) filing an affidavit showing reasonable grounds for believing that the person never was or has ceased to be qualified as a trustee of the board, and

(ii) paying into court the sum of $250 as security for costs.

2012 cE-0.3 s91;AR 217/2022

Appeal of board's resolution

92(1) Where a person is declared under section 91(a) to be disqualified from remaining as a trustee, that person may apply to the Court of King's Bench for an order declaring the person to be qualified to remain as a trustee.

(2) Where a person

(a) is declared under section 91(a) to be disqualified from remaining as a trustee, and

(b) makes an application to the Court under subsection (1),

that person remains disqualified unless the Court otherwise orders.

(3) An application under this section must be made within 30 days from the date that the resolution was passed under section 91(a).

(4) On hearing an application and any evidence, whether oral or by affidavit, that the Court requires, the Court may make an order, with or without costs,

(a) declaring the person to be qualified to be a trustee, and

(i) reinstating the person as a trustee for any unexpired portion of the term of office for which the person was elected,

(ii) requiring any person who has been elected to serve the balance of that term to vacate the office, and

(iii) requiring the repayment to the reinstated person of any honorarium, salary or entitlement that was not paid to the person during the period of disqualification,

or

(b) declaring the person to be disqualified from remaining as a trustee and requiring the person to vacate the person's seat on the board.

2012 cE-0.3 s92;AR 217/2022

Hearing of application

93(1) On hearing an application under section 91(b) or (c) and any evidence, whether oral or by affidavit, that the Court requires, the Court of King's Bench may make an order, with or without costs,

(a) declaring the person to be disqualified from remaining as a trustee and the seat on the board to be vacant,

(b) declaring the person to be qualified to remain as a trustee, or

(c) dismissing the application.

(2) If the Court declares a person disqualified for a contravention of section 87(1)(d), (e), (f) or (g), it may order the person to pay to the board the total amount of any profit attributable to the contravention.

(3) An application under section 91(b) or (c)

(a) must be made within 4 years from the date on which the contravention is alleged to have occurred, and

2006 ABQB 387
Alberta Court of Queen's Bench

Howell v. Grande Yellowhead Regional Division No. 35

2006 CarswellAlta 665, 2006 ABQB 387, [2006] A.W.L.D. 2531,
400 A.R. 57, 45 Admin. L.R. (4th) 63, 60 Alta. L.R. (4th) 179

Cheryl Howell (Applicant) and Grande Yellowhead Regional Division #35 (Respondent)

Moen J.

Heard: March 24, 2006
Judgment: May 25, 2006
Docket: Edmonton 0603-01602

Counsel: Ms Howell for herself
Grace Garcia Cooke for Defendant

Subject: Public

Headnote

Education law --- Administration of schools — Trustees and boards — Tenure of office — Removal

Trustee voted on motion establishing programme to provide incentives of at least $20,000 for teachers to retire — Trustee did not declare pecuniary interest although her partner was teacher — Trustee did not put on record that partner said he did not intend to retire that year — Board passed resolution disqualifying trustee — Trustee applied for order declaring her qualified to remain — Application dismissed — School Act defines pecuniary interest as one that "could" monetarily affect person or person's spouse or adult independent partner — Trustee had such interest on application of objective reasonable test — Partner was eligible for incentive and could change intention not to retire — Interest viewed objectively was not so remote or insignificant that it could not reasonably be regarded as likely to influence person — Disqualification did not arise inadvertently or by bona fide error of judgment — Trustee was aware of her obligations and was warned by other trustees of conflict.

APPLICATION by school trustee for order declaring her to be qualified to remain as trustee.

***Moen J.*:**

Introduction

1 Cheryl Howell, the Applicant, ("Ms. Howell") was a school board trustee with the Board of Trustees of Grande Yellowhead Regional Division ("GYRD") #35 (the "Board") until January 4, 2006, when the Board passed a resolution disqualifying Ms. Howell from remaining as a trustee because, they said, that she was in a conflict of interest on a matter before the Board on which she had voted and as such she breached the *School Act*, that is, she had a pecuniary interest in the matters on which she voted.

2 The matter before the Board involved a Retirement Incentive Program ("RIP") which was to encourage teachers to retire by inducing them with an incentive of more than $20,000. The program was for one year. Ms. Howell is an adult interdependent partner of a teacher with the GYRD who was eligible for retirement and therefore also for the program. Ms. Howell described that person as her "spouse".

3 Ms. Howell says that before she voted she consulted with her partner about whether he intended to use the program that year. She was assured by him that he did not intend to retire during that year. She voted on two motions regarding the RIP.

4 Ms. Howell appeals the Board's resolution disqualifying her from remaining as a trustee with the Board.

5 The issues before me are:

1. Did Ms. Howell have a pecuniary interest under the *School Act*? If so, what are her obligations?

2. If so, has Ms. Howell any defences to voting on the Motions before the Board?

Discussion

6 Ms. Howell is before me under s. 87 of the *School Act*:

> 87 (1) Where a person is disqualified under section 86(a) from remaining as a trustee, that person may apply by originating notice to the Court of Queen's Bench for an order declaring the person to be qualified to remain as a trustee.

7 Under s. 87 the Court may declare the person to be qualified as a trustee and reinstate the person; or declare the person to be disqualified from remaining as a trustee and the seat on the Board to be vacant.

1. Did Ms. Howell have a pecuniary interest under the School Act? If so, what were her obligations?

8 At the Board's Regular Meeting of December 7, 2005, Trustee Caputo moved that the Board approve the RIP ("RIP Motion 153"). Trustee Akers requested that the vote be recorded because she believed that Ms. Howell had a pecuniary interest in RIP Motion 153. Ms. Howell did not declare a pecuniary interest in that Motion, nor did she explain on the record that her partner was eligible to retire but that he did not intend to do so. Further, she participated in discussions and voted in favour of the motion. Also during the December 7, 2005 Board Meeting, Trustee Wall put forth a motion to limit the number of eligible RIP recipients to 20 teachers ("RIP Motion 154"). Trustee Wall asked if any of the trustees had a conflict of interest in Motion 154 and told Ms. Howell that he was specifically referring to her. Ms. Howell stated that she did not have a conflict and voted in favour of Motion 154.

9 Both votes were unanimous.

10 Ms. Howell says that she did not have a pecuniary interest because her partner had assured her that he did not intend to retire that year and to take the RIP.

11 Ms. Howell's adult interdependent partner ("partner") is a teacher employed by the Board. He is 57-years old, has been a teacher with the Board for 14 years, and was eligible to participate in the RIP at the time of the two votes at issue here.

12 The RIP provides an incentive for eligible teachers to retire. The minimum RIP payout to an approved applicant is $20,000.00 and the maximum is $29,000.00, depending on the number of retirees. In the prior two school years (2003-2004 and 2004-2005), the RIP payout was $23,007.00 and $22,836.00 respectively. Clearly anyone who might benefit from this program has a pecuniary interest.

13 After the votes on Motions 153 and 154, the Board, under s. 86 of the *School Act* passed a resolution to disqualify Ms. Howell from remaining as a trustee of the Board and declared the seat on the Board to be vacant. They did so because they said that Ms. Howell had a pecuniary interest in the RIP that she should have disclosed at the time there was a discussion of the RIP, and she should have followed the requirements of the *School Act*, that is, where a trustee has a pecuniary interest in a matter before the Board, that trustee under s. 83 is required to do the following:

> (a) disclose the general nature of the pecuniary interest prior to any discussion of the matter;
>
> (b) abstain from voting on any question relating to the matter;
>
> (c) subject to subsection (3), abstain from discussing the matter; and

> (d) subject to subsections (2) and (3), leave the room in which the meeting is being held until the discussion and voting on the matter are concluded.

14 If a trustee does not do those things, that trustee becomes disqualified to remain as a trustee and must resign (ss. 83(7) and s. 85). Where the trustee fails to resign, the Board may, as it did here, disqualify that trustee.

15 The pecuniary interest, that Ms. Howell was said to have, related to the RIP for which her partner was qualified. Therefore, I must determine if her participation in the two votes on the RIP are a pecuniary interest under the *School Act*.

16 The *School Act* at ss. 80(1)(b) defines "pecuniary interest" with respect to a person, as an interest in a matter that *could monetarily affect* the person. Section 80(2) of the *School Act* also deems the pecuniary interest of a person's spouse or adult interdependent partner to be the pecuniary interest of that person. Further, "the pecuniary interests of the spouse or adult interdependent partner of a person that are known to the person or of which the person reasonably should know are deemed to be the pecuniary interests of the person." (s. 80(2) *School Act*)

17 When evaluating whether a person has a pecuniary interest in a matter, one must apply an objective, reasonable test:

> The court is not to measure or weigh the extent or amount of the pecuniary interest if an interest in the relevant sense can be said to exist... If such an interest can be reasonably said to exist, then the court cannot ignore it nor be moved by protestations that it did not influence the person whose vote is impugned. The question is whether the pecuniary interest can be reasonably said to exist, not whether or how it had an effect on the vote.
>
> *Lukas v. Peden* (1974), 49 D.L.R. (3d) 272 (Alta. C.A.), at 4.

18 In other words, the intentions or motives of the person are irrelevant.

19 I note that the definition of "pecuniary interest" is an interest in a matter that *could* affect a person, not one that *would*. In this case, although it was her partner's present intention not to take advantage of the RIP, his interest in the RIP could have affected her decision to vote for the program. I note that he signed a declaration on January 3, 2006 that he did not intend to take retirement in that year. This was one month after the votes in question here and just before the motion disqualifying her. That declaration could be seen as self-serving. However, the question is: Did Ms. Howell know, or ought she to have known, that the RIP *could* monetarily affect her partner and consequently affect her? The answer is clearly that she ought to have known. Further, she did know that it was a pecuniary interest because she asked her partner and stated that she would not have voted if he had said yes. The cases support the principle that even a general discussion of a program that may have a benefit to the trustee or councillor involved requires that the trustee refrain from discussing and voting on the subject: *Breakey v. Fullerton*, [1995] A.J. No. 603, 31 Alta. L.R. (3d) 283 (Alta. Q.B.), at paras 14-16; *Canmore (Town) v. Elford* (January 26, 2000), Doc. Calgary 9901-14157 (Alta. Q.B.) at paras 44-45.

20 The purpose of conflict of interest legislation is to maintain the integrity of the governing body by prohibiting potential personal financial gains or losses from affecting decisions to be made for the benefit of the public good. "Integrity in the discharge of public duties is and will remain of paramount importance, and when the question of private interest arises, the court will not weigh its extent nor amount in determining the issue.": *Wanamaker v. Patterson*, [1973] A.J. No. 46 (Alta. S.C.): at para. 17.

21 I find that Ms. Howell's belief that she did not have a pecuniary interest by virtue of her consultation with her partner, does not save her. She had a pecuniary interest and because of that pecuniary interest she was bound to follow the procedure set out in the *School Act* at s. 83 as stated above. She did not do so. Therefore, by virtue of her pecuniary interest, she was disqualified.

22 The Board was entitled to pass a resolution to disqualify her and it properly did so.

23 I declare that Ms. Howell had a pecuniary interest when she voted for Board Motions 153 and 154.

24 That does not end the matter. Once it is established that she has a pecuniary interest, I must then review whether she has any defence to having participated in and voted on that matter.

2. If so, has Ms. Howell any defences to her voting on the Motions before the Board?

25 It is Ms. Howell's onus to show this Court that she has a defence: *Breakey v. Fullerton*, *supra*, at para 19; *Edmonton (City) v. Chichak*, [1990] A.J. No. 132, [1990] 3 W.W.R. 748 (Alta. Q.B.), aff'd [1990] 5 W.W.R. 300 (Alta. C.A.), at 5; *Canmore (Town) v. Elford* (January 26, 2000), Doc. Calgary 9901-14157 (Alta. Q.B.) at para 46.

26 First, Ms. Howell says that she did not have a pecuniary interest because her interest was so remote or insignificant that it cannot reasonably be regarded as likely to influence her.

27 Second, Ms. Howell submits that if she has breached the conflict of interest provisions under the *School Act*, the Court should exercise its discretion to reinstate her pursuant to s. 89 of the *School Act*:

> 89 Where the Court of Queen's Bench hears an application under section 86(b) or (c) or 87 and finds that the person is disqualified, the Court may nevertheless declare the person to be qualified to be a trustee if it is of the opinion that the disqualification arose inadvertently or by reason of a *bona fide* error in judgment.

28 It is noted that in these circumstances I can only declare Ms. Howell to be qualified as a trustee where I am of the opinion that she voted inadvertently or made an honest error in judgment.

29 Therefore, we must examine those two questions:

1. Was her interest remote or insignificant? and

2. Was Ms. Howell inadvertent in her voting or did she make a *bona fide* error in judgment?

1. Was Ms. Howell's interest in Motions 153 and 154 remote or insignificant?

30 This question arises from the *School Act* which provides that:

> 80(3) For the purposes of this Division, a person does not have a pecuniary interest by reason only of any interest that the person may have
>
> > (g) by reason of an interest that is so remote or insignificant that it cannot reasonably be regarded as likely to influence the person.
>
> [emphasis mine]

31 Ms. Howell claimed that the likelihood that the RIP was going to benefit her was remote and insignificant. Further, she says that she voted on the RIP for the year 2004/2005 without question from the Board at that time. In response to this latter claim, just because someone has done something wrong and it was not challenged does not give her carte blanche to continue to vote on matters in which she has a conflict of interest.

32 To determine this question, I must use an objective test: "Would a reasonable elector, being apprised of all of the circumstances, be more likely than not to regard the interest of the councillor as likely to influence that councillor's action and decision on the question?": *Whiteley v. Schnurr*, [1999] O.J. No. 2575, 4 M.P.L.R. (3d) 309 (Ont. S.C.J.), at para 10. In other words, it is not the trustee's view that must be assessed here, it is the view of a reasonable elector.

33 I note that the statute being considered in *Whiteley* is an Ontario Statute but the language there is almost identical to the *School Act* in Alberta. For this reason the reasoning in that case is persuasive. Further, although *Whiteley* is a case about a city councillor, the principles are the same for any elected official.

34 In *Whiteley*, the interest of the city councillor was indirect, not as here, direct. In that case, the court found that the interest was remote and insignificant. It is instructive to state the facts of that case to illustrate when an interest is remote and insignificant. In that case, the Guelph councillor was an employee of the University of Guelph being one of 5,000 employees whose pay, benefits and employment prospects were governed by a collective agreement between the University and his union. The University had an application before City Council for an official plan amendment which would benefit the University Heritage Trust Fund. That Fund was governed by an independent board of trustees who were not employees of the University and not subject to direction by or order of the University.

35 The test is fact driven and may be different in each case. The court in *Whiteley* suggests that the test should be: "Would a reasonable elector, being apprised of all the circumstances, be more likely than not to regard the interest of the councillor as likely to influence that councillor's action and decision on the question?" The court suggested that such an elector might consider: "any present or prospective financial benefit or detriment, financial or otherwise, that could result depending on the manner in which the member disposed of the subject matter before him or her.": at para 10.

36 Here, we have a trustee who had a direct relationship with an employee of the Board and who could have directly benefited from the RIP. Although her partner had told her that he was not going to take advantage that year of any RIP, nevertheless it was possible for him to change his mind. He was not bound by the decision of the Board nor her decision to vote. Therefore the benefit was not remote, it was very close to her.

37 Ms. Howell also says that the vote was unanimous so her vote had no effect. The Court in *Wanamaker* stated that "the outcome of the vote is not relevant, nor is the effect or the operation of the resolution if passed.": at para. 20. Therefore, the effect of her vote is not to be considered.

38 I must also comment on an argument made by Ms. Howell that this was policy and therefore could not provide an advantage to her or her partner. She suggested that it was not a pecuniary interest until there was a motion before the Board that had her partner's name in it.

39 The matter before the School Board does not have to be that closely related to the trustee for it to be a pecuniary interest. I do not accept that the two motions before the Board were policy. The Board was implementing a program. Even if I did accept that the Board was only implementing policy, the test for remoteness set out in *Whiteley* is met.

40 Was the potential of the RIP for her partner insignificant? Even $300 was not considered to be insignificant: *Mino v. D'Arcey*, [1991] O.J. No. 411, 2 O.R. (3d) 678 (Ont. Gen. Div.), at 6. Here the potential was for at least $20,000.00.

41 The reason that the Courts consider such a sum to be significant is that the Courts set a high standard of public trust. The public interest must be served with high moral standards. Not only must public officials not benefit from their decisions, they must not be perceived to benefit from their decisions. The measure of the standard is an objective one. In other words, it is not what the person making the decision thinks or believes that matters - that is a subjective test - but rather what a person in the community would think if they heard that Ms. Howell had voted on a motion under which her partner could benefit. This is the objective standard: *Moll v. Fisher* (1979), 96 D.L.R. (3d) 506 (Ont. Div. Ct.), at 3,4.

42 Therefore, I find that the potential of over $20,000 as a benefit for her partner was not insignificant.

2. Was Ms. Howell inadvertent in her voting or did she make a bona fide error in judgment?

43 Having found Ms. Howell disqualified as set out above, she may defend herself by showing that her vote was inadvertent or that she made a *bona fide* error in judgment. Inadvertence was discussed by this court in *Edmonton (City) v. Chichak*, [1990] A.J. No. 132 (Alta. Q.B.). To be inadvertent, the action must be accidental or unintentional, or careless: at p. 5 and 6 of 10 in the Quicklaw version. "*Bona fide*" is discussed in the same case as: honestly, without fraud or deceit, honesty in fact, complete frankness: at p. 6 of 10.

44 Ignorance of the law may be classified as inadvertent. However, for a court to determine whether it is inadvertent depends on the circumstances of each case. Wilful blindness or reckless disregard for the legal consequences cannot be characterized as inadvertence: *Chichak* p. 7 of 10.

45 For a court to make a finding of inadvertence or *bona fides* and consequently to qualify a person to continue in their role as a school trustee, the court must analyze the evidence with care.

46 First, I will review Ms. Howell's understanding of the law.

47 In October of 2004, Ms. Howell was involved in an orientation as to trusteeship. At that time the *School Act*, s. 80(1)(b) was explained to her and the other trustees and particularly the meaning of "pecuniary interest". The Board's Superintendent provided all Trustees with a binder of written material. He also led the trustees through a detailed review of the pecuniary interest provisions under the *School Act* and the roles and responsibilities of the trustees. Those materials state the following:

> Recent legislation limits individuals to whom the trustee has a deemed pecuniary interest to either a spouse or an adult interdependent partner. The trustee must refrain from discussion of, voting on, and participating in any way in issues that could monetarily affect both the trustee and either a spouse or an adult interdependent partner.

48 The above information sets out the section of the *Act* relating to pecuniary or conflict of interest. It also sets out in detail what an adult interdependent partner is. Finally, it sets out in detail what a trustee is to do if a pecuniary interest arises.

49 Further, at the organizational meeting in the fall of 2004, she was required to disclose in writing any potential conflict of interest. She disclosed her potential conflict of interest regarding her partner at those meetings. It appears from this disclosure that Ms. Howell knew well that any vote that could have a pecuniary benefit to her partner was one in which she should not have participated in any way.

50 The materials provided to Ms. Howell by the Superintendent were clear and, given that she had previously been a Mayor for a village, she had experience with conflict of interest legislation and must have understood the materials presented at the organizational meeting.

51 In November 2005, the trustees, including Ms. Howell, met with a Senior Education Consultant with the Alberta School Boards Association who conducted a comprehensive policy review of the Board's policies including trustee conflict of interest. The materials provided at that meeting are clear that a trustee is solely responsible for declaring "subject matter which *may* place the trustee in a conflict of interest." [emphasis mine].

52 Trustee Akers, in her Affidavit, stated that she had challenged Ms. Howell numerous times about her pecuniary interest in other matters. It was Trustee Akers' evidence that Ms. Howell on many occasions did not declare her conflict until she was challenged by another trustee after which Ms. Howell would declare a conflict and leave the meeting. Trustee Akers' Affidavit sets out specific examples of this. Those instances are examples of where Ms. Howell was warned before the meeting in question here. There were several instances where it should have been clear to Ms. Howell that she was in conflict. Further, having been challenged on those occasions puts her on notice that she may be in conflict on future occasions. Trustee Wall also gave evidence that he had personally asked Ms. Howell at least six times about potential conflict of interest. It is clear from the Affidavits before me that the issue of conflicts of interest were raised often by other trustees with Ms. Howell.

53 Finally, there was evidence that Ms. Howell acted as a pension consultant for the Alberta Teachers' Association involving teachers in the GYRD while she was a member of the Board of Trustees. Her consulting would be directly related to advising teachers as to whether they should take advantage of the RIP. She never declared that conflict either.

54 The Board also points out that Ms. Howell also voted on the motion to disqualify her as a trustee even though she had a pecuniary interest in that motion - that is - she stood to lose her trustee honorarium and benefits as a trustee.

55 I note that Ms. Howell represented herself and that she set out the law as found in the *School Act* without much difficulty. She did not cite any case law.

56 For the vote on Motion 153 regarding the implementation of the RIP for the school year 2005/2006, Trustee Akers requested that the vote be recorded. This was unusual. Notwithstanding Ms. Howell's declaration at the organizational meeting in November 2004 that she may have a conflict where there were matters dealing with the Alberta Teachers' Association given her relationship with her partner, Ms. Howell participated in the discussion and voted on the RIP.

57 For the vote on Motion 154, regarding limiting the number of persons that could take advantage of the RIP, Trustee Wall asked that the vote be recorded and specifically asked if there were any conflicts of interest in the trustees. Trustee Wall told Ms. Howell that he was specifically referring to her. Ms. Howell stated that she did not have a conflict of interest and she participated in the discussion and the vote.

58 One cannot claim inadvertence when one has been warned of the conflict: *Wetaskiwin (County No. 10) Board of Education v. Burghardt*, [1993] A.J. No. 854 (Alta. Q.B.) at paras 51-52, Here, Ms. Howell had been questioned and warned several times on other matters and she had been warned on the specific vote for Motion 154. She apparently believed that she had not been warned, but my review of the evidence shows that it is clear that she had.

59 From all of the evidence before me I cannot find that Ms. Howell was not aware of her obligations to declare that she had a pecuniary interest. Further, if she was not aware of her obligations, she was wilfully blind and this cannot be *bona fide*. I cannot find that Ms. Howell made an error in judgment in the face of the training she received in 2004 and 2005 and of the warnings she received from her fellow trustees. In particular, after Trustee Hall requested a recorded vote and asked her if she had a conflict, she could no longer say she acted in a *bona fide* belief that she was not in a conflict. She did not even tell the other trustees that she and her partner had discussed the issue and that he did not intend to apply for retirement. She gave her fellow trustees no opportunity to address this issue. In any event, even in the face of her partner's alleged intentions, she was still in a conflict of interest and she knew or ought to have known this.

60 "A trustee well-versed not only in the statutory conflict of interest provisions but in their rationale, is not permitted the luxuries of recklessness or wilful blindness." *Margolis v. Brown* [1991 CarswellBC 1248 (B.C. S.C.)], (15 July 1991) Nanaimo No. 11468 at pp. 3-5. I agree with this statement.

61 I find that Ms. Howell has not met the evidentiary threshold required, that of a preponderance of evidence, to show that she voted on Motions 153 and 154 where she was in a pecuniary conflict inadvertently or with a *bona fide* error in judgment. Therefore I find that she has not established a defence to her voting.

Conclusion

62 The evidence establishes that Ms. Howell breached the conflict of interest requirements contained in the *School Act* with respect to her voting on the RIP motions before the Board at the December 7, 2005 Board Meeting.

63 Further, I find that Ms. Howell has not established a defence to that contravention of the conflict of interest provisions, that is, her vote on Motions 153 and 154 was not inadvertent nor did she make a *bona fide* error in judgment.

64 I dismiss Ms. Howell's appeal of the Board's motion to disqualify her from the Board and uphold the Board's January 4, 2006 disqualification motion.

65 The Board shall have its costs of this Action.

66 The Board is to prepare the Order in this matter. In this regard, I invoke Rule 323.1(3)(e) because Ms. Howell is representing herself.

Application dismissed.

End of Document

2022 ABKB 629
Alberta Court of King's Bench

Nassichuk-Dean v. University of Lethbridge

2022 CarswellAlta 2446, 2022 ABKB 629, [2023] 5 W.W.R. 95,
[2023] A.W.L.D. 656, 2022 A.C.W.S. 3840, 53 Alta. L.R. (7th) 426

Hailey Nassichuk-Dean (Applicant) and University of Lethbridge (Respondent)

D.V. Hartigan J.

Heard: May 5-6, 2022
Judgment: September 20, 2022
Docket: Lethbridge 2106-00780

Counsel: Carol Crosson, for Applicant
Don Dear, K.C., for Respondent

Subject: Constitutional; Public; Employment; Human Rights

Headnote

Education law --- Colleges and universities — Students — Miscellaneous

Student at University of Lethbridge claimed that requirement to be vaccinated breached right to freedom under s. 7 of Canadian Charter of Rights and Freedoms, and religious rights under Alberta Human Rights Act — Student brought application for declaration that rights were violated — Application dismissed — Issue as to whether rights were violated remained live controversy so that application was not moot — Subject matter of application was gone and could no longer have any effect on student's future education, nor can declaration rectify any breach of her rights or compensate her for any losses she may have incurred from any potential breach — Principle of use of scarce public and judicial resources, also weighed against declarative relief — Facts and legal issues were not fully before court as considerable portion of argument relied upon evidence of expert witness as to potential harm from vaccines — Declaration on so narrow and specific factual context would have no future public utility and had potential to make mischief were it to be applied to or influence future health policies — Student could have sought remedy under Act and declined to do so.

APPLICATION by student for declaration that mandatory vaccine policy violated rights.

***D.V. Hartigan J.*:**

Background

1 The Applicant, Hailey Nassichuk-Dean ("Ms. Nassichuk-Dean"), was a student at the University of Lethbridge (the "University") from the fall of 2019 to the Fall of 2021.

2 Due to the COVID-19 pandemic, the Government of Alberta cancelled in-person classes in post-secondary institutions on March 15, 2020. Between March of 2020 and September of 2021, the University primarily delivered classes to students online.

3 In order to facilitate a return to in-person classes, and recognizing the high rates of COVID-19 infections due to the 4th wave of the pandemic, the University imposed a mandatory COVID-19 vaccination policy for students and staff. Effective November 1, 2021, all persons on campus would need to provide proof of vaccination, unless they were subject to an exemption.

4 Ms. Nassichuk-Dean sought an exemption from the general policy based upon her religious beliefs. That request for an exemption was denied by the University. As consequence of that denial, the Applicant was unable to take all the courses she intended to take in that academic year, although she was able to complete two of her three chosen courses online.

5 The Applicant seeks the following Declarations from this court:

i) A Declaration that the Respondent's vaccination policy and its application to the Applicant violated s. 7 of the Charter of Rights and Freedoms [Charter]; and

ii) A Declaration that the Respondent's rejection of the Applicant's religious exemption request breached the Alberta Human Rights Act, RSA 2000, c A-25.5 [Alberta Human Rights Act].

Preliminary Issues

6 Prior to dealing with the substantive issues for which the above remedies are sought, two initial issues need to be addressed. The University argues that this application should not proceed for two interrelated reasons:

1. The University argues that as the impugned vaccination policy was rescinded in March of 2022, the application is moot; and

2. Even if the application is not moot, this application is not an appropriate case for declarative relief.

Is The Application Moot?

7 The Respondent argues that there is no longer a tangible or concrete dispute between the parties. The vaccination program which is the subject matter of this application was repealed after being in place approximately four months. Therefore, it is the Respondent's position that any decision made by this Court as to the impact of the program on the Applicant's Charter or other rights will have no practical effect on her ability to attend the University.

8 The leading case regarding the principles of mootness remains Borowski v Canada (Attorney General) [1989] 1 SCR 342 [Borowski]. The doctrine of mootness is an aspect of the general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. If, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The matter will therefore not be heard unless the court exercises its discretion to depart from that general policy: *Borowski*, at para 15.

9 To determine whether an application is moot, a two-step analysis must be undertaken: first, to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic; and second, if the answer to the first question is yes, to determine whether the court should exercise its discretion to hear the case: *Borowski*, at para 16.

10 With respect to the first stage of the analysis, there must be a consideration of whether there remains a live controversy between the parties. A live controversy, in this context, involves whether there exists, on an objective assessment, a dispute between the parties the resolution of which will actually affect the parties' rights or interests: The Alberta Teachers' Association v Buffalo Trail Public Schools Regional Division No 28, 2022 ABCA 13, at para 34.

11 It may well be, from a practical perspective, that there is no remedy that can be granted by the Court to rectify or ameliorate the impact of the alleged breaches of the Applicant's rights. The Applicant is not seeking damages or other compensatory relief. Nor can the court provide any relief from future potential harm the vaccination policy may cause Ms. Nassichuk-Dean, as that policy is no longer in place and hasn't been since March. Again, Ms. Nassichuk-Dean is not seeking injunctive or other relief for any anticipated rights breaches against her.

