

EfficiencyOne

M08888

IN THE MATTER OF *The Public Utilities Act*, R.S.N.S. 1989,

c. 380, as amended.

- and -

IN THE MATTER OF an Application by EfficiencyOne for Approval of the Use of
Measure Level Non-Energy Benefits Within Cost Effectiveness Testing

EFFICIENCYONE BOOK OF AUTHORITIES

FILED

February 24, 2020



INDEX

CASE LAW

1. Re: Efficiency Nova Scotia, 2011 NSUARB 99
2. Re: EfficiencyOne, 2015 NSUARB 204
3. Re: EfficiencyOne, 2017 NSUARB 174
4. Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited, 2019 NSCA 22
5. Re: Rizzo & Rizzo Shoes Ltd., 1998 1 S.C.R. 27

LEGISLATION

6. Interpretation Act, R.S.N.S. 1989, c. 235
7. Public Utilities Act, R.S.N.S. 1989, c. 380
8. Utility and Review Board Act, S.N.S. 1992, c. 11

SECONDARY SOURCES

9. Hansard, Sixty First General Assembly, First Session: October 27, 2009, pp. 1807-1816
10. Nova Scotia Utility & Review Board Order M08604, Re: EfficiencyOne Application for Approval of 2019 DSM Plan
11. Public Service Commission of Maryland Order No. 87082, July 16, 2015

Tab 1

DECISION

NSUARB-E-ENSC-R-10
2011 NSUARB 99



NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE EFFICIENCY NOVA SCOTIA CORPORATION ACT

- and -

IN THE MATTER OF AN APPLICATION by EFFICIENCY NOVA SCOTIA CORPORATION for Approval of its Electricity Demand Side Management Plan for 2012

BEFORE:

Peter W. Gurnham, Q.C., Chair
Kulvinder S. Dhillon, P.Eng, Member
Roberta J. Clarke, Q.C., Member

COUNSEL:

EFFICIENCY NOVA SCOTIA CORPORATION
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CONSUMER ADVOCATE
William Mahody, LL.B.

ECOLOGY ACTION CENTRE
Brennan Vogel

NOVA SCOTIA POWER INC.
Nicole Godbout, LL.B.

AVON VALLEY *ET AL.*
Nancy G. Rubin, LL.B.

HALIFAX REGIONAL MUNICIPALITY
Stephan Jedynak, LL.B.
Julian Boyle

**NOVA SCOTIA DEPARTMENT OF ENERGY, NOVA
SCOTIA ENVIRONMENT AND CONSERVE NOVA
SCOTIA**

Mark V. Rieksts, LL.B.
Richard Penny
Nancy Rondeaux

**NEWPAGE PORT HAWKESBURY CORP. and
BOWATER MERSEY PAPER COMPANY LIMITED**

David MacDougall, LL.B.
James MacDuff, LL.B.

QUETTA INC.

John H. Reynolds, P.Eng.

HEARING DATES: April 18 and 19, 2011

FINAL SUBMISSIONS: May 20, 2011

BOARD COUNSEL: S. Bruce Outhouse, Q.C.

**BOARD COUNSEL'S
CONSULTANTS:** Mel Whalen, Multeese Consulting Inc.
Tim Woolf, Synapse Energy Economics Inc.

DECISION DATE: June 30, 2011

DECISION: Application is approved. Directions given for future filing.
See Summary at pages 48-50

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1.0 INTRODUCTION

[1] What initiatives should be taken to encourage electricity consumers in Nova Scotia to conserve and efficiently use electrical energy? How should such initiatives be paid for? Who should pay for them? How should the savings be measured? These issues are all elements of a demand side management (“DSM”) plan.

[2] As stated in the decision of the Nova Scotia Utility and Review Board (the “Board”) in the 2011 DSM Plan:

[3] For the purposes of this decision, DSM can be defined as a plan to conserve and efficiently use electrical energy, thereby reducing electricity consumption, peak demand, air emissions and greenhouse gases. DSM includes initiatives to promote the purchase of energy efficient products, encourages customers to manage their electricity load and compare and consider fuel switching to reduce electricity energy consumption and costs.

[4] As noted in the Board’s decision on NSPI’s [Nova Scotia Power Inc.] previous DSM application, in the absence of a DSM Plan, NSPI will need to build expensive infrastructure to meet the rising customer demand for energy, including generating stations, transmission lines, distribution lines, and substations. As a public utility, the costs incurred by NSPI for such expenditures are passed on to customers, subject to Board review and approval. DSM measures are intended to diminish (or delay) the need for these expenditures, thereby offsetting costs which would otherwise be incurred, and providing a benefit to customers while meeting established environmental objectives.

[5] There is no question that DSM is an important and necessary responsibility. “Going green” is a path that the federal and provincial governments have committed to take with overall objectives of environmental protection, reduction in future energy demand and usage of alternative sources of energy. However, going green is not inexpensive. Well-intentioned efforts to promote DSM must be subject to critical analysis and planning to ensure that expenditures are justifiable and projected benefits will be realized as, ultimately, the public will pay the bill.

[6] The overall issue of DSM is now under the authority of Efficiency Nova Scotia Corporation (“ENS”). The Board’s intention in this decision is to provide guidance and helpful direction to ENS with respect to its role as it takes over the administration of DSM of electricity in the Province.

[7] In the Board’s view, it is important to identify that the concept of DSM goes well beyond the Board’s jurisdiction in approving projects and promotions by NSPI. DSM relates to a far broader plan for the public to better use all forms of energy. For the purposes of this decision, the Board’s findings are limited to NSPI’s role in DSM and consequently, whether the DSM Plan it proposes is in the public interest, is cost effective, meets the established objectives, and warrants approval.

[2010 NSUARB 155, pp. 5-6]

[3] The shift in responsibility for DSM from Nova Scotia Power Inc. ("NSPI") to Efficiency Nova Scotia Corporation ("ENSC") is discussed below.

[4] On April 18 and 19, 2011, the Board held a public hearing to consider the 2010 DSM Evaluation Report and 2010 Savings Verification Study ("SVS") provided to ENSC and the Board, and to consider ENSC's application for approval of its 2012 DSM Plan (the "Application") (Exhibit E-1)

[5] The Board's Final Issues List included the following:

1. Evaluation and verification reports of 2010 DSM programs
2. Proposed 2012 DSM Plan described in Appendix A and B, including
 - effective spending relative to purposes and priorities, e.g. Enabling Strategies
 - access and participation by renters and low income households
 - improved information exchange with municipal utilities
 - improved public understanding of potential benefits from plan participation
 - reporting of program costs by customer class
3. TRC test
 - effectiveness of DSM measures with Total Resource Cost ("TRC") ratios near 1.0
 - applying TRC screening to programs instead of measures
 - calculation and application of avoided costs
4. Free ridership and spillover approach within Nova Scotia
5. Implementation of 3 pilot programs
 - fuel substitution (including financing)
 - green schools
 - advanced houses
6. Reporting of energy and demand savings
 - incremental vs. cumulative
 - prior year over/under achievement
 - ELI projects
 - construction codes
 - new federal standards
7. Proposed integrated multi-fuel approach to program administration
8. Proposed consideration of a multi-year performance-based model
9. Future role of Program Development Working Group

[6] The following parties were Intervenor: the Consumer Advocate ("CA"); Avon Valley, *et al.* ("Avon"), Ecology Action Centre ("EAC"); Halifax Regional Municipality ("HRM"); NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Company Limited ("NPB"); Nova Scotia Department of Energy ("NSDOE"); Nova Scotia Environment ("NSE"); Conserve Nova Scotia ("CNS"); Nova Scotia Power Inc. ("NSPI"); and Quetta Inc. ("Quetta").

[7] William Mahody appeared on behalf of the CA; Nancy Rubin represented Avon; Brennan Vogel represented EAC; HRM was represented by Stephan Jedynak; Nicole Godbout appeared for NSPI and Mark Rieksts appeared for NSDOE, NSE and CNS (collectively, the "Province"). John Reynolds appeared for Quetta.

[8] Direct evidence was given by the ENSC Panel consisting of: Allan Crandlemire, Interim Chief Executive Officer; Charles Faulkner, Director of Energy Efficiency Programs; and Philippe Dunskey, of Dunskey Energy Consulting ("Dunskey"), a consultant to ENSC. George Foote testified (by teleconference), on behalf of the CA and Glenn Reed, of Energy Futures Group, Inc., testified on behalf of EAC. Tim Woolf, of Synapse Energy Economics, Inc. (by teleconference), Dr. H. Gilbert Peach, of H. Gil Peach & Associates, and Mel Whalen, P.Eng., of Multeese Consulting Inc., gave evidence on behalf of Board Counsel.

[9] Closing Submissions were received after the hearing from EAC, NPB, ENSC, Avon, the Province, the CA and Quetta. Reply submissions were filed by EAC, NPB and ENSC.

2.0 BACKGROUND

[10] Prior to January 26, 2010, the electricity DSM conservation and energy plan for Nova Scotia was administered by NSPI. ENSC was established under the *Efficiency Nova Scotia Corporation Act*, S.N.S. 2009, c. 3, as amended (the "*ENSC Act*").

[11] The relevant provisions of the *ENSC Act* are:

2 The purpose of this Act is to

- (a) establish an administrator to manage electricity demand-side management programs in the Province;
- (b) establish a fund to be used to defray the costs of electricity demand-side management programs;
- (c) provide for regulatory oversight of the administrator, the Fund and electricity demand-side management programs; and
- (d) provide the administrator with the authority to engage in energy efficiency and conservation programs other than electricity demand-side management programs.

3 In this Act,

...

(c) "electricity demand-side management program" means an electricity demand-side management program designed to

(i) promote efficiency of electricity use,

(ii) promote electricity conservation, and

(iii) manage electricity demand where it is not otherwise managed by a public utility;

...

(h) "public utility" means any person that may now or hereafter transmit, deliver or furnish electric power or energy for compensation to or for the public, and includes Nova Scotia Power;

(i) "Review Board" means the Nova Scotia Utility and Review Board established under the Utility and Review Board Act.

...

8 The objects of the Corporation are to

(a) design and administer electricity demand-side management programs with a view to restraining future electricity demand and use in the Province; and

(b) engage in energy efficiency and conservation programs other than electricity demand-side management programs.

...

16 (1) The Corporation shall operate on a not-for-profit basis.

...

20 The Corporation

(a) shall administer electricity demand-side management programs with a view to restraining electricity demand and use; and

(b) may engage in energy efficiency and conservation programs other than electricity demand-side management.

...

31 (1) Subject to the approval of the Review Board, the Corporation shall determine a public utility's annual assessment for electricity demand-side management.

(2) A public utility's annual assessment for electricity demand-side management programs must be paid to the Corporation in such amounts and at such times as the Review Board determines.

(3) The Corporation shall provide notice of an assessment to a public utility in any manner it considers necessary or expedient.

(4) Any notice provided pursuant to subsection (3) must indicate the amount owing by the public utility and the time the assessment is payable.

...

35 The Corporation shall submit to the Review Board for approval an electricity demand-side management program for one or more calendar years, at the time and in the manner required by the Review Board, commencing with the program for the 2012 calendar year or such later year as the Review Board determines.

36 In approving the electricity demand-side management program, the Review Board must be satisfied that the allocation of costs of the Corporation between electricity demand-side management programs and energy efficiency and conservation programs, other than electricity demand side management programs, is just and reasonable.

37 The Review Board has the general supervision of the Corporation in relation to electricity demand-side management and may make all necessary examinations and inquiries and keep itself informed as to the compliance by the Corporation with the provisions of law and has the right to obtain from the Corporation all information necessary to enable the Board to fulfil its duties.

38 The Public Utilities Act applies mutatis mutandis to the supervision of the Corporation under Section 37, except that

(a) the Corporation is not entitled to recover any rate of return through its assessments; and

(b) notwithstanding Section 117 of the Public Utilities Act, where there is a conflict between this Act and the Public Utilities Act, this Act prevails.

39 Each public utility is entitled to recover through its rate base the electricity demand-side management charges assessed against it under this Act on the basis approved by the Review Board under the Public Utilities Act.

[12] In order to transfer responsibility for administration of DSM from NSPI to ENSC, a transition plan was developed, pursuant to ss. 40-41 of the *ENSC Act*. The transition plan was approved by the Board, subject to conditions, by letter dated September 22, 2010, which provided:

The Board has carefully reviewed the DSM Transition Plan and grants approval to proceed with implementation, subject to the following directives:

- a) The DSM Transition Committee is to continue providing oversight in the transition process through to submission of the 2012 DSM Plan;
- b) As directed in the Board's letter dated June 1, 2010 ENSC is to file its quarterly financial reports, the first of which is to be submitted by October 22, 2010;
- c) ENSC and its new consultant are to meet with Board consultants and NSPI within two weeks of the consultant being engaged, with the purpose of ensuring that previously deferred DSM initiatives are appropriately addressed before new initiatives are pursued;
- d) Executed copies of Transition Agreements are to be filed with the Board by October 15, 2010;
- e) The ENSC workplan for development of the 2012 DSM Plan is to be filed with the Board by November 1, 2010. This workplan should outline the schedule of activities, milestones, and the specific role to be undertaken by NSPI and any consultants in this process.

[13] ENSC has complied with the Board's directives.

[14] The Board is required to receive and comment on the 2010 DSM Evaluation Report dated February 28, 2011, prepared by NMR Group Inc. ("NMR") (Exhibit E-2), and the 2010 SVS, dated March 2011, prepared by H. Gil Peach &

Associates (Exhibit E-3). The Board's findings on the Report and SVS are outlined below.

[15] ENSC also seeks approval of the 2012 DSM Plan, including the strategies and investments set out in Appendix A to the Application. The Board's findings on the Plan are set out later in this Decision.

[16] The Board notes that all intervenors and expert witnesses spoke generally in encouraging and supportive terms about the DSM work to date and the 2012 Plan. The Board also observes that the transition from NSPI's administration has been without significant challenges.

3.0 EVALUATION AND VERIFICATION OF 2010 DSM PLAN

3.1 Evaluation Report and Savings Verification Study

[17] ENSC reported in its Application (Exhibit E-1, pp. 8-9) that in 2010 the DSM energy savings results had exceeded the target (84.79 GWh v. 81.13 GWh). The demand savings results were slightly lower than the target (16.38 MW v. 16.63 MW).

[18] The Board had approved the energy savings target for 2010 and an expenditure of up to \$22.56 million in its Decision reported as 2009 NSUARB 116. ENSC noted the 2010 results were reached, and its start up activities covered by an expenditure of \$22.71 million, although it stressed that final expenditure figures for 2010 were not yet audited.

[19] NMR prepared a Final Report entitled "Evaluation of 2010 DSM Programs", which was filed as Exhibit E-2. NMR is independent of, and conducted its

evaluation for, NSPI (DSM administrator to October 1, 2010) and for ENSC thereafter.

The Report indicated that:

...the portfolio of programs evaluated in 2010 was generally run well and efficiently. The 2010 targets were met despite ramped up savings goals and operational challenges at a time when program staff were carrying out their work while also transitioning to Efficiency Nova Scotia Corporation.

...

The savings achieved by the DSM Administrator's portfolio of conservation programs exceeded 2010 program energy savings targets by 5% or a total of 3.84 GWh; they also virtually met demand savings targets, achieving 98% of the target. The achievement of the portfolio energy savings target came through exceeding some individual program goals, coming close to some, and falling short on others.

The Efficient Products -Residential program exceeded its 2010 program target by 153%, or 7.6 GWh; within the Efficient Products Retail program, the Compact Fluorescent Lamp (CFL) markdown component accounted for 72% of the program's energy savings. The Efficient Products Direct Install program exceeded its 2010 program target by 26%, or 5.3 GWh. The EnerGuide for Existing Houses program exceeded its 2010 program target by 65%, or 3.2 GWh...

...

The other programs having specific energy savings targets were not able to achieve those targets. These programs include the Low Income Households program, which fell short of its program target by 83%, or 4.4 GWh; the Business Energy Rebates/Smart Lighting Choices programs, which fell short of their program target by 33%, or 3.3 GWh; the Small Business Lighting Solutions program, which fell short of its program target by 20%, or 2.8 GWh; and the New Houses program, which fell short of its program target by 66%, or 1.3 GWh. The C&I Custom program nearly achieved its program target, falling short by only 3%, or 0.6 GWh...

[Exhibit E-2, pp. 1-3]

[20] The Evaluation Report noted that both the Efficient Products-Retail and Efficient Products-Direct Install programs were likely reaching their limits for securing energy savings. It also noted that it was uncertain whether the EnerGuide for Existing Houses Program would continue to be eligible for federal rebates.

[21] NMR also commented on the challenges of the Low Income Households program where recruitment continues to be difficult.

[22] NMR anticipates that the Business Energy Rebate program, which was new in 2010, will have greater impact in the future.

[23] Two challenges were noted by NMR in its evaluation process, both relating to data issues: quality of data, with inconsistent, inaccurate or missing data; and access to and delivery of data, noting an "inability to generate participation reports in a reasonable time frame."

[24] The Board retained H. Gil Peach & Associates to undertake an SVS of the NMR Report. The study, dated March, 2011, was filed as Exhibit E-3. The study was to "review, verify and if appropriate, recommend adjustments to the savings data and estimates" from NMR.

[25] The SVS contains two basic findings:

Finding 1: All of the 2010 DSM programs were competently administered by the DSM Administrator. This finding is based on the NMR evaluations, our review of program documentation and tracking databases, interviews with the DSM Administrator's management, specialists, program managers, and staff as well as discussions with delivery agents and "due diligence" site visits. Some programs encountered problems and there are some areas in which we suggest improvements for the next cycle with a primary concern for internal program control and the reduction and/or explanation of free-ridership levels.

Finding 2: In general, NMR Program Year 2010 evaluations were conducted within industry accepted evaluation frameworks and within the appropriate professional scope of a firm of seasoned Demand Side Management evaluators, given the time constraints of the regulatory schedule. There is only one decision to meld samples in a single evaluation where this savings verification study differs from the evaluator's technical decision. There are some areas in which we suggest improvements for the next evaluation cycle with a primary concern for more electrical measurement to serve as a replacement for and/or as a correction factor in modeling. We also support NMR's recommendation for a Nova Scotia socket study.

[Exhibit E-3, p. 5]

[26] The SVS recommended acceptance of:

... the NMR evaluation results for ... 2010, except for a ten percent (10%) cut for Efficient Products-Direct Install...

[Exhibit E-3, p. 6]

[27] Additional recommendations were made in the SVS for improvements in evaluation methods. These recommendations are set out at pp. 7-12 of the SVS. Evaluations of individual programs were discussed at pp. 21-46.

[28] Dr. Peach, chief author of the SVS, testified at the Hearing. He stressed that the SVS recommendation regarding free ridership arose from a concern about methodology rather than the NMR results, as he considers that methods "...are always open to further development and incremental improvement." (Transcript, p. 309)

[29] In response to Counsel for ENSC, Dr. Peach stated:

MR. FOREMAN: And in your opening statement and your comments you've clearly indicated in your previous verification reports dealing with DSM, and I guess I'll paraphrase your comments, that the programs have been well and efficiently run with sound investment and good value delivered to ratepayers.

DR. PEACH: Yes. I'm completely heartened by the work that's been done to date, including the work by the Nova Scotia Power and the work as it's been handed off by to the new administrator.

I'm impressed by the spirit of the people, the intentionality, the focus. I think it has all the earmarks of a pretty wonderful organizational action.

I see that there's, generally, support from the parties for a certain level of DSM effort and it looks very -- like a very successful program to me in all so far.

Now, I'm not saying about next year or the year after that, I haven't see [sic] that.

[Transcript, pp. 312-313]

[30] In response to Counsel for ENSC, Dr. Peach also commented on the data tracking problems identified by NMR, noting he had no concerns and that data tracking is "coming along nicely". He expected it would be used productively by ENSC (Transcript, p. 315-316)

[31] Dr. Peach's expectations were supported in the responses of ENSC to Board Counsel which confirmed that the work was in progress to address the data system problems.

[32] One of the SVS suggestions for evaluation which received specific attention in the Hearing is that there should be an "...organizational study [of ENSC] with some elements of a management audit." (Exhibit E-3, p. 47)

[33] The CA pursued this with both Mr. Crandlemire and Dr. Peach. Mr. Crandlemire foresaw no difficulty for ENSC in taking part in such an evaluation (Transcript, p. 43). Dr. Peach agreed that such a study should be mandated by the regulator to ensure independence, but suggested that a management audit process might take place after the operations of ENSC were in place for more than a year (Transcript, pp. 328-329).

[34] The direct evidence of Mr. Foote commented on ENSC's commitment to improving data quality and noted:

... It is essential that each successive evaluation of programs include recommendations for improvements in data quality and evaluation techniques. A requirement for such recommendations should be included in any Terms of Reference for program evaluation.

[Exhibit E-10, p. 12]

[35] Mr. Whalen stated in his direct evidence that the evaluation and verification reports "appear to be working as they should" (Exhibit E-12, p. 12). He noted that the SVS agreed with NMR's calculations except for the Efficient Products-Direct Install program, referred to above.

[36] In its Closing Submission, ENSC urged the Board to accept the 2010 DSM results, the NMR Report and the SVS, noting in particular that the results had not been challenged.

[37] ENSC commented in its Reply Submission on the issue of an organizational or management audit as suggested in the SVS. This audit suggestion

was endorsed by Quetta and the Province in their Closing Submissions as well. ENSC stated that it is continuing to review all of the recommendations from both the NMR Report and the SVS, and suggested it would be premature to direct such a process at this time.

3.1.1 Findings

[38] As pointed out by the CA in examination of both the ENSC panel and Dr. Peach, the evaluation and verification of the DSM program and results are of critical importance to ratepayers. It is the means by which ratepayers may be satisfied that their investment in DSM is prudent and effective.

[39] The Board observes that there were no significant challenges to the results of the NMR Report and the SVS. The Board is satisfied that the 2010 DSM Plan evaluation and verification should be accepted with the qualification made in the SVS for a 10% reduction for the Efficient Products-Direct Install program.

[40] The Board notes that, in Closing Submissions, only the Province specifically endorsed the recommendations in the SVS. In an exchange with the Board Chair, Mr. Faulkner suggested that a formal response to the recommendations would be filed with the Board shortly after completion of the hearing process (Transcript, pp. 208-209).

[41] The Board is satisfied that ENSC is reviewing the recommendations and orders ENSC to file its response to them no later than July 31, 2011, for consideration by the Board.

[42] The Board accepts the submission of ENSC that it would be premature to order an organizational or management audit at this time. The Board will consider this suggestion when the 2013 DSM Plan application for approval is heard.

4.0 PROPOSED 2012 DSM PLAN

4.1 Proposed Plan

[43] In its direct evidence, ENSC described the programs proposed for the 2012 DSM Plan:

Programs for the proposed 2012 DSM Plan are separated into three categories:

- Residential Programs, which include four components: Efficient Products, Existing Houses, New Houses and Home Energy Report
- Commercial and Industrial (C&I) Programs, which encompass three components: Prescriptive Rebate, Custom and Small Business Direct Install
- Enabling Strategies, which cover eight areas: Education and Outreach, Development and Research, Fuel Substitution, Innovative Financing, Building Energy Labelling, Codes and Standards, Training and Quality Assurance, Renewable Heating Industry and Working with Local Governments

[Exhibit E-1, Appendix A, p. 5]

[44] ENSC advised that it prepared the DSM Plan with the assistance of Navigant Consulting Inc. ("Navigant") and Dunsky. ENSC also sought and received input from stakeholders and other interested participants. ENSC testified that the proposed 2012 DSM Plan meets the energy saving targets within the level of investment identified in the 2007 Integrated Resource Plan ("IRP") and the 2009 IRP Update.

[45] ENSC identified what was new in the 2012 DSM Plan:

- program components for renters and multi-unit residential buildings

- a Home Energy Report program to encourage residential customers to make energy-saving behavioural changes, such as: lowering thermostat settings, using cold water for clothes washing and switching off lights in unoccupied rooms
- program components and strategies to increase access to DSM programs by low-income households, discussed in Section 8
- innovative financing options for residential programs
- enhanced outreach to commercial, industrial and institutional customers through key accounts management and subsector specialization
- additional fuel choice and fuel substitution components to be built into the residential and commercial DSM programs

[Exhibit E-1, p. 5]

[46] ENSC compared the cumulative saving targets from the 2009 IRP Update with the actual and expected savings results for 2008 to 2012.

Figure 4.2 Cumulative Savings Targets and Results 2008-2012

Year	IRP Target (GWh)	Result (GWh)	IRP Target (MW)	Result (MW)
2008	16	21 ^a	2	5 ^a
2009	66	86 ^a	9	15 ^a
2010	149	171 ^b	26	31 ^b
2011	295	329 ^c	57	62 ^c
2012	500	543 ^d	101	100 ^d

^a verified results

^b estimate based on evaluated but not verified results

^c estimate based on approved Plan

^d estimate based on proposed Plan and includes savings outside DSM programs

[Exhibit E-1, p. 12]

[47] For 2012, ENSC forecasts annual energy and demand savings of 233.6 GWh and 44 MW respectively. On a cumulative basis, forecast energy savings are 543 GWh compared to an IRP target of 500 GWh and the cumulative forecast demand savings are 100 MW compared to the IRP target of 101 MW. The proposed investment for 2012 is \$43.7 Million.

[48] ENSC, in its Final Submission, stated that the DSM Plan struck the right balance between energy savings and expenditures. NPB, Avon and the CA all supported the 2012 DSM Program and the level of expenditures as filed.

[49] EAC suggested opportunities exist for improvement to the 2012 DSM Plan in terms of lighting and improvements to residential programs. Mr. Reed, testifying for EAC, raised some concerns as well about fuel substitution:

Fuel substitution measures, however, are very capital intensive, requiring a large upfront investment to replace an electric appliance or heating or hot water system that is typically functioning and not in need of immediate replacement. The space heat fuel conversion measures are estimated to cost between \$3,417 for a wood stove to \$18,312 for a high efficiency gas boiler (Response to NPB IR-3). Even with the promise of large annual savings accruing to the customer, particularly for space heating and hot water conversions, it is often difficult to convince customers to make this financial investment without some type of assistance. Such assistance is typically in the form of an upfront rebate as has been proposed for the fuel substitution pilot, consumer friendly (typically reduced cost) financing, or some combination of the two.

...

Also note that ENSC is using an 80 percent net to gross ratio (Response to EAC IR -43) for the Existing Houses Program. This value does not match those proposed by Dunskey Consulting in their Residential Fuel Substitution Pilot Program description (Appendix D of ENSC's 2012 DSM Plan). Potentially, depending on the final 2012 installed measure mix, ENSC's planned savings from this set of measures may be overstated.

[Exhibit E-11, pp. 3 & 4]

[50] With respect to residential lighting, ENSC appears to agree with Mr. Reed:

MR. FAULKNER: We feel Mr. Reid makes a good observation. The LED lighting product market is evolving very rapidly. For instance, the list of – I think he quoted more than 100 lamps and over 1,100 fixtures. If we went back to last August there were none on that list so it is evolving quickly and we would certainly assess those opportunities before we put our 2012 program together. So I think it's a good recommendation and we would consider it as we move to 2012.

[Transcript, pp. 211-212]

4.2 Level of Spending

[51] In section 6.2 of its evidence, ENSC identified the guiding principles observed in preparing the 2012 DSM Plan. The first two state:

Meet IRP Targets: ENSC's primary goal is to meet IRP targets as a whole, both in the short term (measured by incremental annual energy and demand savings) and long term (measured by cumulative savings).

Low-cost Programs: Program costs will be minimized, where doing so does not hinder meeting overall IRP targets in both the short and long term.

[Exhibit E-1, pp. 20-21]

[52] Figure 4.1 of the evidence shows DSM targets for the years 2008 to 2015 as presented in the 2009 IRP Update Report, while Figure 4.2 compares the cumulative savings targets with results for the years 2008 to 2012. Both figures are reproduced below:

Figure 4.1 DSM Targets 2008-2015 (from 2009 IRP Update)¹²

Year	Incremental Demand Savings (MW)	Cumulative Demand Savings (MW)	Incremental Energy Savings (GWh)	Cumulative Energy Savings (GWh)	Incremental Program Cost (\$ millions)	Cumulative Program Cost (\$ millions)
2008 ^a	2	2	16	16	3	3
2009 ^a	7	9	50	66	10	13
2010 ^b	17	26	83	149	23	36
2011 ^b	31	57	146	295	41	77
2012^b	44	101	205	500	61	137
2013 ^b	63	164	305	805	82	219
2014 ^b	57	222	276	1081	74	293
2015 ^b	57	279	276	1357	74	367

Numbers are rounded.

^a (expressed in 2008 dollars)

^b (expressed in 2010 dollars)

12. *Supra* note 6, 2009 IRP Update Report, Appendix D, Attachment 4, page 1.

Figure 4.2 Cumulative Savings Targets and Results 2008-2012

Year	IRP Target (GWh)	Result (GWh)	IRP Target (MW)	Result (MW)
2008	16	21 ^a	2	5 ^a
2009	66	86 ^a	9	15 ^a
2010	149	171 ^b	26	31 ^b
2011	295	329 ^c	57	62 ^c
2012	500	543 ^d	101	100 ^d

^a verified results

^b estimate based on evaluated but not verified results

^c estimate based on approved Plan

^d estimate based on proposed Plan and includes savings outside DSM programs

[53] As can be seen in Figure 4.1, the projected incremental program cost for 2012, in the IRP Update is \$61 million, with targeted cumulative savings of 500 GWh and 101 MW, and incremental savings targets of 205 GWh and 44 MW.

[54] By comparison, in its Application, ENSC proposes 2012 program costs of \$43.7 million, with Figure 4.2 showing cumulative savings of 543 GWh and 100 MW, which translates into incremental savings of 233.6 GWh and 44 MW. These results include over-achievements from 2008 and 2009, as well as preliminary savings from one of the Extra-Large Industrial (“ELI”) customers during 2009 and 2010, and preliminary savings from the adoption of energy-efficiency codes and standards.

[55] Excluding the savings from the 2008/09 over-achievement, the ELI customers, and codes and standards, the cumulative savings would only be 433.5 GWh and 79.2 MW, while the incremental savings would be 124.1 GWh and 23.2 MW. This is notably less than the IRP targets shown in Figure 4.1 for 2012.

[56] In the direct evidence of Board Counsel Consultant, Multeese, Mr. Whalen expressed his concern that the proposed spending for 2012 will deliver lower energy

and demand savings than those approved by the Board for 2011, which he considered to be a regressive step. Mr. Whalen also noted that the 2012 programs will yield fewer kWh savings per dollar invested, when compared to 2011 and previous years. In order to meet all IRP targets, Mr. Whalen stated that:

...the 2012 plan should have savings of 173.2 GWh and 39.3 MW, with expenditures of \$60.6 million.

[Ex. E-12, p. 6]

[57] Further, Mr. Whalen recommends:

...that ENSC adjust its plan to provide energy savings from its programs that are at least equal to the 2011 plan. Such an approach sustains the momentum of the 2011 plan and makes the achievement of the 2013 savings targets more achievable.

[Exhibit E-12, p. 9]

[58] As presented in the ENSC response to Multeese IR-4(f), this recommendation would increase the ENSC proposed 2012 spending from \$43.7 million to \$53.4 million. Excluding the savings from the 2008/09 over-achievement, ELI customers, and codes and standards, the resulting incremental savings would be 158.6 GWh and 29.4 MW, while the resulting cumulative savings would be 487.6 GWh and 86.4 MW.

[59] Mr. Whalen was questioned about his recommendation to increase the 2012 energy savings target to match the 2011 target of 158.6 GWh and the possibility that it may result in significant over-achievement. In response, he stated:

...the discussion's been primarily around 2011 to 2013, and whether or not that's achievable. I think if 2012 were to stay at 2011, as I've said in my evidence, getting to 2013 is also, you know, within range with an effort that would be comparable to 2012 at 158.5 from programs.

So when I look at 2012 and 2013, going beyond that in the IRP, it just seemed to me to be a mistake to -- I don't know if back-off is the right word -- but even to -- I guess I'll use Mr. Crandlemire's expression, to let your foot off the floor a little bit. And I'm not sure that, you know, that's exactly what the corporation's doing, but that's what it seemed to me; that you had the opportunity to be able to get the same level as 2012 and any of

the plans seem to have the same economics; TRC of about two, PAC of about three. The corporation has not said that 158.5 is not achievable, so I don't see a good reason for not going to the 158.5.

MR. FOREMAN: In fairness the evidence that Mr. Crandlemire gave yesterday also clearly indicated, with respect to that foot on the pedal analogy, that they do have -- or from his perspective, from Efficiency's perspective, they have the pedal, like, pushed fully down.

MR. WHALEN: I certainly would agree with Efficiency Nova Scotia that 2011 is a big challenge. I did not hear the corporation say that they had doubts about meeting that. They've talked about flexibility, being able to adjust, you know, as things need to be adjusted to be able to meet that.

There's the whole question of, you know, if you can do that in 2011 why would you not keep that momentum if you can; the momentum with your contractors, with your suppliers, with all the partners who are working with you on DSM. It just seemed to me that if you can do that for 2011, which is the approved plan for 2011, maintaining that into 2012 would -- made sense, particularly in the discussion of the IRP and trying to meet the longer term of the IRP.

[Transcript, pp. 349-350]

[60] In his direct evidence, Board Counsel Consultant Tim Woolf supported Mr. Whalen's recommendation to increase the 2012 DSM savings level to match or exceed the 2011 level:

With regard to the 2012 DSM Plan savings, I concur with my colleague Mel Whalen that ENSC should at least maintain, if not exceed, the savings goals from the 2011 DSM Plan.

[Exhibit E-13, p. 10]

[61] He confirmed his opinion during the hearing:

...as Mr. Whalen points out, these actual budgets are less than what they were in 2011, suggesting that maybe even scaling back and that an alternative approach would be to maintain or increase the budget and that would be consistent with the more long-term ramp ups in making it a bit easier to get to 2013 goals.

[Transcript, p. 224]

...

BOARD: But you're also supporting Mel Whalen, they should be -- change the proposal to increase those target to -- in 2012 to meet the 2011 target which means there'll be more than the cumulative target to 2012?

MR. WOOLF: Yes. The point being, that it appears as though by maintaining or slightly increasing the budgets in 2011 they'll be able to achieve just that much more cost effective energy efficiency and be that much closer to achieving their goals in 2013 and 2014.

BOARD: So you're in support as long as it's cost effective to go beyond the cumulative targets?

MR. WOOLF: Yes, my statement is under the presumption that the efficiency programs they're operating are cost -- as they appear to be very cost effective. And so to maintain the budgets in 2011 or increase them by 10 percent you would also be -- they would also be implementing very cost effective programs.

[Transcript, pp. 230-231]

[62] On behalf of EAC, Mr. Reed also supported Mr. Whalen's recommendation:

...My principal comment in terms of the DSM plan that's been proposed for 2012 is that I concur with the Board consultants that the spending levels should be increased to attain the program savings levels that were in place for 2011, and that should be at a minimum for 2012.

[Transcript, p. 261]

[63] Dr. Peach also supported Mr. Whalen's recommendation:

...The one area that I do have some concern...as Mel Whalen has put in his testimony, that the efforts might be dropped back. On -- my experience with working with DSM over a number of years is that if there's any drop back with contractors, this causes a problem...
...

...I support Mel Whalen's point that a cutback in level of effort is not a good idea...

[Transcript, pp. 316-318]

[64] Mr. Whalen was also asked about the increased spending level that would be needed to match the 2011 energy savings target and whether he had considered the impact this might have on the ELI customers. He responded that he had done a "back of the envelope" calculation which indicated there would be a small benefit to the ELI customers if the spending level was increased to \$53.4 million. Subsequently, in responding to Undertaking U-3, Mr. Whalen provided slightly more refined calculations for most customer classes. The only customer class showing a small net benefit was the ELI class, while the Residential and General Demand classes showed an increased net cost due to the higher spending level.

[65] In its Closing Submission of May 13, 2011, ENSC stated:

With respect to the proposed budget for the 2012 DSM Plan of \$43.7M – a modest increase over the 2011 DSM Plan budget of \$41.9M – ENSC submits that there is insufficient evidence and rationale at this critical time in the aggressive ramp-up of DSM programming to order a further increase in DSM program expenditures, particularly when the 2012 DSM Plan as filed will already deliver incremental and cumulative energy savings that significantly exceed the already aggressive energy savings targets found in the 2009 IRP Update.

...

As ENSC understands the evidence that has been introduced, there are three primary concerns raised to support the proposed alternate 2012 DSM Plan investment levels that would result in an increased 2012 DSM Plan budget to \$53.4M or \$58M:

(a) There is sufficient uncertainty in achieving the aggressive energy savings targets projected for 2013 and beyond and a corresponding desire to “front load” savings beyond the existing IRP energy saving targets to provide greater flexibility in future years;

(b) IRP energy savings targets should be viewed as a “floor” and not a “ceiling”, and therefore the primary focus of DSM programming should be to implement “all cost effective” energy efficiency measures that can reasonably be achieved each year;

(c) Allowing a smaller level of program-based energy savings from 2011 may be regressive and “scaling back” DSM programming could interfere with established contractors and employment and threaten the ability to further ramp-up aggressive energy savings from actual DSM programs in future years.

[ENSC Closing Submission, pp. 3-5]

[66] ENSC acknowledged some of the concerns raised, and submitted that the proper question for the Board is:

...what evidence is on the record to suggest that acknowledged “uncertainties” are of such magnitude to justify ordering such significant increases in spending, when the only result is to further increase the already significant over-achievement in cumulative IRP targets – particularly so, when most stakeholders are opposed to such increased spending at this time and have legitimate concerns with respect to short-term rate impacts.

[ENSC Closing Submission, p. 6]

[67] In their Closing Submissions, several Intervenors supported the 2012 program and spending levels proposed by ENSC. In supporting that budget and savings targets, the CA raised the following concerns:

...

2. The proposed budget for 2012 represents a 100% increase on the 2010 DSM spending. In fact, proposed program spending in 2012 will come close to equaling the cumulative 2008-2010 spending.

3. Efficiency Nova Scotia is a new entity. Management positions were created and filled during mid-year 2010 and operational responsibilities for DSM administration were completely transferred to Efficiency Nova Scotia by December, 2010. 2011 will mark the first full year of Efficiency Nova Scotia operation of DSM programming.

...

Obviously, any upward pressure on rates is a concern. To the degree, however, that DSM spending has the impact of actually lowering customer bills, rate impacts caused by DSM spending need to be carefully analyzed.

In the submission of the Consumer Advocate, it is not a matter of saying that Efficiency Nova Scotia is right and Mr. Whalen is wrong. Rather, it is a matter of identifying which alternative most adequately fosters ratepayer confidence in DSM spending. At the current time, with the transitional nature of Efficiency Nova Scotia's operations the most prudent course is the more cautious approach represented by the plan as filed.

The Consumer Advocate acknowledges that special attention will need to be paid in 2013 and subsequent years to ensure that IRP targets are met. The 2012 DSM Plan as filed strikes a reasonable balance between the achievement of IRP targets and cautious spending of ratepayer dollars.

[CA Closing Submission, pp. 2-3]

[68] Avon supported the overall budget and recognition of non-customer-funded program savings:

The Avon Group is supportive of the overall program budget as filed with its recognition of non customer-funded program savings from Codes and Standards and the extra large industrial class.

The overall program budget for 2012 is \$43.7 million, up marginally from the 2011 budget of \$41.9 million. The incremental savings targets are 233.6 GWh and 44 MW among the highest in North America as a percentage of utility revenue and demand.

While some Intervenors and consultants may argue for higher spending levels, the 2012 DSM Plan as filed, exceeds the savings targets which were included in the 2009 IRP update.

...

While the thrust of the questions by the Ecology Action Centre were with a view to establishing that savings outside customer-funded efficiency programs should not reduce the DSM budget figure drawn from the IRP, none of the experts adopted that position. Indeed, the EAC consultant, Glenn Reed concurred that it was appropriate to include savings and that the savings estimate was "conservative".

...

The Avon Group supports the current budget and recommends the Board confirm that the inclusion of non-program savings is appropriate.

[Avon Closing Submission, pp. 1-3]

[69] NPB's position is that the proposed 2012 DSM budget should not be increased because the Plan exceeds the IRP energy savings target and all ratepayer classes support the proposed investment. NPB stated:

ENSC's proposed DSM budget of \$43.7 million and the associated incremental savings targets of 233.6 GWh and 44 MW for 2012 are already among the highest in North America in terms of percent of utility revenues and percent of demand... NPB respectfully submits that the Board should reject any recommendations that would require ENSC to further increase the proposed DSM spending levels as part of its 2012 DSM Plan...NPB submits that ENSC has succeeded in striking an appropriate balance in setting the 2012 DSM budget in its pursuit of aggressive DSM savings targets.

...

ENSC has put forward a 2012 DSM Plan that meets, and in fact exceeds, the ambitious energy savings targets contained in the Integrated Resource Plan ("IRP"), at a budget level that is among the highest in North America on a percentage of utility revenues basis.

...

ENSC's plan meets its savings targets in part by relying on conservative estimates of energy efficiency savings from both codes and standards (10 GWh as opposed to the 21.8 GWh identified by ENSC's independent consultant) and projects by extra-large industrial ("ELI") customers that were implemented without funding from the NSPI/ENSC DSM programs (80 GWh instead of the 124.5 GWh identified by ENSC's independent consultant). Allan Crandlemire, interim CEO of ENSC, noted in response to Board counsel that ENSC wanted to be absolutely confident that they would have the 80 GWh, so the approach they took with respect to the savings from the ELI projects was a "conservative on conservative estimate". NPB also notes that due to preliminary information and time constraints, energy efficiency projects conducted by Bowater Mersey Paper Company Ltd. which were identified to ENSC were not included as part of the assessment.

...

...the proposed level of investment is supported, as NPB understands it, by representatives of all the ratepayer classes actively participating in this process. NPB respectfully submits that the Board should reject the suggestions from certain non-ratepayer class intervenor consultants that further increases to ENSC's budget are required at this time.

[NPB Closing Submission, pp. 1, 2, 6]

[70] In its Reply Submission, EAC supported increased levels of DSM savings:

In the past, Nova Scotian stakeholders have agreed that DSM is the better ratepayer option to pursue, not only because it offered the least cost procurement option, when compared to supply options, but also because stakeholders have consensually recognized that energy efficiency can reduce the overall costs of the electricity system, most importantly the costs associated with the fuel and capacity requirements of NSPI. In turn, this provides widespread benefits for all.

...

...DSM overachievement gives a very positive indication of the substantial opportunities that exist for transformative efficiency and conservation measures in Nova Scotia and the positive system benefits that can be accrued, sooner, faster and with broader economic and environmental contributions for all Nova Scotians.

...

...the EAC recommends that the Board approve an increased DSM budget based on the proposals put forward by Board consultant Mel Whalen, and supported [by] Gil Peach, Tim Woolf and EAC consultant Glenn Reed.

[EAC Reply Submission, p. 1]

4.2.1 Findings

[71] The Board understands that the targets for energy and demand savings are considered to be aggressive when compared to other jurisdictions; however, these targets and associated investments were established early in the DSM process and have been accepted during the IRP development. Further, as the interim administrator, NSPI has been able to successfully achieve and exceed those targets within the approved budgets.

[72] ENSC, as the new administrator, has indicated that the 2012 targets are achievable, but stated that it would be very challenging to meet those targets. A similar concern was expressed by some of the Intervenor.

[73] The Board recognizes that ENSC is faced with significant challenges as a new administrator and will need some time to fully develop its organizational capabilities. At the same time, it is critically important to ensure that the momentum

experienced with DSM savings is not eroded. This is an issue which the Board will monitor in future applications.

[74] ENSC and most Intervenors supported inclusion of savings resulting from non-program funded initiatives which, if included, would produce cumulative savings greater than those identified in the IRP, at a cost that would be less than that assumed in the IRP.

[75] Notwithstanding the suggestions of Board Counsel Consultants and EAC, the Board is persuaded that ENSC should be afforded some flexibility during its developmental stage and also accepts that including savings from non-program funded initiatives would satisfy the IRP targets. Therefore, the proposed 2012 investment of \$43.7 million for ratepayer funded DSM programs is approved.

4.3 Cost Allocation

[76] Avon recommended the Board reduce the costs directly assigned to the large industrial class from \$1.473 Million to \$1.01 Million. In its Closing Submission Avon stated:

The 2012 program costs that have been assigned to the large industrial customer class relate to three categories: Prescriptive Rebate program, Custom program as well as the Enabling Strategies. The C&I Custom program is for any commercial or industrial customer that completes energy studies and audits and implements efficiency measures in their facilities. The C&I Custom program includes a new construction component to offer incentives to create more efficient buildings. The Prescriptive Rebate program (which also includes a new construction component) comprises the "Smart Lighting Choices" and Business Energy Rebates (BER). The BER program: offers incentives in the form of rebates for eligible products like lighting, motors, drives, HVAC, refrigeration and compressed air. Those programs are available to any of the six tariffs that comprise the general and industrial customers of Nova Scotia Power as well as municipal customers (and their customers) and certain residential customers who are on charitable rates such as hockey rinks.

...

ENSC, however, has no evidentiary basis to support the take-up of these programs (and expenditures in relation to) large industrial customers. The figure is nothing more than an estimate or a guess. ENSC has no record of any large industrial customers which in 2010 accessed any of the Business Energy Rebate program, the Core Performance path or the While Building path of the Custom program. At the time of preparing the 2012 Plan, ENSC was not aware of any new construction projects planned by large industrial customers.

[Avon Closing Submission, pp. 4 & 5]

[77] The CA expressed concern about the allocation of enabling strategies. In his Closing Submission the CA stated:

As the Board is well aware, the current cost allocation of DSM programming was the subject matter of a settlement agreement involving all of the ratepayer classes. That settlement agreement did not address the issue of cost allocation for spending associated with enabling strategies.

Allocating enabling strategy costs on the basis of customer accounts is not equitable and should be the subject of immediate revision by the Board.

First, an allocation on the basis of customer class is directly at odds with the uncontested crossclass impact of these benefits. Residential ratepayers only have access to approximately 50% of the DSM spending and yet are being asked to pay over 90% of the costs associated with enabling strategies.

Second, the dramatic increase in spending on enabling strategies makes reference to previous compliance filings irrelevant. The fact that \$1M in education and outreach costs were apportioned in a certain way two years ago is not justification for the manner in which \$5M – to be spent in significantly differently ways - is to be allocated in 2012.

Allocating the cost of Enabling Strategies on the basis of electricity consumption by rate class, spending by rate class, or forecast energy savings by rate class each represents a more equitable and appropriate method of cost allocation given the evidence presented at the hearing.

[CA Closing Submission, p. 3]

4.3.1 Findings

[78] With respect to the submission of the CA, the current cost allocation was the subject matter of a Settlement Agreement in the 2010 DSM proceeding. That Settlement Agreement, approved by the Board, calls for a review of cost allocation in connection with a 2013 DSM Plan. In the Board's view it would not be useful or appropriate to make *ad hoc* changes with respect to cost allocation in advance of a full

review in 2013. Accordingly, the Board is not prepared to make any changes to the cost allocation undertaken by ENSC for purposes of the 2012 DSM Plan. With respect to the submissions of Avon, the Board is not prepared to second guess the allocations done by the Administrator who has analyzed this issue. The Board also recognizes that there is a true-up mechanism which would respond to Avon's concerns in the event they turn out to be justified.

4.4 Bill Impacts

[79] In his direct evidence on behalf of Board Counsel, Mr. Woolf discussed the need to establish key principles regarding how to quantify bill and rate impacts due to increasing DSM budgets in order that these rate and bill impacts can be properly evaluated when brought to the Board. He summarized his recommendations as follows:

- Rate impact analyses should estimate the impacts of energy efficiency on customer bills, as well as customer rates, because the primary direct benefits of efficiency measures are reflected in the customer bills.
- Rate and bill impacts should separately identify the impacts on (a) program participants, (b) program non-participants, and (c) all customers on average.
- Rate and bill impact analyses should estimate the number of program participants, in order to provide an indication of the portion of customers that experience bill reductions.
- Rate and bill impact analyses should account for impacts over the long-term (e.g., using a study period that includes at least the average life of energy efficiency measures), in order to capture the full effect of energy efficiency savings.
- Rate and bill impact analyses should compare (a) the estimated rates and bills resulting from the energy efficiency programs associated with IRP targets to (b) the estimated rates and bills resulting from different levels of efficiency programs.
- Rate and bill impact analyses should account for all the costs of energy efficiency that are expected to affect rates.

- Rate and bill impact analyses should account for all the benefits of energy efficiency that are expected to affect rates, including avoided generation costs, avoided transmission costs, avoided distribution costs, and avoided environmental compliance costs.