12 Rather, the Applicant is seeking declarations that the application of the University's COVID-19 policy violated her s. 7 Charter rights, and that the rejection of her application for a religious exemption from the policy breached her rights under the *Alberta Human Rights Act*.

13 Our Court of Appeal has held that an action for declaration may proceed in the absence of a claim for any other remedy: Trang v Alberta (Edmonton Remand Centre) 2005 ABCA 66 [Trang #1], at para 5.

14 In *Trang #1*, the parties seeking a declaration alleged that their *Charter* rights were breached by the detention facility while they were remanded awaiting trial. The government argued that the action was moot, as all the charges against the applying parties had either been stayed or otherwise disposed. The Court of Appeal held that, notwithstanding that the underlying criminal proceedings were at an end, whether or not the applying parties' *Charter* rights were breached while they were detained remained a live controversy: *Trang* #1, at para 5. The proceedings were therefore not moot.

15 In Pridgen v University of Calgary 2010 ABQB 644 [Pridgen], Strekaf J considered the issue of mootness in an action for declarative relief. In that case, a group of students had been disciplined by the University of Calgary. The students sought a declaration that the discipline violated their *Charter* rights. The University of Calgary argued that the issues on that application were moot, as the applicant's periods of probation had passed and all reference to the discipline had been removed from the respective academic records. Applying *Trang #1*, the Court found that the action for declarative relief was not moot: *Pridgen*, at paras 27 and 28.

16 I therefore find that the issue as to whether Ms. Nassichuk-Dean's rights were violated remains a live controversy between the parties. The application is not, therefore, moot.

17 Given that finding, I do not need to proceed to the second stage of the analysis set out in *Borowski*.

Is This an Appropriate Case for Declarative Release?

18 While I have found that the application is not moot, there remains the question as to whether the Court should exercise its discretion to hear the matter. The Applicant argues this is an appropriate case for the Court to exercise that discretion.

The Legal Framework

19 Declaratory relief is a discretionary remedy, which should only be given in appropriate circumstances. Generally, declarations will not be granted "where the dispute has become academic or will have no practical effect in resolving any remaining issues between the parties: Trang v Alberta (Edmonton Remand Centre) 2007 ABCA 263 [Trang #2], at para 15.

20 Clearly, there can be no practical effect on Ms. Nassichuk-Dean's rights or interests were this Court to grant her the declarations she seeks. The University has rescinded the vaccination policy. Ms. Nassichuk-Dean's vaccination status, whatever it may be, will have no effect on her ability to attend the University in the future. In that respect, the issue has become an academic enterprise.

21 However, even where the issues have become largely academic, exemptions to the general principal can occur. The Court of Appeal in *Trang #2* set out the reasons courts should be hesitant to make such exceptions:

> Declarations can potentially be granted even if they will have no practical effect on the rights of the parties. However, this is rarely done for several reasons:
>
> > a) Generally speaking, parties who actually suffer damage or consequences have a right to set the legal principles surrounding their injury. Others who are not directly affected are not generally granted remedies that may affect the rights of those directly affected.

> b) Judicial and societal resources are limited. People cannot afford to be in court constantly just because someone else wants to resolve theoretical questions.
>
> c) Declarations can lack context, leading to generalized and unhelpful declarations that are meaningless without further litigation.
>
> d) Abstract declarations encourage intervention in the affairs of governments and citizens beyond the proper role of the superior courts:
>
> . . .
>
> For all these reasons, declarations that have no practical utility are rarely granted. [***Trang #2***, at para 16]

22 It is helpful to review cases where the principles in *Trang #2* have been applied to applications for declarations where the underlying dispute between the parties has effectively become academic.

23 In Anderson v Canada (Employment, Workforce and Labour) 2019 ABQB 579 [Anderson], the applicants sought a declaration that their s. 2(a) and 2(b) *Charter* rights were infringed by an attestation clause requirement in the 2018 Canada Summer Jobs application form. The impugned clause was removed in subsequent years' applications. As a consequence, the only live issue between the parties was the application for declarative relief.

24 In that action, Tilleman J declined to hear the claim. While some of his concerns involved timing and resource issues not present in this case, as well as the fact there were a number of similar actions currently before other courts, he stated: "I also remain concerned about deciding a constitutional issue where the foundation upon which the proceedings were launched no longer exists, as the attestation clause is no longer mandatory[.]" (*Anderson*, at para 16). Clearly, this parallels the action before me, as the vaccination policy, like the attestation clause, is no longer in effect.

25 In R v Alcantara 2012 ABQB 73 [Alcantara], the two accused persons sought declarations that two sections of the *Criminal Code* were of no force or effect as being contrary to the Charter. The issue was rendered effectively academic, as the evidence obtained through those wiretap provisions had been found admissible via other means.

26 The Court declined to exercise its discretion to issue a declaration. Greckol J, as she then was, canvassed each of the four considerations in *Trang #2*. I find her analysis helpful to me in the present case and will summarize her reasons below.

27 In dealing with the first consideration, that parties not directly affected are not granted remedies that may affect the rights of those who are, the Court found a declaration could affect the rights of those who have not had an opportunity to argue the matter. The Court found this consideration weighed against granting a declaration: *Alcantara*, at para 29.

28 With respect to the issue of the appropriate use of judicial resources, the Court found, notwithstanding the thoroughness of counsel's arguments, and the fact that they were "worthy of serious consideration", the "concern with the expenditure of public and judicial resources in relation to an issue that, while not moot, largely is academic at this stage, weighs heavily against granting a declaration" (*Alcantara*, at para 42).

29 The Court found that the third consideration, that being the concern that a declaration in the case would lack context, was not an issue. Nor did the fourth consideration, that of the potential for abstract declarations encouraging improper intervention in governmental affairs, weigh against a declaration.

30 The Court summarized its reasons for declining the application as follows: "[t]he issue sought to be determined is in large part theoretical at this juncture, and to make a decision could affect the course of future litigation. It is preferable to litigate in a context where the result has practical significance and the impact is real. Further, judicial and public resources are limited."

Application to The Present Case

31 I will therefore apply the considerations in *Trang #2* to the Ms. Nassichuk-Dean's application.

32 The first consideration, that parties not directly affected are generally not granted remedies that may affect the rights of those who are, weighs against granting a declaration. The policy that is the subject matter of this application is gone. It can no longer have any effect on Ms. Nassichuk-Dean's future education, nor can a declaration rectify any breach of her rights or compensate her for any losses she may have incurred from any potential breach.

33 The second consideration, that of the use of scarce public and judicial resources, also weighs against declarative relief.

34 The Applicant argues in her supplemental brief that "the facts and legal issues are fully before this court". I do not agree. A considerable portion of the Applicant's argument relies upon the evidence of an expert witness as to the potential harm from vaccines. The Respondent provided evidence from an expert as well, who effectively contradicts the Applicant's expert. Neither expert testified in these proceedings.

35 Clearly, absent *viva voce* testimony and the inherent safeguard of cross-examination, I am in no position to chose between the evidence of the two experts, or to make any determinations with respect to their credibility. The Applicant bears the onus of proof in her application. Either a more fulsome hearing is required to present a more thorough evidentiary record, or I must determine the matter in the absence of any expert scientific evidence. Such a hearing, effectively a "battle of experts", would consume considerable court time and resources.

36 I am also of the view that a declaration in this case may lack context. The circumstances here are very specific and unique. Essentially, this application involves the impact of a specific learning institution's short-term policy meant to address a serious and unprecedented public health crisis. The policy was created in the context of a constantly changing pandemic environment, and had to take into account the availability and efficacy of vaccines and testing equipment.

37 It is difficult to imagine a similar set of circumstances arising again. As such, a declaration on so narrow and specific a factual context would have no future public utility. If anything, it would only have the potential to make mischief were it to be applied to or influence future health policies.

38 Ms. Nassichuk-Dean argues in her submissions that: "[t]his application is not just about the Applicant, it speaks to the public interest of all students in Alberta, Canada, and beyond, to determine how far a state agent can go in mandating a medical treatment in order to meet the objective of health and safety." (Brief of Argument of the Applicant, at paragraph 7) In effect, the Applicant is asking the Court to make an abstract declaration which may have a significant impact on future governmental action. That impact is the very concern identified in the fourth aspect of the *Trang #2* test.

39 Finally, with respect to the specific request for a declaration in relation to the Alberta human rights legislation, Ms. Nassichuk-Dean has not commenced any action or complaint under that legislation. The Respondent argues that this Court does not have jurisdiction to hear that matter, as it should properly be before the Human Rights Commission.

40 I find that I do not have to rule with respect to the jurisdictional issue. Even if this Court had jurisdiction to issue such a declaration, the fact that Ms. Nassichuk-Dean could have sought a remedy under the *Alberta Human Rights Act* and declined to do so further weighs against making that declaration. Declaratory relief is generally not appropriate where other, more concrete legal proceedings can address an issue: *Trang #2*, at para 19.

Conclusion

41 When I weigh the considerations in *Trang #2* in the context of the circumstances of this case, I find that this is not an appropriate case for declarative relief. The application is therefore dismissed.

Costs

42 If the parties are unable to agree on the issue of costs, they may arrange to bring the matter back before me within 30 days of this decision being published. The matter of costs may be heard either in person or via WebEx.

Application dismissed.

2022 ABCA 13
Alberta Court of Appeal

The Alberta Teachers' Association v. Buffalo Trail Public Schools Regional Division No 28

2022 CarswellAlta 92, 2022 ABCA 13, [2023] A.W.L.D. 615, 2022 A.C.W.S. 3744

The Alberta Teachers' Association (Appellant) and Buffalo Trail Public Schools Regional Division No. 28 (Respondent)

Frans Slatter J.A., Barbara Lea Veldhuis J.A., and Thomas W. Wakeling J.A.

Heard: November 2, 2021
Judgment: January 13, 2022
Docket: Edmonton Appeal 1603-22465

Proceedings: reversing *Alberta Teachers' Association v. Buffalo Trail Public Schools Regional Division No 28* (2020), 2020 CarswellAlta 1788, 2020 ABQB 582, Eric F. Macklin J. (Alta. Q.B.); refusing application for judicial review *Buffalo Trail Public Shools Regional Division No. 28 and ATA (Teacher Workloads), Re* (2016), 2016 CarswellAlta 2236, Christopher Lane Member, John M. Moreau Chair, Sandra M. Anderson Member (Alta. Arb.)

Counsel: J.L. Taylor, for Appellant
C.W. Neuman, Q.C., D.P. McLellan, for Respondent

Subject: Public; Labour

Headnote

Administrative law --- Judicial review — Where issue becoming academic or moot

Relationship between teachers' union and school division was governed by overlapping framework agreement negotiated between union, government, and school boards' association, implementing legislation, Ministerial order, and collective agreement with — Union filed policy grievance under collective agreement against school division regarding its teacher workload policy, but arbitration board held that it did not have jurisdiction because dispute did not originate under collective agreement — Union's application for judicial review was dismissed as being moot — Union appealed — Appeal allowed — Union conceded that first four grounds of relief were moot but argued that its claim for damages remained outstanding — Chambers judge concluded that union's claim for damages was unsustainable in policy grievance that failed to identify individual teachers who sustained damages and that, as claim was without merit, jurisdiction of arbitrators was moot — Chambers judge essentially concluded that proceedings were moot by deciding issues that arbitration board said it had no jurisdiction to decide, thereby purporting to judicially review decision that board did not make and had declined jurisdiction to make — Chambers judge had no mandate to resolve underlying dispute on merits, only to apply applicable standard of review to decision declining jurisdiction that was actually made by arbitrators — Proceedings were moot if there was no remaining live issue between parties, but this was not same thing as saying that pleadings did not disclose cause of action or that proceedings were without merit — Chambers judge based conclusion of mootness on view that grievance was without arguable merit — Finding that there remained live dispute, but it was without merit, was opposite of finding that there was no live dispute at all — Assuming validity of grievance, there was outstanding, live issue respecting proper remedy for past breaches, if any, and only issue was whether arbitrators had improperly declined jurisdiction.

APPEAL by union from judgment reported at *Alberta Teachers' Association v. Buffalo Trail Public Schools Regional Division No 28* (2020), 2020 ABQB 582, 2020 CarswellAlta 1788 (Alta. Q.B.), dismissing its application for judicial review of arbitration board's decision that it lacked jurisdiction to deal with policy grievance.

Per curiam:

1 The appellant Alberta Teachers' Association filed a teacher workload policy grievance under a Collective Agreement against the Buffalo Trail Schools Division, but the majority of the arbitration board held that it did not have jurisdiction because the dispute did not originate under the Collective Agreement. The appellant applied for judicial review, arguing that the arbitration board had erred in declining jurisdiction. The chambers judge did not resolve that issue, because he concluded that the dispute was moot: Alberta Teachers' Association v Buffalo Trail Public Schools Regional Division No 28, 2020 ABQB 582.

2 The relationship between the parties was governed by a number of overlapping instruments:

(a) A Framework Agreement negotiated between the Alberta School Boards Association, the Government of Alberta and the Alberta Teachers' Association. This agreement governed compensation for teachers between 2012 and 2016, and addressed a number of issues relating to teacher workloads. The resulting province-wide agreement was intended to form the background of individual collective agreements that would be determined through "local-table" negotiations.

(b) The Assurance for Students Act, SA 2013, c. A–44.8, which was enacted to implement the Framework Agreement after it had been ratified by most of the school divisions and union locals.

(c) A Ministerial Order, #033/2013, which was designed to set the maximum amount of time teachers would be required to instruct students, with the goal of reducing instructional time to 907 hours every school year.

(d) A Collective Agreement between the appellant and the respondent.

These four instruments were interrelated, referred to each other, and were intended to operate together. Each of these instruments has since expired or been repealed.

3 The appellant took the view that the respondent had breached the terms of the arrangement with respect to teacher workloads. It filed a grievance under the Collective Agreement, seeking as relief:

1. a declaration that the [Buffalo Trails] Division has breached the *Ministerial Order* and the Framework Agreement;

2. a direction requiring the Division to comply with the *Ministerial Order* and the Framework Agreement;

3. a direction requiring the Division to modify [an administrative procedure] in order to comply with the *Ministerial Order* and the Framework Agreement;

4. a direction requiring the Division to remove school based professional learning days and/or Teacher Effectiveness Support Team days from its 2015/2016 calendar;

5. damages in an amount to be determined at arbitration; and

6. such further and other remedies as an arbitrator may deem fit, including all remedies required to make any teachers affected whole.

The appellant concedes that the first four grounds of relief are now moot, but argues that the claim for damages remains outstanding. It argues that the arbitration board wrongly declined jurisdiction, and that it should have proceeded to decide whether a remedy should be awarded.

4 The Framework Agreement included "Part E: Dispute Resolution", which outlined dispute resolution procedures for certain discrete issues. It also included "Part G: Arbitration" which dealt with any other dispute respecting the interpretation, application or operation of the agreement. The respondent school division is not a direct party to the Framework Agreement, but it is listed as a "School Jurisdiction" in the appendix to that agreement, and as an "employer" in the schedule to the *Assurance for Students Act*. The Framework Agreement contemplated ratification by each school division and each union local, but it was ultimately implemented by the *Assurance for Students Act*. The Collective Agreement included standard grievance and arbitration provisions. As noted, the policy grievance was filed under the Collective Agreement.

5 While the Framework Agreement, the statute, and the Ministerial Order all contemplated Collective Agreements between the individual school divisions and the appellant, the majority of the arbitration board held that they had not been incorporated within the parties' Collective Agreement:

> In summary, a binding decision through arbitration is only required for issues that arise under the collective agreement. Although employment-related, the allotment of professional development time into non-instructional days is not a "difference" under section 16.1 of the collective agreement that falls within the purview of an arbitrator . . .
>
> The majority of the arbitration board therefore declined to adjudicate the dispute. This conclusion was the opposite of the one reached by another arbitrator in a parallel dispute between the appellant and the Greater St. Albert Roman Catholic Separate School District Number 734.

6 The appellant applied for judicial review. The chambers judge noted at paras. 13 and 22 that there had been a considerable delay in bringing the grievance forward, as well as in the subsequent court proceedings. That is undoubtedly so, but it does not follow that the appellant is foreclosed from seeking remedies for breaches that happened in the past.

7 The chambers judge concluded at para. 22 that any decision about the jurisdiction of the arbitrators would have "no meaningful effect on the current or future legal rights and obligations of the parties". This was because the appellant's claim for damages was unsustainable as pleaded:

> 24 Each of these cases relied upon by the ATA involved grievances initiated by the union on behalf of individual members. In each case, the individual member was alleged to have sustained damages or financial loss arising from the conduct of the employer that was the subject of the grievance. While the grievance as it related to the impugned conduct may have been rendered moot, the grievance as it related to the alleged damages or financial loss had not.
>
> 25 The grievance initiated by the ATA in this case is a policy grievance. It did not identify any individual member or group of members who sustained or may have sustained damages arising out of any actions by the Division or any breach by the Division of the Ministerial Order, the Framework Agreement or the collective agreement. The grievance does seek as two of six specified remedies "damages in an amount to be determined at arbitration" and "such further and other remedies as an arbitrator may deem fit, including all remedies required to make any affected teachers whole." Notably, the claim for damages does not specify teachers as having sustained damages, though the claim for "other remedies" includes those "required to make any teachers whole." This suggests that it was never intended that a claim for damages would be made on behalf of teachers and that some other unspecified remedy may be sought to make them "whole." There are no facts alleged in support of the right of the ATA to any damages nor is there a reference to any other form of remedy it may be entitled to or an arbitrator might award. There are also no facts alleged to support the right of any individual teacher or group of teachers to any damages even if they were included in that claim nor are there any facts alleged that might support some other remedy being awarded to make them "whole."
>
> The chambers judge concluded that since the claim for damages was without merit, the jurisdiction of the arbitrators was moot.

8 Of course, if the arbitration board correctly declined jurisdiction, then none of this makes any difference to the rights of the parties.

9 The appellant's argument, however, was that the arbitration board erred in declining jurisdiction. If the board did in fact have jurisdiction, then all of the issues analyzed by the chambers judge were issues for the arbitrators, not the court. Whether the claim for damages, as pleaded, as well as the claim for "other remedies", including those "required to make any teachers whole" was sustainable, was an issue for arbitration. Whether the grievance should be read generously, and whether any deficiencies could be cured by amendment, were also issues for the arbitrators.

10 The chambers judge essentially concluded the proceedings were moot by deciding issues that the arbitration board said it had no jurisdiction to decide. In effect, he purported to judicially review a decision the arbitration board did not make, and had declined jurisdiction to make. The reviewing court had no mandate to resolve the underlying dispute on the merits, only to apply the applicable standard of review to the decision declining jurisdiction actually made by the arbitrators.

11 Proceedings are "moot" if there is no remaining live issue between the parties. This is not the same thing as saying that the pleadings "do not disclose a cause of action", or that the proceedings can be summarily dismissed because they are without merit. The chambers judge based the conclusion of mootness on the basis that the grievance was without arguable merit. Finding that there remains a live dispute, but it is without merit, is the opposite of finding that there is no live dispute at all.

12 As the appellant points out, there are numerous decisions holding that a dispute is not moot if the issue of a proper remedy for past breaches remains unresolved: Trang v Alberta (Edmonton Remand Centre), 2005 ABCA 66 at paras. 3, 5, 363 AR 167; J. Cote & Son Excavating Ltd. v City of Burnaby, 2017 BCSC 2323 at paras. 38–40, 85 CLR (4th) 155; Astrazeneca Canada Inc. v Sandoz Canada Inc., 2020 FC 635 at para. 12; Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)2021 NLSC 9at paras. 15, 17. There are labour arbitration decisions to the same effect.

13 It follows that the chambers judge erred in concluding that the proceedings were moot. The analysis should have proceeded on the assumption that the grievance, as pleaded, was valid. Assuming the validity of the grievance, there was an outstanding, live issue respecting the proper remedy for past breaches, if any. Assuming the grievance was valid, the only issue before the chambers judge was whether the arbitrators had improperly declined jurisdiction to decide the grievance. If the issue was truly moot, it would not have been necessary for the chambers judge to conclude that the grievance was without merit.

14 The appeal is accordingly allowed, and the matter is remitted to the Court of Queen's Bench for a rehearing.

Wakeling J.A. **(concurring in the result):**

15 I agree that the appeal of The Alberta Teachers' Association must be allowed and the judicial review application remitted to the Court of Queen's Bench to be reheard.

16 This appeal raises an interesting issue that does not appear to have been considered before.

17 The law is clear that an action or proceeding is moot [1] if there is no "live controversy" that divides the parties and the resolution of which will actually affect the parties' rights or interests: [2]

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present *live controversy* exists which affects the rights of the parties, the case is said to be moot.

18 Most of the time it is in the public interest to remove moot cases from the litigation stream. [3] The judicial branch of government has finite resources and they are best expended to resolve controversies that actually affect the parties' interests [4] and merit the expenditure of public taxpayers' funds. A court relieved of the obligation to decide a moot case is free to decide other cases. [5]

19 The law governing declarations is consistent with the law governing mootness. A court cannot make a declaration unless "it will settle a 'live controversy' between the parties". [6]

20 But what are the benchmarks of a "live controversy"?

21 Is there a "live controversy" only if the parties' pleadings or other filed material or both, objectively assessed, demonstrate that there is an unresolved dispute between a party and another party adverse in interest the resolution of which will actually affect the parties' rights or interests? [7]

22 Suppose P files a claim against D, a statutory delegate, alleging that Bylaw 123 passed by D contravenes the *Canadian Charter of Rights and Freedoms* and is unconstitutional. [8] After D files a statement of defence denying the claim, D repeals Bylaw 123. P subsequently files an application seeking an order compelling D to file an affidavit of records. D opposes the application, alleging that the matter is moot. D files an affidavit of a senior member of D stating that D has repealed Bylaw 123. Is the claim moot because there is no longer a dispute about the validity of Bylaw 123 — the bylaw does not exist anymore?

23 Or is there a "live controversy", as well, if the outcome is not obvious? In other words, is there no live controversy if the position of one disputant is completely without merit and cannot possibly succeed?

24 Suppose P files a statement of claim alleging that D cheers for the Nashville Predators in breach of his common law duty to cheer for his hometown National Hockey League team and that D's breach has caused P a compensable loss. D files a defence in which he admits that D is a resident of Edmonton and cheers for the Nashville Predators. D denies in his defence that his cheering for the Nashville Predators harms P in any way and that there is a common law duty to cheer for the home team. D also asserts that the mootness doctrine applies. D applies for an order dismissing P's action on the ground that it discloses no cause of action or is moot or both.

25 I am not aware of a single case in which a court has applied a merit-based test to determine whether there is a "live controversy". [9] Nor am I aware of any scholar who has adopted such a position.

26 This may be a sign that the answer is so obvious that it merits no consideration.

27 But I do not think that is the case.

28 Assuming that the judges who constructed the "live controversy" standard intended the words to have their ordinary meaning, it will be useful to examine the dictionary meanings of "live" and "controversy".

29 "Live", according to The American Heritage Dictionary of the English Language", means "[o]f current interest or relevance: a live topic; still a live option". [10] Webster's Third New International Dictionary of the English Language Unabridged, offers a similar definition: "living in thought or controversy: of continuing interest: open to debate: not settled or decided". [11] So does The Oxford English Dictionary: "Of questions, subjects of consideration: Of present interest and importance; not obsolete or exhausted". [12]

30 These dictionaries define "controversy" much the same way. The American Heritage Dictionary of the English Language [13] offers this definition: "A dispute, especially a public one, between sides holding opposing views". Webster's Third New International Dictionary of the English Language Unabridged [14] presents this version: "a cause, occasion or instance of disagreement or contention: a difference marked esp. by the expression of opposing views". The Oxford English Dictionary [15] version follows: "the contending of opponents one with another on a subject of dispute".

31 I conclude that a "live controversy", in ordinary speech, does not capture settled or decided issues. For example, the fact that members of the Flat Earth Society assert that the earth is flat does not mean that the shape of the earth is a "live controversy" today. Scientists definitively answered this question a long time ago.

32 This conclusion supports the notion that there is a merit-based component to "live controversy" in ordinary speech. If the position of one of the disputants is without any merit and cannot possibly be correct, those who use the language correctly would state that there is no "live controversy".

33 While a reasonable person adequately conversant with the scientific literature would not characterize the issue the Flat Earth Society exists to debate as a live controversy just because of the contrarian position the Flat Earth Society adopts and would reject out of hand the assertion that the earth is flat, the law has followed a different course.

34 I am satisfied that, for legal purposes, the mootness concept does not incorporate a merit-based component. It is not unusual for words used by the general community in ordinary speech and by a segment of the community interested in a specific activity to have different meanings. [16] For lawyers and judges mootness measures only the existence — objectively assessed, based on a review of the pleadings or other filed material — of a dispute between two or more parties the resolution of which will actually affect the parties' rights or interests.

35 The jurisprudence's sole focus on the objective assessment of the pleadings or other filed material does not limit in any way a party's ability to challenge meritless claims or a court's ability to remove meritless claims from the litigation stream. There are other options that a litigant confronted with a hopeless or baseless claim can invoke. [17] A party can apply to strike out an adversary's pleading on the ground it does not disclose a cause of action [18] or seek summary judgment. [19]

36 It makes no sense to expand the scope of the mootness doctrine and give it a role already assigned to other protocols each of which operates effectively and independently. Judges should strive to simplify the law whenever possible and not, without good reason, complicate it.

37 As a result, P's claim against D is vulnerable on the basis that it discloses no cause of action, not that it is moot — there is a live controversy between P and D.

38 Applying the generally accepted understanding of the mootness doctrine leads to the conclusion that the workload policy grievance dispute between the Teachers' Association and the Regional Division is not moot. An objective review of the grievance and other material filed with the arbitrator and the Court of Queen's Bench discloses the existence of a present difference between the parties. The Teachers' Association maintains that the Regional Division breached governing standards and that the Regional Division must pay damages. And the Regional Division's position is that it did not breach the governing standards and is not obliged to pay the Teachers' Association damages.

39 Justice Macklin's approach, [20] if I understand him correctly, incorporates a merit-based component into the mootness test and assumes that there is no "live controversy" if the position of one party is completely without merit and must fail:

> The grievance initiated by the ATA ... is a policy grievance. It did not identify any individual member or group of members who sustained or may have sustained damages arising out of any actions by the Division or any breach by the Division of the Ministerial Order, the Framework Agreement or the Collective Agreement ... Notably, the claim for damages does not specify teachers as having sustained damages .... This suggests that it was never intended that a claim for damages would be made on behalf of teachers and that some other unspecified remedy may be sought to make them "whole". There are no facts alleged in support of the right of the ATA to any damages nor is there a reference to any other form of remedy it may be entitled to or an arbitrator might award. There are also no facts alleged to support the right of any individual teacher or group of teachers to any damages even if they were included in that claim nor are there any facts alleged that might support some other remedy being awarded to make them "whole".

40 The Teachers' Association's grievance is not moot. There is a live controversy that divides the parties — did the Regional Division contravene the collective agreement, as alleged in the June 3, 2015 grievance letter, and, if so, has the Teachers' Association or any teachers suffered damages as a result? [21]

41 It follows that the appeal must be allowed and the judicial review application reheard.

42 I acknowledge the high quality of counsel's oral and written submissions.

Appeal allowed.

Footnotes

1 Black's Law Dictionary 1208 (11th ed. B. Garner ed-in-chief 2019) ("moot case. (16c) A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights ... mootness doctrine. (1963) The principle that American courts will not decide moot cases — that is, cases in which there is no longer any actual controversy").

2 *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.) , 353 per Sopinka, J. (emphasis added). See also *R. v. Clark* (1943), [1944] S.C.R. 69 (S.C.C.) , 72 (1943) per Duff, C.J. ("the direct and immediate object of the proceeding was to obtain a judgment forejudging and excluding the respondents from sitting and exercising the functions of members of the 'then present' Legislative Assembly; and obviously, the Legislative Assembly having been dissolved since the delivery of the judgment of the Court of Appeal, such a judgment sought could not now be executed and could have no direct and immediate practical effect as between the parties, except as to costs. It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained"); *Roe v. Wade* (1973), 410 U.S. 113 (U.S. Sup. Ct.) , 125 (1973) per Blackmun, J. ("The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated"); *Mills v. Green* (1895), 159 U.S. 651 (U.S. Sup. Ct.) , 653 (1895) per Gray, J. ("The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it"); *Gouriet v. Union of Post Office Workers* (1977), [1978] A.C. 435 (U.K. H.L.) , 501 (H.L. 1977) per Lord Diplock ("The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation .... [T]he jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else"); L. Abrams & K. McGuinness, Canadian Civil Procedure Law 1384 (2d ed. 2010) ("A sufficient interest requires a genuine grievance, and whether the complainant is genuinely concerned. Alternatively stated, there must be a genuine existing legal controversy which the courts have jurisdiction to resolve") & L. Sossin, Boundaries of Judicial Review: The Law of Justiciability in Canada 107 (2d ed. 2012) ("Mootness arises where, because of factual developments (e.g. a litigant dies) or legal developments (e.g. the impugned law is repealed or amended), the dispute no longer has a concrete effect on the parties by the t ime it is submitted for resolution before the Court").