[Exhibit E-13, pp. 13-14]

[80] In its Closing Submission the Province recommended that ENSC should engage the Program Development Working Group ("PWDG") and NSPI in consultations with respect to providing a more comprehensive picture of rate and bill impacts on customers associated with future DSM plan expenditures. In its Reply Submission ENSC responded as follows:

ENSC agrees that this is an important issue, and supports the suggestion from NSDOE that NSPI, the PDWG and ENSC collectively review this issue further to develop such principles to determine how this information can or should be incorporated into DSM plan filings.

[ENSC Reply Submission, p.4]

4.4.1 Findings

[81] The Board is persuaded that there is a need to have better information on rate and bill impacts in future proceedings and directs ENSC to undertake the necessary consultation with a view to providing enhanced information as suggested by Mr. Woolf in connection with the 2013 DSM Plan.

5.0 OTHER ISSUES

5.1 Total Resource Cost ("TRC")

[82] ENSC's application proposes to use the TRC test at the program level and not at the measure level starting in 2012:

ENSC is proposing that the TRC test for the 2012 DSM Plan be applied at the program level, not at the measure level as was previously required. ENSC is seeking the flexibility

to consider factors in addition to TRC, when selecting measures. In some cases, a measure that fails the TRC test may provide strategic or long-term benefits, such as stimulating demand for newer technologies to achieve economies of scale.

The TRC test compares the net present value of lifetime benefits (avoided cost of energy and avoided cost of capacity) to the net present value of the total costs (the sum of ENSC's investment and the participants' cost). Each program in 2012 has a TRC value greater than 1.0, indicating that the lifetime benefits exceed the total cost.

[Exhibit E-1, p. 17]

[83] Mr. Foote, consultant for the CA, noted that "ENSC makes a reasonable case for using the TRC on a program basis and has provided precedents from other jurisdictions...The program TRCs provided by ENSC appear reasonable and justifiable." (Exhibit E-10, p.11).

[84] Mr. Reed, consultant for EAC, provided the following in his direct evidence:

...Further, while the TRC test is widely accepted in many jurisdictions, the test does have its limitations. Most notably, the test considers all costs, but in most jurisdictions only resource benefits – energy and water - are considered. There are often, particularly in existing and new home programs, a multitude of non-energy benefits that are often not quantified. This results in some potential asymmetry when using the TRC test and may deem a measure not cost-effective due to the inability to quantify these non energy benefits. This is further reason not to use the TRC test as an absolute determinant of whether a measure should be included in a given program as the TRC test may tend to undervalue measure benefits and yield a lower benefit cost ratio.

[Exhibit E-11, p. 8]

[85] Mr. Whalen, consultant for Board Counsel, supports ENSC's proposal and provided reasons in his direct evidence.

[86] The Province, in its Closing Submission, noted that:

As part of its application, ENSC is proposing that the TRC test for the 2012 DSM Plan be applied at the program level, rather than at the measure level as previously required. ... NSDOE supports the application of the TRC test at the program level, rather than the measure level.

[Province Closing Submission, p. 4]

5.1.1 Findings

[87] The Board has considered the ENSC's request to change the TRC test from the measure level to the program level. There appears to be no opposition to this request and the Board agrees with the benefits and flexibility which will be provided to ENSC with this change.

[88] The Board approves ENSC's request that TRC test be applied at the program level starting January 1, 2012.

5.2 Free Ridership and Spillover

[89] The Board in its Decision on the 2011 DSM Plan considered free ridership and spillover and directed that:

[31] The Board has reviewed the recommendations of a number of the parties and agrees that further study of the impact of free ridership and spillover on the DSM Plan is warranted. Accordingly, the Board directs that ENS proceed with a collaborative process to consider and develop an approach to deal with these two factors in a Nova Scotia context.

[2010 NSUARB 155, p. 17]

[90] NMR reviewed the issue of free ridership and spillover in its evaluation report and noted that:

For each program, aside from LIH, NMR calculated a net-to-gross ratio, based on estimates of free ridership and, in some cases, spillover. NMR relied on survey results to estimate free ridership and spillover. The net-to-gross ratios for each program are presented in Table 2-1. Additional detail on the methods employed in the determination of net-to-gross ratios and net impacts for each program can be found in the individual program reports.

...

Table 2-1: 2010 Energy & Demand Net-to-Gross Ratios

Program	Net-to-Gross Ratio
Efficient Products –Retail: CFLs	133%
Efficient Products –Retail: Fixtures, Controls & Appliances	44%
Efficient Products –Retail: Appliance Retirement &Replacement	74%
Low Income Households	100%
EnerGuide for Existing Houses	76%
New Houses	46%
C&I Custom	90%
Efficient Products - Direct Install	77%
Small Business Lighting Solutions	87%
Smart Lighting Choices	84%
Business Energy Rebates	54%

[Exhibit E-2, pp. 8-9]

[91] The SVS made the following recommendation:

Recommendation 11: The DSM Administrator should consider whether or not it may be useful to revisit approaches to assessing free-ridership. Currently, NMR is using an improved variant of the Oregon Energy Trust/Research Into Action method. Just as the original multiplicative method used in the first Program Year understated free-ridership, it may be that for certain programs the current method somewhat overstates free-ridership.

[Exhibit E-3, p. 10]

[92] Mr. Foote, in his direct evidence, recommended that ENSC provide estimates of free ridership and spillover for 2012 programs and compare these with the actual results later at the evaluation stage.

[93] EAC, in its direct evidence, suggested that ENSC should determine a net-to-gross (“NTG”) ratio at the measure level.

...As previously noted, the 2012 Plan incorporates NTG ratios at the program level, with the exception of the New Houses Program. Lacking better data this might be an appropriate approach. However, moving forward ENSC should consider developing NTG ratios at the measure level or at least the measure category level for key measures or measure categories.

[Exhibit E-11, p. 8]

[94] The Province, in its Closing Submission, recommended that:

ENSC has signaled in this filing that it intends to refine the evaluation of free ridership and spillover effects as programs evolve, and that it intends to undertake this evaluation through stakeholder consultation. NSDOE endorses this approach as part of complying with the recommendations set out in the Savings Verification Study.

[Province Closing Submission, p. 3.]

[95] ENSC, in its Closing Submission, agreed with the recommendations from

Intervenors:

ENSC will carefully consider the comments and recommendations provided by Dr. Peach regarding his evaluation of free ridership and spillover.

With respect to continued refinements in the process of how free ridership and spillover are assessed and incorporated into DSM planning and reporting, ENSC agrees with the suggestions put by Board Counsel to the ENSC Panel on cross-examination that this process "is in Efficiency Nova Scotia's hands" and is not something that requires specific UARB approval.

[ENSC Closing Submission, p. 8]

5.2.1 Findings

[96] The Board has considered the evidence filed by the parties and agrees that a free ridership and spillover study, as ordered by the Board in its Decision on the 2011 DSM Plan, is required. In its Closing Submission, ENSC has agreed to carry out this study in 2011. The Board orders that this study be completed as noted by ENSC and submitted to the Board no later than December 15, 2011.

5.3 Pilot Programs

[97] ENSC's Application included three pilot projects: Residential Fuel Substitution; Clean Nova Scotia Green School; and Nova Scotia Home Builders Association Eco Home.

[98] The Dunsky report explained the development and implementation of a Residential Fuel Substitution Pilot. The report outlined the approach to be followed to implement the Pilot and the expected results. The report also included recommendations on new technology; degrees of incentives for each technology; eligibility criteria for measures; and where the Pilot should be implemented first. The report also describes a participation process which includes participant, installer and ENSC. The report concludes with the measurement and evaluation plan and the anticipated results for each technology.

[99] Wanda Baxter, on behalf of Clean Nova Scotia, prepared the "Green Schools Nova Scotia: Facilitating a Culture of Environmental Sustainability Report" which was included in the Application. The report noted that the Pilot is expected to reduce the use of electric energy by 10% to 15% and also provide support for sustainable development. Among the report's recommendations is to start the program in 2011 in selected schools in one or two School Boards. The success of each pilot program is dependent upon the full support from the school and its administration. To be eligible, selected schools should have relatively high energy consumption.

[100] ENSC included in its Application a copy of the presentation prepared for the Program Development Working Group dated December 14, 2010 on the Eco Home Pilot. The project has two phases: a design phase, which is complete, and a build phase. The next step in the Pilot is to request construction bids from developers and build the designed house. The Pilot proposes a monetary incentive of up to \$100,000 for building products and material which are energy efficient.

5.3.1 Findings

[101] The Board has considered the three pilot projects proposed by ENSC. There appears to be general support for these projects with which the Board agrees.

[102] The Board expects ENSC to implement these projects in 2011 and to provide updates in its future filings to the Board.

5.4 Reporting of Energy and Demand Savings

[103] The Application notes that the proposed target for the 2012 DSM Plan includes savings for ELI projects of 80 GWh in energy and 12 MW in demand. The proposed savings from the adoption of energy efficiency codes and standards are 10 GWh of energy and 2.7 MW of demand.

[104] ENSC defined the reporting of energy savings as follows:

Previous DSM plans relied exclusively on customer-funded, incentive-based DSM programs to meet IRP targets. The 2009 IRP Update is based on the assumption that energy savings from sources in addition to DSM programs would contribute to targets. Consistent with the IRP Update, ENSC is recording incremental energy and demand from two sources outside of customer-funded DSM programs:

- savings from energy-efficiency projects implemented by the Extra-Large Industrial (ELI) class of electricity customers
- savings from the adoption of energy-efficiency codes and standards

5.1.1 Extra-Large Industrial Projects

ELI customers completed efficiency projects in 2009 and 2010. The resulting energy and demand savings contribute to the IRP targets and are reported in this filing because they are incremental to customer-funded DSM and were not included in the 2009 IRP Update.

The cumulative ELI energy and demand savings are estimated to be 80 GWh and 12 MW. These estimates are based on a preliminary investigation completed on behalf of ENSC by third-party specialists and, as such, are necessarily conservative. These projects will undergo evaluation in 2011. Variances between estimates and final verified results will be reported in the filing of the 2013 DSM Plan.

5.1.2 Adoption of Energy-Efficiency Codes and Standards

In this filing, ENSC has reported energy savings attributed to the adoption of codes and standards from two sources: a new residential energy code and a new federal standard for general-service lamps to be phased in over the course of 2012. Additional information is provided in Section 13. Both of these changes are incremental to the electrical load forecast in the 2009 IRP Update.

[Exhibit E-1, pp. 15-17]

[105] ENSC plans to consider savings, which are not included in this year's plan, as a part of the 2013 plan:

ENSC has not included Nova Scotia Power initiatives in the 2012 DSM Plan savings projections. However, ENSC recognizes the significant savings contributions that could be realized from NSPI initiatives such as conversion of street lights to Light-Emitting Diode (LED), Voltage control, smart metering and rate design. ENSC will discuss opportunities for energy savings with NSPI for potential inclusion in 2013 and future DSM Plans.

[Exhibit E-1, p. 17]

[106] ENSC proposes to support and promote new opportunities in energy codes and standards:

A number of opportunities are emerging in the residential and commercial sectors for ENSC to support and promote new energy codes and standards. In particular, two areas to be pursued in the short-term are:

- the adoption of a high-performance T-8 lighting standard (building on the market transformation achieved through the Smart Lighting Choices program)
- the adoption in Nova Scotia of a forthcoming national energy code for commercial buildings

[Exhibit E-1, Appendix A, pp. 34-35]

[107] Mr. Foote, in his direct evidence, stated that:

Any discussion of whether to include non-program standards and at what level should not distract the UARB and stakeholders from the main purpose of this process which is to ensure spending proposed by ENSC is rationalized and justified and is at a level appropriate to meet future energy demand while complying with environmental regulation.

Savings from non-program sources are relevant to the discussion to the extent that they can be shown to reduce the need for new or replacement generation capacity and can assist in meeting environmental targets.

[Exhibit E-10, p. 5]

[108] EAC does not support the inclusion of non-program savings and noted that:

...The "found" ELI savings again reinforces the uncertainty of the DSM planning and forecasting process. ENSC should maximize the amount of efficiency it can obtain in each year in order to reach or exceed its cumulative savings goals. There will always be uncertainty as to whether ENSC will be able to meet any one particular annual goal. If the opportunity presents itself to exceed an annual IRP target, it should be pursued. There is little if any downside to front loading savings and doing so potentially provides ENSC greater flexibility in out years to pursue more innovative and comprehensive savings strategies under reduced pressure to meet any one specific annual incremental savings target.

[Exhibit E-11, pp. 6-7]

[109] Mr. Whalen testified that "The savings from large industrials and from the introduction of codes and standards are appropriately estimated. Their inclusion in the 2012 Plan is consistent with the [2007] IRP and should be approved." (Exhibit E-12, p. 2).

[110] Mr. Woolf, consultant to Board Counsel, supports ENSC's estimates for energy savings.

[111] NPB in its Closing Submission stated that:

None of the various consultants who filed testimony in this proceeding were opposed to the inclusion of energy efficiency savings from codes and standards and ELI projects, and the Board's verification consultant, Dr. Peach, also confirmed that this is the "proper way to do it." NPB submits that for future certainty it would be helpful if the Board confirmed in this decision that it is appropriate for ENSC to include as part of its DSM plans, significant and verifiable efficiency savings that occur which are in addition to the applicable IRP load forecast.

[NPB Closing Submission, p. 3]

[112] ENSC, in its Reply Submission, further added:

Keeping in mind that such additional savings from the ELI sector and Codes & Standards are inherently conservative, ENSC contends that the proposed 2012 DSM Plan providing overall cumulative energy savings of 233 GWh with a program investment of \$43.7M strikes a reasonable balance at this point in time by respecting the interests and concerns of stakeholders while maximizing the continued success of cost-effective DSM programs for the benefit of all Nova Scotians.

[Exhibit E-14, p. 4]

[113] In its Closing Submission, Avon stated “The Avon Group supports the current budget and recommends the Board confirm that the inclusion of non-program savings is appropriate”.

5.4.1 Findings

[114] The Board has considered the issue of including non-program savings in the overall cumulative savings planned for 2012. ENSC is proposing to include savings from work already undertaken by the ELI customers and expected changes to codes and standards.

[115] ENSC has confirmed in its evidence that the ELI estimates are conservative, based on estimates prepared by its consultant. During the hearing, the Board questioned the savings from codes and standards, given that implementation may be delayed from the target date of January 1, 2012. ENSC indicated that it can still meet the savings targets without any contributions from codes and standards.

[116] The Board has considered and approves the targets as proposed, including non-program contributions from the ELI customers and codes and standards.

5.5 Integrated Multi-Fuels Mandate

[117] ENSC noted that the Province is in the process of changing its mandate and future responsibilities:

With the expectation that ENSC will obtain a multi-fuels mandate in time for integration with 2012 electricity DSM programs, program designs will be adjusted to streamline processes, reduce costs and increase savings. ENSC will pay particular attention to avoid cross-subsidization of programs between electricity customers and taxpayers.

[Exhibit E-1, p. 31]

[118] The Dunsky report outlines current experience in other parts of North America:

Throughout Canada and the U.S., efficient and effective DSM program delivery is often challenged by the existence of a patchwork of DSM administrators. In some regions, for example, a variety of electric and gas utilities, in addition to provincial or state agencies, may offer different and sometimes overlapping programs and incentives. The resulting multiplicity of actors and program offerings can act as a powerful barrier to clear communication with both customers and market channel actors, and can further result in duplicative administrative, marketing and outreach costs.

[Exhibit E-1, Appendix C, p. 17]

[119] Mr. Whalen supports ENSC's integrated multi-fuel mandate, provided a robust method to separate costs for each fuel is established and approved by the Board.

[120] During the hearing, ENSC elaborated on the current status of negotiation with the Province and how it plans to re-organize after the change in mandate. ENSC proposes to submit its plan for the Board's approval in the fall of 2011.

[121] Avon, in its Closing Submission, noted its concern with respect to shared services and allocation of costs and recommended that:

...The Avon Group recommends that the Board direct ENSC to prepare a report with respect to the allocation of shared services, quantifying the impact upon 2012 programs and its proposal for allocations going forward. The Avon Group further recommends that such report be made public and accessible to intervenors and interested parties for comment and debate as appropriate.

[Avon Closing Submission, p. 7]

[122] The CA requested that a plan be developed soon to avoid subsidization by electric customers to others:

The Consumer Advocate would respectfully request that Efficiency Nova Scotia be directed to swiftly develop a detailed plan containing specific steps to ensure that electricity ratepayers are in no way subsidizing activities associated with non-electricity users.

[CA Closing Submission, p. 3]

[123] The Province, in its Closing Submission, noted that:

NSDOE recommends that the Board direct ENSC to develop a clear methodology for tracking costs associated with electricity DSM program and energy efficiency programs related to the use of other fuels, as ENSC works towards obtaining multi-fuel mandate in time for integration with the 2012 electricity DSM programs.

NSDOE in particular sees a need for the development of a mechanism by way of a code of conduct, or protocol for the identification of time spent by ENSC's employees and executives on electricity DSM matters, and work on efficiency and conservation programs dealing with other fuels, to ensure that ratepayers are not subsidizing costs associated with other fuels efficiency programs.

[Province Closing Submission, p. 5]

[124] ENSC, in its Closing Submission, further added that:

ENSC is fully committed to ensuring that no cross-subsidization occurs of non-electricity efficiency programs from approved DSM funds. In addition to confirmation of the segregated accounting of DSM funds received from electricity ratepayers, ENSC has committed to seeking expert assistance in determining the most effective and transparent allocation methodology for the sharing of common expenses that benefit both electric DSM and non-electric efficiency programs.

[ENSC Closing Submission, p. 9]

5.5.1 Findings

[125] The Board understands that ENSC's mandate is being expanded to manage non-electricity efficiency programs. Some transition is already underway and formal negotiations are to be concluded in the near future. ENSC, at this time, does not have a formal written policy to track time and costs for its activities, but plans to finalize the policy in the near future and submit it to the Board for approval.

[126] Intervenors have expressed concern with the delay in the development of the policy and the potential for cross-subsidization by electricity customers of other fuel customers. The Board shares this concern and orders ENSC to develop and file, no later than September 30, 2011, its policy to track time and costs for electric and other fuel mandates.

5.6 Multi Year Performance Based Model ("PBM")

[127] ENSC seeks Board approval to engage stakeholders to assess the use of a Performance Based Model ("PBM") for future submissions to the Board. ENSC stated that:

Under such a multi-year, performance-based model, the UARB's oversight role would evolve while continuing to protect the interests of stakeholders and ratepayers through evaluation and verification. Whereas the current regulatory framework focuses on pre-approval of a one-year DSM Plan and strict application of benefit-cost screening mechanisms such as the TRC test at the individual measure level, a performance-based model would focus on the approval of overall investments, savings targets and other relevant indicators, followed by review and validation of performance.

In this filing, ENSC is seeking approval to engage the UARB and stakeholders in 2011 to further assess the options for implementing such a model in the future.

[Exhibit E-1, p. 29]

[128] The Dunskey report noted that:

...

The move to a performance-based model would provide ENSC with increased flexibility to adjust and adapt its plans as needed, as situations arise and as feedback comes in. Furthermore, an oversight model focused on outcomes can significantly reduce the time, energy and talent that the DSM administrator must devote to formal regulatory hearings and processes, freeing them up to focus more on ensuring targets are met.

[Exhibit E-1, Appendix C, pp. 12-13]

[129] Mr. Whalen had no objections to ENSC's request, provided such a move is permissible under the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended.

[130] The Province, in its Closing Submission, supported ENSC's request to explore the use of a PBM:

NSDOE supports ENSC's proposal to engage the UARB and stakeholders in 2011 to assess the possibility of adopting a performance based model for the delivery and oversight of DSM programs. ...

[Province Closing Submission, p. 4]

[131] EAC's Closing Submission also supports the PBM discussion among the stakeholders:

The Ecology Action Centre (EAC) supports the move towards a performance based approach at Efficiency NS and the efforts to provide more versatile energy efficiency programs for Low-Income rate-payers in the 2012 DSM plan. As well, EAC supports efforts to increase outreach education for Nova Scotian ratepayers to take advantage of Efficiency NS program offerings, in the 2012 plan. As well, EAC supports the use of the TRC at the program level.

[EAC Closing Submission, p. 2]

[132] Board Counsel explored this issue further with ENSC during the hearing:

MR. outhouse: And why do you believe you need the Board's approval to engage in consultation?

MR. CRANDLEMIRE: I don't think we need the Board's approval to engage in consultation. What we were looking for from the Board is this; if the Board had the perspective of that -- not interested in performance-based approach, no way, no how, obviously there's no reason to have extensive consultation with stakeholders, build some consensus around approach that has no possibility of flying but to the extent that the Board can provide an early indication that they're open to consideration of that kind of option, why then I think we want to have that discussion not only with stakeholders but also with representatives of the Board.

[Transcript, p. 165]

[133] ENSC, in its Closing Submission, further elaborated on the process it intends to follow with stakeholders, if the Board approves the request for a PBM consultation:

...the approval that ENSC is seeking from the Board at this time is to engage in necessary consultation and dialogue to further assess the available options for implementation of a future multi-year regulatory model, which will still provide "cost-recovery" rates to pay for DSM expenditures and will allow greater flexibility and performance in the delivery of DSM programming by ENSC.

[ENSC Closing Submission, p. 13]

5.6.1 Findings

[134] ENSC suggests exploration of a PBM with stakeholders for future approval by the Board. The Board noted its concerns during the hearing and ENSC elaborated on the issue in its closing submission.

[135] Based on this, the Board has no objection to ENSC discussing a PBM with the stakeholders.

6.0 ROLE OF PROGRAM DEVELOPMENT WORKING GROUP

[136] On March 5, 2008, NSPI and most of the Intervenors in the 2009 DSM proceeding signed a Settlement Agreement ("SA") and filed that agreement with the Board as part of an amended DSM Plan. The SA was approved by the Board and communicated to the parties in a letter dated April 18, 2008. Clause 8 of the SA stated:

The Parties agree to establish a Program Development Working Group ("PDWG") to assist with program design and implementation, including considering performance measures for the new administrator. The PDWG will be a small, collaborative, working group to support implementation of 2008 and 2009 programs. The PDWG should include NSPI, Board staff, Conserve Nova Scotia and stakeholder representatives. NSPI, Conserve Nova Scotia, stakeholders, and Board staff may include their expert consultants in the work of the PDWG as they deem useful. The PDWG will have access to consultants, as necessary, as had been proposed for the DSM Advisory Committee. The PDWG will develop Terms of Reference that support transparency and regular reporting to the UARB and non-participating stakeholders.

[2008 NSUARB 47, p. 8]

[137] The PDWG was intended to support the 2008 and 2009 programs; however, the new Administrator, ENSC, was not fully functional until the latter part of 2010. With general support of NSPI and the DSM participants, the Board approved the continuation of the PDWG until transition to the new Administrator was complete:

There was strong support shown by all parties for the continuation of the PDWG throughout the transition process in order to ensure a measure of continuity for program development, review, and implementation. The Board accepts that the PDWG should retain its current role until the transition to ENS is completed. At that time, ENS can then determine whether the continuation of the PDWG, or another committee, would be appropriate.

[2010 NSUARB 155, p. 55]

[138] In its Application, ENSC stated:

The Program Development Working Group (PDWG), established during NSPI's tenure as interim DSM Administrator, has advised ENSC during the transition from NSPI to ENSC and during the preparation of the 2012 DSM Plan. The PDWG is a valuable resource and stakeholder forum, providing ENSC and NSPI, as the interim administrator, with expert knowledge and sound, thoughtful advice on important issues. ENSC sees value in having the PDWG continue its role in 2011, receiving periodic progress reports on DSM programs, and advising ENSC on the design of new programs and any mid course adjustments based on program results or changing circumstances.

ENSC is committed to broad, transparent and effective stakeholder consultation. As noted by the UARB, in its 2011 DSM Plan Decision, ENSC is now engaged with members of the PDWG in a review of the role and composition of the PDWG. A broader group of stakeholders will be consulted in 2011 on necessary changes to the PDWG or the creation of a new stakeholder process.

[Exhibit E-1, pp. 2-3]

[139] During the hearing, there was little mention of the PDWG. The Board notes that in their Closing Submissions, none of the Intervenors opposed the ENSC proposal regarding the PDWG. The ENSC Closing Submission stated:

ENSC sees continued value and support in having the PDWG continue throughout 2011, as ENSC engages both the PDWG and broader stakeholders on necessary changes to the PDWG or creation of a new stakeholder process.

ENSC submits that there is expert and stakeholder support for this process, and that it should be approved by the Board.

[ENSC Closing Submission, p. 10]

6.1 Findings

[140] The Board recognizes the valuable contributions made by the PDWG while NSPI served as the interim DSM Administrator and also during the transition process from NSPI to ENSC as the new DSM Administrator. The Board accepts the ENSC proposal to have the PDWG continue its current role while ENSC engages broader stakeholders regarding changes to the PDWG or creation of a new stakeholder process. ENSC is directed to file the results of this review as part of its 2013 DSM Plan.

7.0 PROGRAM MONITORING

[141] During the hearing, several comments were made regarding the aggressive DSM targets facing ENSC and its ability to meet these significant challenges. In his opening statement, Mr. Crandlemire said:

Nova Scotians are set to achieve some of the most ambitious electricity savings in North America: 234-million kiloWatt hours.

...

At Efficiency Nova Scotia, we've been going full-speed since December and now have a staff of about 45 going flat-out to deliver energy savings programs for all Nova Scotians.

[Exhibit E-20, pp. 2 & 4]

[142] In response to questions from EAC, Mr. Crandlemire stated:

In terms of level of effort on DSM, the 2011 targets are approximately double the 2010 targets. I can assure you that Efficiency Nova Scotia has got its foot on the gas pedal hard to the floor this year in terms of achieving those targets and we don't have any intention to let up in the foreseeable future.

[Transcript, p. 86]

[143] Board Counsel questioned ENSC on whether the targets were achievable:

MR. OUTHOUSE: I guess, Mr. Faulkner, going forward -- these numbers on the face of them give me some concern that you can achieve the targets that you have projected going forward. I just wanted to give you the opportunity to address that...

I'm just trying to find out whether you see the targets that you've set as being achievable for the dollars you're predicting.

...

MR. CRANDLEMIRE: I'll just add a couple of lines to Mr. Dunsky's comments.

I don't want anyone to think for a minute that the targets in 2010 weren't challenging, that the targets in 2011 aren't challenging or they're not going to be challenging in 2012.

We had people in the office between Christmas and New Year's scratching for savings in 2010 to meet that target, so I'm not expecting that it will be a bit different in 2011. As I mentioned earlier this morning, gas pedal hard to the floor going full out, getting savings.

...

MR. outhouse: I take it the outcome of all that is that despite the challenge, you remain confident that the targets are realistic. Achievement of the targets is realistic, I should say.

MR. Crandlemire: Yes, it is.

[Transcript, pp. 185-189]

[144] Counsel for ENSC also explored this topic during cross-examination of Mr. Whalen:

MR. Foreman: In fairness the evidence that Mr. Crandlemire gave yesterday also clearly indicated, with respect to that foot on the pedal analogy, that they do have -- or from his perspective, from Efficiency's perspective, they have the pedal, like, pushed fully down.

MR. Whalen: I certainly would agree with Efficiency Nova Scotia that 2011 is a big challenge. I did not hear the corporation say that they had doubts about meeting that.

[Transcript, p. 350]

[145] The Closing Submission of the CA also raised concerns about the increased level of spending for 2012 and the early stage of organizational development at ENSC:

...

2. The proposed budget for 2012 represents a 100% increase on the 2010 DSM spending. In fact, proposed program spending in 2012 will come close to equaling the cumulative 2008-2010 spending.

3. Efficiency Nova Scotia is a new entity. Management positions were created and filled during mid-year 2010 and operational responsibilities for DSM administration were completely transferred to Efficiency Nova Scotia by December, 2010. 2011 will mark the first full year of Efficiency Nova Scotia operation of DSM programming.

...

[CA Closing Submission, p. 2]

[146] A similar point was raised by NPB in its Closing Submission:

The administration of DSM has recently been transferred to ENSC, and 2011 will be its first full year of operation. Matters with respect to its organization, such as a formal protocol for the segregation of costs between the electricity and non-electricity aspects of its business, are still under development.

[NPB Closing Submission, p. 4]

7.1 Findings

[147] The Board notes that while ENSC stated it has the “gas pedal hard to the floor going full out” in order to achieve targeted savings, Mr. Crandlemire has also indicated that the targets are achievable. He has not suggested the targets would not be met. Despite these assertions, the Board considers the extend of questioning on this matter to be an indicator that parties have some doubt, which was further expressed in some of the Closing Submissions.

[148] In order to address these concerns, the Board directs ENSC to meet with Board Staff and Consultants on a quarterly basis to review its progress in program implementation, program expenditures, and achievement of the targeted energy and demand savings.

8.0 ECOLOGY ACTION CENTRE REQUEST FOR COSTS

[149] In its Final Submission, EAC stated:

1. It is submitted that the EAC acted responsibly and prudently as an intervener in these hearings. The interventions have been novel and brought a different perspective to the proceedings. As such, it is submitted that the EAC has behaved in a civil and responsible manner to incur only such costs as were necessary to complete the evidence before the Board concerning the issues in this application, including bringing forward expert witness Glenn Reed to testify to the issues.

2. It is submitted that the arguments submitted by the EAC have contributed to the “better understanding” of the issues affecting customers in this application for the approval of the 2012 DSM plan by the new administrator, Efficiency NS.

[EAC Final Submission, p. 21]

[150] EAC advised that the costs it sought “...would include a reasonable sum for costs incurred in the EAC’s participation...”, the details of which would be provided if the Board allows the request for costs.

[151] ENSC indicated in its Reply Submission that it: "...has requested that EAC provide it with a proposed Bill of Costs following closure of the hearing and submissions."

[152] If EAC and ENSC are unable to agree on EAC's entitlement to, or quantum of costs, the Board reserves jurisdiction to rule on costs.

9.0 SUMMARY OF BOARD FINDINGS

[153] The Board accepts the 2010 DSM Plan evaluation and verification, with the qualification made in the SVS for a 10% reduction for the Efficient Products-Direct Install program.

[154] The Board understands that ENSC is actively working to address the data systems problems identified by NMR. The Board is satisfied that ENSC is reviewing the SVS recommendations, and orders ENSC to file its response to them no later than July 31, 2011, for consideration by the Board.

[155] The Board is persuaded that ENSC should be afforded some flexibility during its developmental stage and also accepts that including savings from non-program funded initiatives would satisfy the IRP targets. Therefore, the proposed 2012 investment of \$43.7 million for ratepayer funded DSM programs is approved.

[156] The Board has considered and approves the targets as proposed, including non-program contributions from the ELI customers and codes and standards.

[157] In order to address concerns about whether the targeted savings can be met, the Board directs ENSC to meet with Board Staff and Consultants on a quarterly

basis to review its progress in program implementation, program expenditures, and achievement of the targeted energy and demand savings.

[158] The Board considers that it would not be useful to review cost allocation prior to the review scheduled in connection with the 2013 DSM plan. The Board also accepts as reasonable the cost allocations done by the Administrator recognizing there is a true-up mechanism to respond to any misallocation.

[159] The Board directs ENSC to undertake the necessary consultation with a view to providing enhanced information on rate and bill impacts in future proceedings, as suggested by Mr. Woolf, starting with the 2013 DSM Plan.

[160] The Board agrees that changing the TRC test from the measure level to the program level will provide ENSC with benefits and flexibility. The Board approves ENSC's request to apply the TRC test at the program level starting January 1, 2012.

[161] The Board orders that the free ridership and spillover study, as ordered in its 2011 DSM Plan decision, be completed and submitted to the Board no later than December 15, 2011.

[162] The Board expects that ENSC will implement the Residential Fuel Substitution, Green School and Eco Home pilot projects in 2011, and that ENSC will provide updated information on them in future filings.

[163] The Board shares the concerns of Intervenor resulting from the expansion of ENSC's mandate to manage non-electricity efficiency programs. The Board orders ENSC to develop and file, no later than September 30, 2011, its policy to track costs for electric and other fuel mandates.

[164] The Board has no objection to ENSC's proposal to explore a PBM with stakeholders.

[165] The Board accepts ENSC's proposal to have the PDWG continue its current role while ENSC engages broader stakeholders regarding changes to the PDWG or creation of a new stakeholder process. ENSC is directed to file the results of this review as part of its 2013 DSM Plan.

[166] As noted above, if EAC and ENSC are unable to agree on EAC's entitlement to, or quantum of costs, the Board reserves jurisdiction to rule on costs.

[167] An Order will issue accordingly.

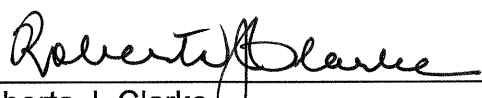
DATED at Halifax, Nova Scotia, this 30th day of June, 2011.



Peter W. Gurnham



Kulvinder S. Dhillon



Roberta J. Clarke .

Tab 2

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF AN APPLICATION for Approval of a Supply Agreement for electricity efficiency and conservation activities between EfficiencyOne and Nova Scotia Power Incorporated, the establishment of a final agreement between the parties, and approval of a 2016-2018 Demand Side Management Resource Plan

BEFORE: Peter W. Gurnham, Q.C., Chair
Kulvinder S. Dhillon, P.Eng., Member
Roberta J. Clarke, Q.C., Member

APPLICANTS: **EFFICIENCYONE**
James R. Gogan, CA, LL.B.

NOVA SCOTIA POWER INCORPORATED
Colin Clarke, Q.C.
David Landrigan, LL.B.
Brian Curry, LL.B.

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SMALL BUSINESS ADVOCATE
Nelson Blackburn, Q.C.
Ellen Burke, LL.B.

AFFORDABLE ENERGY COALITION
Donna Franey, LL.B.
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CLEAN NOVA SCOTIA FOUNDATION
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Stephen McGrath, LL.B.
Nancy Rondeaux

PORT HAWKESBURY PAPER LP

James MacDuff, LL.B.

BOARD COUNSEL: S. Bruce Outhouse, Q.C.

HEARING DATE(S): June 15, 16, 18 and 19, 2015

FINAL SUBMISSIONS: July 15, 2015

DECISION DATE: August 12, 2015

DECISION: The Board approves a DSM Plan for 2016-2018 in the aggregate amount of \$102,150,000. Approved spending is \$33,210,000 during 2016; \$34,020,000 during 2017; and \$34,920,000 in 2018. Findings and directives are summarized at paragraphs 138-148.

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1.0 INTRODUCTION

[1] It is generally acknowledged that using less energy, and using energy more efficiently, is a public good, as it can result in environmental benefits, such as less reliance on fossil fuels (and thus lowering emissions), and financial benefits to consumers of electric energy. Programs and activities designed to influence the amount and timing of electricity usage, and ultimately reduce the overall demand for electricity, are known as demand-side management (“DSM”).

[2] The nature and cost of such programs and activities for the Province of Nova Scotia were the subjects of a hearing before the Nova Scotia Utility and Review Board (“Board”) on June 15, 16, 18 and 19, 2015. EfficiencyOne (“E1”), a newly created entity, applied to the Board for approval of a Supply Agreement for these activities between it and Nova Scotia Power Incorporated (“NSPI”) and approval of a 2016-2018 DSM Plan. The application was made pursuant to amendments made by s. 15 of the *Electricity Efficiency and Conservation Restructuring (2014) Act*, S.N.S. 2014, c. 5 (“*EECR Act*”) to the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended (“*PUA*”).

[3] Attached as Appendix A to this Decision is the list of parties, intervenors and witnesses in this proceeding.

[4] Opening statements were filed by E1, NSPI, the Consumer Advocate (“CA”), the Small Business Advocate (“SBA”), the Industrial Group, the Ecology Action Centre (“EAC”), the Affordable Energy Coalition (“AEC”), and the Nova Scotia Department of Energy (“DOE”).

[5] The Board received 37 letters of comment from members of the public. At an evening session held on June 15, 2015, 21 persons, who had previously registered to do so, spoke. A list of speakers is attached as Appendix B to this Decision.

2.0 BACKGROUND

[6] The Board considers it useful to set out some of the background of DSM in Nova Scotia to provide some context for this Decision.

[7] For a number of years prior to 2010, NSPI included requests for approval of spending for DSM programming in applications to the Board. The Board issued a number of directives concerning the development and administration of such programming. The costs of DSM were included in the rates paid by NSPI customers.

[8] By 2008, in a settlement agreement, stakeholders and NSPI agreed to begin a process to transition DSM activities to a new administrator, other than NSPI. In the interim period, NSPI continued as the temporary DSM administrator.

[9] Pursuant to the *Efficiency Nova Scotia Corporation Act*, S.N.S. 2009, c. 3, as amended ("*ENSC Act*"), the Efficiency Nova Scotia Corporation ("*ENSC*") was established to manage electricity DSM programs in the place of NSPI. Board approval of its programs and cost allocations was required, and the Board was given powers of general supervision over ENSC. A transition plan was mandated and required Board approval, which was granted in 2010.

[10] ENSC began to administer DSM programming and made applications to the Board for approval of its programs, spending and cost allocation, on a regular basis, either for multi-year plans, or for cost recovery riders.

[11] Over the period from the institution of DSM management programs, the range of programs and activities varied, as did the spending. Once ENSC had taken over the provision and administration of DSM programs, NSPI customers saw their respective charges for DSM as a separate line item on their bills.

[12] In 2014, the *EECR Act* provided for significant changes to DSM programming by amending the *PUA* and repealing the *ENSC Act*. Electricity efficiency and conservation activities were defined:

79A In this Section and Sections 79B to 79V,

...

(b) “electricity efficiency and conservation activities” means activities, programs or plans relating to

(i) the efficient use of electricity,

(ii) the conservation of electricity,

(iii) the alteration of the consumption pattern of an end-user of electricity that has the effect of reducing demand during Nova Scotia Power Incorporated's periods of highest demand,

(iv) the utilization or management by Nova Scotia Power Incorporated of its electrical system in a more cost-effective manner,

(v) the delivery of a reduction in the amount of electrical energy or capacity that Nova Scotia Power Incorporated would otherwise be required to supply to its customers, or

(vi) any other prescribed activities, plans or programs;

[13] The Board uses the terms DSM and electricity efficiency and conservation activities interchangeably in this Decision.

[14] DSM is to be provided by a franchise holder who has the exclusive right to supply NSPI with “...reasonably available, cost-effective efficiency and conservation activities...” for a nine year term for the first franchise (*PUA* s. 79C(2)). The franchise is

granted by the Minister of Energy, and the franchise holder is "...deemed to be a public utility..." (*PUA* s. 79G(2)).

[15] The Board is to determine the activities to be undertaken, and NSPI is to undertake the activities by virtue of an agreement for a three year term with the franchise holder, approved by the Board (*PUA* ss. 79(H), 79(I), and 79(J)). Customers of NSPI will not see the amount for DSM activities on their respective bills as a separate item; rather, it will be part of the NSPI charges.

[16] The first franchise holder is the entity now known as E1. NSPI and E1 are deemed to have entered into an agreement for 2015, spending for which was prescribed by s. 79R of the *PUA*:

79R (1) In making an order approving electricity efficiency and conservation activities pursuant to Section 79Q, the Board shall approve the amount that the franchise holder may spend to supply the activities, which must not exceed the sum of

(a) \$35,000,000; and

(b) the amount of any over recovery of funds by Efficiency Nova Scotia Corporation during 2013.

(2) In making an order approving electricity efficiency and conservation activities pursuant to Section 79Q, the Board shall approve the amount that the franchise holder may charge to Nova Scotia Power Incorporated for the activities, which must not exceed the lesser of

(a) \$35,000,000; and

(b) the amount approved by the Board pursuant to subsection (1) less the amount of any over recovery of funds by Efficiency Nova Scotia Corporation during 2013.

[17] NSPI is directed to defer the recovery of the 2015 spending over an eight year period, pursuant to s. 79R(3) of the *PUA*. Spending and programs for the three year term, 2016-2018, are the subject of this proceeding.

[18] The *EECR Act* contemplated that NSPI and E1 would reach and enter into an agreement for the provision of DSM activities. The evidence in this matter reveals

that the two parties, despite a period of negotiation, were unable to reach an agreement. As a result, pursuant to s. 79J(3), an application came before the Board. That section provides that "...the Board shall establish a final agreement between the parties on such reasonable terms as the Board considers appropriate".

[19] E1 filed a DSM Plan that called for spending of an aggregate \$121.5 million over the 2016-2018 period, with a target of total cumulative energy savings of 405.9 GWh, and demand savings of 62.5 MW. While NSPI did not file a plan *per se*, it submitted that spending of \$22 million annually, with a target of annual energy savings of 100 GWh, should be approved by the Board.

[20] During the course of the hearing, the Board was presented with two consensus documents. The first document (Exhibit E-61) ("Quantum Agreement") was signed by E1, the CA, the SBA, the AEC, and the EAC. It is attached as Appendix C to this Decision and provides for spending of an aggregate \$113.5 million, with the same energy and demand savings targets as originally put forward by E1. The programs undertaken would be those filed by E1 in its application, and a number of matters which were in issue were referred to the DSM Advisory Group for study. E1 also agreed to undertake a Small Business Energy Study which had been proposed by the SBA. As was made clear in the closing submissions from AEC and EAC, the principles of equity and the provisions regarding the charitable contribution which NSPI had agreed to make to Clean Nova Scotia ("CNS") for a low income residential program (Sections 9 and 10 of the Quantum Agreement) were also important.

[21] The second document (Exhibit E-62) ("Consensus Agreement") was signed by E1, NSPI, the CA, the SBA, the Industrial Group, the EAC, and the AEC. The

Quantum Agreement provided that the Consensus Agreement, which is attached as Appendix D to this Decision, was incorporated by reference.

[22] The Consensus Agreement addressed a number of issues, which were identified in the Board's Final Issues List in this proceeding, and which the Board discusses below.

[23] In a number of previous decisions relating to electricity matters, and to other matters, the Board has indicated its view of consensus and settlement agreements. In *Re Nova Scotia Power Inc.*, 2008 NSUARB 140, the Board said:

[12] The Board's Regulatory Rules facilitate settlement discussions. The Board welcomes and appreciates the efforts of parties to, in good faith, settle issues, even where, as sometimes happens, a settlement cannot be ultimately achieved.

[13] Where, as here, the Agreement is supported by representatives of all of the customer classes, the Board can have confidence that the Agreement is in the public interest.

[14] Customers of NSPI and members of the public are, perhaps understandably, wary of the settlement process. Many of those customers and members of the public may not appreciate that by the time the hearing commences 80% of the rate hearing process has already happened. NSPI filed extensive evidence, as required by the Board, to support its rate request. Interested parties and Board Staff asked NSPI many hundreds of written questions (Information Requests), to which responses were filed.

[15] All of the parties who chose to do so filed evidence, including expert evidence. Written questions (Information Requests) have been asked of and answered by interested parties who filed evidence. NSPI filed reply evidence. As noted, all of this happened before the hearing was scheduled to begin so that the parties and the Board are well informed about the case in advance of any oral public hearing.

[16] The public can rest assured that the Board Members hearing the matter have also thoroughly reviewed all of the material in advance of coming to a decision as to whether to approve the Agreement as being in the public interest.

[17] Settlement agreements, while relatively new in regulatory matters before the Board, are common in the litigation process. Within the Board's adjudicative mandate, for example, assessment appeals, planning appeals and other matters are often settled. In the civil courts of Nova Scotia, a much higher percentage of cases are settled than go to trial.

[18] That is not to say that the Board would hesitate to reject a settlement agreement it did not consider to be in the public interest, however, it should be understood that a properly supported settlement is a success of the regulatory process, not a failure.

[2008 NSUARB 140, pp. 10-11]

[24] As pointed out by counsel for the Industrial Group in its closing submission, the Consensus Agreement has broad stakeholder support. The Board will address the specific terms in more detail later in this Decision; however, the Board approves the Consensus Agreement. The Board considers that it serves the public interest by resolving, or providing a method of resolving, a number of the outstanding issues raised in this proceeding. Further, it contains a provision which will ensure that, where consensus cannot be reached after consultation with stakeholders, the parties will bring outstanding matters back to the Board no later than June 30, 2016. This will allow sufficient time to deal with any such matters prior to the submission of the next DSM Plan.

[25] For reasons that are explained later in this Decision, however, the Board does not approve the Quantum Agreement as it does not consider that the amount of DSM spending agreed upon is in the public interest, despite the support of the CA, the SBA, the EAC and the AEC. The Board wishes to be clear that it has no difficulty with certain aspects of the Quantum Agreement, i.e., the proposed discussion of a potential development of a DSM Expenditure Justification Criteria, the Small Business Energy Study, the referral of cost-effectiveness screening tests to the DSM Advisory Group, and the provision of the results of the CNS low income program to the Board and stakeholders. The Board observes that NSPI does not, according to its closing submission, object to a number of these matters. NSPI objects to the Small Business

Energy Study due to cost and other issues; however Ms. Vincent said there is money for it in Enabling Strategies.

[26] The Board also notes that the DOE supported the principles of equity as well as other sections of both the Quantum Agreement and the Consensus Agreement, including mid-course adjustments.

[27] The Board understands that the non-financial provisions of the Quantum Agreement will be pursued by E1, NSPI and other stakeholders through the DSM Advisory Group.

3.0 ISSUES

3.1 Evaluation Report of 2014 DSM Programs (Econoler)

[28] As in the previous year, E1 engaged the services of Econoler Inc. ("Econoler") to conduct independent evaluations of the 2014 DSM programs. The Econoler team collaborated with two partner entities, Corporate Research Associates ("Corporate Research") and Equilibrium Engineering. Econoler coordinated all the evaluation activities, and prepared and reviewed all the deliverables. Corporate Research was responsible for the participant and builder surveys, interviews with partners and participants, and reporting on the data collected from those activities. Equilibrium Engineering conducted on-site visits, reviewed tracking sheets, assisted Econoler with certain parts of the impact evaluation, and analyzed and reported on those activities.

[29] In accordance with the Settlement Agreement from May 2012, a rolling schedule of evaluations was undertaken. This meant that mature programs which had both a process and impact evaluation in 2013 did not have a full-scale impact evaluation

in 2014. Instead, the 2014 evaluation for those programs involved validating ENSC's tracked savings and ensuring that the evaluation parameters corresponded to those established in previous full-scale impact evaluations.

[30] The 2014 DSM portfolio included seven programs which consisted of 16 components and initiatives. Econoler evaluated all 16 in addition to Codes and Standards. The series of reports were filed on February 27, 2015.

[31] A revised version of the Home Energy Report ("HER") evaluation was filed on March 19, 2015 in response to a request from the Board's verification consultant for additional detail on the methodology used to evaluate this program. Based on Econoler's evaluations, the DSM portfolio achieved net energy savings of 151.9 GWh and net peak demand savings of 27.1 MW at the generator. In addition, savings from Codes and Standards, which are outside of the DSM programs, were determined to be 31.4 GWh of energy and 5.2 MW of peak demand.

[32] The evaluator's reports contained 71 recommendations. The previous report on the 2013 DSM portfolio contained 122 recommendations.

[33] In its application, E1 stated that energy savings of 151.9 GWh exceeded the 2014 target of 137.8 GWh by 14.1 GWh or 10.2%. This was primarily attributed to results reported for the HER program. However, in its recommendations for the HER (Exhibit E-2, Table 15, page 37), the evaluator identified some concerns with the reported results. Recommendation HER-R2 notes that due to confidentiality issues, the evaluator was not able to review the raw data that Opower, the program delivery agent, received and the treated data upon which it applied adjustments. Econoler recommended that both databases be reviewed to validate whether the adjustments

were applied as defined in the methodology. Also, in recommendation HER-R3, Econoler noted that past electricity consumption for the participant group and non-participant group should be analyzed to:

...help determine whether the savings observed through the billing analysis are attributable to Home Energy Report and not to any other trend that could be observed with the treatment group, but not with the control group. An analysis of the electricity consumption trend for a five-year period should be conducted as part of the next evaluation.

[Exhibit E-2, p. 37]

[34] As noted in the following section, the verification report also identified some concerns with the HER savings results.

[35] A breakdown of the total reported savings shows that the residential programs achieved energy savings of 80.5 GWh compared to a target of 72.9 GWh. The demand savings were 15.5 MW. For the Business, Non-profit, and Institutional programs, the evaluated energy savings were 71.4 GWh compared to a target of 64.9 GWh. The demand savings were 11.6 MW.

[36] Without the HER results, E1's remaining portfolio achieved energy savings of 126.5 GWh compared to a target of 122.4 GWh, and demand savings of 24.2 MW compared to a target of 23.4 MW.

[37] The actual expenditure on the 2014 DSM portfolio was \$38.7 million compared to an approved budget of \$48.7 million.

3.2 Verification Report of 2014 DSM Programs (Peach)

[38] As in previous years, the Board engaged the services of H. Gil Peach & Associates to conduct an independent verification of the 2014 evaluated DSM savings results. Dr. Peach filed his report on March 26, 2015. The primary purpose of the report was to provide a review, verification, and if appropriate, recommended

adjustments to the savings data and estimates created by the evaluation consultants engaged by E1.