3 A court has the discretion to hear a moot case. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.) , 360 per Sopinka, J. ("an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly").

4 Kates & Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", 62 Calif. L. Rev. 1385, 1412 (1974) ("Long before the Constitution was adopted, the mootness doctrine had developed as a common law limitation on the duty of a court to decide a case. At common law mootness was largely directed to consideration of judicial economy; historically it focused on the availability of an effective remedy"); Notes, "The Mootness Doctrine in the Supreme Court", 88 Harv. L. Rev. 373, 375-76 (1974) ("The doctrine that courts will not hear moot cases ... serves two complementary purposes: it prevents the useless expenditure of judicial resources and assures that the courts will not intrude prematurely into policymaking in a manner that will unnecessarily constrain the other branches of government") & 2 P. Hogg, Constitutional Law of Canada 58.19 (5th ed. loose-leaf supp. 2019-release 1) ("The major purpose [of the rule against deciding moot cases] is to ration scarce judicial resources by applying them to real issues. A subsidiary purpose is to limit the power of the courts to make pronouncements of constitutional law that are not required to resolve a dispute. There is also the risk that a moot case would not be properly presented and argued by parties who lack an interest in the outcome").

5 See *Bullis v. Canada (Solicitor General)*, [2000] F.C.J. No. 1131 (Fed. T.D.) , ¶ 7 (Prothonotary) ("The issue here is whether it is worthwhile to apply scarce judicial resources to resolve a point that is moot. This Court is, essentially, fully booked until next year").

6 *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12 (S.C.C.) , ¶ 11; [2016] 1 S.C.R. 99 (S.C.C.) , 110 per Abella, J. See also *Ewert v. Canada*, 2018 SCC 30 (S.C.C.) , ¶ 81; [2018] 2 S.C.R. 165 (S.C.C.) , 205 per Wagner, J. ("A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought"); *Judicature Act*, R.S.A. 2000, c. J-2, s. 8 ("The Court ... has power to grant and shall grant ... all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible *all matters in controversy* between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided") (emphasis added); *Declaratory Judgment Act*, 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction ... any court of the United Sates ... may declare the rights and other legal relations of any interested party seeking such declaration"); *Aetna Life Insurance Co. of Hartford, Connecticut v. Haworth* (1937), 300 U.S. 227 (U.S. Sup. Ct.) , 240-41 (1937) per Hughes, C.J. ("A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot .... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts"); *Egan v. Willis*, [1998] HCA 71 (Australia H.C.) , ¶ 5; (1998), 195 C.L.R. 424 (Australia H.C.) , 429 per Gaudron, Gummow & Hayne, JJ. ("Declaratory relief should be directed to the determination of legal controversies concerning rights, liabilities and interests of a kind which are protected or enforced in the courts") & J. Heydon, M. Leeming & P. Turner, Equity Doctrines and Remedies 625 (5th ed. 2015) ("A real question for answer by a declaration is present if there is a particular degree of connection between the law and the facts. A legal dispute is a dispute over the legal significance of certain facts. A difference of opinion between two persons over whether a contract between them has this meaning or that meaning will be a hypothetical, not real, question if in the circumstances the meaning of their contract has no practical significance for them, and if circumstances in which the meaning would have practical significance are unforeseeable").

7 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law Substance and Procedure 273-79 (5th ed. 2012) ("A case may become moot for several reasons. The controversy must normally exist at every stage of the proceeding, including the appellate stages. Thus, a case may become moot because the law has changed; because defendant has paid moneys owed and no longer wishes to appeal, notwithstanding plaintiff's desire to obtain a higher court ruling; because allegedly wrongful behavior has passed, been mooted, and could not reasonably be expected to recur; because a party could no longer be affected by a challenged statute; for example, a law regulating rights of minors when the party, through lapse of time, is no longer within the age brackets governed by the statute; or because a party is ... [no] longer subject to the law (e.g., the party has died") & 2 P. Hogg, Constitutional Law of Canada 58.17 & 59-18 (5th ed. supp. loose-leaf 2019-release 1) ("A case is 'moot' when there is no longer any dispute between the parties. ... A case becomes moot when the repeal of a statute, the expiry of a lease, the death of a party, the settlement of the dispute, or some other new circumstance, resolves the dispute or makes it irrelevant").

8 See *Moir v. Huntingdon (Village)* (1891), 19 S.C.R. 363 (S.C.C.) (1891) (the Court declined to hear an appeal in a proceeding challenging the validity of a bylaw after the village repealed the bylaw) & *Halvonik v. Reagan*, 457 F. 2d 311 (9th Cir. 1972) (the Court declined to hear an appeal from a district court judgment refusing to hear an injunction application against regulations Governor Reagan issued to combat rioting in a university community but rescinded after the riots stopped and before the applicant sought injunctive relief).

9 *Independent Contractors and Businesses Association v. British Columbia (Attorney General)*, 2020 BCCA 245 (B.C. C.A.) , ¶ 18; 449 D.L.R. 4th 412, 423 comes the closest. Justice Saunders, for the Court, said this "[T]he appellants complain that the judge found that issues presented in the petition had already been decided .... I observe that the judge did not say that all the complaints were the subject of previous decisions, only that 'many' were. Certainly I acknowledge that not all issues presented in the petition were beyond argument. However, even had the judge doubted the merits of all of the issues raised in the petition, it would have made no difference to the conclusion on the issue of mootness. By that stage of her analysis, in para. 39 of her reasons, the judge had already found that the petition no longer addressed a live controversy. That conclusion is unassailable". But the state of the authorities does not foreclose consideration of the issue. See *Home Office v. Harman*, [1982] 1 All E.R. 532 (U.K. H.L.) , 550 (H.L.) per Lord Roskill ("That is not to suggest that the submissions made on her behalf should be rejected because they are novel. Far from it. New situations regularly arise in the practice of law which require previously held and sometimes generally accepted views to be reviewed and if necessary

to be revised in the light of that new situation. Indeed the evolution of the common law of this country to meet the changing needs of contemporary society and its adaptability to change owes much to judicial acceptance of this philosophy"); *Thorson v. Canada (Attorney General)* (1974), [1975] 1 S.C.R. 138 (S.C.C.) , 152 (1974) per Laskin, J. ("Counsel for the respondents contended that a provincial Attorney General could take declaratory proceedings, but he could cite no authority for this proposition nor could I find any. However, want of authority is not an answer if principle supports the submission"); *Laporte v. The Queen*, 29 D.L.R. 3d 651, 655 (Que. Q.B. 1972) ("Simply because something has never been done before is no good reason to say that it should not be done now. I trust that the age of judicial innovation is not dead and there will always be room to extend the frontiers of jurisprudence. If the matter has not been decided before, it falls to be decided now, and the absence of precedent, while it renders my task more difficult, adds nothing to the argument one way or the other") & Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy", 116 Harv. L. Rev. 19, 23 (2002) ("no common law system is the same today as it was fifty years ago, and judges are responsible for these changes").

10 The American Heritage Dictionary of the English Language 1026 (5th ed. 2016) (emphasis omitted).

11 Webster's Third New International Dictionary of the English Language Unabridged 1324 (2002).

12 8 The Oxford English Dictionary 1047 (2d ed. 1989).

13 The American Heritage Dictionary of the English Language 400 (5th ed. 2016).

14 Webster's Third New International Dictionary of the English Language Unabridged 497 (2002).

15 3 The Oxford English Dictionary 855 (2d ed. 1989).

16 A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 73 (2012) ("Sometimes context indicates that a technical meaning applies. Every field of serious endeavor develops its own nomenclature — sometimes referred to as *terms of art*. Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected: 'In terms of art which are above the comprehension of the general bulk of mankind, recourse, for explanation, must be had to those, who are most experienced in that art.' And when the law is the subject, the ordinary legal meaning is to be expected, which often differs from common meaning") (emphasis in original).

17 Kates & Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", 62 Calif. L. Rev. 1385, 1389 (1974) ("mootness claims are frequently advanced before trial by demurrer, motion to dismiss, motion for summary judgment, or motion for judgment on the pleadings").

18 *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 3.68(2)(b) & 7.1(3)(a). See *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 (S.C.C.) , ¶ 4; [2011] 2 S.C.R. 261 (S.C.C.) , 269 per McLachlin, C.J. ("The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action. If it is plain and obvious that the claim cannot succeed, it should be struck out") & *Bruno v. Samson Cree Nation*, 2021 ABCA 381 (Alta. C.A.) , ¶ 65 ("The 'plain and obvious' criterion is met if there is a very high degree of certainty that the pleadings do not disclose a cause of action").

19 Id. r. 7.3. See *Warman v. Law Soc'y of Alberta*, 2015 ABCA 368; 94 Admin. L.R. 5th 37 (the Law Society applied for summary dismissal of the applicants' judicial review application on the ground that it was bound to fail) & *Pharmacia Inc. v. Canada (Minister of National Health & Welfare)* (1994), [1995] 1 F.C. 588 (Fed. C.A.) , 600 (C.A. 1994) per Strayer, J.A. ("there is ... jurisdiction in this Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success").

20 *Alberta Teachers' Association v. Buffalo Trail Public Schools Regional Division No 28*, 2020 ABQB 582 (Alta. Q.B.) , ¶ 25.

21 See *Textile Workers v. Lincoln Mills* (1957), 353 U.S. 448 (U.S. Sup. Ct.) , 459 (1957) (the case is not moot, even though the employer ceased doing business, because the union alleged the employer owed workers back pay for its contravention of collective agreement provisions regarding workloads and assignments).

2022 ABCA 13, 2022 CarswellAlta 92, [2023] A.W.L.D. 615, 2022 A.C.W.S. 3744

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2023 ABKB 434
Alberta Court of King's Bench

Chemtrade Logistics Inc v. Fort Saskatchewan(City)

2023 CarswellAlta 1903, 2023 ABKB 434, [2023] A.W.L.D. 3759,
[2023] A.W.L.D. 3760, 2023 A.C.W.S. 3645, 42 M.P.L.R. (6th) 221

Chemtrade Logistics Inc. (Applicant) and City of Fort Saskatchewan, Fort Industrial Estates Ltd., 2394515 Alberta Ltd., Tag Developments Ltd., Heartland Centre II Ltd., Alberta Energy Regulator, and His Majesty the King in Right of Alberta as represented by The Minister of Justice (Respondents)

L.M. Angotti J.

Heard: June 30, 2023
Judgment: July 19, 2023
Docket: Edmonton 2303-07440

Counsel: Sharon Au, Erica Klassen, for Chemtrade Logistics Inc.
Jeffrey Arsenault, for 2394515 Alberta Ltd.
Daina Young, for Fort Industrial Estates Ltd., Tag Developments Ltd., And Heartland Centre II Ltd.
Gwendolyn Stewart-Palmer, K.C., Kathleen Elhatton-Lake, for City of Fort Saskatchewan

Subject: Civil Practice and Procedure; Public; Municipal

Headnote

Administrative law --- Judicial review — Availability of other remedy

Applicant was sour gas pipeline operator within respondent City — Respondent developer applied for subdivision of lands it owned in proximity to applicant's lands — City conditionally approved developer's subdivision application — Applicant's appeal of City's decision to Land and Property Rights Tribunal was dismissed — City granted respondent numbered company's application for development permit to build agricultural dealership on lands near subdivision and granted other respondent's application for development permit — Applicant applied for judicial review from both permits — Respondents brought applications for summary dismissal of application on grounds that there was statutory right of appeal — Summary applications dismissed; judicial review application to proceed — Where there was statutory right of appeal as adequate administrative remedy, general rule was that such remedy should be exhausted before pursuing judicial review unless Court exercised its discretion — There was adequate alternative remedy with respect to first permit — Respondents did not establish that applicant had adequate alternative remedy with respect to second permit — There was significant public safety interest at stake with respect to both development permits — There was possibility that development permits were contrary to governing legislation — There existed exceptional circumstances, even in presence of adequate alternative remedy, to permit application for judicial review to proceed.

Administrative law --- Judicial review — Jurisdiction of court to review — Miscellaneous

Applicant was sour gas pipeline operator within respondent City — Respondent developer applied for subdivision of lands it owned in proximity to applicant's lands — City conditionally approved developer's subdivision application — Applicant's appeal of City's decision to Land and Property Rights Tribunal was dismissed — City granted respondent numbered company's application for development permit to build agricultural dealership on lands near subdivision and granted other respondent's application for development permit — Applicant applied for judicial review from both permits — Respondents brought applications for summary dismissal of application on grounds that there was statutory right of appeal — Summary applications dismissed; judicial review application to proceed — Where there was statutory right of appeal as adequate administrative remedy, general rule was that such remedy should be exhausted before pursuing judicial review unless Court exercised its discretion — There was adequate alternative remedy with respect to first permit — Respondents did not establish that applicant

had adequate alternative remedy with respect to second permit — There was significant public safety interest at stake with respect to both development permits — There was possibility that development permits were contrary to governing legislation — There existed exceptional circumstances, even in presence of adequate alternative remedy, to permit application for judicial review to proceed.

APPLICATION by respondents for summary dismissal of applicant's application for judicial review.

***L.M. Angotti J.*:**

I. Introduction

1 Chemtrade Logistics Inc. ("Chemtrade") filed a Judicial Review Application with respect to two development permits granted by the Development Authority of the City of Fort Saskatchewan (the "City"). Fort Industrial Estates Ltd., Heartland Centre II Ltd., and Tag Developments Ltd. (the "Fort Industrial Applicants"), applied together for summary dismissal of the Judicial Review Application as it relates to both development permits. 2394515 Alberta Ltd. ("2394515") seeks summary dismissal of the Judicial Review Application with respect only to the first development permit. Reference to the Applicants, is a reference collectively to the Fort Industrial Applicants and 2394515. At the hearing, the Applicants confirmed that the only basis upon which they were pursuing summary dismissal at the Special Chambers hearing on June 23, 2023 was the existence of an adequate alternative remedy in the absence of extraordinary circumstances, submitting that I should exercise my discretion to dismiss the Judicial Review Application rather than allow it to proceed. All parties were clear that the merits of the Judicial Review Application were not yet before the Court and were not to be considered.

2 The Alberta Energy Regulator ("AER") did not participate in the Summary Dismissal Applications. While the City filed a written brief addressing the statutory scheme, background to the issuance of the development permits, and the procedural history, it remained within its appropriate limited role and did not take an advocacy position, nor make any oral submissions at the hearing.

II. Procedural Review

3 Chemtrade owns lands within the City, upon which it operates a sour gas pipeline. The pipeline is subject to specific permit conditions under its operational license issued by the AER, including a mandatory 500 m setback for urban centres or public facilities (the "Setback"). Sour gas is hydrogen sulphide, exposure to which poses significant danger to human health and life.

4 Fort Industrial Estates Ltd. applied for subdivision of lands it owns within the City, to create industrial parcels. The Fort Industrial lands are in proximity to the Chemtrade lands. Some of the proposed industrial parcels are located within the Setback. On July 20, 2022, the City's Subdivision Authority conditionally approved the subdivision application. Chemtrade appealed this subdivision approval to the Land and Property Rights Tribunal ("LPRT"), taking the position that the subdivision plan did not comply with the Setback. The LPRT dismissed the appeal on September 14, 2022, on the basis that Chemtrade did not have standing to bring the appeal. Chemtrade did not seek judicial review of this LPRT decision.

5 2394515 Alberta Ltd. applied for a development permit to build an agricultural dealership on some of the Fort Industrial lands within the subdivision. The application included the erection of buildings within the Setback. Prior to the approval of this development permit, the City and Chemtrade met to discuss various concerns with respect to the Setback and the proposed development. On October 27, 2022, the City's Development Authority issued a development permit to 2394515 (Development Permit #1).

6 On February 13, 2023, Chemtrade appealed Development Permit #1 to the LPRT. Pursuant to the findings of the LPRT, the City mailed out the notice of Development Permit #1 on October 27, 2022, but Chemtrade did not receive a copy of the permit until February 8, 2023. On April 4, 2023, the LPRT concluded that 1) notice had been provided in accordance with the applicable Land Use Bylaw when the City mailed out the notice in October, 2) the appeal had been filed out of time (more than 21 days from the date of notice), and 3) the LPRT did not have jurisdiction to hear the appeal. Chemtrade filed an Application for Permission to Appeal the LPRT decision to the Court of Appeal. That application is scheduled to be heard on August 16, 2023.

7 Heartland also owns lands in proximity to Chemtrade. On April 13, 2023, the City's Development Authority granted a development permit for the Heartland lands (Development Permit #2) to Space Studio Inc. to occupy existing building(s) for the purposes of a business support service. These lands and buildings that are the subject of Development Permit #2 are also located within the Setback. Chemtrade did not file an appeal of Development Permit #2.

8 Chemtrade filed an Originating Application for Judicial Review of Development Permit #1 on April 26, 2023. An amended application was filed on May 23, 2023, adding Development Permit #2.

III. Is Summary Dismissal Appropriate for Judicial Review?

9 Rule 7.3(1)(b) permits the Court to dismiss an action, where there is no merit to the action. The parties were clear that they were not seeking a decision on the merits of the Judicial Review Application, but rather the merits of the threshold question: should the Court exercise its discretion to allow the Judicial Review Application to proceed based on the test of an adequate alternative remedy and exceptional circumstances.

10 The first step in a summary judgment application (including dismissal) is to determine whether summary disposition is appropriate: *Weir*-Jones Technical Services Inc v Purolator Courier Ltd., 2019 ABCA 49 at para 47.

11 Chemtrade submits that a summary dismissal application is not appropriate in the case of judicial review, as it involves a review of the merits of an application and that would simply be engaging in the judicial review itself. Rather, to consider summary dismissal, there must be a showstopper, also described as a fatal flaw, within the judicial review application, and the mere existence of a right of appeal is not such a showstopper.

12 The Applicants submitted that summary dismissal is appropriate for a judicial review application, where the focus is on the initial test of applying discretion to whether a judicial review should proceed when an adequate alternative remedy is said to exist. They cite *Morris Morris v 1934809 Alberta Ltd*, 2018 ABQB 299 and *Boll v Woodlands Boll v Woodlands*, 2021 ABQB 406 as two such examples. Thus, the summary dismissal is a more expeditious process, as compared to dealing with a longer hearing on the substantive merits of the Judicial Review Application.

13 In *Bergman v Innisfree*, 2020 ABQB 661, Justice Feth addressed the appropriateness of summary dismissal of a judicial review application and concluded at para 98-99:

> If summary dismissal of an application for judicial review requires a merits review, the application to dismiss is duplicative of the judicial review proceeding itself and generally does not promote a more expeditious and less expensive means to achieve a just result. Summary dismissal is therefore rarely available in judicial review proceedings.
>
> Summary dismissal of a judicial review proceeding may be appropriate in some limited situations, particularly where a fatal flaw strikes at the foundation of the Court's authority to hear the application.

14 He discusses *Morris* and identifies that case as an example of a "fatal flaw" that strikes at the Court's authority to hear the judicial review. The Applicants before me base their Summary Dismissal Applications on a similar fatal flaw argument - the presence of an adequate alternative remedy and the absence of any exceptional circumstances. As expressed, the parties were clear that they were not seeking a merits review of the judicial review itself, but rather are focused upon whether it is appropriate in the circumstances to permit the judicial review to proceed on its merits. Given the basis upon which the Summary Dismissal Applications have been brought, summary disposition is appropriate to consider in this case.

IV. Does the statutory appeal mechanism in the MGA provide an adequate alternative remedy in this particular case?

15 The Applicants submit that, where there is a statutory right of appeal, a court should be reluctant to exercise its discretion to conduct judicial review on the basis that the statutory right of appeal is an adequate alternative remedy.

16 Part 17 of the Municipal Government Act, RSA 2000, c M-26 ("MGA") and the Matters Relating to Subdivision and Development Regulation, AR 84/2022 ("Subdivision Regulation") provide the framework for the subdivision and development of land in Alberta. Under ss 685(2) and 685(3) of the MGA, "any person affected by . . . [a] development permit made or issued by a development authority" has a statutory right of appeal from a decision made by a development authority, but only if " . . . the provisions of the land use bylaw were relaxed, varied or misinterpreted...". There are specified timelines to bring such an appeal, which in the case of these development permits would be appeals to the LPRT. A further appeal from the LPRT can be made under s 688 to the Court of Appeal on a question of law or jurisdiction.

17 Chemtrade is pursuing an appeal under s 688 to the Court of Appeal from the April decision of the LPRT. Much of Chemtrade's submissions on adequate alternative remedy focused on the appeal to the Court of Appeal, including the process, the limited basis for such an appeal, and the limited potential outcomes. Chemtrade argued that this statutory appeal was not an adequate alternative remedy. However, as submitted by the Applicants, this is not the appropriate appeal remedy to focus upon. Chemtrade does not seek judicial review of the LPRT decision; it seeks judicial review of the Development Authority's decisions to issue the two development permits. This requires consideration as to whether the statutory appeal under s 685 is an adequate alternative remedy to judicial review, as s 685 is the appeal of the development permit decisions.

18 The Applicants rely upon *Morris* and *Boll* as cases establishing that the appeal process under s 685(2) provides an adequate alternative remedy. However, those cases dealt with the s 688 appeal process from a decision of the Subdivision and Development Appeal Board (a parallel body to the LPRT) to the Court of Appeal on questions of law or jurisdiction. As stated, that is not the appeal process to consider in the Judicial Review Application. Further, the Court in *Boll* did not permit judicial review with respect to either the Municipal Planning Commission or the SDAB, as the decision being judicially reviewed was not a decision that either entity did or even could make. Therefore, these cases are only of assistance in respect of the general principles regarding summary dismissal of judicial review applications on the basis of an adequate alternative remedy.

19 Chemtrade exercised its right of appeal with respect to Development Permit #1, which appeal was dismissed as being brought out of time. The LPRT found that Chemtrade had not actually received a copy of Development Permit #1 until February 8, 2023. However, the actual receipt of the development permit did not determine notice, which was governed by the Land Use Bylaw. The LPRT found that notice had been given in accordance with the applicable Land Use Bylaw, by the City mailing out the development permit to adjacent landowners on October 27, 2022. That date triggered the 21 day appeal period, which ended prior to Chemtrade actually becoming aware of Development Permit #1.

20 The Applicants submit that s 685 provides a robust and broad right of appeal. They note that such a right of appeal need not be perfect, but should be substantive and available to the affected party. They also point out that the appeal to the LPRT is on a *de novo* basis, not limited to the record before, nor constrained to the decision of, the Development Authority.

21 Chemtrade submitted that the law with respect to the scope of availability of judicial review in the face of a statutory appeal provision is currently "deeply uncertain" and not an appropriate issue for summary judgment. I disagree that this is the current state of the law in Alberta, as the principles of exercising discretion to allow or disallow a judicial review application have been well established for a significant period of time.

22 Where there is a statutory right of appeal as an adequate administrative remedy, the general rule is that such a remedy must be exhausted before pursuing judicial review, unless the Court exercises its discretion notwithstanding the alternate remedy. The Court should be reluctant to exercise its discretion to hear a judicial review application, unless there are special or exceptional circumstances: Gateway Charters Ltd (Sky Shuttle) v Edmonton (City), 2012 ABCA 93 at para 13; *Spruce Grove Gun Club v Parkland (County)*, 2018 ABQB 427 at para 43-44; Morris at para 5. There are many identified factors to consider in assessing whether an adequate alternative remedy exists: KCP Innovative Services Inc. v. Alberta (Securities Commission), 2009 ABCA 102 at para 10; ; Strickland v Canada (Attorney General), 2015 SCC 37 at para 42. However, the category of factors is not closed, as the Court must engage the relevant factors in a balancing exercise in the context of the particular case and the purposes and policy considerations of the applicable legislative scheme: *Strickland*, at para 43-44.

23 The statutory appeal scheme provides for a de novo hearing to the LPRT, with significant remedial powers. The LPRT can consider the validity of the development permit and cancel the permit, if appropriate; the LPRT would have relative expertise in dealing with development permits, as it is established for the purpose of dealing with issues on land use planning and development. It is an expeditious process, meant to keep such matters out of the courts, and thus promotes the economical use of judicial resources. This accords with the policy considerations under Part 17 of the MGA, to create an efficient and expeditious scheme for development and planning decisions that are done in a time sensitive manner.

24 For Development Permit #1, s 685 provides an adequate alternative remedy. The next step is then to consider whether there are exceptional or special circumstances to consider.

25 Development Permit #2 involved a change in the occupancy of an existing building, but no change in the permitted use under the Land Use Bylaw. Chemtrade did not appeal Development Permit #2. Chemtrade submitted that it did not have a right to appeal under s 685, as the provisions of the applicable Land Use Bylaw were not relaxed, varied, or misinterpreted as the development permit involved a permitted use. Therefore, Chemtrade submits that there was no adequate alternative remedy to judicial review, as there was no statutory right of appeal.

26 The Fort Applicants submit that Chemtrade's argument arises from a superficial reading of s 685(3) and that the correct procedure would have been for Chemtrade to pursue the appeal, allowing the appeal body to make a substantive decision as to whether the threshold of s 685(3) had been met. The Fort Applicants do not argue or submit that the development permit resulted in the applicable Land Use Bylaw being relaxed or varied. Not surprisingly, they also do not submit that the Land Use Bylaw was misinterpreted, as that would be fatal to the development permit.

27 In reviewing the Judicial Review Application with respect to Development Permit #2, Chemtrade pleads that it was not afforded procedural fairness. This is not a ground for appeal under s 685(3). It also pleads that the Development Authority erred in approving Development Permit #2 contrary to s 12 of the Subdivision Regulation, AER Bulletin 1213-03, and/or the Setback. It is possible, but unknown, if these arguments are based upon alleged misinterpretation of the Land Use Bylaw, which incorporates the MGA by reference. The provisions of s 685 are not to be considered as jurisdictional provisions, as determined in *Rau v City of Edmonton*, 2015 ABCA 136, nor do I interpret them in that manner. Rather, I must consider whether, as a result of s 685(3), there is still an adequate alternative remedy. I was not provided with enough information to determine whether Chemtrade would have an appeal dismissed, due to s 685(3). If such an appeal were dismissed because there is no relaxation, variation, or misinterpretation of the Land Use Bylaw, this may result in a lack of consideration of the Subdivision Regulation, the Setback, or the AER Bulletins and Directives, which would not be an adequate alternative remedy. The onus is upon the Fort Applicants to establish that there is an adequate alternative remedy. It is unclear whether, as a result of s 685(3), that Chemtrade had an adequate alternative remedy by appealing Development Permit #2 under s 685 and therefore, that onus has not been met. Even if I am wrong in that regard and there is an adequate alternative remedy, I must still consider whether there are exceptional circumstances to warrant permitting the Judicial Review Application to proceed.

V. Are there exceptional circumstances, such that the Court should exercise its discretion even if there is an adequate alternative remedy?

28 The Applicants further submit that, where there is an adequate alternative remedy, the Court should only exercise its discretion to proceed with judicial review in exceptional circumstances.

29 The Fort Industrial Applicants argued that the Land Use Bylaw provides that it is consistent with the MGA. By implication, this would also mean that the Land Use Bylaw would not permit the issuance of a development permit that contravenes s 12 of the Subdivision Regulation. In essence, their argument asks the Court to simply accept the development permit as valid, because the Land Use Bylaw does not permit an invalid permit and the development permit was granted under the Land Use Bylaw. On this basis, the Fort Industrial Applicants should be permitted to rely upon the permit in conducting their business and not have to face a situation where the development permit may now be rendered invalid, to their detriment because there are no exceptional circumstances.

30 The Applicants submit that any prejudice to Chemtrade does not arise from the process or procedure under the MGA. Rather, the prejudice arises either from Chemtrade's failure to bring the LPRT appeal within the proper time limit (Development Permit #1) or failure to bring an appeal at all (Development Permit #2).

31 In *Gateway Charters Ltd (Sky Shuttle)*, at para 13-15, the Court stated that inherent limitations in legal remedies do not necessarily make a remedy inadequate. Further, using judicial review as an attempt to subvert a procedural limitation, such as a need to obtain leave to appeal or the time limit for bringing an appeal, or where judicial review has the effect of transferring the proceedings from an administrative appellate tribunal to a superior court, are sound reasons for the Court to refuse to allow a judicial review to proceed.

32 In *Edmonton (Development Appeal Board) v. North American Montessori Academy Ltd.*, 1977 ALTASCAD 235, the Court found that it was inappropriate to exercise discretion to hear a judicial review, where the applicant had an effective right of appeal that the applicant did not take advantage of and which had expired, unless there were special circumstances. The Court also determined, on the facts of that particular case, that failing to apply for leave to appeal in the required time frame was not a special circumstance, even though such failure could be attributed to the time limit being reduced by the Christmas season, legal advice not to take legal proceedings, and unsuccessful attempts to find other counsel to take such proceedings. The perceived serious harm accruing to the teachers and pupils of the school by it being shut down in the middle of the school year was also not a sufficient special circumstance.

33 In *Morris*, it was determined that receiving improper legal advice as to an appeal under s 688 and thus failing to take the necessary steps to follow the appeal process did not constitute a special circumstance. Justice Kubik explained that special circumstances are rare and are found to be present when prejudice to the judicial review applicant arises from the appeal process or procedure, rather than from the decisions, omissions, or actions of the applicant themselves.

34 However, in Canadian Industries Ltd. v Edmonton (City) Development Appeal Board (1969), 9 DLR (3d) 727 (ABCA) at p 732, cited in *Morris*, it was determined that failure to receive notice until after the statutory period of appeal had expired could render the appeal process ineffective and the simple existence of a right of appeal is not enough; it must be an effective right of appeal. Similar reasoning is reflected in Yatar v. TD Insurance Meloche Monnex, 2022 ONCA 446 at para 45, where judicial review was available when the adequate alternative remedies were insufficient to address the particular factual circumstances of the case. This is not a difference in the test applicable in Alberta, but is simply another means of describing the exceptional circumstances aspect of the test.

35 At no time have the merits of the Development Permits been reviewed. For Development Permit #1, this is due to a lack of effective notice, such that Chemtrade was not actually aware of the Development Permit in time to exercise its right of appeal regardless of the Development Authority's compliance with the notice provisions in the Land Use Bylaw. I find the arguments on constructive notice inapplicable, as I am unaware of any authority that would have permitted it in place of notice as established under the relevant legislation. Thus, the prejudice to Chemtrade and, potentially, the prejudice to the safety of the public with respect to the alleged failure to comply with the Setback, arises from the procedure under the MGA, not from something that Chemtrade failed, neglected, or choose to do or not to do. For Development Permit #2, this may be due (although it remains uncertain) to the lack of an appeal as a result of s 685(3).

36 The Fort Industrial Applicants referred to the development permits as "validly issued" and the ability of the Fort Industrial Applicants to rely upon those permits as if they were validly issued. They submitted that expediency and finality in the decision-making process support the development permits as issued, because the Land Use Bylaw does not allow the issuance of a development permit that is contrary to or inconsistent with the MGA. I do not have any basis for accepting that the Development Permits were validly issued. That is the core of the dispute between the parties, the merits of which I am not considering at this stage of the Judicial Review Application. Simply because the Land Use Bylaw does not allow for a development permit to be issued in contrary to or inconsistent with the MGA, does not mean that in practice this did not occur.

37 Most significantly, I am satisfied that there is a significant public safety interest at stake with respect to both of these Development Permits. The Fort Industrial Applicants have submitted that a public safety concern with the development permits does not exist, as the AER has not taken any steps with respect to the development permits. However, the evidence establishes that the AER is leaving it to Chemtrade, as the license holder, to ensure that compliance with the Setback is maintained. In *Montessori*, it was found that serious harm to teachers and students was not a sufficient exceptional circumstance. Presumably that harm would result from shutting down the school midway through the year, causing a loss of jobs and interruption to the children's education. That type of harm is not the same as the harm at issue in this matter, being potential harm to the life and health of members of the public that the Setback is meant to guard against.

38 Chemtrade has provided material which establishes that sour gas represents significant harm, including a risk of death, if humans are exposed to it. The AER has put in place directives and conditions in or on licenses for sour gas pipelines, which establish mandatory setbacks. I accept that this was for public safety reasons. And those directives and conditions are of sufficient importance, that legislation has been established to address sour gas pipelines and those established setbacks, through s 12 of the Subdivision Regulation.

39 2394515 relies upon the AER leaving responsibility for compliance with the Setback to Chemtrade as suggesting that the harm is simply to be met by Chemtrade through emergency preparedness plans and otherwise. Such a proposition ignores the possibility that the development permits are contrary to the governing legislation. One of the purposes of judicial review of an administrative decision is to ensure that the substantive outcome of the process falls within the scope of outcomes permitted by the facts and applicable law: *Bergman*, at para 20. That is the core of the Judicial Review Application, an issue which has yet to be reviewed and determined in the statutory appeal process.

40 This prejudice has not resulted from any action or omission by Chemtrade; the evidence before me establishes that they have attempted to take steps to address this concern. However, the processes available to them prior to bringing the Judicial Review Application have failed to substantively address that issue. Thus, I find that exceptional circumstances exist, even in the presence of an adequate alternative remedy, to permit the Judicial Review Application to proceed.

VI. Conclusion

41 The Summary Dismissal Applications are dismissed. The Judicial Review Application shall proceed. I am not seized of this matter, such that the Judicial Review Application can be scheduled in accordance with the Court's normal scheduling procedures.

Application dismissed.

End of Document

SCHEDULE "A" – BOARD MOTION NOVEMBER 14, 2023

BE IT RESOLVED that further to the November 13 and 14, 2023, in camera discussions, and after having carefully considered all the points raised therein, and in accordance with Board Policy and the Education Act, Trustee LaGrange has violated sanctions issued on September 26, 2023, and had further violated Board Policy and the Education Act. As a result, Trustee LaGrange is hereby disqualified under section 87(1)(c) of the Education Act and Board Policy from remaining as a school board trustee. The Board will issue detailed reasons in support of this Board motion on or before November 24, 2023.

BE IT RESOLVED THAT,

1. further to the, on or about August 27, 2023, posting on Trustee Monique LaGrange's personal Facebook account which took the form of a meme displaying two photographs:

a) one of a group of children holding Nazi flags with swastikas; and

b) a contemporary photograph of children holding rainbow Pride flags; and

c) the meme was captioned "Brainwashing is brainwashing" (collectively, the "Meme"),

the Board of Trustees ("Board") finds Trustee Monique LaGrange ("Trustee") to be in violation of Trustee Code of Conduct and the Education Act.

As a result, as of today's date and up to and including the Trustee's Term of Office ("End Date"), the Trustee

a) is censured from being part of all and any part of Board Committees and is censured from attending and participating in all Board committee meetings, including any part thereof. This also includes all and any ASBA and ACSTA meetings and conferences;

b) shall not represent the Board / School Division in any official capacity, including Board/School Division functions, events, award ceremonies, conferences, assemblies, school masses, graduation events, school council meetings and speaking with news/media outlets;

c) shall cease making any public statements in areas touching upon or relating to,

i. the 2SLGBTQ+ community; and

ii. the Holocaust,

including presenting at meetings and conferences on these topics or related areas and speaking with various news outlets.

d) within 90 days of this motion, the Trustee shall enroll in, at her own expense, and successfully complete:

i. suitable sensitivity training about the Holocaust;

ii. suitable sensitivity training relative to the challenges and discrimination faced by members of the 2SLGBTQ+ community; and

iii. suitable sensitivity training covering professional school trustee boundaries and appropriate use of social media, cultural sensitivity and human rights;

iv. The Trustee shall inform the Board as to the proposed training, and prior to the Trustee's commencement of said training, the Board shall determine the suitability of the proposed training and approve each course;

v. the Trustee shall provide the Board with written certificate from the course providers stating that the Trustee has successfully completed said sensitivity training courses; and

vi. The above training is intended to remind the Trustee of her role and responsibilities as a school board trustee and to assist the Trustee to make better decisions in any further communications, including on social media

e) shall issue, at the first public Board meeting following the completion of the ninety (90) day period set out above at paragraph 1(d), a sincere public letter of apology to School Division students, staff, and the Board in relation to the Meme; said sincere apology shall recognize the inappropriateness of the Trustee's actions and that the Trustee is deeply sorry for having offended anyone through her actions; and

f) shall refrain from posting any content of a similar nature relating to Meme. (This term and condition shall be ongoing up to and including the End Date.)

2. The censure referenced at paragraphs 1(a), (b) and (c) may be removed by the Board prior to the End Date, if the terms and conditions set out at paragraphs 1(d),(e), and (f) are met to the satisfaction of the Board, and if, and as long as, the Trustee acts in accordance with Board Policy and the Trustee Code of Conduct.

3. The Trustee, who may attend regular Board meetings, may bring forward any educational related issues for discussion and debate to the Board through the Board's standard procedures and practices.

To ensure clarity, the Board welcomes open debate of education-related issues in accordance with Board policy and procedures, including sensitive or difficult topics.

4. The Board hereby directs the Superintendent of Schools, Dr. Kathleen Finnigan, to arrange for the following within the next twenty (20) days:

a) a meeting with the Director of Education of the Friends of Simon Wiesenthal Centre to discuss their September 6, 2023, letter and to confirm the date of an educational workshop by the Friends of Simon Wiesenthal Centre for the Board;

b) a meeting with Alberta's Human Rights Commission to confirm an educational workshop for the Board;

c) a follow up meeting further to the January 16, February 13, and March 13, 2023, Board workshops on a pastoral approach to support students in the development and understanding of their sexuality for the purpose of confirming a follow up workshop for the Board.

5. The Board shall provide written reasons in support of this motion to be provided to the Trustee in the next twenty (20) days.

6. The Board Chair and the Superintendent of Schools may take those steps necessary to implement the terms and conditions set out in this motion.

7. Pursuant to paragraphs 4 and 10 of Appendix “A” of Board Policy 4, the Board Chair is hereby authorized to disclose the decision of the Board.

REASONS FOR DECISION IN FURTHERANCE OF THE SEPTEMBER 25 and 26, 2023, SPECIAL BOARD MEETING

I. Background

These reasons ("Reasons") are issued further to the September 25 and 26, 2023, special meeting ("Meeting") of the Board of Trustees of the Red Deer Catholic Regional Schools ("Board") during which Meeting the Board passed a motion ("Decision" or "Motion") in relation to Board Trustee Monique LaGrange ("Trustee" or "Respondent"). The Decision, which is set out at Schedule "A" to these Reasons, found the Trustee to be in violation of the Trustee Code of Conduct and the Alberta Education Act ("*Education Act*").

The Trustee was elected Trustee of the Board in 2021. The Meeting was called to address a complaint relating to certain conduct of the Trustee on social media, as will be elaborated upon below.

At the Meeting the Trustee was provided with a full opportunity to make submissions, and she was represented by counsel who submitted written and oral arguments to the Board.

It is undisputed that, on or about August 27, 2023, the Trustee posted on her personal Facebook account a meme displaying two photographs which respectively showed:

a) a group of children holding Nazi flags with swastikas; and
b) a contemporary photograph of children holding rainbow Pride flags,

and captioned "Brainwashing is brainwashing" (collectively, the "Meme" or the "Meme Posting").

During the Meeting, the Trustee stated that her intentions were that the Meme Post was not directed toward Red Deer Catholic Regional Schools ("School Division") ("Understand that this was not directed at Red Deer Catholic") and that the Meme was not a challenge to School Division practices.

The School Division serves over 10,650 students in twenty-one schools in Red Deer, Blackfalds, Sylvan Lake, Rocky Mountain House, Innisfail, and Olds, as well as an At-Home Learning Program, and supports the learning of over 1,095 students in a Traditional Home Education Program.

II. Procedure

In response to a Board trustee complaint to the Board ("Complaint") with respect to the Meme Posting, the Board called the Meeting as per Appendix "A" to Board Policy 4: Trustee Code of Conduct ("Code of Conduct") to review the Complaint and determine if there was a breach of the *Education Act*, the Code of Conduct and/or Board Policy.

Prior to the Meeting, the materials considered by Board included the following:

a) Written Submissions of the Complainant which included:
   i. a photocopied picture of the Meme;
   ii. the Complaint;
   iii. a package of materials in support of the complaint:
      - September 7, 2023, media article from the Western Standard entitled, *EXCLUSIVE: Trustee says her post was about protecting children, involving parents*;
      - September 13, 2023, media article from the True North entitled, Alberta trustee reprimanded for Instagram post critical of gender "indoctrination";
      - a copy of Board Policies 1: Divisional Foundational Statements ("Board Policy 1"), the Code of Conduct (including Appendix "A" and "B"), Board Policy 3: Trustee Role Description including Appendix "A" ("Board Policy 3"), the CCSSA's LIFE Framework, Statement 22358 from the Catechism of the Catholic Church, 1994;
   iv. September 7, 2023, letter to the Minister of Education, from Board Chair Hollman;

v. written reaction submitted to the Board in response to the Meme, which consisted of seven emails/letters from School Division employees, parents, School Division student alumni, and the Simon Wiesenthal Centre of Holocaust Studies which were critical of the Meme, and four emails from individuals who expressed support for the Trustee's actions in relation to the Meme;

vi. written submissions in support of the Complaint.

b) Written submissions from the Trustee's legal counsel.

The complainant and Respondent were both present and were represented by Counsel at the Meeting.

Pursuant to Board policy governing trustee-conduct related complaints, the Meeting comprised an *in camera* portion which lasted for more than a full day, at which submissions were made to the Board. Board members also posed questions at the Meeting.

Not having completed their deliberations, the Board reconvened on September 26, 2023, to complete the same. Following the completion of their deliberations, the Board returned to a public session and voted on the Motion. The Board voted 3-1 in favour of the Motion.

III. Alberta's *Education Act*

The Board's conduct is governed by the *Education Act* which grants the Board jurisdiction to review trustee-related complaints, consider Trustee conduct, and determine appropriate responses and remedies.

The preamble of the *Education Act* provides strong statements supporting the importance of inclusiveness and respect in the provision of education to Alberta students:

> WHEREAS students are entitled to welcoming, caring, respectful and safe learning environments that respect diversity and nurture a sense of belonging and a positive sense of self;
>
> WHEREAS the Government of Alberta recognizes the importance of an inclusive education system that provides each student with the relevant learning opportunities and supports necessary to achieve success;

These recitals are reflected in clauses 9 and 10 of Board Policy 1:

> 9. The schools will foster the mental and physical well-being of all students through:
>
> 9.1 Selection of appropriate programs which emphasize physical, leisure activities; and
>
> 9.2 A respect for the worth and dignity of the individual.
>
> 10. The schools will foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values. Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality.

Section 2 of the *Education Act* states:

> **Limitations**

> 2. The exercise of any right or the receipt of any benefit under this Act is subject to the limitations that are reasonable in the circumstances under which the right is being exercised or the benefit is being received.

Section 33 of the *Education Act* imposes statutory duties on the Board, some of which are:

- develop and implement a school trustee code of conduct: s. 33(1)(k);
- establish and maintain governance and organization structures that promote student well-being and success, and monitor and evaluate their effectiveness: s. 33(1)(h);
- ensure that each student enrolled in a school operated by the board and each staff member employed by the board is provided with a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging: s. 33(1)(d);
- establish, implement and maintain a policy respecting the board's obligation under subsection (1)(d) to provide a welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour: section 33(2); and
- to provide a statement of purpose that provided a rationale for the student code of conduct, with a focus on welcoming, caring, respectful and safe learning environments: section 33(3)(d)(i).

School board trustees in Alberta must adhere to their Code of Conduct. This requirement is contained in Board Policy 1 and is a statutory requirement under the *Education Act* pursuant to s. 34(1)(c) which states:

> **34(1)(c)** A trustee of a board, as a partner in education, has the responsibility to (…) comply with the board's code of conduct (…).

This requirement is also contained at clause 6.20 of Board Policy 3.

Finally, school boards have an obligation to enforce a minimum of standard of conduct expected of trustees. This principle is noted in the Ontario decision of *Del Grande v. Toronto Catholic District School Board,* 2023 ONSC 691 ("*Del Grande*") which is equally applicable here:

> (…) the Board has a statutory obligation to promote student well-being and a positive and inclusive school climate. The Board also has an obligation to enforce a minimum standard of conduct expected of its Trustees. All Trustees have an obligation to comply with the *Code of Conduct* and to assist the Board in fulfilling its duties. Sanctioning the Applicant for making disrespectful comments was not contrary to the *Education Act*, but consistent with the *Act's* statutory objectives. (para. 81).

IV. Board Policy and Compliance with the *Education Act*

The Board's mission is as follows:

> The Red Deer Catholic Separate School Division is committed to supporting inclusive communities that foster care and compassion of students, families and staff with a complete offering of learning opportunities delivered within the context of Catholic teachings and tradition, and within the means of the Division. [Board Policy 1]

The purpose of the Mission statement is to govern the interactions within the School Division and among members of the School Division including Board members. Board Policy 1 sets forth beliefs that are meant to govern the interactions of the Division as stewards of Catholic Education, including Belief 10 which reads:

> The schools will **foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students**, families and staff that is free

> from physical, emotional and social abuses and models our Catholic faith and values. **Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality**. [Emphasis added.]

Administrative Procedure 103 - Welcoming, Safe and Caring, Inclusive and Respectful Learning Environments ("AP 103") details how the Division Foundational Statements are to be carried out by School Division staff. Among other things, a "Christ-centered, welcoming, caring, respectful and safe learning environment **that respects diversity, equity and human rights and fosters a sense of inclusion and belonging**" is to be maintained. [Emphasis added.]

The Code of Conduct states that the Board "commits itself and its members to conduct that meets the highest ethical standards." In doing so it is expected that all Board members treat others with mutual respect and affirm the worth of each person. The preamble to the Code of Conduct includes the following:

> That trustees are the children's advocates and their first and greatest concern is the **best interest of each and every one of these children without distinction as to who they are or what their background may be**. [Emphasis added.]

The Code of Conduct, which was carefully reviewed, considered and applied by the Board in this matter, is attached to these Reasons at Schedule "B". The Board addresses the Trustee's Code of Conduct violations further in these Reasons.

Consequences for the failure of an individual trustee to adhere to the Code of Conduct are specified in Appendix A to the Code of Conduct, which sets out a range of sanctions and remedial measures, which supplement the disqualification sanction at s. 87(1)(c) of the *Education Act*.

V. Position of the Complainant

The Complaint requested that a formal hearing be held with respect to the Meme Posting. It was argued that the Meme Posting and subsequent interviews with the media given by the Trustee were in direct violation of parts of the Code of Conduct, Board Policy and the *Education Act*. In particular, the Complainant submitted that the Trustee's conduct undermined the Division's legal obligations imposed by the *Education Act* and its commitment to inclusion. It was further submitted that this was in contravention of Roman Catholic teachings and was a direct attack on work done by Division teachers to support 2SLGBTQ+ initiatives.

VI. Position of the Respondent

The Respondent's Views Expressed at the Meeting

At the Meeting the Trustee made the following statements as summarized by the Board:

- the Meme Post is not about the LGBTQ ("2SLGBTQ1A+") community;
- the Meme Post is about indoctrination through the United Nations which directly correlates to World War II and Nazism; it is about the agenda of the United Nations and Planned Parenthood which is an attempt to sabotage our youths' identities and destinies and hijacks the LGBTQ [*sic*] community's original mandate;
- if history is not talked about or taught to our children, it will all be forgotten, and if we forget what happened in the past, it will most definitely repeat itself in some form or another. It is important to understand history and teach the lessons we have learned;
- the Trustee's intent of the Meme Post is to show what road we are going down and that we must be vigilant as to what we are allowing in to influence our children;

- the sexuality and beliefs of students is a topic that should be between God, parent and a child; sexual orientation decisions should not be made or influenced at school, especially Catholic Schools;
- that, through the Meme, the Trustee was talking about indoctrination and exposing children who were too young to understand this indoctrination;
- the Trustee posted the Meme to bring attention to what her legal counsel characterized as "objectionable ideology";
- the Respondent's position is that the juxtaposition of the two pictures in the Meme relates to the concept of indoctrination and does not make any particular comparisons to the Nazi regime; and
- that the Pride flag is used to silence people; children are being kicked out of school and people are being fired which is antithetical to the Trustee's religious beliefs; and that "cancel culture" is not what is good, lawful, appropriate or democratic.

The Trustee was clear that her beliefs informed her views: she stated the Holy Spirit had told her to post the Meme and that this was something she should do. The Trustee submitted that Catholic school trustees rely on their beliefs to do their work and should be able to express their religious beliefs as school board trustees.

The Trustee's Rationale for Having Posted the Meme

The Trustee informed the Board that her religious beliefs informed her views. When asked to explain her discernment process around the Meme Post, the Trustee:

- thought that the Meme Post reflected the truth about today;
- was thinking more about the political part of it than anything; asked is this something that would be understood;
- informed the Board that the Holy Spirit said to the Trustee, Go for it;
- trusts the Holy Spirit and decided to share the Meme Post;
- thought it was such a good outline as to what was going on in the world.

In addition, the Trustee and her legal counsel advanced various arguments which were set forth in the Trustee's written submissions filed with the Board. Those written submissions are outlined in the following section.

The Respondent's Written Submissions

The written submissions of Counsel for the Trustee can be broken down into the following main points:

a) The Meme did not contravene Roman Catholic values in any way, because it was targeted at what the Trustee views to be an objectionable ideology;

b) The Meme did not contravene the *Education Act* or any Board policy, including the Code of Conduct;

c) The Meme is protected by the Canadian *Charter of Rights and Freedoms* ("*Charter*"), in particular, the right to freedom of expression and the right to freedom of religion; and

d) The Board's conduct demonstrates a reasonable apprehension of bias and lack of procedural fairness.

VII. Issues

These Reasons address the following issues:

1. Did the Meme contravene Roman Catholic values?

2. Did the Meme contravene the Code of Conduct?

3. Is the Meme protected by the Trustee's *Charter* rights?

4. Is the Decision reasonable?

5. Was the Decision procedurally unfair?

VIII. Did the Meme Contravene Roman Catholic Values?

Both the Complainant and the Respondent made submissions with respect to whether the Meme and its content were contrary to Roman Catholic values. No expert evidence was adduced at the Meeting with respect to Roman Catholic values in this context. The Complainant's submissions did include the CCSSA's LIFE Framework and a section from The Catechism of the Catholic Church, 1994.

In any event, the Board focused on the *Education Act* and the Code of Conduct in reviewing the Complaint and, therefore, did not find it necessary to determine whether the Meme was in contravention of Roman Catholic values.

To be clear, the Board's decision does not turn on whether the Meme contravened Roman Catholic values and the Board does not make a finding in this respect.

IX. Did the Meme Contravene the Code of Conduct?

The Board does not dispute that the Trustee has sincerely held religious beliefs. However, the primary concern before the Board was whether the Trustee, through her Meme Post, breached the Code of Conduct.

These Reasons are limited to the matter before the Board at the Meeting.

Introduction

The Board recognizes that elected school board trustees may hold and express their views. As noted in *Calgary Roman Catholic Separate School District No. 1 v. O'Malley* 2006 ABQB 364:

> The trustees collectively and individually owe a public duty to carry out their responsibilities and the work for the Board in good faith and with reasonable diligence. They are elected for that purpose. They need not be of like mind. They may hold strong and conflicting views. They may debate with vigour, and occasionally with rancour. There is no rule requiring trustees to like each other. But they do have one overarching responsibility – a shared public duty to advance the work of the Board to which they had the privilege of being elected. (…) [para. 41]

The Trustee's argument focused, to a large extent, on her freedom to hold her beliefs and her ability to act on the same in her private life (i.e., to post the Meme).

However, freedom of expression generally, including that of a school board trustee is not absolute. These Reasons will address this concept further below.

The principle that rights are not absolute is recognized at section 2 of the *Education Act*, which reads, "the exercise of any right or the receipt of any benefit under this Act is subject to the limitations that are

reasonable in the circumstances under which the right is being exercised or the benefit is being received." This is further addressed in Board Policy 3 and, in particular, clause 6.4 which directly addresses social media use:

> Trustees will be cognizant that they are representing the interests of the Board while posting or commenting on social media, and aware of public perception that their posts, comments and social media engagement, are in accordance with their duties within the school division.

The Trustee's freedom to express her views (via the Meme Post) must be balanced against the Board's duty and right to operate in the context of, and in a manner consistent with, the preservation and enhancement of the Board's mandate. This includes the Board's duty to comply with the *Education Act* and to maintain a positive school environment.

While the Trustee may hold religious beliefs, in her role as a school Board trustee, the Trustee's actions may not unreasonably impinge upon the Board's statutory mandate to ensure that each student enrolled in its schools and each staff member employed by the Board is provided with a welcoming, caring, respectful and safe learning environment that *respects diversity and fosters a sense of belonging*.

Students have the right to a school system free from bias, prejudice and intolerance, and as a role model and representative of the corporate Board, the Trustee occupies an important role within the education system that extends beyond the classroom. The Division's principles of respecting the needs of our diverse students are legitimately reflected, for example, in Belief 10 of Board Policy 1, Board Policy 4, and AP 103.

Within the context of the *Constitution Act*, the *Education Act*, the Code of Conduct and corresponding Board Policy, Catholic school board trustees, as role models within the school board and as corporate leaders at the top of the Division hierarchy must be, and be seen to be, tolerant of the pluralistic and diverse nature of society.

Alleged Code of Conduct Breaches

i. Clause 1 of the Code of Conduct and Clause 6.2 of Board Policy 3

Clause 1 of Board Policy 4 requires Board trustees to carry out their responsibilities, as detailed in Board Policy 3, with reasonable diligence.

Under clause 6.2 of Board Policy 3, the Trustee "will refer queries, or issues and problems, not covered by Board policy, to the Board for corporate discussion and decision."

Analysis

The Trustee's position is that she did not violate Board policy because she did not make a comparison; rather, the Meme Post was about layers of ideology and about children not understanding those layers. According to the Trustee, the Meme Post was not about people or individuals, rather, it was about ideas which must always be open to criticism and must be tested and challenged.

If the Trustee were of the view there were ideas that had to be tested or challenged, clause 6.2 of Board Policy 3 required the Trustee to refer the same to the Board for corporate discussion. This was not done. Rather, the Trustee took it upon herself to post the Meme.

Finding

In having posted the Meme, the Trustee breached clause 6.2 of Board Policy 3 and thus is in breach of clause 1 of the Code of Conduct. Pursuant to clause 1 of the Code of Conduct, Board trustees shall carry out their responsibilities in accordance with Board Policy 3 with reasonable diligence. A breach of Board Policy 3, is therefore also a breach of Board Policy 4.

ii. Clauses 6 and 22 of the Code of Conduct

The Code of Conduct provides that the Board must commit itself and its members to conduct that "meets the highest ethical standards." Clause 6 requires the Board trustees to "commit themselves to dignified, ethical, professional and lawful conduct." Clause 22 requires the Board trustees to represent the "Board responsibly in all Board-related matters with proper decorum and respect for others."

Analysis

The Trustee made the following arguments:

- a Trustee cannot be responsible for all reactions to social media posts, in particular when such reactions unreasonably take offence based on unreasonable interpretations;
- respect and decorum go both ways; there will be a negative response to something objectively inappropriate, but offence taken to a reasonable position is simply the reality of free speech and the exchange of ideas in the marketplace;
- that someone might be offended by the Meme is not a basis to institute discipline against the Trustee; and
- while the Complainant had a particular reaction to the Meme, that does not mean that someone's personal subjective definition as to decorum can be imposed on the Trustee. That is the essence of "cancel culture."

The Trustee's position is further that there is nothing unprofessional or undignified about the Meme Post:

- there is nothing unprofessional about sharing a dissident minority opinion which did not give rise to a general level of unacceptability;
- the Meme Post reflects a minority opinion that many people do not like and are offended by, but that is a matter for public comment and disagreement. It is an attempt at censorship to claim something is unethical (instead of saying one does not agree); and
- no reasonable person would conclude from the Meme, that what the Nazis did was acceptable or that had anything to do with the LGBTQ (*sic*) community, and that rather, the Meme is about ideas which must always be open to criticism, tested and challenged.

The Trustee's legal counsel submitted that the first loyalty of a trustee is to the school board, however it was also submitted that the Trustee is espousing a minority view (through the Meme Post) which has struggled to get exposure, and that what the Trustee is saying is that children should not be indoctrinated and that she has a duty to bring up difficult conversations, that she does not lose her rights as a private citizen, and that the Board wants to "shut her up."

The Board is mindful of the September 6, 2023, letter it received from the Friends of Simon Wiesenthal Center noting that the Meme Post is "a form of Holocaust distortion and minimization and feeds into rhetoric promoting anti-LGBTQ+ hate and discrimination. What makes this post even more abhorrent is the fact that tens of thousands of victims of the Nazis were people who identified as part of the LGBTQ+ community."

When asked about this letter, the Trustee indicated that the author may not understand the Meme Post as it did not compare two groups but rather, it is about layers of ideology, and about protecting kids. The Trustee stated that the author of the letter did not understand the meaning of the Meme.

The material from the Complainant contained reactions against and in favour of the Meme. Below are two examples from School Division student alumni:

> … Hearing that Monique Lagrange has compared my love to Nazism is downright unacceptable after all the love, hope and student connection I have spurred within the past three years at one of the schools under RDCRS. I am not a Nazi. I am not a threat. I am a man trying to love and treat others with the upmost respect just as God has told me to, regardless of their identity. (… I feel as if I am rightfully upset at the comparison. Proud gay transgender man.)