[39] The verification process included a review of each evaluation's explicit or implicit design, evaluation methods and standards, and/or evaluation protocols used in each evaluation. It also included a review of the program data tracking system, discussions with staff and delivery agents concerning program procedures and methods for program Quality Assurance/Quality Control, and selected due diligence site visits to check installation counts and quality of work.

[40] Regarding overall performance, the verification report noted that seven program components or initiatives exceeded targeted first year energy savings, while seven underperformed. Similarly, seven program components or initiatives achieved targeted demand savings, while seven did not. Three components or initiatives did not have targets: Residential Financing; LED Holiday Lighting Exchange; and Codes and Standards.

[41] There are 20 recommendations identified in the Peach verification report. In the previous report on the 2013 DSM portfolio, 30 recommendations were presented.

[42] The 2014 verification review determined that all but one of the evaluations conducted by Econoler were within accepted industry frameworks. The exception was the HER program. This program is a standalone behavioural program which is intended to motivate households to increase energy efficiency through a variety of means. This motivation is done through repetitive mailings to households with comparisons of energy usage to undisclosed similar households. The program clearly differs from the other

programs, which are centred on technologies or a combination of technologies and codes and standards.

[43] It was determined that the HER program evaluation was not conducted to industry standards because the evaluator was not provided with the NSPI customer data to conduct random assignment to the treatment and control groups, carry out data cleaning and selection, and to conduct the primary evaluation analysis. This customer data was provided by NSPI to the program delivery agent instead of the independent evaluator. Therefore, the evaluation was not independent since the program vendor controlled the database and assignment of houses to the participant treatment group and the non-participant control group.

[44] On page 39 of his report, Dr. Peach noted that “The standard in Demand Side Management evaluation is that evaluation must be conducted by an independent evaluator to guarantee the integrity of reported savings and to prevent conflict of interest.” He also noted that this standard is specifically supported by the SEE Action (State and Local Energy Efficiency Action Network) Evaluation Protocol for behaviour-based programs, and is also strongly recommended in the Universal Methods Protocol for behaviour-based programs.

[45] Similar to the Econoler recommendations, in addressing this issue Dr. Peach recommended that the evaluator should run additional comparisons using an NSPI database rather than the program vendor’s database, in order to determine if a systematic difference can be detected between the participant treatment group and the non-participant control group. He also noted that the claimed energy savings are approximately 1.3%, which is in the range of savings reported in similar HER studies

elsewhere from approximately four vendors who offer this program. Therefore, he stated that, on this basis, the Board “could consider acceptance of the claimed results with qualifications even though the scientific protocol was broken and the results are fatally flawed”. Alternatively, the vendor’s self-evaluated results could be accepted subject to the evaluator’s continued investigation of prior trending.

[46] Dr. Peach further noted that under normal conditions, behavioural-based programs have little value in resource planning but they do have a positive role as enabling strategies in support of technical DSM programs. Consequently, he recommended that behavioural programs be classified as Enabling Strategies along with marketing, promotional, and educational programs.

[47] The verification report contains several recommendations for improvement of evaluations and programs, and also endorses many of the evaluator’s recommendations that would improve measurement and evaluation. Some of the specific recommendations that were noted include:

- Establishing a Nova Scotia Technical Resource Manual (“TRM”) to facilitate program planning and evaluation (Rec #2);
- Developing a set of evaluation guidelines which cover methods, practices, and reporting (Rec #3);
- Implementing one of the accepted formal evaluation protocols (Rec #4);
- Partitioning energy savings to show the percentage claimed according to direct electrical measurement and the percentage developed without electrical measurement (Rec #16).

[48] It should be noted that the TRM was also recommended in the previous verification report and E1 identified this item in its Appendix C of Exhibit E-1 for completion in 2015, following the incorporation of the 2014 evaluation results.

3.3 Status of 2013 and 2014 Verification and Evaluation Recommendations

[49] In Appendix C, attached to its application, E1 included Table 1 - Update on Implementation of 2013 Verification Recommendations, and Table 2 - Update on Implementation of 2013 Evaluation Recommendations. Of the 30 verification recommendations, most were listed as completed, with several remaining to be completed in 2015 or to be considered during the 2016-2018 process evaluation. Similarly, of the 122 evaluation recommendations, the majority were listed as completed, with several currently in progress for implementation during 2015, and a small number deferred for future consideration. No intervenors raised concerns with the status of those recommendations.

[50] In its Closing Submission, E1 stated:

Neither the 2014 evaluation report nor the 2014 verification report was challenged by the formal intervenors during the course of the hearing. EfficiencyOne therefore continues to rely on the evidence filed with the Board on February 27, 2015 with respect to the efforts undertaken by EfficiencyOne pursuant to the 2013 and 2014 verification and evaluation recommendations. Specifically, Appendix C to that evidence provides further detail on the measures undertaken by EfficiencyOne related to 2013 recommendations. EfficiencyOne will file an update on 2014 evaluation and verification recommendations in its Q2 report to the UARB.

[E1 Closing Submission, p. 10]

[51] Although there were no challenges during the hearing, as noted in the previous sections above, the evaluation report contained concerns regarding the savings reported for the Home Energy Report, and the verification report did not accept the energy savings results that were stated in the evaluation report. Evidence filed by Dr. Peach (Exhibit E-36) also addressed that issue.

3.3.1 Findings

[52] In his evidence, Dr. Peach commented on the status of the 2013 evaluation and verification recommendations:

Q. Are you satisfied with the status of the 2013 verification and evaluation recommendations?

A. Yes. In general, from year to year Econoler has been responsive to all recommendations in the Savings Verification study, either making small modifications or stating why not. All key recommendations have been implemented or are in process. Also, ENSC, now E1, has been generally responsive to the evaluator's recommendations. In the minority of cases for which there has not been implementation, Econoler focuses on these in the next evaluation. My general sense is that the whole process moves forward well.

[Exhibit E-36, p. 15]

[53] Based on this observation and the lack of intervenor concerns regarding the evaluation and verification reports, the Board accepts E1's response to the 2013 recommendations to be satisfactory. In addition, the Board directs E1 to file an update on the status of the 2014 evaluation and verification recommendations in its next 2015 report.

[54] However, given the concerns and recommendations expressed by both the evaluator and the verifier regarding the results of the Home Energy Report, the Board directs that the energy and demand savings reported for those programs (25.437 GWh and 2.892 MW) are to be removed from the reported totals for 2014. Should E1 wish to have those savings reinstated at a later date, such reinstatement will be considered by the Board after the steps recommended by the evaluator and the verifier are satisfactorily concluded. The Board notes that the Home Energy Report initiative has not been included in the 2016-2018 DSM portfolio.

3.4 Status of KPMG Procurement Recommendations and Other Procurement Issues

[55] The Board accepts the status report supplied by E1 on the implementation of the KPMG audit recommendations. With respect to procurement issues, this appears to have been resolved as a result of work undertaken by the Deputy Minister of Energy,

Murray Coolican, and contained in a report dated May, 2015 entitled A Review of Efficiency Nova Scotia's Business Energy Solutions Program.

3.5 Proposed 2016-18 DSM Resource Plan

3.5.1 Program Development

[56] E1's 2016-2018 DSM Resource Plan, as modified by the Quantum Agreement, recommends DSM investments for the three year period of:

- (1) \$36.9 million in 2016,
- (2) \$37.8 million in 2017,
- (3) \$38.8 million in 2018.

The revised aggregate amount over the contract period is \$113.5 million.

[57] In justifying its DSM Plan, E1 indicated that its Plan expenditure is 38% less over the three year term than the Mid-DSM level plan, the Preferred Resource Plan from NSPI's recently completed Integrated Resource Plan ("IRP"). E1 argued its Plan is consistent with past expenditures and well within the \$53 million that was in rates for DSM in 2014 and which amount was subsequently repurposed by Order of the Board for 2015 fuel expenses. It expanded on these points in its post-hearing submission:

- It is \$69 million, or 38 percent, less (over the three-year term) than the Mid-DSM level of the IRP's Preferred Resource Plan. The Mid-DSM scenario resulted in the lowest revenue requirement over the 25-year planning period, rendering it the most cost-effective and therefore affordable for Nova Scotians over the long term.
- The Quantum Agreement investment level brings annual DSM investment less than a level that existed in 2011 and significantly below ratepayer-funded DSM Plans in 2012, 2013, and 2014.
- The proposed Plan balances short and long-term affordability by considering the \$53 million for DSM in 2014 rates that was repurposed in 2015 for the FAM repayment and will be available in 2016. This ensures that EfficiencyOne's proposed investment, which is significantly lower than \$53 million, is not the driving factor for an increase in rates while not causing negative impacts on EfficiencyOne's ability to achieve Mid-DSM levels, as per the IRP, in the future as required.

- In an effort to ensure that more customers are able to be participants, the Plan proposes an investment level and range of programs that allows for greater participation than NS Power's alternative DSM scenario while also reflecting an appropriate balance of participation opportunities between Residential and Business, Non-Profit, and Institutional (BNI) sectors and programs, unlike NS Power's alternative scenario that achieves 75 percent of energy savings from the BNI sector.
- It establishes a foundation level of investment that considers short-term affordability while ensuring that DSM can be gradually "ramped up" in future years, as needed.
- It addresses long-term affordability through avoidance of new capacity additions until 2032.

[E1 Closing Submission, p. 31]

[58] NSPI was the only other party to supply substantive evidence on an alternate plan. While not recommending a plan *per se*, NSPI recommended E1 design a plan that would provide annual energy savings of 100 GWh per year with associated demand savings over the contract period. The evidence presented by NSPI indicated this level of DSM savings could be accomplished for \$22 million per year, which was NSPI's recommendation. In putting forward this plan NSPI noted, among other things, that no additional DSM is required by NSPI during the contract period for compliance with Nova Scotia's renewable electricity standards. NSPI indicated its recommendation would provide capacity and energy savings from the low DSM case at the half low price and enable NSPI to avoid additional generating capacity until 2032. NSPI cited the new affordability provisions in the *PUA* and indicated that affordability must be taken into account when making a determination on E1's Plan. Affordability is discussed later in this Decision.

[59] NSPI noted that based on its research, DSM spending in Nova Scotia is higher than in other Canadian jurisdictions. NSPI stated there are significant rate pressures. NSPI went on to say, in its post-hearing submission:

Typically, in a more positive economic climate, being a leader in a particular initiative or industry is viewed in a positive light. Nova Scotia has demonstrated itself to be a leader in the following areas:

- environmental emissions caps;
- renewable energy; and,
- COMFIT.

The province's leadership in these areas, however, has also resulted in Nova Scotia having some of the highest electricity rates in the country.

Just a few years ago, when the province's industrial load was double what it is today, environmental initiatives were viewed by Nova Scotians as being as (if not more) important as affordability. As a result, aggressive government policies were implemented to control emissions from the electricity sector and to allow for the development of significant amounts of renewable energy.

...

Progress in adoption of renewable energy and the corresponding impact on rates is a major reason why Nova Scotians' clear number one priority is affordability. This priority is at such a level of importance that the government of Nova Scotia expressly legislated affordability as a factor to be taken into account by the Board in approving DSM expenditures.

Although there has been a strong shift in Nova Scotians' priorities towards affordability, the policies introduced a few short years ago are going to continue to put upward pressure on electricity costs in Nova Scotia for the next few years. In the immediate term, the COMFIT program is gaining momentum and is projected to add in excess of 150 MW of small low-impact renewable generation to Nova Scotia Power's network over the next two to three years. This is generation that comes at an average cost to rate payers that is nearly three times more expensive than the cost of the energy it is displacing.

[NSPI Closing Submission, pp. 5 & 7]

[60] The CA, SBA, AEC and EAC are all parties to the Quantum Agreement and, therefore, support the DSM level of spending proposed in the Agreement. The CA and SBA represent the majority of NSPI's customers.

[61] The CA noted that since 2011, through and including 2015, ratepayers have been paying approximately \$40 million per year for DSM programs and that is an indication that such a level of expenditures is affordable. The CA also noted that the Legislature imposed a cap of \$35 million for DSM in 2015 and that the Board is entitled to presume that the Province arrived at the cap after careful analysis and was satisfied the \$35 million cap was affordable, although the DOE did not agree.

[62] The Industrial Group requested that the Board direct E1 to implement a plan, at a three year spending level, of approximately \$80 million to achieve DSM energy savings of 100 GWh per year. The Industrial Group did not, however, supply a proposed plan and perhaps should not have been expected to do so. In the course of its submission, the Industrial Group noted that E1's actual spend in 2014 was 80% of its budgeted amount and it still exceeded target energy savings by 10.2%.

[63] The Industrial Group made two very salient points with respect to the delivery of DSM programs, particularly as it relates to incentives. The Industrial Group expressed concern about the level of incentives as well as the role incentives play with respect to energy efficiency targets.

45. The Industrial Group is very concerned that E1 has not sharpened its pen in terms of the appropriate level of incentives.
46. In addition, the Industrial Group is concerned that the established service delivery framework for E1 which requires it to deliver its targeted energy savings disincentivizes E1 from eliminating incentives. E1's performance will be measured against achievement of those targets and failing to do so, puts it at risk of losing its franchise. E1's formal process for evaluation and verification does not allow it to "count" its "Enabling Strategies" (which include measures such as education and advertising) towards its performance targets. In other words, if a consumer may be persuaded solely by information to undertake an efficiency measure because it will pay for itself in a relatively short period of time, E1 cannot count this toward its performance target; however, if that education or information is coupled with an incentive then E1 can measure and count it.

[Industrial Group Closing Submission, p. 12]

[64] Finally, the Industrial Group, as did NSPI and the DOE, recommended E1 be directed to model various funding scenarios in future hearings and not simply its preferred plan.

[65] On the proposed level of spending, the DOE appeared to align itself with NSPI and suggested that E1 be directed to develop a plan at a much lower cost than it requested or it has agreed to accept in the Quantum Agreement. The Board interprets

the DOE's brief as supporting a number close to or at the \$22 million per year suggested by NSPI.

3.5.2 Incentives

[66] The Board, in its questioning of E1's witnesses, and NSPI and the Industrial Group in their submissions, expressed significant concerns over the manner in which incentives are determined by E1. It would appear from the evidence that over 60% of the DSM budget is paid in incentives to program participants.

[67] The concern is that the incentives are not designed to achieve the minimum levels required to induce participant behavior. Mr. Pickles, NSPI's expert, testified there was very little information to indicate how incentives were designed and justified and, in his view, some incentives were outside the range of reasonableness. He cited a number of examples including LED lamps, adjustable speed drives and incentives for the custom program. The Board notes, parenthetically, that when comparing the testimony of Mr. Pickles with that of Mr. Dunskey, a consultant for E1, Mr. Dunskey appeared better informed with respect to what is happening both here in Nova Scotia and in other jurisdictions in North America. Generally speaking, the Board preferred the evidence of Mr. Dunskey. However, the Board acknowledges and accepts the concerns on incentives raised by Mr. Pickles, and more particularly Mr. Drazen, on behalf of the Industrial Group.

[68] Mr. Drazen also raised the concern about a lack of information, noting that several of the measures E1 proposed are so cost effective that customers should be expected to do them on their own, without any incentive. NSPI noted that the evidence from E1 seemed to suggest that the information E1 used in determining incentives is focused extensively on information from customers and trade allies who may have a

vested interest in having a high incentive. It argued E1's Plan does not address the other side of the issue and that is, how much can be afforded. NSPI also argued the process contains no specific quantitative criteria analysis or guidelines with respect to incentives.

[69] Mr. Dunskey countered that argument as follows:

Thank you. Just to explain a little bit more. So we do some of this work from time to time. We've done it for Efficiency Nova Scotia and others where we'll go out and, first of all, do primary research to understand what the actual cost differential is in a specific market.

Once we've done that, speak with the full supply chain, as well as end users or -- and consumers, to get a sense of what their market barriers are. So just for example, I know it was raised in someone's opening arguments, I guess it was, the example of a commercial dishwasher where you had an extraordinarily low payback, and I think it was under one year. We just literally, I think it was last week, just completed market research for the Federal Government into why energy efficient equipment in the commercial kitchen space is not flying off the shelves given that it's so cost-effective.

And so one of the things that we'll do is do a barrier analysis. And this is really critical to understanding how much incentive to provide. If the barriers are pervasive, then we know that we need to provide very significant incentives. If the barriers are minimal or if we can focus on those barriers and actually remove them, then we may need very few incentives.

So in this example of commercial kitchen equipment, we found very pervasive barriers. You know, examples like in most cases when you're looking at restaurant chains or hotel chains, for example, the purchasing department, which is responsible for specifying the equipment, is very different from the operations and maintenance department, which is responsible for paying the bills.

So purchasing actually doesn't really care about payback because they never see the payback. When you have that sort of a barrier, you know that unless you have reason to believe that you can actually have one-on-one discussions with, let's say, a large industry and change their entire internal practices, you need to provide extremely high incentives, because payback never actually makes it to the decision-maker.

It's just one example of a whole series of barriers that we examine in each case to try to understand how far you need to go.

[Transcript, June 16, 2015, pp. 483-485]

[70] E1 argued that incentive levels are determined by various factors including comparison to other jurisdictions, market knowledge gained through historical program operation, market research and consumer pricing information.

3.5.2.1 Findings

[71] The CA summarized his view of the purpose of a DSM program:

The basic purpose is to reduce the level of energy required by Nova Scotia in the future, both short and long term. DSM programs are an integral component in meeting anticipated energy requirements. Having an effective DSM program giving a steady contribution to the control of energy costs is a prudent part of Nova Scotia's energy strategy.

[CA Reply Submission, p. 3]

[72] The Board has several concerns with the NSPI Plan at \$22 million. Firstly, it eliminates most of the programming in the residential class. The residential class is far and away the largest class on NSPI's system. Over the three years the E1 Plan spends approximately \$50 million on the residential class while the preferred scenario in the NSPI Plan spends approximately \$15 million. Secondly, the NSPI Plan cuts roughly in half the amount of spending on DSM from those amounts dedicated and spent on DSM in each of the last four to five years. This comes at a time when NSPI's own IRP supports DSM spending 35% to 40% higher than the amount suggested by E1. There is a radical disconnect between the IRP, which is designed to achieve the lowest long term cost for customers, and the NSPI Plan, which appears focused mainly on avoiding a 2016 rate case. In the Board's view, it is in the interests of ratepayers that they be provided a reasonable opportunity to achieve the overall long term cost savings identified in the IRP. While NSPI's Plan may meet the test of short term affordability, it does not do it in a manner that is in the best interests of Nova Scotia Power Incorporated's customers, who also must be given the opportunity to achieve long term cost savings.

[73] On the other hand, the E1 plan, subject to some adjustments which the Board will make in this Decision, better achieves, in the view of the Board, the

objectives of the *PUA*. It is more consistent with the findings of the *IRP*; the level of funding is at par or below amounts in 2012, 2013 and 2014; and, it ensures more balanced participation by customer classes, particularly the residential class. Having said that, the Board has two concerns. As noted by the Industrial Group, there has been a history of some under-spending by E1 and fairly consistent overachieving of energy savings targets. Indeed, from 2008 to 2014, E1 and its predecessors, overachieved on energy savings and on demand savings in most years as noted in the following chart which was prepared by Board Staff based on historical information:

Program Year	Expenditures (\$ million)		Energy Savings (GWh)		Demand Savings (MW)	
	Plan	Actual	Plan	Actual	Plan	Actual
2008*	3.2	2.45	16.1	21.4	2.1	4.7
2009*	9.7	9.4	50.3	64.4	6.8	10.3
2010	22.9	23.0	82.7	82.5	16.9	15.9
2011	41.9	35.8	158.5	141.8	30.9	28.9
2012	43.7	43.6	124.2	158.1	23.2	33.7
2013	46.2	43.4	135.2	163.2	25.9	34.1
2014 [†]	48.7	38.7	137.8	151.9	27.0	27.1
2015	39.0		121.2		21.2	

* Total actual for 2008 and 2009 was \$11.85 million; 2008 amount was determined from financial information.

† Excluding HER results reduces actuals to 126.5 GWh and 24.2 MW

This suggests that the targets could have been met with less spending.

[74] The Board is also very concerned about the lack of rigor with respect to the determination of incentives. The Board is not satisfied that E1 presently has sufficiently rigorous programs to provide the minimum incentives necessary to achieve the savings targets. Indeed, a large part of E1's analysis seems to be to ask participants what they want. Having regard to the history of underspending, and the history of overachieving of savings and demand targets, and in an effort to bring greater

rigor to the calculation of incentives, the Board is reducing each of the three years in the Quantum Agreement amounts by 10% so that, for example, the amount for 2016 would be reduced by \$3,690,000 to \$33,210,000. This amount is inclusive of the \$8.4 million surplus remaining from 2014, as referenced in the following sections. A similar calculation is to be made for each of the two subsequent years. The Board is comforted in making this adjustment with the knowledge that HST payments ranging from \$1.6 million to \$4.2 million, during the years 2011 to 2014, are no longer required to be paid and can be diverted to program spending. The Board is also mindful of the excess generation capacity in the NSPI system.

[75] It became apparent during the course of the hearing that E1 was requesting inflationary increases for 2017 and 2018. In past Decisions the Board has denied CPI increases to NSPI on the basis that there was no evidence of a direct connection between NSPI's costs and the general rate of inflation. Little, if any, evidence was presented by E1 to justify the inflationary increase and it is denied. The budgets for 2017 and 2018, reduced by 10% as noted in paragraph 74 of this Decision, are approved at \$34,020,000 and \$34,920,000 respectively.

3.5.3 Affordability

[76] Having determined the parameters of a preferred plan, the Board is specifically directed by the 2014 amendments to the *PUA* to address the issue of affordability. The most relevant sections are Section 79L(8) and (9):

79L (8) The Board shall approve an agreement pursuant to this Section if, in addition to any other matters considered appropriate by the Board, it is satisfied that the agreement, including the proposed electricity efficiency and conservation activities that are the subject of the agreement, **is in the best interests of Nova Scotia Power Incorporated's customers** and satisfies the requirements of Section 79J.

(9) The Board's assessment of the proposed electricity efficiency and conservation activities for the purpose of the approval **must take into account their affordability to**

Nova Scotia Power Incorporated's customers, along with any other matters considered appropriate by the Board or as may be prescribed. [Emphasis added]

[77] Traditionally in determining a capital expenditure or a program such as DSM the Board has applied the test of lowest long term cost. This is a principle that is examined in the IRP and in every capital work order application the Board reviews. Issues of affordability, although not explicitly stated in the *PUA* until 2014, were always relevant to discussions under such topics as rate shock and affordability generally. Indeed, for example, affordability has been on the Issues List in recent Annual Capital Expenditure Plans and in several hearings for Halifax Water which also is regulated under the *PUA*.

[78] Firstly, the Board must determine whether Section 79L(9) changes the manner in which the Board examines DSM expenditures and, secondly, whether the proposed plan, as amended by the Board, meets the test of affordability.

[79] The Industrial Group begins the discussion on affordability in its post-hearing submission with the following very salient statement:

The Industrial Group wishes to make it clear that it does not favour short-term affordability at the expense of long-term risks.

[80] The DOE suggested the singular emphasis on affordability in the *PUA* amendments is significant. The DOE, however, noted the Board is not constrained to only take affordability into account and ultimately must be guided by the best interests of NSPI customers. The DOE argued the use of affordability in the legislation was intended to emphasize short term rate impacts. The DOE went on to state:

15. An understanding of these terms must also be informed by the context in which they appear in the *PUA*. These provisions only appear in the part of the *PUA* dealing with electricity efficiency and conservation activities which, by their nature, tend to involve an up-front cost and benefits over time. An assessment of

the cost-effectiveness of these activities must necessarily have a long term purview, as the cost and benefits occur in different time frames. On the other hand, the affordability of these activities relates to their cost, which is paid upfront (unless it is deferred).

[DOE Closing Submission, p. 5]

[81] The DOE suggested affordability means not spending any more than is absolutely necessary at this time. Both NSPI and the SBA indicated that customers view affordability over a short time period. According to Mr. Blunden, of NSPI, that means somewhere between tomorrow and five years.

[82] The Board finds that the inclusion of Section 79L(9) of the *PUA* directs the Board to take into account an increased focus on short term rate impacts. Having said that, the Board notes that there will be a review of the DSM program every three years. There will always be rate pressures to be taken into account in both determining rates and in determining the DSM program. A focus exclusively on short term affordability means that the Board would never get to consider long term costs. That would be to the detriment of ratepayers. The Board does not believe that ratepayers are well-served, or that it is in their best interests to focus only on short term costs and thereby deny customers the real long term cost savings that are possible from a balanced and properly implemented DSM program. Accordingly, while the Board finds that there has been a change in focus mandated by the Legislature, and an increased emphasis on short term rate impacts, the overarching consideration continues to be “the best interests of Nova Scotia Power Incorporated’s customers” as stated in Section 79L(8) of the *PUA*.