And,

> … As both a Christian and a queer alumni, it hurts me that an individual meant to be promoting the deep rooted Christian value to love others, as well as someone with a large amount of responsibility and influence in the Red Deer Catholic School System is spreading hateful messages publicly. I do not believe that the best interest of all students, regardless of identity, will be coming first with Monique LaGrange present as a Trustee. I ask that Monique LaGrange issue a formal apology for this action, as it is damaging to the queer community present in the RDCRS division. (…) I have met with (…) to discuss how we can work to make our schools a better place for all students, including the 2SLGBTQ1A+ students who may be part of the community. I know that the Red Deer Catholic School Division does care about its students of all identities, and I hope that an informed, thoughtful decision is made in regard to this situation. (…)

A medical professional communicated with the Board as follows:

> I (…) am shocked and dismayed that Red Deer Catholic Trustee Monique LaGrange would post on social media a picture of children waving a Nazi flag above a picture of children waving pride flags with the caption, "Brainwashing is brainwashing." The fact that this trustee likens the pride movement to Nazism is absolutely abhorrent particularly as the Nazis sent thousands upon thousands of homosexuals to their death in concentration camps. Instead of promoting and teaching tolerance and diversity to school children, she is advocating a viewpoint that supports creating an environment that promotes bullying, prejudice and discrimination.
>
> It is a well known fact that the LGBTQ2S+ youth are more than four times as likely to attempt suicide than their peers and that a recent survey in North America found that 45% of those youth seriously considered attempting suicide in the past year. This woman's actions suggest very poor judgment and put our youth at serious risk.

Three School Division employees communicated in writing to the Board their personal offence to the Meme Post. One employee, who is also a parent within the School Division, sent this:

> (…)
>
> As both an employee for Red Deer Catholic Regional Schools and as a parent .. in the division, I am profoundly concerned about the message conveyed by

> Trustee LaGrange and its inevitable, albeit wrongful comparison to the fundamental values of the school division and its members. The ignorance with which she compares the 2SLGBTA1A+ community and the Nazis is not only hurtful to the members of both communities and their loved ones, but extremely offensive.
>
> Trustee LaGrange's claim that the aforementioned posts were about "protecting our children and keeping parents as the primary educators" unfortunately fails to address the fact that the views she expressed by making that post directly contradict the fundamental values of both Red Deer Catholic Regional Schools and Catholic education as a whole. These are the values and principles that she has sworn to uphold as an elected official in our community.

Another School Division employee submitted the following:

> (…)
>
> Previously you had used the Nazi regime in comparison to Covid protocols. Now, you are using the promotion of the Pride flag in comparison to Nazi brainwashing. (…)
>
> (…)
>
> I teach and have taught many members of the 2LGBTQ1A+ community that are very open. They have been very open because we have provided a safe space for these students to be themselves (…)
>
> Perhaps you can explain to me what my response should be to students on Tuesday morning when I am asked why a member of our school board is posting homophobic social media posts? Is that inclusion? Is that welcoming?
>
> This is not simply a social media slip. This is indicative of your personal beliefs, beliefs that go against the very foundation of "all are welcome, all belong." (…)

Another:

> (…)
>
> (..) I was deeply saddened and angry that this hateful message would be shared by one of our trustees. (…)
>
> (…) How can we profess that we are working towards creating safe and caring schools when one of our trustees publicly shared hate speech against some of our most marginalized students (…)

The Board also received four emails from parents who supported the Meme Post. These were included in the materials before the Board and were accordingly reviewed and considered during the Board deliberations.

The Board's summary above is not intended to illustrate that greater weight was given to favourable versus unfavourable comments. The conclusion the Board draws, in part, from the public comments is that, contrary to the Trustee's submissions, it is possible and indeed likely for the Meme to be understood in a negative and hurtful way towards the 2SLGBTQ1A+ community, and School Division students from that community in particular.

The Board accepts the Trustee's view that she is entitled to her personal religious beliefs, and that she is entitled to express them. However, the Trustee has statutory and ethical obligations towards the School Division students as well. In her Trustee role, the Respondent has an obligation to communicate respectfully and inclusively (pursuant to the *Education Act*, Code of Conduct and other Board Policies already addressed above). The Board does not accept the Trustee's submission that the Meme was clearly unrelated to Nazism. Regardless of the Trustee's intent, in the Board's view, a reasonable person viewing two photographs (one over the other) could reasonably conclude that a negative comparison was being made.

Further, the complex and nuanced position which the Trustee is attempting to advance is simply not made clear in a Meme which is limited to two photographs and three words. Had the Trustee wished to communicate this concept, communication methods set out in Board Policies 3 and 4 should have been used. The Trustee had an obligation to ensure her communication was in accordance with Board policy.

Finding

By posting the Meme the Trustee violated clauses 6 and 22 of the Code of Conduct.

Providing, through the Meme Post, a display of students waving Pride flags and a display of children of Nazi Germany waving flags and thereby inferring that children waving Pride flags have been brainwashed in a manner akin to children in Germany at or before WWII, conveys a negative implication. The Meme Post is not, on a reasonably objective standard, dignified nor professional, and based on the above reactions to the Meme Post, was not viewed as inclusive or reflective of supportive school environments that welcome students of all orientations.

The Board disagrees with the Trustee's submission that there is no lack of decorum in the Meme Post or that the same does not show disrespect for others, and that the Meme Post was more about raising the conversation about really difficult controversial issues that are important to parents and students.

School board trustees are open to public inspection - employees, students and their parents and other school stakeholders scrutinize trustee conduct. A trustee's personal online conduct can attract as much attention as in-school or at-Board-meeting conduct. Though posted on a personal Facebook page, the Meme Post, in fact, did attract media attention: the September 7, 2023, media article from the Western Standard entitled, "EXCLUSIVE: Trustee says her post was about protecting children, involving parents"; and, the September 13, 2023, media article from the True North entitled, "Alberta trustee reprimanded for Instagram post critical of gender "indoctrination".

The Trustee holds a position of trust and influence within the education system. As a role model within the school system, the Trustee is required to represent the Board in all Board-related matters with proper decorum and respect for others. In having posted the Meme, the Trustee did not display proper decorum and respect for others. The principles noted in *Del Grande* are equally applicable here (at para. 55):

> The focus of the *Education Act* is thus the public education system and **the well-being and achievement of the students who participate in it**, with the goal of ensuring they develop into caring, contributing citizens. **It is the Board**, and **therefore its Trustees**, who are **in service to these objectives** and not the public education system that serves a trustee's objectives. [Emphasis added.]

The Board acknowledges that the Trustee sought to distinguish the *Del Grande* decision and argued that the Saskatchewan decision in *Strom* is more applicable. While noting that the law in Ontario is not identical to that in Alberta, the Board finds that the principles outlined in *Del Grande* as noted in these Reasons are applicable to the issues before the Board.

The Board Motion is intended to allow the Trustee to continue to bring forward issues before the Board. Elected school trustees may form views and opinions and declare themselves on issues. However, the place for the Trustee to express her views was at the Board table where a fulsome debate may occur. In this instance, the Meme Post did not reflect reasonable decorum. In the Board's view, a reasonably well-informed person would conclude that the Trustee's conduct in having posted the Meme reflected behaviour that did not treat individuals respectfully, equitably and with courtesy.

The Trustee's legal counsel noted that the Trustee espouses a minority view (through the Meme Post) which has struggled to get exposure. However, the Board has established a strong policy framework that demonstrates its unequivocal position that Red Deer Catholic Regional Schools require schools to foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values.

In this case, the Trustee placed her personal interests ahead of her public duty to carry out her duties in a dignified, ethical and professional manner, and to represent the Board with proper decorum, which means that the Trustee must conduct herself in her communications in a respectful and professional manner. Posting a highly controversial Meme which does not elaborate or explain the Trustee's rationale and requires schoolchildren and their parents to draw significant inferences if they are to understand the Meme as the Trustee claims to have intended, does not reflect this standard.

Additional Comment

While this section deals with clauses 6 and 22 of the Code of Conduct, the Board is also of the view, for the reasons noted above, that by the Meme Post the Trustee did not "contribute to a positive and respectful learning and working culture both within the Board and the Division" and thus breached clause 6.18 of Board Policy #3 and thus was an additional violation of the Code of Conduct.

iii. Clause 6.4 of Board Policy 3

Clause 6.4 of Board Policy 3 states that trustees "will be cognizant that they are representing the interests of the Board while posting or commenting on social media, and aware of public perception that their posts, comments and social media engagement, are in accordance with their duties within the school division."

Analysis

When asked at the Meeting how the Trustee squares her duty under Board Policy 4 to act for all voters with the posting of the Meme, the Trustee indicated that just because one person does not like it does not mean that everyone else should not like it.

When asked what the Trustee was thinking when she posted the Meme, she stated that she thought the Meme Post was the truth about today. She had asked The Holy Spirit about it. She stated that she was more thinking about the political part of the Meme Post than anything; that it was something that would be understood; the Holy Spirit said, "Do it, go for it." So, the Trustee "shared it and that was it." The Trustee thought it was such a good outline as to what was going on in the world. The Trustee also indicated that you read books and this is happening and it is right there in your face. "I did not think "education when I looked at this." That was my thought process walking through that."

At the time the Trustee posted the Meme Post, she did not consider the interests of the Board nor did she give consideration to the potential public perception of the same. Again, therefore, the Trustee placed her personal interests ahead of her public duty to carry out and advance Board work.

The Board is also mindful of clause 10 of Board Policy #4 states that "while elected from specific wards, trustees shall represent the best interest of the entire Division." This did not occur here.

Finding

In having posted the Meme, the Trustee breached clause 6.4 of Board Policy 3 and thus is in breach of clause 1 of the Code of Conduct.

X. Is the Meme Protected by the Trustee's *Charter* Rights?

The *Education Act*

The Board is aware of the Trustee's submission that s. 87(1)(c) of the *Education Act* infringes section 3 of the *Charter*. Pursuant to section 11 of the *Administrative Procedures and Jurisdiction Act, RSA 2000 c A-3* ("*Administrative Act*") this Board does not have the jurisdiction to consider a question of constitutional law with respect to the *Education Act.* Further, and in any event, the Trustee did not provide notice of the intention to raise a question of constitutional law as required by section 12 of the *Administrative Act*. The Board is also mindful of the *Designation of Constitutional Decision Makers Regulation* (Alta Reg. 69/2006).

Further, and in the alternative, the Board has not exercised its jurisdiction to disqualify the Trustee and therefore, s.87(1)(c) of the *Education Act* has not been engaged.

Finally, the Board notes the submission of counsel for the Trustee that section 87(1) violates the section 3 *Charter* rights of Trustee LaGrange's constituents. This Board lacks jurisdiction to consider the rights of constituents and, in any event, this is not the issue before the Board.

Accordingly, the Board declines to consider the constitutionality of s.87(1)(c) of the *Education Act*.

Charter Rights

As per *Calgary Roman Catholic Separate School District No. 1 v. O'Malley*, 2007 ABQB 574 (paras. 127 to 132) and *Hamilton v. Rocky View School Division No. 41*, 2009 ABQB 225 (paras. 13 to 17), the Charter does not have a bearing on the assessment of whether the Trustee violated the Board's internal Code of Conduct. This matter relates to an internal self-regulatory process governed by Board Policy. Furthermore, the Trustee is not challenging the constitutionality of Board Policy; she made it clear at the Meeting that the Meme Post was not directed toward Red Deer Catholic Regional Schools nor was it a challenge to School Division practices. Accordingly, the Charter does not apply here.

In the alternative, if the Board is wrong and the Charter does apply in this instance, the Board's objectives of regulating the Board and school board trustee communications - as per Board Policy, including in relation to messages of inclusivity within the School Division that foster care and compassion of students and families, and address student issues such as safety, bullying, justice and respectful relationships - outweigh any potential negative effects of the Trustee restrictions set out in the Motion. The Trustee has ethical and fiduciary responsibilities which carry with it a corresponding obligation to communicate appropriately. The Meme does not meet this threshold and in the circumstances, any expressive rights held by the Trustee must properly be subordinate to the obligation to create an inclusive environment for students.

Further, in the Board's view the limitations on the Trustee's conduct are limited, moderate and reasonable. Under the Motion, the Trustee may attend regular Board meetings to bring forward educational-related issues for discussion and debate to the Board through the Board's standard procedures and practices (para. 3 of the Motion).

The Motion strikes a balance between the Board's educational mandate and the Trustee's freedom of expression; the Motion does not interfere with the Trustee's ability, as an elected school board trustee, to act in accordance with her religious beliefs in a manner that is more than trivial or insubstantial. Furthermore, there is evidence noted above before the Board as to the impact of the Meme Post on others (in the context of competing rights and societal concerns).

Charter Values

To the extent an analysis is required as per *Doré v. Barreau du Québec*, 2012 SCC 12 in this matter, the Board is required to balance the severity of the Charter interference with the statutory objectives set out in the *Education Act* and Board Policy, and then ascertain how the Charter values at stake will best be protected in view of these objectives. As described in the prior section, in the Board's view an appropriate balance has been struck.

The Motion is consistent with the statutory objectives set out in the *Education Act* and in Board Policy.

The Board has a statutory duty under s. 33(1)(d) of the *Education Act* to ensure that each student enrolled in a school operated by the board and each staff member employed by the Board is provided with a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging. (As earlier noted, the preamble in the *Education Act* states that "students are entitled to welcoming, caring, respectful and safe learning environments that respect diversity and nurture a sense of belonging and a positive sense of self.) The Board is also required to implement and maintain a policy to provide a welcoming, caring, respectful and safe learning environment; school principals must provide a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging.

All Board members, including the Trustee, have a duty to comply with the Code of Conduct, and to assist the Board in fulfilling the above-referenced duties.

The Trustee, as per the Motion, was not sanctioned for holding certain religious beliefs. Rather, the Trustee was sanctioned for having posted the Meme in violation of the Board's Code of Conduct: 6.2, 6.4 and 6.18 of Board Policy 3 and clauses 1, 6, 10 and 22 of Board Policy 4.

The Motion reflects an appropriate balance between the statutory objectives of the *Education Act* and Board Policy and, the Charter values at stake should they be applicable in the unique facts of this case. When a Board member wishes to advance education-related issues, they must do so in accordance with the Code of Conduct. This did not occur in this instance.

XI. Is the Decision Reasonable?

The Trustee's written submissions at paragraphs 54 to 62 advance the argument that the outcome of the Decision must be reasonable. The Board agrees. In the Board's view, the Decision was made carefully and with full consideration of the evidence and argument presented to it and reflects an appropriate balancing of the Trustee's ability to hold and express beliefs with the Board's statutory mandate to provide

a safe and inclusive environment for its students. The Decision was accordingly reasonable as measured by the principles brought forward by the Trustee.

XII. Was The Decision Procedurally Unfair?

The Trustee argued that these proceedings are tainted by procedural unfairness and bias, and as such, should be stayed. The Board has carefully considered this argument and dismissed the stay of proceedings request.

The foundation of this argument is that, prior to the commencement of the Code of Conduct complaint process, the Board initially passed a motion asking the Minister of Education to dismiss the Trustee. This process was undertaken based on the Board's initial misunderstanding that the Minister was responsible for the review and assessment of the Trustee's conduct. However, the Minister's response informed the Board that this process was in fact the Board's responsibility.

Subsequently, a letter of complaint was filed which triggered the Code of Conduct hearing under Appendix "A" of the Code of Conduct. Prior to the Meeting, each Board member hearing this matter conducted a serious and self-reflective assessment of its ability to hear the matter impartially and without bias. Each Board member determined that they held an open mind and were able to fairly and impartially hear the Trustee's arguments, consider them without pre-determination, and render a fair decision.

The proof of this ability is the outcome of the hearing. Although the Trustee's argument (reflected in her written submissions at paragraphs 96 to 99) focused on the Trustee's objection to the possibility of her disqualification or Trustee removal - including arguments as to the unconstitutionality of the relevant section of the *Education Ac*t – ultimately the Board did not decide that disqualification or removal was the appropriate sanction. Instead, the above-described Motion was passed.

The Board finds that:

1. the careful and considered self-assessment by each Board member who heard this matter, concluding each maintained an open mind and was able to be impartial; and

2. the fact that the Board's ultimate decision was not, in fact, the same sanction as initially referenced in the request to the Minister of Education,

shows that the Board's decision in this case is not tainted by procedural unfairness or bias. Accordingly, the Board declines to stay these proceedings or the Decision.

XIII. Conclusion

The Board finds that the Trustee breached clauses 1, 6.2, 6.4 and 6.18 of Board Policy 3 and clauses 1, 6, 10 and 22 of Board Policy 4.

The Board finds that the appropriate sanctions are those set out in the Motion.

Finally, the Board wishes to comment on paragraph 1(e) of the Motion.

The Board has required the Trustee to issue a sincere public letter of apology to School Division students, staff and the Board in relation to the Meme Post.

The Trustee is being asked to recognize that her communication in relation to the Meme Post was not in accordance with Board Policy and to recognize that members of the School Division found it offensive and experienced hurt feelings. This, in the Board's view, does not offend the Trustee's sincerely held beliefs.

Dated this 13th day of October 2023.

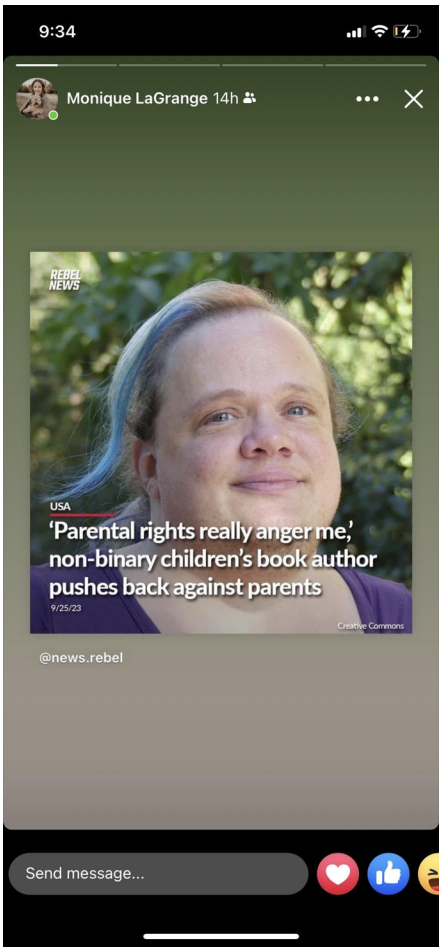
From: **Murray Hollman** <murray.hollman@rdcrs.ca>
Date: Fri, Sep 29, 2023 at 1:12 PM
Subject: Code of Conduct Motion Follow-Up
To: Monique LaGrange <monique.lagrange@rdcrs.ca>

Good afternoon, Trustee LaGrange,

I am emailing you further to:

a) yesterday's online posted comments (Online Comments) indicating that you "have nothing to apologize for", that your legal counsel confirmed you do "not plan on issuing an apology," and that your legal counsel is not able to state whether you will attend the sensitivity training as required by the September 26, 2023, Board motion further to the *in-camera* Code of Conduct hearing (Code of Conduct Motion); and

b) your Facebook from yesterday (September 28 Posting) on your Facebook page, which I understand has now been removed.



As stated in the Code of Conduct Motion, the sensitivity training covering professional school trustee boundaries and appropriate use of social media, cultural sensitivity and human rights is intended to remind you of your role and responsibilities as a school board trustee and to support you to make better decisions in any further communications, including on social media – in your school trustee role.

Given the Online Comments and the September 28 Posting, there is a live issue as to whether you intend to comply with the Code of Conduct Motion.

While I am not making any substantive determination as a fellow school trustee, in my capacity as Board Chair, I did wish to remind you that the issues relating to your conduct in your role as a school board trustee and your corresponding trustee responsibilities are serious; if a further Code of Conduct complaint were to be submitted, any perceived Code of Conduct breaches or Code of Conduct breaches by you in your school trustee role will be carefully examined and adjudicated by the Board. A breach of the Code of Conduct Motion or any further Code of

Conduct breaches could lead to your disqualification as a school trustee on the Board.

Given the Online Comments, may I ask you to confirm whether you will comply with the Code of Conduct Motion?

Trustee LaGrange, I look forward to hearing from you.

Regards,

Murray Hollman

APPENDIX "D"

https://rumble.com/v3mhi2z-school-board-trustee-pushes-back-on-indoctrination.html

On Fri, Oct 20, 2023 at 2:49 PM Murray Hollman [redacted] wrote:

> Hello Trustees,
>
> Please see the below link for your information:
>
> https://rumble.com/v3q7lxq-talk-truth-10.19.23-monique-lagrange-full-show.html
>
> Thank you,
>
> Murray Hollman
>
> --
> You received this message because you are subscribed to the Google Groups "Trustees Only" group.
> To unsubscribe from this group and stop receiving emails from it, send an email to trustees-only+unsubscribe@rdcrs.ca.
> To view this discussion on the web visit https://groups.google.com/a/rdcrs.ca/d/msgid/trustees-only/CAL6%3D27-8jOxKKLLjDXz4F2o%2Bi4tqvg%2BzCN6j38%2B-jYtPyGHn8A%40mail.gmail.com.

Red Deer Catholic Regional Schools

Inspired by Christ. Aspiring to Excellence.

October 16, 2023

Board Chair, Murray Hollman
Montfort Centre
5210 - 61 Street
Red Deer, AB T4N 6N8

Dear Chair Hollman:

RE: Trustee LaGrange Violation of Trustee Code of Conduct and September 26, 2023 Motion

Due to the recent conduct of Trustee Monique LaGrange, I am compelled to issue this written letter of complaint in accordance with my duty as a Trustee of the Red Deer Regional Catholic School Division to report violations of the Trustee Code of Conduct, as outlined in Section 6.21 of Policy 3: Trustee Role Description ("Policy 3"). I am requesting that a formal hearing be held to permit review and consideration of the potential violation of Policy 3 and Policy 4: Trustee Code of Conduct ("Policy 4") in respect of a recent interview given by Trustee LaGrange. I understand that in order for this complaint to have merit to be considered and reviewed by the Board, at least one other Trustee must write to the Board Chair, within three (3) days of the notice in writing of this complaint being forwarded to all trustees, a letter indicating support for having the complaint heard at a Code of Conduct Hearing.

In particular, I submit that Trustee LaGrange's participation in and statements made during the October 2, 2023 interview with Laura-Lynn Tyler Thompson (the "Interview"), is in breach of Policy 3 and Policy 4. During the Interview, Trustee LaGrange identified herself as a Trustee of Red Deer Regional Catholic School Division and professed her need to speak out against alleged sexual orientation and gender identity "indoctrination" in the school system. Specifically, the sections of Policy 4 that I believe Trustee LaGrange has violated include sections 1 (and by extension, Policy 3), 5, 6, 7, 11 and 22:

Policy 4: Trustee Code of Conduct

1. Trustees shall carry out their responsibilities as detailed in Policy 3 – Role of the Trustee with reasonable diligence. (*Policy 3 – Items 6.3, 6.7, 6.18, and 6.20)*

6.3 The trustee can engage with the public through a variety of communication methods, understanding that all communications and interactions must reflect the principles of the Code of Conduct.

6.7 The trustee will support the decisions of the Board and refrain from making any statements that may give the impression that such a statement reflects the corporate opinion of the Board when it does not.

6.18 The trustee will contribute to a positive and respectful learning and working culture both within the Board and the Division.

6.20 The trustee will adhere to the Trustee Code of Conduct.

5. Trustees shall endeavor to work with fellow Board members in a spirit of harmony and cooperation in spite of differences of opinion that may arise during debate.

6. Trustees shall commit themselves to dignified, ethical, professional and lawful conduct.

7. Trustees shall reflect the Board's policies and resolutions when communicating with the public.

11. Trustees shall honor their fiduciary responsibility to the Board and be loyal to the interests of the Division as a whole in the contract of Catholic Education. This loyalty supersedes loyalty to:

11.1 Any advocacy or special interest groups; and
11.2 The personal interest of any trustee.

22. Represent the Board responsibly in all Board-related matters with proper decorum and respect for others.

Additionally, as the Board will recall, on September 26, 2023, a motion was passed in respect of Trustee LaGrange's past conduct (the "Motion") which also contained directions for Trustee LaGrange's future public commentary. The sections of the Motion that I believe Trustee LaGrange has violated by virtue of her participation in and commentary during the Interview are Motion items 1(b) and 1(c), which are as follows:

As of September 26, 2023, until the Trustee's Term of Office, the Trustee:

b. shall not represent the Board / School Division in any official capacity, including Board/School Division functions, events, award ceremonies, conferences, assemblies, school masses, graduation events, school council meetings and speaking with news/media outlets;

c. shall cease making any public statements in areas touching upon or relating to,

i. the 2SLGBTQ+ community; and

ii. the Holocaust,

including presenting at meetings and conferences on these topics or related areas and speaking with various news outlets.

Further, the breach of the terms of the Motion itself constitute a violation of Policy 4.

It is a foundational principle for Red Deer Regional Catholic School Division that all members of the school community foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values. The Division must be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality. Trustee LaGrange's conduct is not aligned with the Division's foundational principles, the Code of Conduct, or the directions contained in the Motion. Any breach of the Trustee Code of Conduct should not be taken lightly and requires a review.

Thank you for your attention to this matter.

Sincerely,

Sharla Heistad
Trustee

Red Deer Catholic Regional Schools

Minutes of a Special Meeting of the Board of Trustees of the The Red Deer Catholic Separate School Division, held November 13, 2023.

Present:	S. Heistad M. Hollman C. Leyson K. Pasula A. Watson, Trustees L. Latka, Secretary-Treasurer K. Finnigan, Superintendent of Schools M. St. Pierre, Executive Assistant J. Butler, Legal Counsel T. Haykowsky, Legal Counsel W. Teed, Legal Counsel
Joined via Zoom:	J. Kitchen, Legal Counsel M. LaGrange, Trustee
Not in Attendance:	D. Lonsdale, Trustee

Board Chair Hollman called the meeting to order at 8:39 AM and shared that Trustee Lonsdale declared a conflict and that is why she is not a part of the meeting.

Trustee Leyson read the opening prayer aloud.
Trustee Watson read the Land Acknowledgement aloud.

Trustee Pasula requested that the Board make time for Trustees to speak privately without Administration or Legal Counsel within the in camera portion of the meeting.

1. APPROVAL OF AGENDA

11/13/23-01-Leyson

THAT THE AGENDA BE ACCEPTED AS PRESENTED.

CARRIED.

Board Chair Hollman asked Administration to leave the meeting room as they will not be deliberating in or decision makers in the proceedings. Superintendent Finnigan,

Secretary-Treasurer Latka, W. Teed and Executive Assistant St. Pierre left the room at 8:46 a.m.

Executive Assistant St. Pierre and W. Teed were asked to enter the meeting at 8:48 a.m to provide administrative and technical support.

11/13/23-02-Pasula

THAT THE COMMITTEE OF THE WHOLE MOVE INTO CAMERA AT 8:45 AM.

CARRIED.

11/13/23-03-Leyson

THAT THE BOARD MOVE OUT OF CAMERA AT 5:24 PM.

CARRIED.

11/13/23-04-Watson

THAT THE SPECIAL MEETING IS RECESSED AT 5:25 PM UNTIL NOVEMBER 14, 2023 AT 8:30 AM.

CARRIED.

Board Chair Hollman called the meeting back to order at 8:36 AM on November 14, 2023.

11/13/23-05-Watson

THAT THE SPECIAL MEETING COME OUT OF RECESS AT 8:36 AM ON NOVEMBER 14, 2023.

CARRIED.

The following Trustees, Legal Counsel and Administration personnel were present; Trustees Hollman, Heistad, Leyson, Pasula, and Watson, Superintendent Finnigan, Secretary-Treasurer Latka, Executive Assistant St. Pierre. The following were in attendance via Zoom; T. Haykowsky, J. Butler, J. Kitchen, and Trustee LaGrange. Chair Hollman shared that Trustee Lonsdale declared a conflict and that is why she is not a part of the meeting.

11/13/23-06-Leyson

THAT THE COMMITTEE OF THE WHOLE MOVE INTO CAMERA AT 8:37 AM.

CARRIED.

Trustee Heistad, J. Butler, Superintendent Finnigan and Secretary-Treasurer Latka recused themselves from the meeting at 8:37 AM.

11/13/23-07-Watson

THAT THE BOARD MOVE OUT OF CAMERA AT 10:06 AM.

CARRIED.

11/13/23-07-Pasula

I MOVE THAT THE BOARD POSTPONES THIS CODE OF CONDUCT PROCESS UNTIL A COMMITTEE OF THE BOARD CAN INVITE THE RESPONDENT TO A CONFERENCE TO DISCUSS THE SITUATION BEFORE US, ENTER INTO ANY AGREEMENTS, INCLUDING TIME AND COST SAVING MEASURES, AND TO DETERMINE THE BEST COURSE OF ACTION FOR RED DEER CATHOLIC REGIONAL SCHOOLS AND ITS BROADER FAMILY, STUDENT AND CHURCH COMMUNITY GOING FORWARD.

DEFEATED.

Trustee Pasula spoke to his motion, stating that he thought the path we are on, could extend well into the future. Agreement entered during a conference could move matters forward more quickly and finalize others, saving the Division time and money. He added that other actions may also be identified in the interest of our schools and stakeholder communities.