[83] The Board then turns to the issue of whether the plan is affordable. NSPI inferred that its \$22 million annual plan can be financed without the necessity of a rate increase. Either of the NSPI plan or the E1 plan will have the added cost of financing

the amortization of the 2015 DSM program. It appears NSPI took this into account. NSPI candidly admitted it was unaware that \$8.4 million in surplus existed in the hands of E1 which can be applied to next year's DSM Plan but, in any event, is for the benefit of ratepayers.

[84] NSPI appeared to take the position that all of its costs must be recovered (including repurposing the \$53 million already in rates for DSM) and that the difference between NSPI's costs, and the room in rates that can absorb DSM without a rate increase, is the amount available for DSM. However, the Board finds that it is all of NSPI's costs which will determine whether a rate increase is required, and not just DSM costs. There are other cost drivers:

- (1) The base cost of fuel will be adjusted this fall and NSPI indicated that the reset could be as much as \$50 million higher than currently included in rates attributed almost entirely to the Province's COMFIT program including more expensive COMFIT generation;
- (2) There will continue to be an under-recovery under the FAM;
- (3) Amortization of the DSM 2015 program will begin.

[85] In the Board's view there are, however, a number of factors which may offset the cost pressures:

- (1) The amortization of NSPI's fixed costs recovery mechanism is ended eliminating \$15 million or \$16 million in rates;
- (2) 2014 DSM surplus of \$8.4 million;
- (3) DSM fuel savings associated with the E1 plan of \$8 million per year (although that may have already been taken into account by NSPI).

[86] The Board notes that NSPI's most recent General Rate Application included the following amounts in rates for 2014, which were no longer required at the end of 2014 based on NSPI's financial statements:

- (1) Section 21 tax deferral at \$18.5 million;
- (2) 2008-2009 DSM amortization at \$1.1 million.

Both of these amounts are further offsets currently available within existing rates since the revenue related to these fully amortized deferrals continues to be collected during 2015.

[87] As noted earlier, in 2014 approximately \$53 million was in rates in the DSM rider. By Order of the Board, at the request of the various customer classes, those funds which were not needed for DSM in 2015 because of the legislated deferral, were diverted to pay excess fuel costs. However, those amounts continue in rates and, as E1 argued, and the Board agrees, were put there for the purposes of paying for DSM.

3.5.3.1 Findings

[88] The Board notes that the DSM amount of \$33,210,000, as set by the Board for 2016, is below DSM spending in each of the last four years. It is also an amount significantly below that recommended in the IRP, and the Board believes, generally speaking, meets the test of affordability as set out in Section 79L of the *PUA*, while at the same time recognizing the overarching principle of what is in the best interests of ratepayers. The Board offers the following analysis concerning a possible rate increase:

- NSPI's DSM Program \$22.0 million
- Plus 2014 ENSC surplus \$8.4 million \$8.4 million
- Plus 2008-09 DSM amortization still in rates \$1.1 million
- **Total** (which, based on the evidence of NSPI, can be absorbed without a rate increase in 2016) **\$31.5 million**

- Year one DSM Program ordered by the Board \$33.2 million
- **Difference** **\$1.7 million**

[89] Given a total NSPI revenue requirement of \$1.3 billion, the Board does not believe a revenue shortfall of approximately \$2 million will drive a rate increase as it believes NSPI should be able to find offsetting savings to achieve that. If that were not possible, and the \$2 million difference would cause a rate increase, the Board would hear evidence with respect to deferral. In the circumstances, therefore, the Board believes the program is affordable.

[90] The Board anticipates E1's proposed program and savings targets can be achieved within the budget approved by the Board in this Decision. However, if E1 feels revisions are necessary they can be requested in the Compliance Filing.

[91] The DOE raised the issue of deferral and amortization of certain of the DSM costs, noting it is permitted by the *PUA*. The DOE indicated that a decision on deferral should generally be made at the time the DSM budget is set. As noted in questioning of the E1 panel by the Board, the Board does not see any logical reason why a deferred amount should be put in NSPI's rate base at a cost of 7.78% when bank financing is available to qualified borrowers at approximately 3%. E1 is directed to enter into discussions with the DOE and with commercial lenders to see if there is a less expensive way to finance any deferrals and whether that is authorized by the *PUA*. The

Board would be much more inclined to order a deferral if it did not attract a financing cost of 7.78%.

[92] E1 is directed to undertake research and make recommendations on a more rigorous program for determining incentives which should be filed with the Board by March 31, 2016. The Board recognizes that optimizing incentives is difficult; however, a guiding principle should be that incentives are designed at the minimum levels required to induce adequate participation and employ some quantitative analysis.

[93] Finally, in future applications, E1 is to provide one or more alternate scenarios of DSM budgets for the Board to consider, and NSPI is to provide rate impact analysis caused by these scenarios.

3.5.4 Relationship of the Proposed 2016-18 DSM Plan to the 2014 Integrated Resource Plan

[94] During a 10-month period in 2014, NSPI developed a new IRP in collaboration with Board Staff and consultants, and in consultation with interested parties and their consultants.

[95] The general purpose of the IRP process is to identify a plan which utilizes both supply-side and demand-side resources to reliably serve the electrical requirements within Nova Scotia at the lowest long term cost to ratepayers. The Preferred Resource Plan determined through this comprehensive modelling process included what was referred to as the “mid-DSM” scenario presented in a Navigant report on DSM potential in the province. That scenario represented a 3-year DSM energy savings of 519 GWh at a 3-year cost of \$183 million. This is about 30% higher than the DSM Plans over the 3-year period of 2012 to 2014, which included approximate energy savings of 397 GWh and expenditures of \$139 million.

[96] It has been the understanding in Nova Scotia that DSM plans were developed to satisfy the levels of energy and demand savings identified in the IRP's Preferred Resource Plan, which can result in hundreds of millions of dollars in savings to ratepayers over the planning period. This issue was extensively explored during the hearing on the 2011 DSM Plan, and it is instructive to revisit the explanation provided by NSPI's former Vice-President, Alan Richardson:

MR. RICHARDSON: So I would suggest that the primary purpose of why we're doing DSM in Nova Scotia is all related to the results of the 2007 Integrated Resource Plan and subsequent update in 2009.

So I believe we filed a quote from the Terms of Reference for the 2009 IRP and it lists basically what we're trying to evaluate in doing the IRP. Bullet number three says:

Develop and evaluate alternative plans in order to determine the best option. The objective function is the cumulative present worth of the annual revenue requirements over the planning period including DSM total resource cost and adjusted for end effects.

So our primary objectives are completely defined within the IRP work. So the IRP says if we can accomplish these savings for this money we will have saved our customers hundreds of millions of dollars over the planning period. And so then the challenge becomes for us to do it. And so far the results are good. The '08-'09 programs did achieve the results that were set out, the goals that were set out. And those were clear right from the start.

MR. MERRICK: Am I correct that you would identify the primary purpose of the DSM spend in Nova Scotia today being to save rate payers money?

MR. RICHARDSON: DSM is part of a long-term Integrated Resource Plan and so the primary purpose of DSM is to hold up its part of that plan. That plan has tremendous benefits of all types, including on the economic side precisely what I've just read, which is very well spelled out, but it also has other benefits such as help meeting our goals for reducing emissions, for reducing carbon dioxide. So it takes us to a cleaner future and it does so in a way that saves our customers hundreds of millions of dollars. That's the primary reason we're doing DSM. [Emphasis added]

[M02783 Transcript, April 19, 2010, pp. 30-32]

[97] In developing the 2016-2018 DSM Plan, E1 stated that it was guided by the results of the current IRP, but in the interest of ratepayer short term affordability, its proposal contained significantly reduced savings targets and related expenditures. In fact, its proposed plan of 405.9 GWh and \$121.5 million is a reduction of 22% in energy

savings and a reduction of 34% in expenditures below the Preferred Resource Plan. The amount of expenditures submitted in the Quantum Agreement of \$113.5 million is 38% less than the Preferred Resource Plan and is also below the 3-year amount for the 2012 to 2014 period.

[98] Regarding NSPI's proposed annual levels of 100 GWh and \$22 million, as noted elsewhere in this Decision, that proposal would result in a radical disconnect from the IRP, with reductions of 42% in energy savings and 64% in expenditures below the Preferred Resource Plan.

3.5.5 Cost Effectiveness Screening

[99] Although the Board has not approved the Quantum Agreement, Section 7 contains a provision which states as follows:

Through collaboration within the DSM Advisory Group the parties agree to work to achieve a consensus as to the methodology and assumptions of the cost effectiveness screening test to be applied to future DSM research plan.

[100] The Board has no objection to that process taking place. In the meantime, the existing Total Resource Cost ("TRC") methodology will remain in place. The Board cautions, however, that a compelling case would have to be made to abandon the TRC test altogether.

3.5.6 Avoided Cost Analysis

[101] Synapse, in its evidence, indicated that rate impact analysis should account for all factors that impact rates either positively or negatively, which would include avoided costs that might exert downward pressure on rates (e.g., generation, transmission and distribution) as well as the avoided cost of complying with environmental regulations.

[102] In response to NSUARB-Pronko IR-4, E1 recognized that intensifying DSM efforts on a locational basis could provide cost effective savings to ratepayers by avoiding or deferring transmission and distribution related capital investment.

[103] In NSPI's response to NSUARB IR-7, NSPI indicated that locational avoided cost is the type of consideration the company would look to explore with E1 in future.

[104] The Board encourages the collaboration noted in the two IR responses on this issue.

3.5.7 Rate and Bill Impact Analysis

[105] In approving the Consensus Agreement the Board approves the Section 6 provisions related to rate and bill impact analysis.

3.5.8 Program Cost Allocation

[106] In approving the Consensus Agreement the Board has approved Section 4 on the cost allocation.

3.5.9 Evaluation and Reporting

[107] In approving the Consensus Agreement the Board approves Section 5 dealing with evaluation and reporting.

3.6 Performance Targets, Indicators, and Thresholds

[108] E1 proposed that the performance targets be cumulative annual energy and peak demand savings at the end of the three year period at the portfolio level and the performance indicator be an annual reporting of annual incremental energy and peak demand savings. The annual reporting will also include lifetime energy savings as a performance indicator. E1 noted that it also plans to include information in its annual

reports on total ratepayers' benefits, total spending by E1 and customer satisfaction, but not as performance indicators.

[109] The performance threshold proposed by E1 is 90% of the performance targets for the three year cumulative energy and peak demand savings.

[110] Based on the proposed plan, the cumulative performance targets are 405.9 GWh of energy savings and 62.5 MW of demand savings at the generator. These performance targets were confirmed in the Quantum Agreement. As noted earlier in the Decision, the Board has reduced the expenditures on DSM activities from the amounts in the Quantum Agreement and those proposed in the application, which may impact the performance targets.

3.6.1 Findings

[111] The Consensus Agreement signed by the parties, and approved by the Board, provides further details on the performance targets, indicators and thresholds. These targets are cumulative at the end of the three year period and the threshold for compliance is 90% of the proposed targets. As discussed earlier in the Decision, E1 is ordered to incorporate these targets in its Compliance Filing.

3.7 Mid-Course Adjustments and Flexibility

[112] In the Consensus Agreement, the parties agreed to the setting of targets over a three year period, instead of annual targets. E1 had sought the ability to make changes of up to 25% in targeted savings and investments at the sector level so that it could make any appropriate adjustments as the programming evolves. Section 5 of the Consensus Agreement allows E1 to make such changes at a program level, and requires it to provide explanations of changes exceeding 25% at the program level. E1 also agreed "...to use reasonable efforts to avoid program changes that will result in

substantial changes to any customer class on an annual basis”, and to give written notice of intent to implement any mid-course adjustments.

[113] In its closing submission, the Industrial Group asked the Board to deny the request by E1 to permit moving up to 25% at a sector level “...if on an annual basis, it will impact customer classes greater than 25%.”

3.7.1 Findings

[114] The Board is satisfied that the provisions of the Consensus Agreement adequately address the ability of E1 to make mid-course adjustments and allow sufficient flexibility at the program level. Limiting the 25% adjustments to programs rather than sectors will reduce potential impacts at the customer class level. The Board does not consider it necessary to address this at the sector level, given E1’s approach to the impact on customer classes. The Board also notes that the Industrial Group is a signatory to the Consensus Agreement.

3.8 Establishment of a Reserve Fund

[115] As a part of the Consensus Agreement, E1 withdrew its request for a reserve fund.

3.9 HST Status

[116] E1 noted that its predecessor, ENSC, sought a ruling from the Canada Revenue Agency (“CRA”) as to whether or not the company is making a taxable supply to NSPI and if it is entitled to claim full input tax credits for the HST it paid in delivering its programs.

[117] The CRA ruling and a subsequent appeal denied the request for input tax credits by the ENSC. E1 now has an appeal pending before the Tax Court of Canada.

[118] E1 noted that it is currently negotiating with NSPI regarding the funding of this appeal and during this period, the HST receivable is an asset of the E1 Transition Corporation. Based on legal advice, E1 is now claiming and receiving input tax credits for 2015 and corresponding HST cost is not included in the DSM cost estimates.

3.9.1 Findings

[119] The Board understands that E1 is pursuing the input tax credits for past HST which it paid while delivering DSM services. The matter is currently before the Courts and the Board will await the decision before issuing directions on this matter. E1 is directed to provide the Board with full information when the matter is resolved by the Courts for further directions from the Board.

3.10 Agreed form of Supply Agreement

[120] E1 included an Agreed Form of Supply Agreement as Appendix J of its application, effective January 2016. The Supply Agreement generally outlines the terms and conditions which each party is expected to adhere to, in order to fulfill their respective responsibilities under the *PUA*. Attached to the Supply Agreement were various schedules, some of which were left blank pending the Board's Decision in the current proceedings and the Compliance Filing.

3.10.1 Findings

[121] The Board has reviewed the Supply Agreement and has no comments at this time. E1 is ordered to complete the Supply Agreement incorporating the Board's Decision as a part of its Compliance Filing.

3.11 Compliance with Electricity Efficiency and Conservation Restructuring (2014) Act

[122] Section 79J of the *PUA* contemplates that E1 and NSPI will enter into an agreement for electricity efficiency and conservation. That implies to the Board a good faith negotiation and a reasonable attempt to resolve as many issues as possible. Under the *PUA*, where the parties are unable to come to agreement that may be referred to the Board.

[123] This proceeding was far more litigious as between E1 and NSPI than it needed to be. The Board understands that on the critical question of the DSM budget the parties were sufficiently far apart that there was likely no reasonable prospect of agreement. In those circumstances it is the role of the Board to adjudicate and come to a conclusion which it has done in this Decision. However, there were many other issues that could, and should, have been agreed upon well before the hearing. As it turned out, E1 and NSPI did come to an agreement in the form of the Consensus Agreement tabled during the course of the hearing on many of those issues, but only after thousands of dollars in consulting fees and many pages of evidence were produced in circumstances where, in the view of the Board, it need not have happened. Perhaps the degree of separation on the overall budget poisoned other aspects of the negotiations but it should be constantly kept in mind that both parties are being funded by ratepayers.

3.12 Establishment of a Standardized Filing for Future Applications to approve a DSM Supply Agreement

[124] The Consensus Agreement proposed to establish a standardized filing for future applications by E1. The parties to the Consensus Agreement have agreed to refer this matter to the DSM Advisory Group for discussion and report back to the Board

as noted in the Consensus Agreement. In general, it is expected that the standardized filing will include:

- i) Lifetime energy and demand savings;
- ii) Annual participation and participation rates by program;
- iii) Cost-effectiveness testing analysis results by program;
- iv) Levelized cost of saved energy for each program;
- v) Detailed description of the rate and bill impact analysis; and
- vi) Such other items as agreed to in the DSM Advisory Group.

[Exhibit E-62, p. 4]

[125] E1 also agreed to provide technical data in its future plans by measure or other similar information, as far as possible.

3.12.1 Findings

[126] The parties in the Consensus Agreement have agreed to work on a standardized filing template and other information and to submit a report to the Board for approval.

[127] The Board approves this process and awaits the filing of the report.

3.13 Costs

[128] The EAC seeks costs in this proceeding in the amount of \$27,500. The EAC is a non-profit organization and would qualify for costs under the Board's *Costs Rules*. The Board did find the evidence provided by the EAC's witness, Ms. Chant of the Vermont Energy Investment Corporation, helpful. The Board directs that E1 and the EAC discuss the issue and see whether it can be resolved. If not, the Board reserves the right to make any cost determination. It would be unlikely that the Board would award costs to reimburse salaries of employees of the EAC.

4.0 LETTERS OF COMMENT AND PUBLIC SPEAKERS

[129] The Board received 37 letters of comment from various persons, who wrote individually or on behalf of organizations. With only two exceptions, all were supportive of E1 and maintaining the amount of its proposed DSM plan, and in a number of instances, some writers urged the Board to allow an increase in spending on efficiency programs. One of the exceptions did not address the DSM Plan, but presented a critique of the evidence of Dr. Peach.

[130] Among the reasons cited for this support were environmental benefits and fighting climate change, economic benefits including jobs in the energy efficiency field, and benefits to low income customers, with particular emphasis on programming for low income renters. A number of writers suggested they would not mind paying more to support increased DSM programming. The Board notes that several writers described their personal experiences with E1 or its predecessor, ENSC, resulting in decreased electricity consumption and significant savings.

[131] At the evening session held on June 15, 2015, the Board heard from 21 speakers. A number of the speakers were engaged in businesses that were providers of services to E1, or were delivery agents for services under DSM programs. They spoke of the environmental, economic, and financial benefits of DSM programming and supported E1's Plan as filed. Concerns about losing industry capacity if spending and programs are decreased, and problems of "ramping up" after a "ramping down", were expressed.

[132] Other speakers included students who had either recently graduated from, or are currently in, programs which they hope will lead to positions in energy efficiency

or sustainability businesses. They want to ensure that the “culture” of energy efficiency is maintained. They, too, supported E1.

[133] Rev. Charles Bull, representing the Anglican Diocese of Nova Scotia and Prince Edward Island, spoke about the environmental impacts of energy efficiency, and also about the need to assist low income earners to be energy efficient. In his view, cuts to E1’s Plan would affect the most vulnerable in society.

[134] Julian Boyle spoke on behalf of the Town of Lunenburg and its electric utility, as well as the Municipal Electric Utilities of Nova Scotia Co-operative. He said he was not in a position to support or criticize the E1 Plan; however, he noted that access to DSM programming in Lunenburg was not the same as other areas of the province. Mr. Boyle said only participants benefit from DSM programming and, therefore, there is a need for equal access. He also suggested that E1 needs to target programming which reduces peak energy demand.

[135] The Board appreciates that all of these persons and organizations took the time to write or to speak to present their views. The Board understands the importance of ensuring that low income customers are able to participate in or benefit from energy efficiency programs. The Board notes that NSPI has committed already to annual contributions to Clean Nova Scotia for programming for low income homeowners. E1 is encouraged to pursue programming for low income renters within the Plan approved by the Board.

[136] The Board notes, however, its limited role, as pointed out by Counsel for the Industrial Group in its closing submission:

32. It is not the role of the Board to prop up or sustain an industry, regardless of the impassioned evidence of speakers in the public session who have enjoyed an expansion of their business under E1. The arguments with respect to the number

of jobs created is not a matter of concern for this Board unless they directly connect to costs associated with the delivery of the programs. Job creation is a policy matter for the Province, not the Board under the **Public Utilities Act**. Furthermore, it should be evident from the early submissions and the basis for intervention by Nichent, that there are businesses in Nova Scotia which are prepared to deliver efficiency to consumers outside of the circle of preferred providers or suppliers to E1.

[Industrial Group Closing Submission, p. 8]

[137] The Board understands the concerns expressed in the letters and comments of the speakers. However, the Board's jurisdiction with respect to DSM plans is restricted by ss. 79L(8) and (9) of the *PUA*, which address the best interests of NSPI's customers and affordability, as discussed earlier in this Decision.

5.0 SUMMARY OF BOARD FINDINGS

[138] E1 applied to the Board for approval of its 2016-2018 DSM Plan, pursuant to s. 79J(3) of the *PUA*, as it was unable to reach agreement with NSPI on the terms of the Supply Agreement. E1 sought approval for spending of an aggregate \$121.5 million over the three years, with a target of total cumulative energy savings of 405.9 GWh and demand savings of 62.5 MW. NSPI submitted that the Board should approve a plan which included \$66 million over three years, with a target of annual energy savings of 100 GWh.

[139] During the course of the hearing, two settlement documents were presented to the Board, the first being the Quantum Agreement, whereby E1, the CA, the SBA, the EAC and the AEC agreed to an aggregate spending of \$113.5 million, with the same energy and demand savings target as originally put forward by E1. NSPI, the Industrial Group, and the DOE were not parties to the Quantum Agreement.

[140] A Consensus Agreement, which was signed by NSPI and the Industrial Group, in addition to the signatories to the Quantum Agreement, addressed a number of issues which the Board had identified in its Final Issues List for this proceeding.

[141] The Board does not approve the Quantum Agreement, and instead, approves an aggregate spending of \$102,150,000, which is a 10% reduction in the amount agreed to in the Quantum Agreement, with no inflation increases over the three years. As noted in paragraphs [74] and [75], the approved spending is \$33,210,000 during 2016; \$34,020,000 during 2017; and \$34,920,000 during 2018. The Board has reduced DSM spending by 10%, having considered the history of underspending on DSM programming, the history of overachieving savings and demand targets, and as an inducement to bring greater rigor to the calculation of incentives.

[142] The Board considers that the target energy and demand savings included in the E1 DSM Plan can be achieved within the approved spending; however, if E1 feels that revisions are necessary, they can be requested in the Compliance Filing.

[143] The Board finds that this plan meets the tests set out in the *PUA* in that it is in the best interests of NSPI's customers. Further, the Board acknowledges that affordability is given an increased focus under the provisions of s. 79L of the *PUA*. The Board concludes, however, that a focus exclusively on short-term affordability would be detrimental to ratepayers since long-term costs would never be considered, which would not be in the best interests of ratepayers.

[144] While not approving the Quantum Agreement, the Board has no difficulty with certain aspects of the Quantum Agreement, i.e., the proposed discussion of a potential development of a DSM Expenditure Justification Criteria, the Small Business

Energy Study, the referral of cost effectiveness screening tests to the DSM Advisory Group, and the provision of the results of the Clean Nova Scotia Low Income Program to the Board and stakeholders.

[145] The Board approves the Consensus Agreement, which refers a number of matters to the DSM Advisory Group, and has given directions regarding the evaluation and verification reports and recommendations, as set out in paragraphs [53] and [54] of this Decision. The Board finds that the TRC for cost effectiveness screening is to remain in place for the time being.

[146] In approving the Consensus Agreement, the Board notes that it contains a provision which will ensure that, where consensus cannot be reached after consultation with stakeholders, the parties will bring outstanding matters back to the Board no later than June 30, 2016, which allows sufficient time to deal with such matters prior to the submission of the DSM Plan for the next three year term of the franchise.

[147] The Board directs E1 to undertake research and make recommendations on a more rigorous program for determining incentives, which should be filed with the Board by March 31, 2016.

[148] In future applications, E1 is to provide one or more alternate scenarios of DSM budgets for the Board to consider, and NSPI is to provide rate impact analysis on those scenarios.

6.0 ORDER

[149] An Order will issue following a Compliance Filing. The Compliance Filing is to be filed by September 15, 2015. If that is problematic, E1 and NSPI should approach Board Counsel to discuss an alternate date.

DATED at Halifax, Nova Scotia, this 12th day of August, 2015.