Trustee Watson thanked Trustee Pasula for putting forward the motion, but indicated that she felt the Board of Trustees has allowed sufficient time for reconciliation over the last 6 weeks, and that further time would not be beneficial, for the Division, schools, and families. Watson stated that the matter has been hugely disruptive to the Division and it does not need to be discussed further. Trustee Leyson and Chair Hollman both stated that they echoed Trustee Watson's sentiments.

11/13/23-07-Leyson

BE IT RESOLVED THAT FURTHER TO THE NOVEMBER 13 AND 14, 2023, IN CAMERA DISCUSSIONS, AND AFTER HAVING CAREFULLY CONSIDERED ALL THE POINTS RAISED THEREIN, AND IN ACCORDANCE WITH BOARD POLICY AND THE EDUCATION ACT, TRUSTEE LAGRANGE HAS VIOLATED SANCTIONS ISSUED ON SEPTEMBER 26, 2023, AND HAD FURTHER VIOLATED BOARD POLICY AND THE EDUCATION ACT. AS A RESULT, TRUSTEE LAGRANGE IS HEREBY DISQUALIFIED UNDER SECTION 87(1)(C) OF THE EDUCATION ACT AND BOARD

POLICY FROM REMAINING AS A SCHOOL BOARD TRUSTEE. THE BOARD WILL ISSUE DETAILED REASONS IN SUPPORT OF THIS BOARD MOTION ON OR BEFORE NOVEMBER 24, 2023.

CARRIED.

Trustee Watson spoke to the motion, stating that the Board had issued a fair resolution to the matter but that Trustee LaGrange did not comply with the requests asked of her and that there were no further options or sanctions available to the Board, and disqualification was the only option left. Board Chair Hollmand and Trustee Leyson both echoed her statement.

Trustee Pasula stated that he would like the record to show, that given the Board's commitment to meeting the highest ethical standards, a commitment enhanced when leadership and guidance are forthcoming from within its membership, he stated he won't be able to support the motion for several reasons including and related to:

1. the procedural fairness that the board must act in accordance with; and,
2. the scope of the sanctions Policy 4 makes available to the board.

He stated that he has unresolved questions regarding the procedure the Board has been engaged in through the complaint process in concert with concerns regarding whether our code of conduct authorizes the Board to institute the sanction the motion calls for, and additionally, should it be available as a sanction, whether the proposed disqualification of a publicly elected official - with a duty to represent the electorate, would be commensurate with the conduct of the respondent that gave rise to the complaint.

Mr. Kitchen, Legal Counsel for Trustee LaGrange, stated aloud that Trustee LaGrange will resign pursuant to section 90 of Education Act, and a written resignation will be sent to the Board.

Ms.Haykowsky, Legal Counsel for the Board, asked Mr. Kitchen if the resignation of Trustee LaGrange can be provided to the Board in writing and Mr. Kitchen indicated that yes, a written resignation will be sent to the Division.

Trustee Pasula read the closing prayer aloud.

11/13/23-09-Pasula

THAT THE SPECIAL MEETING ADJOURN, THE TIME BEING 10:21 AM.

CARRIED.

(CHAIR)

(SECRETARY-TREASURER)

Red Deer Catholic Regional Schools

Minutes of a Special Meeting of the Board of Trustees of the The Red Deer Catholic Separate School Division, held November 23, 2023.

Present:	M. Hollman C. Leyson K. Pasula A. Watson, Trustees L. Latka, Secretary-Treasurer K. Finnigan, Superintendent of Schools T. Haykowsky, Legal Counsel W. Teed, Legal Counsel M. St. Pierre, Executive Assistant
Not in Attendance:	D. Lonsdale, Trustee S. Heistad

Board Chair Hollman called the meeting to order at 9:02 AM.

Trustee Leyson read the opening prayer aloud.
Trustee Pasula read the Land Acknowledgement aloud.

1. APPROVAL OF AGENDA

11/23/23-01-Leyson

THAT THE AGENDA BE ACCEPTED AS PRESENTED.

CARRIED.

11/23/23-02-Pasula

THAT THE COMMITTEE OF THE WHOLE MOVE INTO CAMERA WITH TRUSTEES ONLY AT 9:05 AM WITH THE SUPPORT OF EXECUTIVE ASSISTANT ST. PIERRE.

CARRIED.

11/23/23-03-Watson

THAT THE BOARD MOVE OUT OF CAMERA AT 9:13 AM.

CARRIED.

Trustee Pasula stated that based on the discussion with the Committee and an opinion from the Division's legal advisor, Trustee Pasula recused himself from the discussion of the meeting's agenda item and excused himself from the meeting at 9:14 AM.

Ms. T. Haykowsky, Legal Counsel and W. Teed, Legal Counsel, entered the meeting at 9:14 AM.

11/23/23-04-Leyson

THAT THE COMMITTEE OF THE WHOLE MOVE INTO CAMERA AT 9:14 AM.

CARRIED.

11/23/23-05-Leyson

THAT THE COMMITTEE OF THE WHOLE MOVE OUT OF CAMERA AT 11:27 AM .

CARRIED.

Board Chair Hollman called the meeting back to order at 11:27 AM.

Superintendent Finnigan, Secretary-Treasurer Latka entered the meeting at 11:28 AM. Trustee Heistad, Trustee Lonsdale and Ms. Butler, Legal Counsel, joined the meeting via Zoom at 11:28 AM.

11/23/23-06-Watson

BE IT RESOLVED THAT THE BOARD ADOPT ITS REASONS IN FURTHERANCE OF THE NOVEMBER 14, 2023, BOARD MOTION.

BE IT FURTHER RESOLVED THAT IN FURTHERANCE OF THE REQUEST OF THE RESPONDENT, SAID REASONS SHALL BE DISCLOSED. THE BOARD CHAIR SHALL RELEASE SAID REASONS ON FRIDAY, NOVEMBER 24, 2023.

CARRIED UNANIMOUSLY.
Trustee Heistad and
Vice-Chair Lonsdale

recused themselves from voting on this Motion.

11/23/23-07-Watson

THAT THE SPECIAL MEETING ADJOURN AT 11:35 AM.

CARRIED.

Trustee Watson read the closing prayer aloud.

(CHAIR)

(SECRETARY-TREASURER)

REASONS FOR DECISION IN FURTHERANCE OF THE NOVEMBER 13 and 14, 2023, SPECIAL BOARD MEETING

I. Introduction

The Board of Trustees of Red Deer Catholic Separate School Division ("Board") possesses those powers statutorily conferred upon it, including pursuant to the *Education Act*, SA 2012, c E-0.3 ("Act").

The Act grants the Board jurisdiction to review trustee-related complaints, consider trustee conduct, and determine appropriate responses and remedies. In other words, the Board has the statutory authority to govern its internal procedures by regulating the conduct of its members.

To this end, section 87(1)(c) of the Act confers the statutory power on the Board to disqualify a Board member "...from remaining as a trustee of a board if that person has breached the code of conduct of the board established under section 33, where the sanction for the breach under the code of conduct may be determined by the board to be disqualification."

On November 14, 2023, the Board, seized with the October 16, 2023, Code of Conduct complaint ("Second Complaint") made by a Board member ("Complainant #2") against the "Respondent" (at the time of the Second Complaint, Trustee Monique LaGrange), which is attached hereto as Appendix "A", voted ("Second Motion") 3-1 in favour of disqualifying the Respondent from her school Board trustee position.

The Second Motion was approved by the Board majority after the November 13 and 14, 2023, special Board meeting ("Second Code of Conduct Hearing") during which the Board conducted an *in camera* hearing as a result of the Second Complaint. The Second Motion is attached hereto as Schedule "A".

At the Second Code of Conduct Hearing, the Board heard information, evidence, and argument from both Complainant #2, the Respondent and their respective legal counsel.

These reasons ("November 2023 Board Reasons" or "Reasons") are issued by the majority of the Board on November 24, 2023, further to the Second Code of Conduct Hearing.

II. Background

The relevant factual background will be briefly reviewed:

First Code of Conduct Hearing

- On September 25 and 26, 2023, the Board held a Special Board Meeting ("First Code of Conduct Hearing") during which the Board conducted an *in camera* hearing further to the September 7, 2023, Code of Conduct complaint ("First Complaint") submitted by a Board member ("Complainant #1") against the Respondent;
- At the First Code of Conduct Hearing, the Board heard information, evidence, and argument from both Complainant #1, the Respondent and their respective legal counsel;
- At the First Code of Conduct Hearing, it was undisputed that, on or about August 27, 2023, the Respondent posted on her personal Facebook account a meme displaying two photographs which respectively showed:
  a) a group of children holding Nazi flags with swastikas; and
  b) a contemporary photograph of children holding rainbow Pride flags,
  and captioned "Brainwashing is brainwashing" ("Original Meme").

- During the First Code of Conduct Hearing, the Respondent stated that her intentions were that the Original Meme was not directed toward the Red Deer Catholic Separate School Division ("Division") and was not a challenge to Division practices;
- After fulsome deliberations, on September 26, 2023, the Board determined that the Respondent had breached Board Policy 3 – Trustee Role Description ("Board Policy 3"), Board Policy 4 - Trustee Code of Conduct ("Board Policy 4" or "Code"), and the Act. The Code is attached hereto as Appendix "B";
- On September 26, 2023, the Board passed a motion ("First Motion") censuring the Respondent. The Motion and the related October 13, 2023, Board reasons ("October 2023 Board Reasons"), are bundled and attached collectively hereto as Appendix "C".

September 28, 2023, Posting

- On September 28, 2023, the Respondent posted two items on her personal Facebook page:
    a) the first depicting a wolf wearing facial make-up and licking its lips, with the caption, "I just want to read some books to your chickens"; and
    b) a photograph of a non-binary author with the caption, "'Parental rights really anger me' non-binary children books author pushes back against parents." (both of which are attached hereto as Appendix "D")

  At the Second Code of Conduct Hearing, the Respondent's legal counsel indicated item b) was a news article, not a meme and further, that the Respondent was sharing a news article about an individual who identifies as non-binary. This item is attached hereto as Appendix "E".

  The materials referred to above at (a) and (b) are collectively referred to herein as the "Social Media Posts."
- On September 29, 2023, the Board Chair emailed the Respondent regarding the Social Media Posts, and informed the Respondent that the issues relating to her conduct as a school board trustee and her corresponding trustee responsibilities are serious. The Board Chair further advised the Respondent that breach of the First Motion could result in further conduct hearings, a possible outcome of which was disqualification from acting as a trustee. This email is attached hereto as Appendix "F".
- At or around October 2, 2023, "*Laura-Lynn Talks*", released an interview ("Laura-Lynn Interview") in which the Respondent appeared as a guest. It is the understanding of the Board that the Laura Lynn Interview was recorded sometime between September 26, when the First Motion was passed, and October 1, 2023. At the outset of the Laura-Lynn Interview, the Respondent identified herself as a Red Deer Catholic Regional Schools Trustee and she spoke about the posting of the Original Meme that resulted in the First Code of Conduct Complaint. A link to the Laura-Lynn Interview is attached as Appendix "G".
- On October 19, 2023, the "*Talk Truth*" talk show ("Talk Truth Interview"), which aired on the same date, conducted by Corri and Allen Hunsperger, included an interview with the Respondent a link to which is attached as Appendix "H".

  At the outset of the *Talk Truth* Interview, Corri Hunsperger identified the Respondent as a Red Deer Catholic School Trustee who is currently in the news and who got herself "into a little bit of hot water".

  The Respondent spoke about the Original Meme that led to the Respondent being, "brought up on a code of conduct" "in front of the Board". When asked if she could "rewind time", the Respondent stated that: she would "still post" the Original Meme again; "it is not offensive if you understand" "what is actually going on in the world."; it's thought-provoking; it's a warning of what could be. History likes to repeat itself. And so, where are we in that, that you know circle of history. So, you know people need to wake up. They seriously do and parents need to know what's going on."

  The Respondent also indicated in the Talk Truth Interview that,

> "teachers they're not in the profession to indoctrinate your children. They, they love children. They're there to make the world better, um, and so, you know, you have to understand that part of it. But most of us that have gone to university in the last 20 years, we have been victims of this indoctrination ourselves. And so, when you're indoctrinated, you don't think anything of what you're, you know, the way you're teaching it the words you're using. And so, it just becomes your normal, um, and so this filters down it's a very slow drip into our classrooms. And so, it's you know it's just being aware of how the process works and the whole agenda of how they're indoctrinating us, where that's coming from you have to understand that as well. So be aware, um, as a parent take your authority back. So, you are the primary educator and we can't forget that. We as parents, so I have a unique perspective here because I'm a parent, I have a background I was a teacher and I'm now a school trustee. So, I've seen the whole gambit basically and so I have a very interesting perspective and authority is huge. So, parents have given their authority away to something that maybe they perhaps didn't recognize. And so, it's getting that authority back and educating your kids. You should be educating your kids, you know, about relationships and sexuality, that's your job as a parent. That's between you, your child, and God. Not the teachers. And so, the teachers are there to do reading, arithmetic, you know that sort of thing right. And you know we need to just make sure that we are as a parent, we know what the boundaries are."[1]

The Laura Lynn Interview and the Talk Truth Interview are collectively, the "Interviews."

The above events were undisputed at the Second Code of Conduct Hearing.

The Second Complaint

- The Second Complaint related to both the Social Media Posts and the Interviews, and alleged that the Respondent's Social Media Posts, and participation in and commentary during the Interviews, contravened the Code and the Act, and further breached the First Motion;
- Following receipt of the Second Complaint and in accordance with Appendix A of Board Policy 4 and the Act, the Board scheduled the *in camera* Second Code of Conduct Hearing;
- The Respondent was present (virtually) at the Second Code of Conduct Hearing and was provided with a full opportunity to make submissions; she was represented by counsel who submitted written and oral arguments to the Board.
- Complainant #1 did not participate in any way in the Second Code of Conduct Hearing or the preparation of these Reasons.

III. Materials Submitted at the Second Code of Conduct Hearing

Prior to the Second Code of Conduct Hearing, Complainant #2 submitted the following materials to the Board, the Respondent and her legal counsel:

a) The Second Complaint;
b) The October 16, 2023, support letter for the matter to proceed to a hearing;
c) The 8-page written Submissions of Complainant #2 ("Complainant #2's Written Submissions") which included:
    - Board Policy 4;
    - First Motion and October 2023 Board Reasons;
    - Board Chair's September 29, 2023, 1:12 p.m. email to the Respondent;

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[1] Note: These statements are taken from the October 19, 2023, "*Talk Truth*" talk show.

- Laura Lynn Interview;
- Board Chair's October 20, 2023, email (Trustees Only) re: Some New Information;
- Trustee Heistad Complaint re LaGrange conduct 10.02.23;
- Policy 1 – Division Foundational Statements;
- Board Administrative Procedure 103 - Welcoming, Safe and Caring, Inclusive and Respectful Learning Environments ("AP 103");
- Board Policy 3;
- TrueNorth[2] and LifeSite news articles;[3] and
- Talk Truth Interview.

In response to Complainant #2's Written Submissions, the Respondent's legal counsel submitted to the Board, and Complainant #2 and her legal counsel, a 10-page written submission ("Respondent's Written Submissions") which did not contain any attachments.

Complainant #2 and the Respondent were both present and were represented by Counsel at the Second Code of Conduct Hearing.

At said hearing, no party objected to the Board composition nor raised issues of procedural unfairness.

Pursuant to Appendix A of Board Policy 4, during the *in camera* portion of the Second Code of Conduct Hearing submissions were made by the parties (i.e., Complainant #2 and her legal counsel, and the Respondent and her legal counsel) to the Board. Board members also posed questions at the Second Code of Conduct Hearing. Following the completion of their deliberations, the Board returned to a public session and, as earlier noted, voted 3-1 in favour of the Second Motion which reads:

> BE IT RESOLVED that further to the November 13 and 14, 2023, in camera discussions, and after having carefully considered all the points raised therein, and in accordance with Board Policy and the Education Act, Trustee LaGrange has violated sanctions issued on September 26, 2023, and had further violated Board Policy and the Education Act. As a result, Trustee LaGrange is hereby disqualified under section 87(1)(c) of the Education Act and Board Policy from remaining as a school board trustee. The Board will issue detailed reasons in support of this Board motion on or before November 24, 2023.

IV. Alberta's Education Act

The preamble of the Act addresses inclusiveness and respect in the provision of education to Alberta students:

> WHEREAS students are entitled to welcoming, caring, respectful and safe learning environments that respect diversity and nurture a sense of belonging and a positive sense of self;
>
> WHEREAS the Government of Alberta recognizes the importance of an inclusive education system that provides each student with the relevant learning opportunities and supports necessary to achieve success;

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[2] True North Canada News, *Red Deer Trustee has "no regret" about anti-gender ideology post, despite punishment*, by Noah Jarvis, published September 28, 2023, attached as Appendix "I".

[3] LifeSite, *Canadian Catholic school trustee silenced, forced to undergo 'sensitivity' training for opposing LGBT agenda*, by Anthony Murdoch, published September 27, 2023, attached as Appendix "J".

These recitals are also reflected in beliefs 9 and 10 of Board Policy 1 – Division Foundational Statements:

> 9. The schools will foster the mental and physical well-being of all students through:
> 9.1 Selection of appropriate programs which emphasize physical, leisure activities; and
> 9.2 A respect for the worth and dignity of the individual.
>
> 10. The schools will foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values. Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality.

Section 2 of the Act states:

> **Limitations**
> 2. The exercise of any right or the receipt of any benefit under this Act is subject to the limitations that are reasonable in the circumstances under which the right is being exercised or the benefit is being received.

Section 33 of the Act imposes statutory duties on the Board, some of which are:

- develop and implement a school trustee code of conduct;[4]
- establish and maintain governance and organization structures that promote student well-being and success, and monitor and evaluate their effectiveness;[5]
- ensure that each student enrolled in a school operated by the board and each staff member employed by the board is provided with a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging;[6]
- establish, implement and maintain a policy respecting the board's obligation under subsection (1)(d) to provide a welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour;[7] and
- to provide a statement of purpose that provides a rationale for the student code of conduct, with a focus on welcoming, caring, respectful and safe learning environments.[8]

School board trustees in Alberta must adhere to their code of conduct. This requirement is contained in Board Policy 1 and is a statutory requirement under the Act, which states:

> A trustee of a board, as a partner in education, has the responsibility to (...) comply with the board's code of conduct (...).[9]

This requirement is also contained at clause 6.20 of Board Policy 3.

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[4] Act s. 33(1)(k).

[5] Act s. 33(1)(h).

[6] Act s. 33(1)(d).

[7] Act s. 33(2).

[8] Act s. 33(3)(d)(i).

[9] Act s. 34(1)(c).

Finally, the courts have recognized that school boards have an obligation to enforce a minimum of standard of conduct expected of trustees. This is noted in the Ontario decision of *Del Grande v. Toronto Catholic District School Board,* which the Board cited in the October 2023 Board Reasons. The Board acknowledges that this decision is not binding in Alberta, but continues to find the following principle applicable:

> (...) the Board has a statutory obligation to promote student well-being and a positive and inclusive school climate. The Board also has an obligation to enforce a minimum standard of conduct expected of its Trustees. All Trustees have an obligation to comply with the *Code of Conduct* and to assist the Board in fulfilling its duties. Sanctioning the Applicant for making disrespectful comments was not contrary to the *Education Act*, but consistent with the *Act's* statutory objectives.[10]

V. Position of Complainant #2

The Second Complaint alleges that the Respondent breached the Code in relation to the above-described conduct ("Alleged Code Breaches") in the following ways:

a) failing to carry out her responsibilities with due diligence (Board Policy 4, Section 1, noting the responsibilities outlined in Board Policy 3, Section 6.3, 6.4, 6.7, 6.18 and 6.20);
b) failing to represent the Board with respect and decorum and to reflect Board policy in public communications (Board Policy 4, Sections 7 and 22);
c) failing to work in harmony with fellow Board members including in communications to the electorate (Board Policy 4, Sections 5 and 15); and
d) failing to conduct herself in a dignified, ethical, professional and lawful manner (Board Policy 4, Section 6).

The Second Complaint further alleges that the Respondent failed to comply with the First Motion in the following ways:

a) continuing to represent the Board in an official capacity in speaking to news and media outlets; and
b) continuing to make public statements touching upon the 2SLGBTQ+ community.

VI. Position of the Respondent

The Respondent's Written Submissions

The Respondent contests the reasonableness of the factual and legal findings of the Board as articulated in the October 2023 Board Reasons and intends to seek judicial review of the First Motion. The Board acknowledges that seeking such a remedy is the Respondent's right. However, as the Respondent has not sought and obtained a judicial stay of the First Motion, it remains in force notwithstanding her disagreement with it.

The Respondent disagrees with the Second Complaint and advances the following arguments:

a) The definitions used in the First Motion, in particular those of "represent", "official capacity" and "community", are vague and uncertain, and must be interpreted according to their ordinary meaning in the absence of a specified definition;

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[10] *Del Grande v. Toronto Catholic District School Board*, 2023 ONSC 691, para 81.

b) The Respondent did not communicate (intentionally or unintentionally), in the Interviews or otherwise subsequent to the First Motion, in any official capacity as a school board trustee with the media;

c) The Respondent has spoken only about 2SLGBTQ+ ideology, and not about the "community" being specific individuals or the group of people comprising that community as a whole;

d) The Respondent has not breached the Code and the Second Complaint arises from a personal disagreement with the Respondent's personal beliefs; and

e) The Respondent's conduct is consistent with her pastoral obligations, as she adheres to traditional Catholic beliefs and values.

The Respondent's Views Expressed at the Hearing

Through her counsel, the Respondent expressed her views at the Second Code of Conduct Hearing consistent with those found in the Respondent's Written Submissions. The Respondent stressed that she loves all students in the Division, but that truly adhering to Catholic values, beliefs and teachings requires a rejection of what she describes as transgender "ideology" which, in the Respondent's view, is in fact a mental disorder.

The Respondent also reiterated her arguments that the First Motion was unclear and that she did not violate any of its terms. The Respondent acknowledged that at no time did she seek clarification of any of the terms of the First Motion. In her view, the onus was on the Board to make the First Motion clear, and not on the Respondent to seek clarification.

VII. Issues

After careful consideration of the written and oral submissions of Complainant #2 and the Respondent, the Board determined that the following issues required determination:

1. Did the Respondent's conduct subsequent to the issuance of the First Motion constitute a failure to comply with the conditions of the First Motion?

2. Did the Respondent's conduct subsequent to the issuance of the First Motion constitute a further breach of the Code?

3. If the answer to either or both of Issue 1 and Issue 2 is yes, what is the appropriate sanction?

VIII. Reasons

Context to These Reasons: Board Policy and Compliance with the Act

The Board's mission is as follows:

> The Red Deer Catholic Separate School Division is committed to supporting inclusive communities that foster care and compassion of students, families and staff with a complete offering of learning opportunities delivered within the

> context of Catholic teachings and tradition, and within the means of the Division.[11]

The purpose of the Mission Statement is to govern the interactions within the Division and among members of the Division including Board members. Board Policy 1 sets forth beliefs that are meant to govern the interactions of the Division as stewards of Catholic education, including Belief 10 which reads:

> The schools will **foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students**, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values. **Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality**. [Emphasis added]

AP 103 details how the Policy 1: Division Foundational Statements are to be carried out by School Division staff. Among other things, a "Christ-centered, welcoming, caring, respectful and safe learning environment **that respects diversity, equity and human rights and fosters a sense of inclusion and belonging**"[12] is to be maintained. [Emphasis added]

The Code states that the Board "commits itself and its members to conduct that meets the highest ethical standards." Board members are expected to conduct themselves, at all times, in a mutually respectful way which affirms the worth of each person, especially students:

> That trustees are the children's advocates and their first and greatest concern is the **best interest of each and every one of these children without distinction as to who they are or what their background may be.**[13] [Emphasis added.]

Section 1 of the Code requires that Trustees carry out their responsibilities as detailed in Board Policy 3 with reasonable diligence. Board Policy 3 is attached in full as Appendix "K". The Board notes the following provisions in particular:

> 6. Specific Responsibilities of Individual Trustees
>
> (...)
>
> 6.3 The trustee can engage with the public through a variety of communication methods, understanding that all communications and interactions must reflect the principles of the Trustee Code of Conduct.
>
> 6.4 Trustees will be cognizant that they are representing the interests of the Board while posting or commenting on social media, and aware of public perception that their posts, comments and social media engagement, are in accordance with their duties within the school division.
>
> (...)

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[11] Board Policy 1: Division Foundational Statements, Mission ("Mission Statement").

[12] AP 103, Background.

[13] Code p. 1.

> 6.7 The trustee will support the decisions of the Board and refrain from making any statements that may give the impression that such a statement reflects the corporate opinion of the Board when it does not.
>
> (...)
>
> 6.18 The trustee will contribute to a positive and respectful learning and working culture both within the Board and the Division.
>
> (...)
>
> 6.20 The trustee will adhere to the Trustee Code of Conduct.

Failure to adhere to these responsibilities is considered to be a breach of the Code pursuant to section 1 of Policy 4, which Policy also states:

> 5. Trustees shall endeavour to work with fellow Board members in a spirit of harmony and cooperation in spite of differences of opinion that may arise during debate.
>
> 6. Trustees shall commit themselves to dignified, ethical, professional and lawful conduct.
>
> 7. Trustees shall reflect the Board's policies and resolutions when communicating to the public.
>
> ...
>
> 15. Work together with fellow trustees to communicate to the electorate.
>
> 16. Remember at all times that individual trustees have no legal authority outside the meeting of the Board, and therefore relationships with school staff, the community, and all media of communication is to be conducted on the basis of fact.
>
> ...
>
> 22. Represent the Board responsibly in all Board-related matters with proper decorum and respect for others.

Consequences for the failure of an individual trustee to adhere to the Code are specified in Appendix "A" to the Code, which sets out a range of sanctions and remedial measures, all of which supplement the disqualification sanction in the Act:

> **87(1)(c)** A person is disqualified from remaining as a trustee of a board if that person has breached the code of conduct of the board established under section

> 33, where the sanction for the breach under the code of conduct may be determined by the board to be disqualification[14]

Issue 1: Did the Respondent's Conduct Subsequent to the Issuance of the First Motion Constitute a Failure to Comply with Conditions of the First Motion?

The Board did not arrive at the First Motion lightly. As noted in the October 2023 Board Reasons, the Board carefully reviewed all materials provided to it at the First Code of Conduct Hearing, considered the submissions of Complainant #1 and the Respondent, and engaged in a fulsome and comprehensive consideration of the issues.

The Board notes that the Laura-Lynn Interview was recorded before the First Motion had been issued publicly but after the First Motion had been passed (and was therefore in effect). The Board does not find this distinction to be of any significance. The Respondent did not inform the Board that she had made an effort to halt the release of the Laura-Lynn Interview, or if that was not possible, to publicly disavow it. The Respondent did not alert the Board that this interview was about to be publicly released, nor did the Respondent offer any explanation to the Board as to this interview (rather, the Respondent maintains the Laura-Lynn Interview did not breach the First Motion). The Laura-Lynn Interview is in context consistent with the Respondent's overall approach and subsequent to the issuance of the First Motion.

Condition (b) of the First Motion

Condition (b) of the First Motion ("Condition (b)") states:

> As a result, as of today's date [September 26, 2023] and up to and including the Trustee's Term of Office ("End Date"), the Trustee
>
> a. ....
>
> b. shall not **represent the Board/School Division in any official capacity**, including Board/School Division functions, events, award ceremonies, conferences, assemblies, school masses, graduation events, school council meetings and **speaking with news/media outlets.** [emphasis added]

The Respondent's Written Submissions indicate that the First Motion lacks clarity surrounding the meaning of "represent" and "official capacity", and that in the absence of any specific definition, the plain and ordinary meaning of those terms must be used. The Respondent further argues that at no time in any of the Respondent's media comments, either personally or through counsel, did she purport to "represent" the Board in an "official capacity".

The Board agrees with the Respondent that the interpretation of Condition (b) must be in accordance with the plain and ordinary meaning of its language; however, such interpretation must also be reasonable and account for the context in which it was written. The Respondent was identified, introduced or described as a school board trustee in the Interviews. The topics of discussion were in both of the Interviews related to educational issues within the scope of a Trustee's job responsibilities, and/or the First Motion which was the result of a process applicable only to school board trustees. The Board is of the view that a reasonable person, reading or hearing comments or social media postings of a school board trustee introduced and/or

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[14] Act s. 87(1)(c).

self-described as such, would not anticipate that such comments were offered solely in the trustee's personal capacity absent, at minimum, a specific declaration to that effect from the trustee.

The Respondent's arguments in this regard are unconvincing and the Board does not accept them. The Board finds that the Respondent has not complied with Condition (b) of the First Motion in relation to the Interviews.

Condition (c)

Condition (c) of the First Motion ("Condition (c)") states:

> As a result, as of today's date [September 26, 2023] and up to and including the Trustee's Term of Office ("End Date"), the Trustee
>
> a. ....
>
> c. shall cease making any public statements in areas touching upon or relating to,
> i. **the 2SLGBTQ+ community**; (emphasis added) and
> ii. the Holocaust

The Respondent submitted that the term "community" is not clear or defined, and accordingly must be understood to refer to specific individuals or the group of 2SLGBTQ+ individuals as a whole. By contrast, the Respondent argues that her comments related to ideas and ideology, not this particular community. For the reasons following, this argument is unconvincing, and the Board does not accept it.

A critical feature of the 2SLGBTQ+ community is the gender and sexual orientation of its individual members as expressed as a member of that community. To separate those individuals from that core understanding of their own identity is artificial. Further, it is a strained interpretation that is at odds with any possible "plain meaning" of the term "community".

Further, the Respondent has argued that the Original Meme and Social Media Posts are not about the 2SLGBTQ+ community but about "transgender ideology" (as the Respondent puts it). This argument is similar to that rejected by the Board in the First Code of Conduct Hearing in which the Board found that the nuanced message allegedly sought to be conveyed by the Respondent in the Original Meme to an audience, including elementary-aged school children, was not adequately conveyed by a three word, two picture meme.

The Respondent cannot insist on a plain meaning interpretation of language only when it suits her.[15]

The Board finds that the Trustee has not complied with Condition (c) of the First Motion by making public statements in areas touching upon or relating to the 2SLGBTQ+ community, *inter alia* through the Interviews.

In addition, the evidence provided in the Second Complaint of the Social Media Posts demonstrates posting of content of a similar nature to the Original Meme at issue in the First Complaint, touching upon or related to the 2SLGBTQ+ community. The Board finds that the Social Media Posts are an additional violation of the First Motion.

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[15] Respondent Submissions paras 10 and 26.

Intended Breaches of First Motion Not Part of the Reasons

The Board notes that the 90-day timeline granted to the Respondent has not yet passed since the First Motion. As a result, the Board does not find that the Trustee violated conditions (d) or (e) of the First Motion related to sensitivity training and an apology.

Issue 2: Did the Respondent's Conduct Subsequent to the Issuance of the First Motion Constitute a Further Breach of the Code?

The Respondent expressly relies on her prior submissions at the First Code of Conduct Hearing (para. 4). She is entitled to do so. However, the Board carefully reviewed and considered those submissions before issuing the First Motion, which remains the Board's valid and as yet uncontested ruling on the matter.

The Respondent's Written Submissions (paras. 30-33) essentially dismiss the Second Complaint as a disagreement over personal beliefs and politics while dismissing the Complainant #2's views as "liberal" or "woke".

The October 2023 Board Reasons clearly outline the Respondent's Code breaches that led to the First Motion, and to the extent that the Respondent continues to express disagreement with them, the Board hereby adopts and incorporates those reasons. As noted above, the Respondent has continued with a course of conduct that is disparaging of the 2SLGBTQ+ community, disregarding of the inclusivity guidance promulgated by the Board and the Division, and disrespectful of the Board, all the while offering no new rationale or explanation. In this regard, the Board agrees with and accepts the submissions of Complainant #2 in finding that the Respondent has breached the following provisions of the Code:

- Policy 3, Sections 6.3, 6.4, 6.7, 6.18 and 6.20; and
- Policy 4, Sections 1, 5, 6, 7, 15 and 22.

The Board's detailed reasons for finding breaches are as follows:

- Board Policy 3, Section 6.3: For the reasons noted, the Respondent failed to communicate with the public in a manner that reflected the principles of the Code;
- Board Policy 3, Section 6.4: For the reasons noted, the Respondent's activity on/in relation to the Social Media Posts failed to reflect any recognition of her obligation to represent the interests of the Board, her duties as a trustee, or awareness of public perception;
- Board Policy 3, Section 6.7: For the reasons given, the Respondent has failed to support the First Motion and October 2023 Board Reasons, indeed, the Respondent through her counsel has publicly denigrated them and indicated an intention not to comply. While the timeline for compliance has not yet expired such that the First Motion has not yet been breached with respect to these declarations, these expressions, as an *obiter* statement, nevertheless contradict section 6.7;
- Board Policy 3, Section 6.18: For the reasons noted, the Respondent has failed to contribute to a positive and respectful learning environment; to the contrary, a community within the Division has been made to feel unwelcome and unsafe;
- Board Policy 3, Section 6.20: For the reasons noted, the Respondent has not adhered to the Code;

- Board Policy 4, Section 1: For the reasons noted, the Respondent failed to carry out her responsibilities under Policy 3 with reasonable diligence. The Respondent instead knowingly has declined to carry out the above-described responsibilities with respect to the 2SLGBTQ+ community;

- Board Policy 4, Section 5: For the reasons noted, the Respondent did not endeavour to work with her fellow trustees in a spirit of harmony and co-operation. Rather, the Respondent conducted herself contrary to Board and Division guidance, disregarded a motion of the Board, and has through her counsel denigrated and disrespected her fellow trustees;

- Board Policy 4, Section 6: For the reasons noted, the Respondent has not conducted herself in a dignified, professional and ethical manner. Rather, she has disrespected and denigrated the Board and a valued and respected community within the broader educational community that she was elected to serve;

- Board Policy 4, Section 7: For the reasons noted, the Respondent has not reflected Board policy and resolutions in her public communications, in fact, she has openly disregarded and/or expressed the intention to disregard them. While the time to comply with certain conditions of the First Motion has not yet passed and accordingly it has not yet been breached, repeated open affirmations of the intent not to comply are inconsistent with this provision;

- Board Policy 5, Section 15: For the reasons noted, the Respondent has not worked together with the Board to communicate with the electorate. Rather, the Respondent has engaged in her own communications contrary to Board and Division policy and the First Motion;

- Board Policy 4, Section 22: For the reasons noted, the Respondent has failed to represent the Board responsibly and with proper decorum and respect for others in Board-related matters. In a public interview, in which the Respondent is identified as a trustee and does not state that she is speaking solely in her personal capacity, at which business of the Board is discussed, the Board finds this provision applicable. The Respondent failed to show respect for either the Board or the 2SLGBTQ+ community.

Accordingly, the Board finds that the Respondent has committed further and additional breaches of the Code, in addition to her non-compliance with the First Motion.

Catholicity-related Arguments raised by the Respondent and her Counsel

According to the Respondent's Written Submission, the Respondent seeks to protect children, protect parental rights, and uphold Christ-inspired beliefs with integrity even in the face of alleged political persecution by her fellow Board members. The Respondent's legal counsel argued that it is not of value to be able to secretly hold one's beliefs but not be able to espouse them.

The Board wishes to highlight what it wrote in the First Motion regarding the Respondent's ability to raise any education-related concerns, including those relating to what the Respondent refers to as "gender ideology":

a) the Respondent could bring forward any educational-related issue for discussion and debate to the Board through the Board's standard procedures and practices; and
b) the Board welcomes open debate or education-related issues in accordance with Board policy and procedures, including sensitive or difficult topics.

The Respondent Suggests that Board Members Act as if they Serve on a Secular Board
At the Second Code of Conduct Hearing the Respondent's legal counsel suggested the Respondent acted as if she served on a religious Catholic school board whereas the other Board members acted as if they served on a secular school board. Paragraph 35 of the Respondent's Written Submissions addresses this as follows:

> ... Much of the political disagreement between Trustee LaGrange and the Board has arisen precisely because Trustee LaGrange adheres to traditional Catholic beliefs and values about gender, sex, family, and protecting children, while the Board has prioritized the liberal secular values that promote LGBT ideas and gender ideology and undermines parental rights.

During the Second Code of Conduct Hearing the Respondent's legal counsel submitted that:
a) it is disingenuous to say that gender ideology and the sexualization of children are Christ-centered; they are not;
b) No true follower of Christ, who is both honest and reasonable, would claim that they are;
c) That Catholic beliefs are at odds with "LGBTQ ideologies", and this is the source of conflict between the Respondent and the Board.

However, the issue before the Board does not turn on whether the Respondent's impugned conduct contravened Roman Catholic values but whether the same violated the Act, the Code and the First Motion.

To the extent the Respondent is suggesting that her personal interpretation of Catholic doctrine entitles her to disregard the Act and Board Policies 3 and 4, which the Board views as reasonable, it does not. The Respondent has obligations to the Board on which she serves, to the Division, and to its students, which obligations are set forth in legislation and in Division and Board policy, all of which govern trustee conduct.

Furthermore, the Respondent was free to seek to change Board Policies 3 and 4 and related Board practices to better align with what she believes to be the proper approach to Catholic education. Following the First Code of Conduct Hearing, the Respondent did not put forward any "gender ideology"- related agenda items for the Board to examine and debate.

The Board does not find that the Catholicity-related arguments have a bearing on its decision as to whether or not the Respondent is in breach of the Code or the First Motion.

Additional Arguments of the Respondent

At paragraph 31 of her Written Submissions, the Respondent argues that the Board is "misusing" its disciplinary power to "...silence and discipline the other side through the abuse of power". The Board rejects this characterization.

As noted above, the Respondent was free to bring matters to the Board for discussion and debate; she did not. The Respondent was free to seek a judicial stay of the First Motion; she did not. Rather than making an effort to work with the Board following the First Motion, which did not call for the disqualification remedy, the Respondent continued with the same or similar course of conduct. With respect, it is hardly an abuse of power, or indeed even a surprise, that the parties now find themselves here. The Board Chair attempted to engage with and inform the Respondent that the path she was on could lead to this outcome (i.e. Board Chair's September 29, 2023, 1:12 p.m. email to the Respondent); again the Respondent paid no heed.

At paragraph 33 of the Respondent's Written Submissions, the Respondent further argues that the Code is not a "tool to silence or expel trustees who hold to minority views or beliefs...". The Board agrees. The

Board is not reacting to or addressing "minority views or beliefs". The Board is addressing one of its members' failure to comply with a validly issued Board motion, and with the Code.

The Board is reluctantly utilizing the Act and the Code in the manner outlined in these Reasons because the Respondent has left it no choice.

Responses to the Dissent

The Board acknowledges the concerns of the trustee who ultimately voted against the Second Motion ("Dissenting Trustee"). The Respondent did not raise issues of procedural unfairness at the Second Code of Conduct Hearing. In any event, as noted in the October 2023 Reasons, the Board had concluded that the First Code of Conduct Hearing was conducted in a fair manner in accordance with the principles of procedural fairness.

Concerns with the availability, and appropriateness, of the disqualification sanction were also expressed. The availability of the sanction is found at s. 87(1)(c) of the Act. This Board has deliberated upon the suitability of the sanction, finding that disqualification is appropriate.

The Board wishes to be clear - the Second Motion is not the result of the Original Meme, or a single social media post or single interview. Rather, the conduct considered at the Second Code of Conduct Hearing was as outlined in the Second Complaint. The content of the Social Media Posts and the Interviews also have an impact beyond a single trustee. Trustee conduct which suggests a lack of inclusivity of all individuals, regardless of sexual orientation or gender, impacts the community that the Division serves and students in particular.

Lastly, the Dissenting Trustee proposed an alternative resolution whereby the Respondent would be invited to a meeting to discuss an agreed resolution to these matters. With the utmost respect, the Board sees no indication of a willingness on the part of the Respondent to conduct herself in accordance with Board Policies 3 and 4, which, again, in the view of the Board are reasonable.

The Board notes the following in support of its view that the Respondent is unwilling to discuss an agreed resolution to these matters, including:

i. The Respondent, via her counsel, has indicated through the media that she will not comply with the First Motion's apology condition, and likely not with the condition that she receive sensitivity training;[16]
ii. The Respondent's Written Submissions state at paragraph 2 that she "contests the reasonableness of the factual and legal findings of the Board as articulated in the Reasons and contests the lawfulness of the censure as contained in the Motion. Trustee LaGrange intends to file an Application for Judicial Review of the Motion and Reasons." Again, the Respondent is entitled to seek such a review. However, the First Motion remains the valid decision of the Board, which the Respondent dismisses throughout her submissions;
iii. The Respondent expresses in the Interviews that she would not do anything differently if given the chance;[17]
iv. The Respondent's Written Submissions contain gratuitous and disrespectful interjections, for example:

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[16] True North Canada News, *Red Deer Trustee has "no regret" about anti-gender ideology post, despite punishment*, by Noah Jarvis, published September 28, 2023, attached to the Reasons as Appendix "I".

[17] Laura Lynn Interview, attached to the Reasons as Appendix "G"; Talk Truth Interview, attached to the Reasons as Appendix "H".

a. Para. 4: "... submissions of Trustee Heistad, *such as they are*.";
b. Para. 21: "Unfortunately, the Board fails to grasp this, *whether disingenuously* or by honest mistake.":
c. Para. 22: "...*by believing or convincing themselves*...".;
d. Para. 22: "failure on the part of the Board, *intentional or unintentional*...".
(The emphasis is ours.)

v. The Respondent's Written Submissions go on to dismiss the concerns raised in the First and Second Complaints as nothing more than a particular "liberal" or "woke worldview" (para. 30). Indeed, the Trustee, through her counsel at para. 24 of her submissions, suggests that:

> No "expertise" is needed, (...) , to acknowledge that it is severely mentally disordered for someone to think they are not the gender (sex) God created them to be and to further think they can change their gender (sex) to something other than what it is. While such commentary may offend liberal, secular sensibilities, it aligns with Catholic beliefs and the natural law associated with Catholic beliefs, which rejects the man-made idea that only certain "experts", and not lay believers, may identify unnatural and/or sinful behaviours.

The Board acknowledges that expressing an intent not to comply with the First Motion prior to the 90-day timeline does not necessarily amount to a breach and that there is still time within which the Respondent could comply with conditions (d) and (e). However, the intention communicated to the public to date is part of the context in which the Board considered the suggestion of the Dissenting Trustee that an agreed-upon resolution could be achieved under the current facts. The Respondent disavows any connection between her public conduct wherein she identified herself, and was expressly acknowledged as, a Board trustee speaking about matters such as the content of school curriculum within the scope and ambit of her role as a trustee including the discipline levied on her solely in her official capacity as a trustee. Based on the facts before the Board, this distinction is artificial. The Board finds that a reasonable person, hearing a school board trustee introduced as such and discussing matters related to education and trustee discipline, would be of the reasonable belief that the trustee's comments were offered in their official capacity as a trustee – in particular when that trustee refrains from confirming that they are commenting solely in their personal capacity. With respect, contrary to the Respondent's submission, if the Respondent wished the public to understand that she is speaking solely in her personal capacity then she should have said so; and

vi. Finally, as described above, the Respondent continues to advance interpretations of her words and conduct which she asserts are what she really intended, as opposed to how her words have been interpreted. The position that the Respondent was attempting to advance is not made clear, for example, in the social media post depicting a wolf wearing facial make-up and licking its lips, with the caption, "I just want to read some books to your chickens."

The Board has considered the suggestion that the Respondent and Board could achieve an agreed resolution of the Second Complaint. Respectfully, and in light of the context above, the Board disagrees.

Issue 3: If the answer to either or both of Issue 1 and Issue 2 is yes, what is the appropriate sanction?

Unfortunately, it has become apparent to the Board that the Respondent did not accept the First Motion with the weight and seriousness anticipated or hoped for by the Board. The Respondent is entitled to her personal beliefs. She is free to work within the Board and Division to seek change. However, the Respondent is not free to disregard Board policy in order to further her views.

Further, the Respondent has continued a course of conduct that has resulted in further breaches. This has all occurred in a very short time.

As noted above, the Board has the jurisdiction to disqualify a trustee pursuant to s. 87(1)(c) of the Act, following which the trustee is required to resign pursuant to s. 90 of the Act. The Respondent accepted that statutory requirement and resigned under protest at the conclusion of the Second Conduct Hearing.

Given the totality of the evidence before the Board, the Board was left with very few options. Disqualification was reasonable, and in light of the Respondent's conduct, the only realistic outcome in this matter.

IX. Conclusion

The Board is of the view that the Respondent can no longer be permitted to continue as a Board member. Again, while the Respondent is entitled to her personal beliefs, the Respondent's conduct constitutes a breach of the Code and Act, and in addition, a violation of the First Motion. This will not be condoned by the Board.

Accordingly, the Board passed the Second Motion pursuant to section 87(1)(c) of the Act, disqualifying the Respondent from continuing in her position. The Respondent then resigned under protest pursuant to s. 90 of the Act.

XII. Summary of Responses to Issues

1. Did the Respondent's conduct subsequent to the issuance of the First Motion constitute a failure to comply with the conditions of the First Motion?

    a. Answer: Yes.

2. Did the Respondent's conduct subsequent to the issuance of the First Motion constitute a further breach of the Code?

    a. Answer: Yes.

3. If the answer to either or both of the above questions is yes, what is the appropriate sanction?

    a. Answer: For the reasons given herein, disqualification as a Board member.

Dated this 24th day of November 2023.

SCHEDULE "A" – BOARD MOTION NOVEMBER 14, 2023

BE IT RESOLVED that further to the November 13 and 14, 2023, in camera discussions, and after having carefully considered all the points raised therein, and in accordance with Board Policy and the Education Act, Trustee LaGrange has violated sanctions issued on September 26, 2023, and had further violated Board Policy and the Education Act. As a result, Trustee LaGrange is hereby disqualified under section 87(1)(c) of the Education Act and Board Policy from remaining as a school board trustee. The Board will issue detailed reasons in support of this Board motion on or before November 24, 2023.

Red Deer Catholic Regional Schools

POLICY 1: DIVISION FOUNDATIONAL STATEMENTS

Mission

The Red Deer Catholic Separate School Division is committed to supporting inclusive communities that foster care and compassion of students, families and staff with a complete offering of learning opportunities delivered within the context of Catholic teachings and tradition, and within the means of the Division.

Our schools are gospel-centred communities of hope, fostering a Catholic Christian value system within a pluralistic society.

CONTINUING THE MISSION OF JESUS, PROPHET, PRIEST AND SERVANT KING

We make His life, mission and teaching our focal points of belief and conduct within our Catholic schools. Therefore, the education of the whole child -- intellectual, aesthetic, emotional, social, physical, and spiritual -- is our service commitment.

As stewards of Catholic Education nothing in this policy, or any other policy or administrative procedure, is to be interpreted so as to limit or be a waiver of the Red Deer Catholic Regional School Board's rights and powers pursuant the Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms to maintain the denominational character of Catholic Schools.

If any of the provisions in this policy conflict with the Red Deer Catholic Separate School Division's rights and powers pursuant to the Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms to maintain the denominational character of Catholic schools, the Red Deer Catholic Separate School Division's rights and powers pursuant the Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms to maintain the denominational character of Catholic schools will govern.

Abbreviated Mission Statement

Making Christ known to children.

Beliefs

1. Catholic schools, as stewards of Catholic education, have the responsibility to help all children to develop their unique, individual capabilities to learn and to live, and thereby to experience humanity and the world as created by God and redeemed by Jesus Christ.

2. Catholic schools and Catholic parishes are complementary to the family, which is the primary steward for the child's formation.

3. Education must be based on the Christian concept that each person is a unique and special child of God. The objectives and purpose of education as stated by Alberta Education must be set in this total Christian concept.

4. Students must participate in all Catholic education activities including Religious Studies classes, liturgies, celebrations, and sacramental preparations, at all grade levels.

5. The schools will strive for excellence in education for all students to develop their academic and interpersonal skills. In this way, students will be prepared to use their God-given talents to live and work effectively in society.

6. The schools will assist all students to choose and develop a hierarchy of values consistent with the teachings of the Catholic faith.

7. The schools, in cooperation with parents and parishes, will strive to develop the gift of Catholic faith by assisting all students to:

    7.1 Perceive faith as a personal, free and joyful response to the gift of God himself;

    7.2 Experience the person of Christ in their own lives through relationships with others and with the community of believers;

    7.3 Pray and celebrate their faith as a source of strength in daily life; and

    7.4 Become aware of their religious heritage and acquire a better understanding of the various rites of the Catholic Church.

8. The schools will help all students, families and staff to realize their responsibility to transform the world by practicing the Catholic faith and values in a pluralistic society.

9. The schools will foster the mental and physical well-being of all students through:

    9.1 Selection of appropriate programs which emphasize physical, leisure activities; and

    9.2 A respect for the worth and dignity of the individual.

10. The schools will foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values. Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality.

11. Staff of The Red Deer Catholic Separate School Division will support families in the faith development of students by serving as witnesses to their Catholic beliefs. Catholic social teachings will provide a foundation for the future contributions of our students to society and this connection will be formed by authentic Catholic schools shaped by those employed in the Division.
    Staff also share in the responsibility of helping students see the relevance of our faith in today's world and solving current problems within a Catholic world-view.

Principles of Practice

- We honour our children.
- We provide a safe and secure environment.
- We live and proudly proclaim our Catholic Christian faith.
- We provide quality education in a Catholic environment.
- We pray as an educational community.
- We practice servant-leadership.
- We focus on our mission through clarity of purpose.
- We value our staff.

Motto

Inspired by Christ. Aspiring to Excellence.

Logo

Red Deer Catholic
Regional Schools

Logo Description

- The central feature is a cross which depicts Christ-centered education.
- The four stylized books represent the Gospels, which define our faith and provide the foundation elements for ongoing personal development.
- The circle represents the head of a child, whose arms are open, embracing Christ and knowledge. In full stride, the child exudes youth and potential.
- Green and blue represent creation and beauty, which are eternal gifts from God.

Reviewed: February 2008
Revised: September 2016, April 2018

Red Deer Catholic Regional Schools
Inspired by Christ. Aspiring to Excellence.

ADMINISTRATIVE PROCEDURE NO. 103

WELCOMING, SAFE AND CARING, INCLUSIVE AND RESPECTFUL LEARNING ENVIRONMENTS

Nothing in this administrative procedure is to be interpreted so as to limit or be a waiver of the Red Deer Catholic Regional Division rights and powers pursuant the *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms* to maintain the denominational character of Catholic schools.

If any of the provisions in this administrative procedure conflict with the Red Deer Catholic Regional Division rights and powers pursuant to the *Constitution Act, 1867,* and the *Canadian Charter of Rights and Freedoms* to maintain the denominational character of Catholic schools, the Red Deer Catholic Regional Division rights and powers pursuant to the *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms* to maintain the denominational character of Catholic schools will govern.

Background

The Division believes everyone in the school community shares in the responsibility of creating, maintaining and promoting a Christ-centered, welcoming, caring, respectful and safe learning environment that respects diversity, equity and human rights and fosters a sense of inclusion and belonging.

The Division's goal is to develop responsible, caring and respectful members of a just, peaceful and democratic society. Student and staff self-discipline and appropriate conduct, consistent with our Catholic Christian morals and beliefs, is an essential part of a positive school climate. The Division affirms the rights of each student and staff member, as provided for in the *Alberta Human Rights Act* and the *Canadian Charter of Rights and Freedoms* and will not discriminate against students or staff members as provided for in the *Alberta Human Right Act* or the *Canadian Charter of Rights and Freedoms*.

All efforts to further enhance welcoming, caring, respectful and safe learning environments of schools must be in accordance with the teaching of the Catholic Church. Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice and respectful relationships.

Definitions

1. **Sanctity of Human Life** - Foundational principles of all Catholic social teaching is the sanctity of human life. Recognizing each human person as the image and likeness of God, the Catholic Church believes that the inherent dignity of the human person starts with conception and extends until natural death. The value of human life is valued above all material possessions in the world. This is the lens through which the Division advocates for the safety and well-being of students and staff within our schools.

2. **Catholic teaching on social relationships** recognizes all those called to a life with Christ as, simply and completely, children of God. Our students and staff must respect the unique differences of every person, extending understanding and compassion to others. Each of us is recognized for the entirety of our gifts and is called forth to contribute these gifts for the betterment of creation and the building of God's kingdom. This understanding of the human person and God's plan for each of us defines all of our social relationships. Our relationships, therefore, are characterized by generosity of self, mutual respect, and a desire for the good of the other.

3. **Respect for the Human Person** - Social justice can be obtained only in respecting the transcendent dignity of all students, staff and community members.

4. **Bullying** means repeated and hostile or demeaning behaviour by an individual in the school community where the behaviour is intended to cause harm, fear or distress to one or more other individuals in the school community, including psychological harm or harm to an individual's reputation. It often involves an imbalance of social or physical power.

   Bullying behaviours are a form of aggression and can be:
   - Physical – For example: poking, elbowing, hitting
   - Verbal – For example: name calling, insults, racist, sexist or homophobic comments, put-downs
   - Social – For example: gossiping, spreading rumours, excluding someone from the group, isolating, ganging up
   - Cyber – For example: social or verbal bullying through the use of email, text messages, social media including the sharing of intimate images.

5. **Harassment:** Any behavior that in effect or intent disparages, humiliates, or harms another person or class of persons. It is behaviour that denies dignity and respect, and is demeaning and/or humiliating to another person or class of persons. Harassment may include, but is not limited to, references related to age, national or ethnic origin, religion, gender, sexual orientation, disability, race and/or sources of income, family status or citizenship. Sexual harassment is any unwelcome behavior that is sexual in nature. Such behavior may directly or indirectly affect or threaten to affect in an adverse manner a student's well-being and/or learning environment. The behavior does not need to be intended as harassing to be considered as personal harassment. It is sufficient that one knows, or ought reasonably to know, that his/her behaviour is offensive and unwelcome. Harassment is not a relationship of mutual consent. It is any action including, but not limited to verbal, physical, written and cyber messaging that is unwelcome or intimidating and denies individual dignity and respect.

6. **Restorative Discipline** adds to the current discipline framework of our schools. It promotes values and principles that use inclusive, collaborative approaches between students, home, church and the school for being in community. This approach validates the experiences and needs of everyone within the community, particularly those who have been marginalized, oppressed, or harmed. These approaches allow schools to act and respond in ways that are healing, rather than alienating, or coercive. Restorative Discipline is a strategy that can be used to address bullying within a school.

7. **Supporting Positive Behaviours** is a strategy to further the social responsibility and responsiveness of students in meeting behavioural expectations of their school. Within this model, predetermined levels of support and intervention are established to enhance a positive climate of school engagement for all students. While the support model may look different at each school, three levels are identified as part of the intervention protocol:

   7.1 Basic/Universal Support:
   Systemic teaching that produces a clear understanding of expectations is developed in a collaborative and respectful culture.

   7.2 Targeted Support:
   Additional support is provided for those students who have not yet internalized appropriate responses to the expectations that they have been expected to follow.

   7.3 Individual/Intensive Support:
   Highly focused support is established for those students who require ongoing adult monitoring in order to engage in appropriate behaviours.

   Supporting Positive Behaviours is based upon a belief that teaching and nourishing appropriate behaviours has a far greater success than relying upon a model of consequences and punishment. This model is applied according to student's age, maturity, and individual circumstances and is a strategy that can be used to address bullying within a school.

Guidelines

1. Ensure that the CCSSA *Living Inclusion Faithfully for Everyone* (LIFE) Framework document is utilized as a resource to continue creating, maintaining and promoting a Christ-centered, welcoming, caring, respectful and safe learning environment that respects diversity, equity and human rights and fosters a sense of inclusion and belonging.

2. All actions by students that impact the safety and well-being of students or staff or call into question a student's success in being accountable for his/her conduct to the successful operation of the school will be addressed through *Administrative Procedure No. 362 Student Conduct.*

3. All schools and classrooms must enact procedures that support the following expectations with respect to bullying or harassment.

   3.1 No action toward another student, regardless of the intent of that action will cause harm, fear, or distress to that student.

   3.2 No action toward another student within the school community will diminish the student's reputation within the school community.

   3.3 Any action that contributes to a perception of bullying, whether or not the behaviour occurs within the school building, during the school day or by electronic or other means, will be addressed by the school if it is determined that the actions impact the well-being of the alleged victim within the school community.

3.4 Any action that humiliates or contributes to diminishing the reputation of a student on the basis of race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons is deemed to be an act of bullying or harassment.

3.5 No report by a student that he/ or she is being “bullied” will be ignored by a school official. The official will respond as if an incident has happened and report the incident to a teacher or principal.

3.6 The principal will establish a distinction between those matters of bullying that will be addressed by teachers, and those to be addressed by the principal.

3.7 Students who are bystanders to an act of bullying have a responsibility to report observed incidences to school staff. Students are expected to either exercise communication dedicated to prevent bullying behaviour, or failing this, immediately report such incidences to school staff.

3.8 Students do not have a role in disciplining other students who have allegedly participated in bullying behaviour. They are encouraged to discourage these actions by labeling the behaviour through communication to others as bullying, requesting that the behaviour cease, and report the incident to a school official.

3.9 Each individual and each situation will be resolved based on the specific circumstances of the situation and taking into account the student’s age, maturity, and individual circumstances.

3.10 If in the opinion of the teacher or principal an act of bullying has occurred, interventions will be applied dedicated to stopping the behaviour in the future, and educating the student victimized about how to address the issue in the future. Those disciplined for their involvement in bullying will be communicated what to “stop” doing, and “start” doing in order to further a safe and caring culture within the school.

3.11 Parents play a primary role in assisting with the resolution of matters pertaining to bullying. Apprising them of issues in this area as they have impacted their children should occur at the earliest opportunity.

3.12 A principal may use a Restorative Discipline or Positive Behavioural Support model to address matters of discipline.