Peter W. Gurnham

Kulvinder S. Dhillon

Roberta J. Clarke

APPENDIX A PARTIES, INTERVENORS, AND WITNESSES

Parties	Counsel	Witnesses
EfficiencyOne	James R. Gogan, CA., LL.B.	<u>Panel No. 1</u> John Aguinaga, Chief Energy Technical Officer Charles Faulkner, Director, Efficiency Programs Julie-Ann Vincent, Manager, Regulatory Affairs Consultants: Phillippe Dunskey, President, Dunskey Energy Consulting Stuart Slote, Associate Director, Navigant Consulting, Inc. <u>Panel No. 2</u> Allan Crandlemire, Chief Executive Officer Stephen MacDonald, Chief Operating Officer Gina Thompson, Director of Finance
NSPI	Colin J. Clarke, Q.C. David Landrigan, LL.B. Brian Curry, LL.B.	Greg Blunden, CA, Executive Vice President, Customer, Business & Financial Services Eric Ferguson, CA, Director, Regulatory Affairs Michael Sampson, P.Eng., Director, Generation Asset Management Anne-Marie Curtis, P.Eng., Director, Marketing & Sales Consultants: Robert Boutilier, P.Eng. David Pickles, Senior Vice-President ICF International
Board Counsel	S. Bruce Outhouse, Q.C.	Consultants: Dr. H. Gil Peach, H. Gil Peach & Associates LLC Mel Whalen, Multeese Consulting Inc. Tim Woolf, Synapse Energy Economics, Inc.
Intervenors		
CA	John Merrick, Q.C. William Mahody, Q.C	Paul Chernick, President, Resource Insight, Inc. George Foote
SBA	E. A. Nelson Blackburn, Q.C. Ellen Burke, LL.B.	John Athas, LaCapra Associates, Inc.
Industrial Group	Nancy G. Rubin, Q.C. Maggie Stewart, LL.B.	Mark Drazen, Drazen Consulting Group.
EAC	Jamie Thompson	Elizabeth Chant, Vermont Energy Investment Corporation
AEC	Donna Franey, LL.B. Brian Gifford	
CNS	Chris Morrissey Erin Burbidge	

NSDOE Stephen McGrath, LL. B.
 Nancy Rondeaux

Port James MacDuff, LL.B.
Hawkesbury
Paper LP

Rhyno LED Granted Intervenor status but did not appear at the
Lighting hearing
Solutions

APPENDIX B
LIST OF SPEAKERS

1.	Nicole Briand	
2.	Joe Berta	ARCA Canada Inc.
3.	Nic Fieldsend	Journeyman Film Company
4.	Emma Norton	
5.	Rev. Charles Bull	Anglican Diocese of NS and PEI Environment Network
6.	Kawlin Rolfe	Energy Sustainability Engineering Technologist
7.	Dwayne MacDonald	Trinity Maintenance Solution & Trinity Inspection Services
8.	Len Preeper	Thinkwell Research
9.	Dale Robertson	
10.	Tim Houston	MLA for Pictou East and Energy Critic for the PC Caucus
11.	Kim Thompson	The Deanery Project
12.	Jamie Muirhead	MJM Energy Limited
13.	Wayne Groszko	
14.	Trevor Parsons	Innovative Real Estate Ltd.
15.	Gordon Wilkie	Solar Nova Scotia
16.	Megan McCarthy	powerWHYS Technologies
17.	Katrina Isabel Phillips	
18.	Chester Goluch	Chester & Company
19.	Kirk Mock	President, Bro-Moc Print
20.	Steve Zubalik	
21.	Julian Boyle	Municipal Electric Utilities of Nova Scotia Cooperative (MEUNSC)

APPENDIX C

Quantum Agreement

61

M06733

IN THE MATTER OF: *THE PUBLIC UTILITIES ACT*

And

IN THE MATTER OF: *An application by EfficiencyOne for Approval of a Supply Agreement for Electricity Efficiency and Conservation Activities between EfficiencyOne ("E1") and Nova Scotia Power Inc. ("NSPI"), the establishment of a final agreement between the parties, and approval of a 2016-2018 Demand Side Management ("DSM") Resource Plan*

WHEREAS EfficiencyOne is the Franchise Holder in accordance with the *Public Utilities Act*;

AND WHEREAS EfficiencyOne has filed an application with the Nova Scotia Utility and Review Board, in accordance with the provisions of the *Public Utilities Act*, for the approval of a Supply Agreement with Nova Scotia Power Inc. ("NSPI") for the supply of electricity efficiency and resource conservation activities for the years 2016 through 2018 ("Supply Agreement");

AND WHEREAS NSPI is, in accordance with the *Public Utilities Act*, deemed to be a co-applicant with EfficiencyOne in the application for approval of the 2016 -2018 DSM Resource Plan ("2016-18 DSM Plan") and Supply Agreement;

AND WHEREAS EfficiencyOne and NSPI (together referred to as the "Co-Applicants") have each filed its evidence before the Board;

AND WHEREAS each of the Co-Applicants has served and responded to Information Requests of the other, and each of the Co-Applicants have responded to Information Requests filed by certain of the formal Intervenor in this proceeding;

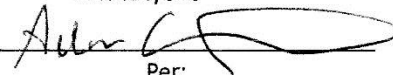
AND WHEREAS, based on the record before the Board, the Parties hereby approve the Terms of Consensus attached hereto as Appendix "A". The Parties reserve the right to amend their position based on any further evidence raised in the proceeding before the Board [or any other Intervenor who are not a party to this Consensus Agreement].

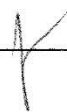
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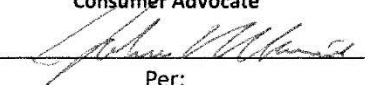
- 1) This Consensus Agreement may be executed by the Parties in counterparts, each of which when so executed and delivered shall be deemed to be an original and when taken together shall be deemed to be one and the same instrument. The electronic delivery, including, without limitation, by email or facsimile transmission, of any signed original of this Settlement Agreement shall be the same as the delivery of an original.

Signed and dated this 16th day of June 2015.

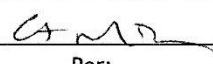
Witness 

EfficiencyOne

Per:

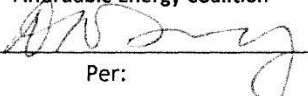
Witness 

Consumer Advocate

Per:

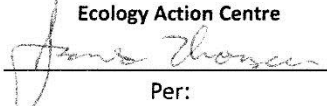
Witness 

Small Business Advocate

Per:

Witness 

Affordable Energy Coalition

Per:

Witness 

Ecology Action Centre

Per:

APPENDIX "A"

1) IMPORTATION OF AGREEMENT

- a) The parties agree to incorporate by reference all of the terms of agreement reached in the partial settlement agreement among EfficiencyOne, Nova Scotia Power, the Consumer Advocate, the Small Business Advocate, the Industrial Group, the Ecology Action Centre, and the Affordable Energy Coalition in the proceeding before the Nova Scotia Utility and Review Board (Matter M06733).

2) DSM INVESTMENT LEVEL

- a) The parties support a reduction in investment level for DSM activities over the 2016-2018 contract period from the proposed \$121.5 million to \$113.5 million as follows:
 - i) \$36.9 million in 2016
 - ii) \$37.8 million in 2017
 - iii) \$38.8 million in 2018

3) EFFICIENCYONE PERFORMANCE TARGETS

- a) EfficiencyOne's cumulative energy and demand savings targets shall be 405.9 GWh and 62.5 MW respectively, as set out in EfficiencyOne's 2016-2018 DSM Resource Plan filing.

4) 2016-2018 PROGRAMS

- a) The DSM programs in 2016-2018 will be as proposed in EfficiencyOne's 2016-2018 DSM Resource Plan filing.

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5) DSM EXPENDITURE JUSTIFICATION CRITERIA

- a) The parties agree to discuss the potential development of DSM Expenditure Justification Criteria (DSMEJC) within the DSM Advisory Group.

6) SMALL BUSINESS ENERGY STUDY

- a) EfficiencyOne agrees to undertake a Small Business Energy Study in 2016, with the scope to be developed in consultation with the Small Business Advocate.

7) COST-EFFECTIVENESS TESTING

- a) Through collaboration within the DSM Advisory Group, the parties agree to work to achieve consensus as to the methodology and assumptions of the cost-effectiveness screening test to be applied to future DSM Resource Plans.

8) DSM ADVISORY GROUP DISCUSSIONS

- a) If consensus is not achieved on any of the above items to be addressed within the DSM Advisory Group, such items will be presented to the UARB for determination.

9) PRINCIPLES OF EQUITY

- a) All ratepayers are entitled to an equitable opportunity to participate in DSM programs. Low-income tenants and homeowners as well as marginally viable commercial and industrial customers are some of the most difficult and most expensive customers to serve. Services that recognize the barriers these customers face must be offered so they can participate. Cost-effectiveness screening must take into account the extra costs involved.

10) NS POWER'S CHARITABLE CONTRIBUTION

- a) The parties encourage Nova Scotia Power to provide the evaluated results of its low income program to the Board and to stakeholders on an annual basis and to coordinate administration and evaluation of the program with EfficiencyOne.
- b) At present, the Parties agree that DSM activities resulting from NS Power's charitable contribution will not be used to reduce or constrain EfficiencyOne's Performance Targets.

APPENDIX D

Consensus Agreement

M06733

IN THE MATTER OF: *THE PUBLIC UTILITIES ACT*

And

IN THE MATTER OF: *An application by EfficiencyOne for Approval of a Supply Agreement for Electricity Efficiency and Conservation Activities between EfficiencyOne and Nova Scotia Power Inc., the establishment of a final agreement between the parties, and approval of a 2016-2018 Demand Side Management ("DSM") Resource Plan*

WHEREAS EfficiencyOne is the Franchise Holder in accordance with the *Public Utilities Act*;

AND WHEREAS EfficiencyOne has filed an application with the Nova Scotia Utility and Review Board, in accordance with the provisions of the *Public Utilities Act*, for the approval of a Supply Agreement with Nova Scotia Power Inc. ("NSPI") for the supply of electricity efficiency and resource conservation activities for the years 2016 through 2018 ("Supply Agreement");

AND WHEREAS NSPI is, in accordance with the *Public Utilities Act*, deemed to be a co-applicant with EfficiencyOne in the application for approval of the 2016 -2018 DSM Resource Plan ("2016-18 DSM Plan") and Supply Agreement;

AND WHEREAS EfficiencyOne and NSPI (together referred to as the "Co-Applicants") have each filed its evidence before the Board;

AND WHEREAS each of the Co-Applicants has served and responded to Information Requests of the other, and each of the Co-Applicants have responded to Information Requests filed by certain of the formal Intervenor in this proceeding;

AND WHEREAS the parties to this Agreement (collectively the "Parties" and individually a "Party") have reached an agreement on certain matters in relation to the approval of the 2016-2018 DSM Plan;

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AND WHEREAS, based on the record before the Board, the Parties hereby approve the Terms of Consensus attached hereto as Appendix "A". The Parties reserve the right to amend their position based on any further evidence raised in the proceeding before the Board.

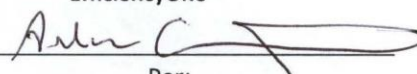
NOW THEREFORE the Parties agree as follows:

- 1) This Consensus Agreement may be executed by the Parties in counterparts, each of which when so executed and delivered shall be deemed to be an original and when taken together shall be deemed to be one and the same instrument. The electronic delivery, including, without limitation, by email or facsimile transmission, of any signed original of this Settlement Agreement shall be the same as the delivery of an original.

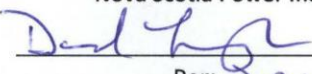
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Signed and dated this 16th day of June 2015.

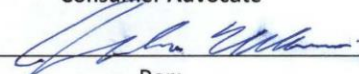
Witness 

EfficiencyOne

Per:

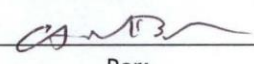
Witness 

Nova Scotia Power Incorporated

Per: DAVID LANDRIAN

Witness 

Consumer Advocate

Per:

Witness 

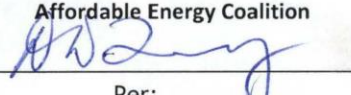
Small Business Advocate

Per:

Witness 

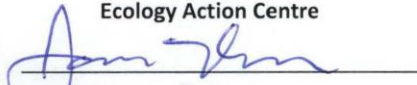
Industrial Group

Per: NANCY RUBIN

Witness 

Affordable Energy Coalition

Per:

Witness 

Ecology Action Centre

Per:

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APPENDIX "A"

1) ESTABLISHMENT OF A STANDARDIZED FILING FOR FUTURE APPLICATIONS TO APPROVE A DSM SUPPLY AGREEMENT

- a) The Parties agree to the establishment of a standardized filing for future applications, the substance of which will be vetted through the DSM Advisory Group for the Board's approval. The standardized filing will include a program description template based on Efficiency Maine (included as Attachment C to EfficiencyOne's Reply Evidence), with the addition of:
 - i) Lifetime energy and demand savings;
 - ii) Annual participation and participation rates by program;
 - iii) Cost-effectiveness testing analysis results by program;
 - iv) Levelized cost of saved energy for each program;
 - v) Detailed description of the rate and bill impact analysis; and
 - vi) Such other items as agreed to in the DSM Advisory Group.
- b) EfficiencyOne is not precluded from providing additional information or sections as it may determine to be relevant.
- c) EfficiencyOne will provide technical data in its Plan filing, by measure, or such similar information to the extent available.

2) ESTABLISHMENT OF A RESERVE FUND

- a) In lieu of development of a DSM reserve fund, the Parties agree they will not challenge EfficiencyOne's ability to apply on an expedited basis to the Board for recovery of funds to address extraordinary or unforeseen circumstances outside of normal operations, if required, provided that Efficiency One has made a good faith effort to mitigate the costs of the extraordinary or unforeseen circumstances.
- b) This clause is without prejudice to any Party's rights of participation in any such application and does not preclude any Party from challenging the merits of the claimed

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recovery, claimed recourse or any other matter.

- c) EfficiencyOne agrees that, if a budget surplus exists at the end of the three-year contract period, the surplus will be returned to NS Power for the benefit of ratepayers as determined by the Board.

3) PERFORMANCE TARGETS, INDICATORS AND THRESHOLDS

- a) The parties agree to the following Performance Targets and Performance Indicators:

- i) Performance Targets are set over the three-year contract period, rather than annually.
- ii) EfficiencyOne is deemed to be in substantial compliance with the approved Plan Performance Targets if 90 percent or greater achievement is reached on the two Performance Targets as listed below. If less than 90 percent of any Performance Target is achieved, a regulatory process will be triggered.

- b) Performance Targets consist of:

- i) Cumulative annual energy savings
- ii) Cumulative annual peak demand savings

- c) Performance Indicators (for indicating or monitoring progress toward Performance Targets) consist of:

- i) Annual incremental energy savings (reported by program)
- ii) Cumulative annual energy savings (reported by program)
- iii) Lifetime savings (once methodology is developed) (reported by program)
- iv) Annual incremental peak demand savings (reported by program)
- v) Cumulative annual peak demand savings (reported by program)
- vi) Total ratepayer benefits (once methodology is developed)
- vii) Total spending (reported by program and rate class)
- viii) Customer satisfaction

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- ix) An analysis of the impact on rates through the implementation of the 2016-2018 programs, to be included as part of EfficiencyOne's historical-looking rate and bill impact analysis as outlined in clause 6(b).
 - x) Reporting on low income program participation, expenditures, and savings through a variety of methods, including estimation based on geographic census information.
- d) For the Performance Indicators reported by program, EfficiencyOne agrees to report on them additionally by rate class as soon as available and not later than within its Q3 report.

4) COST ALLOCATION

- a) The Parties agree to collaboratively work to develop new DSM cost allocation and DSM cost recovery models to be submitted by October 31, 2015 for approval or Decision by the Board, or within a reasonable period of time in accordance with the Board's regulatory schedule. This engagement will include the following items:
 - i) 2015 DSM cost allocation
 - ii) 2016-2018 DSM cost allocation
 - iii) 2014 rate-smoothing adjustment ("RSA"); and
 - iv) Mid-course adjustments.
- b) For clarity, this clause in no way restricts Nova Scotia Power's discretion in making application to the UARB regarding the accounting treatment and recovery mechanism of DSM costs.

5) EVALUATION AND REPORTING

- a) The Parties support EfficiencyOne's proposal for annual program impact evaluations and process evaluations at the organizational level with program process evaluations if required. EfficiencyOne will provide an overview of potential condensed impact reporting to the DSM Advisory in 2016 for discussion.
- b) EfficiencyOne will explore methodologies of demand savings evaluations with its evaluator.

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- c) EfficiencyOne agrees to provide a full report on its 2016-2018 Performance Requirements and Performance Indicators within its Annual Progress Report filed in 2019.
- d) EfficiencyOne will provide explanations of substantial changes, defined as variance in energy savings or investment of 25 percent or more at a program level.
- e) Dependent on an approved cost allocation methodology, EfficiencyOne will undertake reasonable efforts to avoid program changes that will result in substantial changes to any customer rate class on an annual basis.
- f) The Parties agree to the timing of EfficiencyOne's reporting and the contents of those reports as set out in the attached Schedule 1, subject to revisions to the contents of the reports which may be agreed to or determined by the Board as a result of discussions within the DSM Advisory Group.
- g) EfficiencyOne will provide written advance notice of its intent to implement mid-course adjustments by program and their customer rate class impacts. The Parties acknowledge EfficiencyOne's position that it is not able to provide advance notice of mid-course adjustments resulting from third-party evaluation reports, as these adjustments are made immediately after receipt of these reports.

6) RATE AND BILL IMPACT ANALYSIS

- a) As with prior filings of its rate and bill impact analysis, EfficiencyOne agrees to develop, in consultation with the DSM Advisory Group, assumptions to its rate and bill impact analysis. This will include, but is not limited to, the inclusion of contribution to fixed costs. Once complete, the inclusions will be included in future filings of the analysis.
- b) EfficiencyOne agrees to file historical-looking rate and bill impact analyses by October 31st of each year.

7) RESOLUTION PROCESS

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- a) If consensus is not achieved on any of the above items to be addressed within the DSM Advisory Group, such items will be presented to the UARB for determination not later than June 30th, 2016.

8) RESERVATION OF RIGHTS

- a. This agreement is without prejudice to the rights of any Party or the position any Party may take on these issues in future proceedings.

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"Schedule 1"

Report Timing and Contents

Legend:

Filing has not historically triggered an automatic regulatory process (would be on request or by Decision of the UARB).	Filing has historically triggered a regulatory process.

Year	Report/ Process	Filing Timeframe	Inclusions
2015	2015 Q2 Report	July/Aug	- Quarterly and YTD Highlights: - Comparison of targets, mid-course adjustments, and results (by program) - YTD investment by rate class (compared to approved forecast) - Sector highlights (results, participation, and items of interest by program, plus low-income results) - Other activities (organized by Enabling Strategies categories) - Advance notice of Significant Changes if relevant.
	2015 Q3 Report	Oct/Nov	See 2015 Q2 report for details
	Meetings with DSMAG	At least three times per year (generally following filing of quarterly reports)	- Discussion of quarterly report - Other topics as required/requested

Year	Report/ Process	Filing Timeframe	Inclusions
2016	2015 Annual Progress Report	End of March	- Summary of 2015 context, activities and milestones achieved 2015 investment by rate class (compared to approved forecast) - Status of Performance Targets and Indicators - Energy savings and investment for each program component - Management discussion and analysis of any major discrepancies relative to the original plan's intent and forecasts - Summary of investment and savings for each program or target market area - Update to 2016 planned activities (mid-course adjustments by program plus updated program descriptions/highlights) - Corrective Action Plan (if required) - If mid-course adjustments result in substantial changes by program, explanation and justification will be provided) - Notice of significant changes (if required) - Update on items arising from the 2016-2018 DSM Plan process - Updated preliminary cost allocation (if relevant)
	2015 Evaluation Reports	End of March	- Impact evaluation (all programs) - Process evaluation
	2016 Q1 Report	April/May	See 2015 Q2 report for details
	2015 Audited Financial Statements	May	
	2016 Q2 Report	July/Aug	See 2015 Q2 report for details plus advance notice of Significant Changes if relevant.
	Historical-looking rate and bill impact analysis	End of October	- Results by rate class in graphical form - Overview and description of analysis - Commentary around results - Assumptions, including explicit identification of any changes from prior filings
	2016 Q3 Report	Oct/Nov	Status of Performance Indicators by rate class

Year	Report/ Process	Filing Timeframe	Inclusions
			See 2015 Q2 report for remaining details
	Meetings with DSMAG	At least three times per year (generally following filing of quarterly reports)	- Discussion of quarterly report - Other topics as required/requested
2017	2016 Annual Progress Report	End of March	See 2015 Annual Progress Report
	2016 Evaluation Reports	End of March	- Impact evaluation (all programs) - Process evaluation (as proposed in EfficiencyOne's Evidence)
	2017 Q1 Report	April/May	See 2015 Q2 report for details
	2016 Audited Financial Statements	May	
	2017 Q2 Report	July/Aug	See 2015 Q2 report for details
	Historical-looking rate and bill impact analysis	End of October	- Results by rate class in graphical form - Overview and description of analysis - Commentary around results - Assumptions, including explicit identification of any changes from prior filings
	2017 Q3 Report	Oct/Nov	See 2015 Q2 and 2016 Q3 report for details
	Meetings with DSMAG	At least three times per year (generally following filing of quarterly reports)	- Discussion of quarterly report - Other topics as required/requested

Year	Report/ Process	Filing Timeframe	Inclusions
2018	2019-2021 DSM Plan Filing	End of February	- Based on standardized filing agreed to/ordered by the UARB - Rate and bill impact analysis - Preliminary cost allocation (if relevant) - Other items as required to support the Plan
	2017 Evaluation Reports	End of February	- Impact evaluation (all programs; shortened version referencing 2016 evaluation for methodology unless it changed) - Process evaluation (as proposed in EfficiencyOne's Evidence)
	2018 Q1 Report	April/May	See 2015 Q2 report for details
	2017 Audited Financial Statements	May	
	2018 Q2 Report	July/Aug	See 2015 Q2 report for details
	Historical-looking rate and bill impact analysis	End of October	- Results by rate class in graphical form - Overview and description of analysis - Commentary around results - Assumptions, including explicit identification of any changes from prior filings
	2018 Q3 Report	Oct/Nov	See 2015 Q2 and 2016 Q3 report for details
	Meetings with DSMAG	At least three times per year (generally following filing of quarterly reports)	- Discussion of quarterly report - Other topics as required/requested
2019	2018 Annual Progress Report	End of March	- Status of annual performance indicators - See 2015 Annual Progress Report for remaining items
	2018 Evaluation Reports	End of March	- Impact evaluation (all programs; shortened version referencing 2016 evaluation for methodology unless it changed) - Process evaluation (as proposed in EfficiencyOne's Evidence)

Year	Report/ Process	Filing Timeframe	Inclusions
	2019 Q1 Report	April/May	See 2015 Q2 report for details
	2018 Audited Financial Statements	May	
	2019 Q2 Report	July/Aug	See 2015 Q2 report for details plus advance notice of Significant Changes if relevant.
	Historical-looking rate and bill impact analysis	End of October	• Results by rate class in graphical form • Overview and description of analysis • Commentary around results • Assumptions, including explicit identification of any changes from prior filings
	2019 Q3 Report	Oct/Nov	See 2015 Q2 report for details plus advance notice of Significant Changes if relevant.
	Meetings with DSMAG	At least three times per year (generally following filing of quarterly reports)	• Discussion of quarterly report • Other topics as required/requested

Tab 3

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF AN APPLICATION by **EFFICIENCYONE** for determination that Nova Scotia Power Inc. is required to provide EfficiencyOne, pursuant to Section 79K of the Public Utilities Act, RSNS 1989, c. 380, as amended, with Names and Emails and Customer Usage Data on a monthly basis

BEFORE: Peter W. Gurnham, Q.C., Chair
Roberta J. Clarke, Q.C., Member
Richard J. Melanson, LL.B., Member

APPLICANT: **EFFICIENCYONE**
James R. Gogan, LL.B.

INTERVENORS: **CONSUMER ADVOCATE**
William L. Mahody, Q.C.

SMALL BUSINESS ADVOCATE
E.A. Nelson Blackburn, Q.C.

INDUSTRIAL GROUP
Nancy Rubin, Q.C.

NOVA SCOTIA POWER INC.
Matthew Gorman, LL.B.

NOVA SCOTIA DEPARTMENT OF ENERGY
Stephen T. McGrath, LL.B.

FINAL SUBMISSIONS: September 13, 2017

DECISION DATE: November 15, 2017

DECISION: Application granted.

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I INTRODUCTION

[1] This is an Application by EfficiencyOne (E1) requesting a determination that Nova Scotia Power Inc. (NSPI) must provide it with certain data fields in NSPI's possession pursuant to s. 79K of the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended (*PUA*). Pursuant to s. 79K(1) of the *PUA*, NSPI is required to provide the requested data fields to E1 if they contain information respecting customer electricity usage and load; and, the information is necessary to enable E1 to provide NSPI with reasonably available cost-effective efficiency and conservation activities.

[2] E1 is a federally incorporated not-for-profit organization. On November 28, 2014, it was granted a franchise pursuant to s. 79C of the *PUA*. As the franchise holder, E1 is the exclusive provider of electricity efficiency and conservation activities to NSPI.