3.13 Incidences of bullying that adversely impact the safety of individuals or are an affront to the common good of the school community may be addressed through application of sections 24 and 25 of the *School Act.*

Procedures

1. Procedures used by schools to address bullying will be placed within school handbooks, reviewed with school councils, and evaluated for effectiveness annually.

2. Schools must rely on Division support if existing resources or strategies are insufficient in addressing bullying within the school community.

3. Students will be provided with supports that meet individual needs.

4. In maintaining a welcoming, caring, respectful, safe and Catholic environment that respects diversity and fosters a sense of belonging for all students and staff, each incident will be considered on its individual circumstances using a comprehensive and holistic approach to inclusion and meeting all students' needs.

5. Discipline is seen as the change from unacceptable conduct to acceptable behaviour through the use of reasonable and just consequences. In any disciplinary situation, each student will be dealt with on an individual basis.

6. Parent/legal guardian involvement may be necessary to support school discipline procedures. In responsibility as indicated in the School Act:

    6.1 To take an active role in the student's educational success, including complying with the Student Code of Conduct;

    6.2 To ensure that the parent's/legal guardian's conduct contributes to a welcoming, caring, respectful, safe that respects diversity and fosters a sense of belonging for all students and staff;

    6.3 To co-operate and collaborate with school staff to support the delivery of specialized supports and services to students;

    6.4 To encourage, foster and advance collaborative, positive and respectful relationships with teachers, principals, other school staff and professionals providing supports and services in schools;

    6.5 To engage in the student's community.

7. The school will outline expectations, consequences, and the progression of actions to be taken depending on the severity and/or frequency of the occurrences and must take into account the student's age, maturity and individual circumstances and must ensure that support is provided for student who are impacted by inappropriate behaviour, as well as, for student who engage in inappropriate behaviour. At all time, teachers and administrators will use their professional judgment in applying consequences.

Support for Student Organizations

Procedures

1. **The Principal shall:**

1.1 Ensure all aspects of this administrative procedure are clearly communicated and made publicly available to all staff, students and families;

1.2 Ensure that the CCSSA *Living Inclusion Faithfully for Everyone* (LIFE) Framework document is utilized as a resource to continue creating, maintaining and promoting a Christ-centered, welcoming, caring, respectful and safe learning environment that respects diversity, equity and human rights and fosters a sense of inclusion and belonging.

1.3 Ensure that students and staff with diverse sexual orientations, gender identities and gender expressions:

1.3.1 are treated with dignity and respect;

1.3.2 have the right to be open about who they are, including expressing their sexual orientation, gender identity or gender expression without fear of unwanted consequences;

1.3.3 have the right to privacy and confidentiality;

1.4 Provide safe access to a washroom and/or change room for use by any student who desires increased privacy for any reason. Where possible private washrooms shall be made available.

1.5 Ensure as per the Student Code of Conduct that any discriminatory or prejudicial attitudes, language or behaviours are addressed, whether they occur in person or in a digital form;

1.6 Ensure that a comprehensive school wide approach to foster social-emotional learning is utilized to promote healthy relationships, prevent and respond to bullying or discriminatory behaviours, attitudes and actions.

1.7 Ensure all families are welcomed and supported as valued members of the school community and that parents/guardians are encouraged to play an active role in their child's education;

2. Ensure all staff recognize the confidentiality of sexual orientation and gender identity of all students and protect them from unwanted disclosure;Red Deer Catholic Regional Division is bound by the provisions of the *Freedom of Information and Protection of Privacy Act*, which governs the disclosure of personal information.

3. Principals will support the establishment of student organizations or activities in accordance with Section 16.1 of the School Act:

3.1 If one or more students attending a school operated by a board request a staff member employed by the board for support to establish a voluntary student organization, or lead an activity intended to promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging, the principal of the school shall

3.1.1 Immediately grant permission for the establishment of the student organization or the holding of the activity at the school, and

3.1.2 Subject to subsection 16.1(4) of the School Act, within a reasonable time from the date that the principal receives the request designate a staff member to serve as the staff liaison to facilitate the establishment, and the ongoing operation, of the student organization or to assist in organizing the activity;

3.2 The students may select a respectful and inclusive name for the organization or activity, including the name “gay-straight alliance” or “queer-straight alliance’, after consulting with the principal.

3.2.1 For greater certainty, the principal shall not prohibit or discourage students from choosing a name that includes “gay-straight alliance” or “queer straight alliance”.

3.3 The principal shall immediately inform the board and the Minister if no staff member is available to serve as a staff liaison referred to section 16.1(1) of the School Act, and if so informed, the Minister shall appoint a responsible adult to work with the requesting students in organizing the activity or to facilitate the establishment, and the ongoing operation, of the student organization at the school;

3.4 The principal is responsible for ensuring that notification, if any, respecting a voluntary student organization or an activity must be limited to the fact of the establishment of the organization or the holding of the activity. Notification, if any, must be otherwise consistent with the usual practices relating to other students organizations and activities.

4. Ensure the *Freedom of Information and Protection of Privacy Act,* which governs the disclosure of personal information, is adhered to by staff.

Staff shall:

5. Overnight Trips and/or Field Trips;

Ensure that in planning for field trips or school outings the needs of students who have diverse sexual orientations, gender identities and gender expressions are taken into consideration. It is important to make decisions regarding washroom and change room access prior to embarking on any field trips or school outings, in consultation with the student(s). Gender and sexual minority students may feel comfortable using public washrooms that align with their gender identity. Some students, however, may not feel

comfortable with this option. Best efforts should be made to research the availability of gender or private washrooms at field trip or out of school destinations.

When planning activities that involve the need for overnight or housing accommodations, staff shall ensure these issues are addressed on a case-by-case basis. There is no "one way" in which students are accommodated. Many factors are carefully considered including the needs and wishes of the student and their parents/guardians (where the student has consented), the facilities where students will be sleeping, the beds in which students would be sleeping, the supervision provided, etc.

School staff will make every reasonable effort to provide accommodations that are inclusive, respectful and acceptable to the student and that do not impose any additional expense or burden for the student and or their family. The privacy and confidentiality of the student will be maintained at all times.

6. Extra-Curricular and Physical Education Activities

Ensure that students who choose to or are required to participate in physical education or extracurricular activities, including competitive and recreational athletic teams, can do so in ways that are comfortable for them and supportive of their diverse sexual orientations, gender identities and gender expressions. In circumstances where activities are organized by gender, students who are transgender and gender-diverse have the support they need to participate safely in accordance with their gender identity and/or gender expression. Students also have full access to recreational or competitive athletic activities in accordance with their self-declared gender identity. This is fully supported by the Alberta Schools' Athletic Association in their 2015- 2016 Policy Handbook (http://www.asaa.ca/resources/asaa-bylaws-policy).

7. Student Records – maintain student records in a way that respects student's privacy and confidentiality and is in compliance with Alberta's privacy legislation and the *Student Record Regulation.*

7.1 Students will be informed of any limitations regarding their chosen name and gender identity or gender expression in relation to official school records that require legal name and designation;

7.2 School staff may use a student's chosen (i.e., preferred) name and pronouns on report cards or individualized learning plans or other school issued documents, provided the student has requested this.

7.3 Students should be advised that a legal name change is required if they desire their official Alberta Education documents to reflect their new name.

References:

- Stutzman, Lorraine, Mullet, Judy H. (2005). *The Little Book of Restorative Discipline for Schools.*
- *Catechism of the Catholic Church*

- Alberta Catholic School Trustees 'Association (ND).*Safe and caring learning environments for students: A policy exemplar.* Alberta, Canada
- Pastoral Guideline for the LIFE Framework
- Alberta Bill of Rights, s.1 (g)
- School Act

Appendix A:

CCSSA *Living Inclusion Faithfully for Everyone* (LIFE) Framework Document (Revised April 2018)

Revisions:
April 2013
Revised March 2016
Revised May 2018

Appendix A:

CCSSA *Living Inclusion Faithfully for Everyone* (LIFE) Framework Document

(Revised May 2018)

Alberta Catholic Bishops Pastoral Guideline for the LIFE Framework

(April 9, 2017)

Red Deer Catholic Regional Schools

POLICY 4: TRUSTEE CODE OF CONDUCT

The Board commits itself and its members to conduct which meets the highest ethical standards. It is expected that all personal interactions and relationships will be characterized by mutual respect, which acknowledges the dignity and affirms the worth of each person.

- Each trustee, representing all Catholic school supporters of the community and responsible to this electorate through the democratic process, recognizes:

  - That trustees are accountable to the Magisterium of the Church, and that, according to the Code of Canon Law, a Catholic school is an instrument of the Church and is one in which Catholic education is established, directed, recognized or converted to, by the local bishop, who is competent to issue prescriptions dealing with the general regulation of Catholic schools.

  - That legally, the authority of the Board is derived from the province, through the Constitution Act, which ultimately controls the organization and operation of the Division and which determines the degree of discretionary power left with the Board and the people of this community for the exercise of local autonomy.

  - That fellow citizens have entrusted them, through the electoral process, with the educational development of the children and youth of the community.

  - That trustees are the children's advocates and their first and greatest concern is the best interest of each and every one of these children without distinction as to who they are or what their background may be.

  - That trustees are educational leaders who realize that the future welfare of the community, of the province, and of Canada depends in the largest measure upon the quality of education provided in schools to fit the needs of every learner.

Specifically

Whereas the aim of Catholic Education is the development of each student towards personal fulfillment and responsible citizenship motivated by the Spirit of the Gospel and modeled on the example of Jesus Christ, the Catholic School Trustee shall, within the duties prescribed in Acts and Regulations and reflecting a ministry within the Church, adhere to the following Code of Conduct:

1. Trustees shall carry out their responsibilities as detailed in Policy 3 – Role of the

Trustee with reasonable diligence.

2. Provide an example to the Catholic Community by active participation in the communal life of a parish and by a personal lifestyle that reflects the teachings of the Church.

3. Devote time, thought and study to the duties of a trustee so that they may render effective and credible service.

4. Exercise the powers and duties of their office honestly and in good faith. Trustees shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

5. Trustees shall endeavour to work with fellow Board members in a spirit of harmony and cooperation in spite of differences of opinion that may arise during debate.

6. Trustees shall commit themselves to dignified, ethical, professional and lawful conduct.

7. Trustees shall reflect the Board's policies and resolutions when communicating with the public.

8. Consider information received from all sources and base personal decisions upon all available facts in every case; unswayed by partisan bias of any kind, and thereafter, abide by and uphold the final majority decision of the Board.

9. Trustees shall keep confidential any personal, privileged or confidential information obtained in their capacity as a trustee and not disclose the information except when authorized by law or by the Board to do so.

10. While elected from specific wards, trustees shall represent the best interests of the entire Division.

11. Trustees shall honor their fiduciary responsibility to the Board and be loyal to the interests of the Division as a whole in the context of Catholic Education. This loyalty supersedes loyalty to:
    - 11.1 Any advocacy or special interest groups; and
    - 11.2 The personal interest of any trustee.

12. Trustees shall report all conflicts of interest and abstain from voting on or discussing any matter that has been identified as a conflict, in accordance with Appendix 'B' – Conflicts of Interest.

13. In determining whether an actual or perceived conflict of interest exists, the

Trustees shall be guided by the following question:

> *Would a reasonable person, being informed of all of the circumstances, be more likely than not to regard the interest of the trustee as likely to influence that trustee's action and decision on the question?*

14. Maintain the confidentiality of privileged information, including statements made during in-camera sessions of the Board.

15. Work together with fellow trustees to communicate to the electorate.

16. Remember at all times that individual trustees have no legal authority outside the meeting of the Board, and therefore relationships with school staff, the community, and all media of communication is to be conducted on the basis of this fact.

17. Refrain from using the trustee position to benefit either oneself or any other individual or agency apart from the total interest of the Division.

18. Recognize that a key responsibility of the Board is to establish the policies by which the system is to be administered, and that the administration of the educational program and conduct of school business shall be left to the Superintendent and Division staff.

19. Encourage active cooperation by stakeholders with respect to establishing policies.

20. Support provincial and national school board associations for the future of trusteeship in this province and the nation.

21. Provide effective trustee service to the Catholic community in a spirit of teamwork and devotion to education as the greatest instrument for the preservation and perpetuation of our representative democracy.

22. Represent the Board responsibly in all Board-related matters with proper decorum and respect for others.

23. Represent the perceived concerns or needs of the community to the Board or Superintendent as appropriate and accurately communicate the Board's decisions to those who we serve.

24. Abstain from participation in personnel selection when family relatives are involved.

25. Trustees shall disclose any conflict of interest between their personal life and the position of the Board, and abstain and absent themselves from discussion or voting on the matter in question.

26. Trustees shall not use their influence to advance personal, family or friends' interests or the interests of any organization with which the trustee is

associated.

27. Consequences for the failure of individual trustees to adhere to the Trustee Code of Conduct are specified in Policy 4 Appendix A – Trustee Code of Conduct Sanctions.

Legal Reference: Section 33, 34, 51, 52, 53, 64, 67, 85, 86, 87, 88, 89 Education Act

April 2008
Reviewed: April 2011, February 2018
Revised: September 2019, June 2022, April 2023

APPENDIX 'A'

1. Trustees shall conduct themselves in an ethical and prudent manner in compliance with the Trustee Code of Conduct, Policy 4. The failure by trustees to conduct themselves in compliance with this policy may result in the Board instituting sanctions.

2. A trustee who believes that a fellow trustee has violated the Code of Conduct may seek resolution of the matter through appropriate conciliatory measures prior to commencing an official complaint under the Code of Conduct.

3. A trustee who wishes to commence an official complaint under the Code of Conduct shall file a letter of complaint with the Board Chair within ninety (90) days of the alleged event occurring and indicate the nature of the complaint and the section or sections of the Code of Conduct that are alleged to have been violated by the trustee. The trustee who is alleged to have violated the Code of Conduct and all other trustees shall be forwarded a copy of the letter of complaint by the Board Chair, or where otherwise applicable in what follows, by the Vice-Chair, within five (5) days of receipt by the Board Chair of the letter of complaint. If the complaint is with respect to the conduct of the Board Chair, the letter of complaint shall be filed with the Vice-Chair.

4. When a trustee files a letter of complaint and a copy of that letter of complaint is forwarded to all trustees, the filing, notification, content, and nature of the complaint shall be deemed to be strictly confidential, the public disclosure of which shall be deemed to be a violation of the Code of Conduct. Public disclosure of the complaint and any resulting decision taken by the Board may be disclosed by the Board Chair only at the direction of the Board, following the disposition of the complaint by the Board at a Code of Conduct hearing.

5. To ensure that the complaint has merit to be considered and reviewed, at least one other trustee must provide to the Board Chair, within three (3) days of the notice in writing of the complaint being forwarded to all trustees, a letter indicating support for having the complaint heard at a Code of Conduct hearing. Any trustee who forwards such a letter of support shall not be disqualified from attending at and deliberating upon the complaint at a Code of Conduct hearing convened to hear the matter, solely for having issued such a letter.

6. Where no letter supporting a hearing is received by the Board Chair in the three (3) day period referred to in section 5 above, the complaint shall not be heard. The Board Chair shall notify all other trustees in writing that no further action of the Board shall occur.

7. Where a letter supporting a hearing is received by the Board Chair in the three (3) day period referred to in section 5 above, the Board Chair shall convene, as soon as is reasonable, a special meeting of the Board to allow the complaining trustee to present his or her views of the alleged violation of the Code of Conduct.

8. At the special meeting of the Board, the Board Chair shall indicate, at the commencement of the meeting, the nature of the business to be transacted and that the complaint shall be heard in an in-camera session of the special meeting. Without limiting what appears below, the Board Chair shall ensure fairness in dealing with the complaint by adhering to the

following procedures.

8.1 The Code of Conduct complaint shall be conducted at an in-camera session, Code of Conduct hearing, of a special Board meeting convened for that purpose. All preliminary matters, including whether one or more trustees may have a conflict of interest in hearing the presentations regarding the complaint, shall be dealt with prior to the presentation of the complaint on behalf of the complaining trustee.

8.2 The sequence of the Code of Conduct hearing shall be:

8.2.1 The complaining trustee shall provide a presentation which may be written or oral or both;

8.2.2 The respondent trustee shall provide a presentation which may be written or oral or both;

8.2.3 The complaining trustee shall then be given an opportunity to reply to the respondent trustee's presentation;

8.2.4 The respondent trustee shall then be provided a further opportunity to respond to the complaining trustee's presentation and subsequent remarks;

8.2.5 The remaining trustees of the Board shall be given the opportunity to ask questions of both parties;

8.2.6 The complaining trustee shall be given the opportunity to make final comments; and

8.2.7 The respondent trustee shall be given the opportunity to make final comments.

8.3 Following the presentation of the respective positions of the parties, the parties and all persons other than the remaining trustees who do not have a conflict of interest shall be required to leave the room, and the remaining trustees shall deliberate in private, without assistance from administration. The Board may, however, in its discretion, call upon legal advisors to assist them on points of law or the drafting of a possible resolution.

8.4 If the remaining trustees in deliberation require further information or clarification, the parties shall be reconvened and the requests made in the presence of both parties. If the information is not readily available, the presiding Chair may request a recess or, if necessary, an adjournment of the Code of Conduct hearing to a later date.

8.5 In the case of an adjournment, no discussion by trustees whatsoever of the matters heard at the Code of Conduct hearing may take place until the meeting is reconvened.

8.6 The remaining trustees in deliberation may draft a resolution indicating what action,

if any, may be taken regarding the respondent trustee.

8.7 The presiding Chair shall reconvene the parties to the Code of Conduct hearing and request a motion to revert to the open meeting in order to pass the resolution.

8.8 All documentation that is related to the Code of Conduct hearing shall be returned to the Superintendent or designate immediately upon conclusion of the Code of Conduct hearing and shall be retained in accordance with legal requirements.

8.9 The presiding Chair shall declare the special Board meeting adjourned.

9. A violation of the Code of Conduct may result in the Board instituting, without limiting what follows, any or all of the following sanctions:

9.1 Having the Board Chair write a letter of censure marked "personal and confidential" to the offending trustee, on the approval of a majority of those trustees present and allowed to vote at the special meeting of the Board;

9.2 Having a motion of censure passed by a majority of those trustees present and allowed to vote at the special meeting of the Board;

9.3 Having a motion to remove the offending trustee from one, some or all Board committees or other appointments of the Board passed by a majority of those trustees present and allowed to vote at the special meeting of the Board, for a time not to exceed the trustee's term as trustee.

10. The Board may, in its discretion, make public its findings at the special meeting or at a regular meeting of the Board where the Board has not upheld the complaint alleging a violation of the Board's Code of Conduct or where there has been a withdrawal of the complaint or under any other circumstances that the Board deems reasonable and appropriate to indicate publicly its disposition of the complaint.

Legal Reference: Sections 60, 61, 68, 72, 80, 81, 82, 83, 84, 85, 86, 246 *Education Act*

APPENDIX B – CONFLICTS OF INTEREST

Trustees should not gain benefits or monetary rewards because of their position as a trustee except for any allowances, honorarium or remuneration approved by the Board for duties performed. The requirements outlined herein are in addition to Article 16 of Policy 19 – Board Operations.

1. Trustees are expected to avoid both actual potential and perceived conflicts of interest with respect to their fiduciary duties and in all matters considered by the Board. Trustees shall act at all times in the best interests of the Board and the entire Division rather than any personal interests.

2. Trustees shall report any actual, potential or perceived conflict of interest. An actual or potential conflict of interest exists when a trustee is confronted with an issue in which the trustee has a personal or pecuniary interest. A perceived conflict of interest exists when a trustee is confronted with an issue in which the trustee may be seen to have a conflict, such as an issue or question involving or impact a family member of the trustee. For greater clarity,

    a. a “personal interest” includes, but is not limited to, matters in which the trustee has any interest that may reasonably be regarded as likely to have influence on them when carrying out their duties and responsibilities; and

    b. a “pecuniary interest” includes, but is not limited to, where a matter would or could give rise to the expectation of a gain or loss of money and includes “pecuniary interest” as defined in the *Education Act*.

3. In connection with any actual, potential or perceived conflict of interest in any matter being considered by the Board or a committee of the Board, a trustee must disclose the existence of the actual, potential or perceived conflict of interest and be given the opportunity to disclose all material facts to the other trustees and members of committees of the Board. Full disclosure, in itself, does not remove a conflict of interest.

4. Upon disclosing the actual, potential or perceived conflict of interest and all material facts, and after any desired discussion with the Board, the trustee shall leave the Board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining Board or committee members shall decide if a conflict of interest exists.

5. If the Board or committee members determine that a conflict of interest does exist, the trustee shall not vote on the matter and shall not participate in the decision and shall not attempt to influence the decision of other Board or committee members.

6. It is the responsibility of other trustees who are aware of an actual, potential or perceived conflict of interest on the part of a fellow trustee to raise the issue for clarification, first with the trustee and then, if needed, with the Board Chair or committee chair.

7. If the Board or committee has reasonable cause to believe a trustee has failed to disclose actual, potential or perceived conflicts of interest, it shall inform the trustee of the basis for such belief and afford the trustee an opportunity to explain the alleged failure to disclose.

a. If, after hearing the trustee's response and after making any further investigation as deemed necessary by the circumstances, the Board or committee determines that the trustee has failed to disclose an actual, potential or perceived conflict of interest, it shall take appropriate disciplinary and corrective action.

8. The minutes of the Board and all committees of the Board shall contain the names of the persons who disclosed or otherwise were found to have an actual, potential or perceived conflict of interest, the nature of the conflict, any action taken to determine whether the conflict was in fact present, and the Board's or committee's decision as to whether a conflict of interest in fact existed.

9. A trustee shall not also be an employee of the Division, nor shall a trustee receive any compensation for services rendered to the Division in any non-governance capacity. This provision shall not prohibit trustees from receiving authorized compensation for serving as a member of the Board or from receiving reimbursement for authorized expenses incurred during the performance of Board duties, as outlined in Policy 19 – Board Operations.

10. The Board shall not enter into any contract or arrangement with any of its trustees or with a firm, organization, corporation, or partnership in which a trustee has a financial interest unless a more advantageous contract or arrangement is not reasonable possible with another firm, organization, corporation or partnership and the Board or committee of the Board have determined by majority vote of the disinterested trustees whether the contract or arrangement is in the Division's best interests, for its own benefit, and whether it is fair and reasonable.

Red Deer Catholic Regional Schools

POLICY 3: TRUSTEE ROLE DESCRIPTION

The role of the trustee is to contribute to the work of the Board as it carries out its mandate to govern and achieve its vision, mission, beliefs, values and principles. The Board believes that its ability to fulfill its obligations is enhanced when leadership and guidance are forthcoming from within its membership. The oath of office taken by each trustee when she/he assumes office binds that person to work diligently and faithfully in the cause of public education.

Catholic trustees have a unique, dual challenge. They must ensure that students are provided an education which meets or exceeds the goals of Alberta Education and at the same time, ensure that Catholic values and principles are reflected at all times in its policies and practices.

As leaders in the Catholic faith community, Catholic trustees require an understanding, a willingness to grow and a commitment to bearing daily witness to the faith. To meet this challenge, Catholic trustees are entrusted with certain denominational school rights, powers and privileges enshrined in the Canadian Constitution. They exercise these rights with the religious guidance of parish and diocesan authorities.

The Board is a corporation. The decisions of the Board in a properly constituted meeting are those of the corporation. A trustee who is given corporate authority to act on behalf of the Board may carry out duties individually but only as an agent of the Board. In such cases, the actions of the trustee are those of the Board, which is then responsible for them. A trustee acting individually has only the authority and status of any other citizen of the Division.

1. Board Orientation

   As a result of elections, the Board may experience changes in membership. To ensure continuity and facilitate smooth transition from one Board to the next following an election, trustees must be adequately briefed concerning existing Board policy and practice, statutory requirements, initiatives and long-range plans.

   The Board believes an orientation program is necessary for effective trusteeship. All trustees will attend all aspects of the orientation program.

   The Division will offer an orientation program for all newly elected trustees that provides information on:

   1.1 Role of the trustee and the Board;

   1.2 Organizational structures and procedures of the Division;

   1.3 Board policy, agendas and minutes;

   1.4 Existing Division initiatives, annual reports, budgets, financial statements and long-range plans;

1.5 Division programs and services;

1.6 Board's function as an appeal body; and

1.7 Statutory and regulatory requirements, including responsibilities with regard to conflict of interest.

2. The Division will provide financial support for trustees to attend Alberta School Boards Association (ASBA) and Alberta Catholic School Trustees Association (ACSTA) sponsored orientation seminars.

3. The Division will provide financial support for trustees to attend Alberta Education sponsored trustee workshops or information sessions.

4. The Board Chair and Superintendent are responsible for developing and implementing the Division's orientation program for newly elected trustees. The Superintendent shall provide each trustee with access to the Board Policy Handbook and the Administrative Procedures Manual at the organizational meeting following a general election or at the first regular meeting of the Board following a by-election.

5. Incumbent trustees are encouraged to help newly elected trustees become informed about the history, functions, policies, procedures and issues.

6. Specific Responsibilities of Individual Trustees

6.1 The trustee will model involvement in the faith community.

6.2 The trustee will refer queries, or issues and problems, not covered by Board policy, to the Board for corporate discussion and decision.

6.3 The trustee can engage with the public through a variety of communication methods, understanding that all communications and interactions must reflect the principles of the Trustee Code of Conduct.

6.4 Trustees will be cognizant that they are representing the interests of the Board while posting or commenting on social media, and aware of public perception that their posts, comments and social media engagement, are in accordance with their duties within the school division.

6.5 If trustees choose to post pictures of students on their social media sites, permission must be given by the relevant school authority.

6.6 The trustee will participate in, and contribute to, the decisions of the Board in order to provide the best solutions possible for the education of children within the Division.

6.7 The trustee will support the decisions of the Board and refrain from making any statements that may give the impression that such a statement reflects the corporate opinion of the Board when it does not.

6.8 The trustee will participate in training opportunities in order to ensure that the appropriate skills, knowledge and understandings are acquired.

6.9 The trustee will ensure that Catholic values and principles are reflected at all times in the Board's policies and practices.

6.10 The trustee will become familiar with Division policies, meeting agendas and reports in order to participate in Board business.

6.11 The Trustee will keep the Board Chair and/or the Superintendent informed in a timely manner of all matters coming to his/her attention that might affect the Division. Refer administration matters to the Superintendent.

6.12 The trustee will provide the Superintendent with counsel and advice, giving the benefit of the trustee's judgment, experience and familiarity with the community.

6.13 Trustees are encouraged to share Divisional information, key messages, Board priorities, exemplary practices, and student achievement and learning results.

6.14 The trustee will, in alignment with the Board engagement efforts, provide for the engagement of parents, students and the community in matters related to education.

6.14.1 Respectfully bring forward and advocate for local issues and concerns prior to a Board decision;

6.14.2 Interpret the needs of the community to the Board and the Board's action to those we serve; and

6.14.3 Liaise with designated School Council(s).

6.15 Trustees are encouraged to develop individual growth plans on an annual basis.

6.16 The trustee will share the materials and ideas gained from a trustee development activity with fellow trustees at the next available opportunity.

6.17 The trustee will stay current with respect to provincial, national and international education issues and trends.

6.18 The trustee will contribute to a positive and respectful learning and working culture both within the Board and the Division.

6.19 The trustee will attend Division or school functions where possible.

6.20 The trustee will adhere to the Trustee Code of Conduct.

6.21 The trustee will report any violation of the Trustee Code of Conduct to the Board Chair or when applicable, to the Vice-Chair.

Legal Reference: Section 33, 34, 51, 52 53, 64, 67, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96 Education Act, Section 6 Commissioner of Oaths Act

Reviewed: March 2011, January 2018
Revised: November 2019, June 2022

APPENDIX 'A'

SERVICES, MATERIALS AND EQUIPMENT PROVIDED TO TRUSTEES

Trustees shall be provided with the following services, materials and equipment while in office:

1. Reference:
   - Access to *The Education Act*
   - Board Policy Handbook and Administrative Procedures Manual
   - School year and Annual Work Plan
   - Current telephone listings of schools, principals, vice-principals and school secretarial staff
   - List of School Council Chairs
   - These items shall be available online on the RDCRS Board Portal

2. Communications/Public Relations:
   - Access to Superintendent weekly updates on Division News
   - Notification of significant media events, reminders of special meetings
   - Access to school newsletters to trustee liaison
   - Name tags, business cards, lapel pins
   - Speaker's notes
   - Individual and Board photographs

3. Administrative/Secretarial Services:
   - Access to interoffice mail
   - Conference registration, travel and accommodation arrangements
   - E-mail address and Information Technology service support
   - Document management, photocopying and related secretarial services

4. Equipment
   - A computer or stipend, with appropriate software and access. The equipment shall be returned to the Board upon completion of the term in office.
   - Cell phone stipend.

5. Corporate Clothing
   - One piece of corporate clothing

6. Briefcase

7. Professional Development Allowance of $5,000 per year. This includes mileage, hotel, registration and meals.

8. Mileage compensation for all Board business (stipend)

Appendix revised June 2022