[3] Pursuant to s. 79K(2) of the *PUA*, by letter dated August 5, 2016, E1 requested that NSPI provide fifty-six data fields, which it said related to NSPI's customers' electricity usage and load.

[4] Following a number of meetings between E1 and NSPI to clarify the scope of the request, it was determined NSPI did not have eighteen of the requested data fields. E1 withdrew its request for these data fields, which need not be further considered in this Application.

[5] Of the remaining thirty-eight data fields, there are thirty-five, identified as Customer Usage Data, and more particularly set out in Schedule "A" of the Application, where NSPI takes the position that some or all may fall within the scope of s. 79K(1) of

the *PUA*. NSPI requests an Order from the Board confirming s. 79K(1) of the *PUA* applies to these data fields before releasing them to E1.

[6] The applicability of s. 79K(1) of the *PUA* to the three remaining data fields is contested by NSPI. They are identified in the Application as Names and Emails, and consist of the first name of residential customers; the last name of residential customers (which collectively would also include the customer name of all business customers); and, the email addresses of customers.

[7] For the reasons which follow, the Board finds that s. 79K(1) of the *PUA* applies to both the Customer Usage Data, and the Names and Emails. Consequently, NSPI is required to provide the requested data fields to E1.

II BACKGROUND

[8] On June 12, 2017, E1 filed the Application seeking a Board Order compelling NSPI to provide the Customer Usage Data and the Names and Emails.

[9] The Board determined the Application should proceed by a paper hearing, and by Order dated June 20, 2017, established a timeline for processing the Application.

[10] Notices of Intervention were received from the Consumer Advocate (CA), the Small Business Advocate (SBA), the Industrial Group (IG) comprised of eleven large and medium industrial customers of NSPI, and the Nova Scotia Department of Energy (NSDOE). NSPI participated as the responding party.

[11] On July 11, 2017, Information Requests (IRs) were issued to E1 by Board staff and the SBA, to which E1 responded on July 25, 2017.

[12] NSPI filed evidence and submissions on August 15, 2017. The SBA and CA provided submissions on August 22, 2017. The IG and NSDOE did not file any materials in this Application. E1 filed rebuttal evidence and submissions on September 13, 2017.

[13] Utility efficiency and conservation activities are generally referred to as Demand Side Management (DSM) services. In 2008, the Board approved NSPI as an interim DSM Administrator. It was recognized by the Board, and regulatory stakeholders, that there was a perceived conflict of interest in a situation where a for-profit electric utility is responsible for persuading its customers to use less electricity.

[14] In 2010, a new regulatory scheme was established by the Province pursuant to the *Efficiency Nova Scotia Corporation Act*, S.N.S 2009, c. 3, as amended (*ENSCA*) whereby the mandate to provide DSM services was transferred from NSPI to Efficiency Nova Scotia Corporation.

[15] Legislative amendments to the *PUA* in 2014 created the current DSM approach, and E1 became the sole franchise holder entitled to provide NSPI with DSM services.

III ISSUES

[16] The issues to be decided in this Application are:

- a) Whether the Names and Emails are information in NSPI's possession or control respecting customer electricity usage and load that is necessary to enable E1 to provide NSPI with reasonably available cost-effective energy efficiency and conservation activities;

- b) Whether the Customer Usage Data is information in NSPI's possession and control respecting customer electricity usage and load that is necessary to enable E1 to provide NSPI with reasonably available cost-effective energy efficiency and conservation activities.

IV LEGISLATION

[17] E1's authority to request information from NSPI, NSPI's obligation to respond to E1's request, and the Board's jurisdiction to determine the Application, are all set out in s. 79K of the *PUA*, which states:

Information for franchise holder

79K (1) Nova Scotia Power Incorporated shall provide a franchise holder with such information in its possession or control, including records and personal information, respecting customer electricity usage and load as is necessary to enable the franchise holder to provide Nova Scotia Power Incorporated with reasonably available cost-effective energy efficiency and conservation activities.

(2) Upon written notice from a franchise holder, Nova Scotia Power Incorporated shall, within a reasonable period, provide the franchise holder, for the purpose of enabling the franchise holder to provide Nova Scotia Power Incorporated with reasonably available cost-effective energy efficiency and conservation activities, such information in its possession or control, including records and personal information, respecting customer electricity usage and load as is specified in the notice.

...

(4) A franchise holder that believes that Nova Scotia Power Incorporated has failed to provide the information required or requested pursuant to subsection (1) or (2) may apply to the Board for a determination of what information Nova Scotia Power Incorporated is required to provide and the period within which it must be provided.

(5) A franchise holder shall keep confidential all information obtained pursuant to this Section except information that

- (a) is in the public domain at the time it is obtained;
- (b) comes into the public domain after it has been obtained, other than by virtue of a breach of this subsection; or
- (c) is required by law to be disclosed, but only to the extent so required.

(6) Information provided pursuant to this Section is subject to the same conditions on transfer or disclosure to which it was subject when held by Nova Scotia Power Incorporated, and the franchise holder shall comply with any such conditions.

(7) A transfer or disclosure for the purpose of this Section of information that is subject to any privilege, including solicitor-client privilege, does not constitute a waiver of the privilege.

(8) No person has or may maintain any cause of action or claim against Her Majesty in right of the Province, the Minister, Nova Scotia Power Incorporated or the franchise holder arising from or in relation to any provision of information by Nova Scotia Power Incorporated to the franchise holder pursuant to this Section

[18] The term “personal information” is defined in s. 79A(g) of the *PUA* as having “the same meaning as in the *Personal Information Protection and Electronic Documents Act (Canada)*.”

[19] Section 2(1) of the *Personal Information Protection and Electronic Document Act*, S.C. 2000, c. 5, as amended (*PIPEDA*), says personal information means “information about an identifiable individual”.

[20] The purpose of the *PIPEDA* is set out in s. 3:

Purpose

3 The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

[21] Schedule 1 of *PIPEDA* contains the following provisions:

4.3 Principle 3 – Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

...

Disclosure without knowledge or consent

7(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

...

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

...

(i) required by law.

[22] The Board received submissions related to *PIPEDA* and how it impacts on the proper interpretation of s. 79K(1) of the *PUA*.

[23] As well, because of the intended use of the Names and Emails by E1, in targeted mass marketing efforts, *Canadian Anti-Spam Legislation*, S.C. 2010, c. 23, as amended, (*CASL*) ramifications have been raised in the submissions, which will be discussed later in this Decision.

V NAMES AND EMAILS

[24] The request for Names and Emails was the most contentious issue raised by the parties. While there is some overlap in relation to the evidence and statutory interpretation principles in relation to the Customer Usage Data request, the Board will address the issue of Names and Emails first.

a) Evidence and Submissions

[25] E1 has established comprehensive energy efficiency campaigns which are not specifically targeted to individual customers. It says that as DSM markets mature, the opportunity to enhance readily available DSM measures decreases over time.

[26] New methodologies and more effort is required to achieve additional energy savings. E1 indicates this involves targeted energy initiatives that tailor DSM activities to customer and utility system needs, in order to alleviate specific loading and consumption scenarios.

[27] Examples of the types of DSM initiatives contemplated by E1 are:

- Contacting customers with targeted marketing campaigns, with promotional information about programs that provide the greatest benefit to them, including rebates on energy-efficient products or services that are specific to a customer's consumption levels and building type. The targeting can be achieved by segmenting customers into similar groups based on their characteristics;
- Exploring the option of focusing DSM initiatives on a locational basis, also known as geotargeting, to avoid specific infrastructure upgrades, by providing promotional incentives to reduce peak demand for customers who are connected to infrastructure that is approaching capacity.

[28] E1 says if targeted marketing initiatives are not addressed to specifically named customers, there is significantly less uptake, leading to less successful programs.

[29] As evidence of the foregoing, E1 relies on the following:

- Discussions with Canada Post, as well as E1's direct mail fulfillment company, which determined that targeted mail outs increase campaign response rates, mail opening rates, and uptake of targeted program offerings;
- E1's extensive experience and knowledge of marketing strategy, and familiarity with various existing industry data to support that named correspondence generates significantly higher response rates;
- A comparison of E1's own experience, where digital display campaigns reaching a mass audience achieve limited "click-to-open" rates and even more limited conversion rates. The "click-to-open" rate is the ratio of internet users who click on a specific advertisement to the number of users who view the advertisement.

The conversion rate is the ratio of users who download an application form or book an appointment online, to the number of persons who click on a specific link or advertisement. Email newsletters to unnamed recipients had a somewhat higher “click-to-open” rate, and conversion rate. By comparison, E1’s targeted email campaigns, using existing customer data, achieved significantly higher participation rates;

- Examples from Pacific Gas & Electric in California, Arizona Public Service Company in Arizona and Duke Energy in North Carolina, which showed targeted correspondence had significantly higher program participation rates.

[30] In addition to increasing program success rates, E1 says such targeted marketing programs are more cost-effective for the following reasons:

- Broadly targeted promotions using various marketing mediums, such as television, radio, online, and print ads, cost between \$0.30 and \$0.60 per individual reached, and are not targeted to persons who are actually eligible to take advantage of the program;
- Email marketing efforts only cost \$0.01 per individual reached, and can be targeted to persons who are both eligible and likely to participate.

[31] E1 states administrative burden will be greatly alleviated. It currently does not have a central database of its customer accounts. Having access to the Names and Emails will significantly reduce administrative overhead, which currently involves manually compiling customer records, and provide more accurate monitoring and tracking capabilities for present and future offerings. It will also avoid duplication of communications where one named customer may have more than one account.

[32] E1 says it will use the Names and Emails in a manner consistent with any applicable federal and provincial legislation, as well as in a manner consistent with its Affiliate Code of Conduct.

[33] It further indicates the transfer of the Names and Emails is consistent with NSPI's own privacy policy, which states, in part:

We do not sell or rent our customers' personal information. We do, however, disclose all or part of it to certain third parties, suppliers, and agents who help us serve our customers, facilitate billings and collection of payments, process data on our behalf, or require access to the information in order to provide other services to us.

[NSPI Customer Privacy Policy, Exhibit E-7, Tab 6]

[34] In response to Board IR-8, E1 indicated requiring NSPI customers to opt-out of receiving targeted DSM promotional material, rather than an opt-in process, was consistent with the legislative intent of the *PUA*; was more convenient for customers; and, placed E1 on the same footing as NSPI in direct marketing campaigns.

[35] E1 also pointed to the Home Energy Report program from 2014-2015, which E1 and NSPI successfully managed. This program utilized an opt-out approach, with less than one percent of customers who were contacted opting out.

[36] NSPI's evidence described the process followed by E1 and NSPI in considering the data fields request, identification of the nature of the information requested, and the early identification by NSPI of its significant concerns relating to the release of its customers' identifiable information.

[37] NSPI indicates E1's data request is modelled after an information request made by OPower, which had been retained by Efficiency Nova Scotia Corporation, NSPI's previous DSM service provider. In 2012, NSPI shared customer data with OPower, who created and sent Home Energy Reports to customers on Efficiency Nova Scotia Corporation's behalf.

[38] NSPI says this resulted in over 600 calls and emails to its customer care department within the first week of the program. Over 330 customer inquiries requested their data be removed from the program.

[39] E1 noted the reports were sent to 96,554 households in 2013; 92,711 households in 2014; and, 89,514 households in 2015. It says that less than 1.5% of households opted out of the Home Energy Report program from 2013 to 2016, when the program ended.

[40] Based on past experience, NSPI says it shares personal identifiable information with E1 only when the customer provides written consent, which can be described as an “opt-in” system.

[41] The SBA and CA did not file any evidence, but provided submissions on the scope of the request and the sufficiency of the evidence provided by E1.

b) Analysis and Findings

i) Statutory Interpretation

[42] Based on the legislative history of the enactment of s. 79K of the *PUA*, the purpose of the legislation, and the language used in this provision, E1 submits that the legislation is “broadly worded and should be given an expansive interpretation.”

[43] E1 takes the position that s. 79K(1) of the *PUA* specifically contemplates the disclosure of personal information from NSPI to E1, as does the 2016-2018 Supply Agreement between E1 and NSPI, made pursuant to s. 79J of the *PUA*, and approved by this Board.

[44] E1 argues s. 79K of the *PUA* has confidentiality and disclosure provisions, which contemplate the transfer of personal information, and provide statutory requirements and protections in relation to this type of information.

[45] E1 says that s. 79K(1) of the *PUA* is not in conflict with *PIPEDA*. *PIPEDA* permits disclosure of personal information for legitimate business purposes, and legally required disclosures are not affected by *PIPEDA*.

[46] E1 submits the intent of the legislative scheme is to put E1 on the same footing as NSPI was in the provision of DSM services, insofar as customer data is concerned, including personal information such as the Names and Emails. It says the goal of the legislation is to permit E1 to deliver cost-effective DSM measures which are in the best interests of NSPI's customers.

[47] NSPI submits that s. 79K(1) of the *PUA* must be interpreted in light of the significant interest in protecting the privacy rights and expectations of its customers, in conformity with the purpose and scope of *PIPEDA*.

[48] *PIPEDA* prohibits private companies from disclosing personal information, without the knowledge and consent of the affected individual, subject to certain exceptions. NSPI takes the position that in the context of privacy law, the object of the *PIPEDA* is to enhance privacy protection, and legislation should not be interpreted in a broad and expansive manner, so as to encourage the disclosure of such personal information.

[49] NSPI says it is subject to *PIPEDA*, as a private-sector company. It cites *R v. Orlandis-Habsburgo*, 2017 ONCA 649, for the proposition that its clients have a legitimate expectation of privacy. The Ontario Court of Appeal found in that case that a

utility sharing a customer's energy consumption data with police violated this reasonable expectation.

[50] The CA generally supports the position taken by E1:

It is the Consumer Advocate's submission that the transfer of responsibility for energy efficiency programming and administration out of NSP was never meant to negatively impact the promotion and availability of cost-effective energy efficiency. The various protections implemented by the legislature were intended to place the franchise holder in at least as good a position as NSP in making customers aware of energy efficiency program offerings.

In its submission, NSP raises issues related to the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA). The specific reference to "personal information" at Sections 79K(1) of the *Public Utilities Act* ("Act") suggests that the legislature was very much aware of PIPEDA and was providing a reasonable method for such information to be conveyed from NSP to the franchise holder.

[Exhibit E-5, p. 2]

[51] Determining the scope of s. 79K(1) of the *PUA* involves an exercise in statutory interpretation. In *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837(SCC), the Supreme Court of Canada adopted what has become known as the "modern principle" of statutory interpretation using the "contextual approach". The Board follows this approach in interpreting the *PUA*.

[52] In *Re Rizzo & Rizzo Shoes Ltd.*, Mr. Justice Iacobucci said that:

...Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p.87, he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[53] Statutory interpretation is also guided by a consideration of s. 9(5) of the *Interpretation Act*, R.S.N.S 1989, c. 235, as amended (*IA*):

9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;

- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[54] The modern principle of statutory interpretation therefore allows for an analysis of the following questions:

- What is the meaning of the legislative text?
- When the text was enacted, what did the legislation intend and what purpose did it hope to achieve?
- What are the consequences of adopting a proposed interpretation; and, are these consequences consistent with the norms the legislation is presumed to respect?

[55] The history leading up to the enactment of s. 79 of the *PUA* is important in understanding its purpose and scope.

[56] In *Re Nova Scotia Power Incorporated*, 2008 NSUARB 47 (CanLII), NSPI submitted a DSM plan to the Board for approval. The proceeding resulted in a stakeholder settlement agreement which was ultimately approved, subject to Board directives.

[57] The following passages from the Board's decision provide some context:

[13] One of the issues that arose during the work of the Collaborative was with respect to the role of NSPI in administering the DSM program. A number of stakeholders indicated that they did not support NSPI assuming that responsibility. Their concern in this regard related to a perceived conflict of interest, given that one of NSPI's major financial requirements is to ensure that its revenue from the sale of electricity is adequate to meet all of its needs, while a DSM Plan can result in a reduction in those revenues.

[14] Board Counsel, in correspondence dated September 17, and October 1, 2007, indicated to the Parties that the Board did not have jurisdiction to establish and implement an agency which would administer the DSM program. Subsequently, the Province indicated that it would determine how the DSM program would be administered. It initiated a review of this issue, in consultation with the parties, led by facilitator Dr. David Wheeler, Dean of the Faculty of Management at Dalhousie University.

[58] The settlement agreement provided, in part, that NSPI would be the temporary DSM administrator. It further provided for a process whereby a new DSM administrator would be identified, administrative structures defined, with the assistance of a Facilitator provided by the Province, and a transition process developed.

[59] Ultimately, the Legislature enacted the *ENSCA*, which came into force on January 22, 2010. This legislation created Efficiency Nova Scotia Corporation, the DSM administrator prior to E1.

[60] Section 21(1) of the *ENSCA* says the following with respect to disclosure of information by NSPI:

Information to be provided by public utilities and confidentiality

21 (1) Upon written notice from the Corporation, a public utility shall, within such reasonable time as is specified in the notice, provide to the Corporation, for the purpose of permitting the Corporation to fulfil its duties under this Act, such information, including records, respecting customer electricity usage and load as is specified in the notice.

(2) The Corporation and any representatives of the Corporation shall keep confidential all information obtained under subsection (1) except information that

- (a)** is in the public domain at the time it is obtained;
- (b)** comes into the public domain after it has been obtained, other than by virtue of a breach of this subsection;
- (c)** is available to the Corporation on a non-confidential basis from a public utility if the source is entitled to disclose the information; or
- (d)** is required by law to be disclosed, but only to the extent so required.

[61] In 2014, the legislative scheme for delivering DSM service was amended by the enactment of ss. 79A to 79V of the *PUA*, and the passage of the *Electricity Efficiency and Conservation Restructuring (2014) Act*, S.N.S. 2014, c. 5, as amended (*EECRA*).

[62] The *EECRA* provided for the transition of functions, from Efficiency Nova Scotia Corporation, to the new franchise holder selected pursuant to s. 79C of the *PUA*. As previously indicated, this initial franchise holder is E1.

[63] Section 4(1) of the *EECRA* says the following with respect to the transfer of information from Efficiency Nova Scotia Corporation to E1:

Transfer of business information

4 (1) The Corporation shall, on or before the Implementation Date, transfer to the first franchise holder all of its business information, including any business information that is personal information.

(2) Information transferred pursuant to this Section is subject to the same conditions on the transfer to which it was subject when held by the Corporation.

(3) A transfer to the first franchise holder pursuant to this Section of information that is subject to any privilege, including solicitor-client privilege, does not constitute a waiver of the privilege.

(4) No person has or may maintain any cause of action or claim against Her Majesty in right of the Province, the Minister, the Corporation, Nova Scotia Power Incorporated or the first franchise holder arising from or in relation to any transfer of information by the Corporation to the first franchise holder pursuant to this Section.

[64] The *PUA* also contemplates the transfer of information from E1, to any subsequent franchise holder, or to NSPI on an interim basis, as follows:

Information and assistance for new franchise holder

79E (1) In the event of the termination or expiration of a franchise, the franchise holder shall provide a new franchise holder with the information in its possession or control, including personal information, and the assistance necessary for the uninterrupted delivery or evaluation of electricity efficiency and conservation activities, in such manner as the Minister directs.

(2) The information and assistance referred to in subsection (1) must be provided within a reasonable period to ensure the uninterrupted delivery of electricity efficiency and conservation activities.

(3) Where there is no new franchise holder, the information and assistance referred to in subsection (1) must be provided to Nova Scotia Power Incorporated for the uninterrupted delivery of electricity efficiency and conservation activities and to enable Nova Scotia Power Incorporated to provide the information and assistance to the new franchise holder when the new franchise holder is known.

(4) All persons shall keep confidential all information obtained pursuant to this Section except information that

(a) is in the public domain at the time it is obtained;

(b) comes into the public domain after it has been obtained, other than by virtue of a breach of this subsection; or

(c) is required by law to be disclosed, but only to the extent so required.

(5) Information provided pursuant to this Section is subject to the same conditions on the transfer or disclosure to which it was subject when held by the franchise holder, and the person to whom it is disclosed or transferred shall comply with any such conditions.

(6) The provision of information pursuant to this Section that is subject to any privilege, including solicitor-client privilege, does not constitute a waiver of the privilege.

(7) No person has or may maintain any cause of action or claim against Her Majesty in right of the Province, the Minister, Nova Scotia Power Incorporated, the franchise holder or the new franchise holder arising from or in relation to the provision of information to the new franchise holder or Nova Scotia Power Incorporated pursuant to this Section.

[65] Section 79A(b) defines “electricity efficiency and conservation activities” as:

(b) “electricity efficiency and conservation activities” means activities, programs or plans relating to

(i) the efficient use of electricity,

(ii) the conservation of electricity,

(iii) the alteration of the consumption pattern of an end-user of electricity that has the effect of reducing demand during Nova Scotia Power Incorporated’s periods of highest demand,

(iv) the utilization or management by Nova Scotia Power Incorporated of its electrical system in a more cost-effective manner,

(v) the delivery of a reduction in the amount of electrical energy or capacity that Nova Scotia Power Incorporated would otherwise be required to supply to its customers, or

(vi) any other prescribed activities, plans or programs;

[66] When this definition is read in conjunction with the 2014 *PUA* amendments as a whole, it is apparent that the object of these provisions is to create a comprehensive DSM service delivery model, which is cost-effective, with measurable performance standards, subject to the Board’s regulatory oversight.

[67] The legislative scheme also reveals a significant, detailed, overarching concern with the flow of information, from Efficiency Nova Scotia Corporation to the initial franchise holder, from NSPI to a franchise holder, and between successive

franchise holders, to ensure the delivery of comprehensive, cost-effective DSM services can be achieved.

[68] Having reviewed ss. 79A to 79V of the *PUA*, in the context of the statutory scheme for the supply of DSM services as a whole, including the legislative history, the Board agrees with E1's position that, to the extent it is possible and permissible by law, the Legislature intended to put E1 in the same position as NSPI, insofar as the ability to deliver DSM services is concerned, with the same information available to NSPI, in order to be able to deliver these services, but without the perceived conflict of interest that exists when a for-profit utility is asked to find ways to reduce the consumption of electricity.

[69] This interpretation is consistent with the broad language in the legislative text, which clearly requires personal information be transferred as part of the flow of information between DSM and NSPI, and between successive DSM providers. It is also consistent with the object of providing comprehensive, cost-effective DSM services, without violating any norms the legislation is deemed to respect.

ii) Are the Names and Emails information respecting customer electricity and load?

[70] Mindful of the more general principles of statutory interpretation discussed above, the Board will now address the specific interpretation issues related to s. 79K(1).

[71] NSPI submits that the Names and Emails are not information that would fall within the wording "respecting electricity usage and load." It says that this data is not directly related to electricity usage and load. The SBA supports NSPI's position.

[72] Section 79A(b)(iii) of the *PUA* speaks in terms of “the alteration of the consumption pattern of an end-user of electricity...”. This language confirms that DSM is directed not only to usage and load as a whole, but also to specific end-user usage and load.

[73] Whether the Names and Emails are information “respecting customer electricity and usage” should not be viewed in isolation. Using a contextual approach, the answer to the question is tied to whether this information is necessary to deliver cost-effective DSM services which attempt to change end-user consumption patterns.

[74] For reasons that follow, the Board finds that E1 has established the necessity of the Names and Emails to enable it to deliver reasonably available, cost-effective DSM services. Therefore, in the context of delivering E1 services to end-users, the Names and Emails are “information respecting electricity usage and load.”

iii) Are the Names and Email necessary to enable E1 to provide NSPI with reasonably available cost-effective energy efficiency and conservation activities?

[75] NSPI’s position on the necessity of the Names and Emails is summarized at p. 18 of its submissions:

In short, E1 has failed to establish:

- (1) That the Act requires the release of Names and Emails for enhancements to E1’s delivery model and marketing activities, which are already “reasonably available and cost-effective” to customers;
- (2) That the Names and Emails are “necessary”, and without same E1 would be delivering cost-ineffective DSM activities;
- (3) That the Act requires the release of customer personal information so E1 may implement the ‘best’ or ‘most optimal’ marketing campaign; and
- (4) That E1 has no other reasonable options available, marketing or otherwise, to improve DSM uptake and reduce costs in doing so - particularly given that E1 will be

in receipt of customer postal codes, customer billing addresses, customer service addresses, and customer phone numbers should the Board decide E1 is entitled to the Customer Usage Data.

Privacy is a balance, and any cost pressures faced by E1 resulting from not receiving the Names and Emails, which have not been substantively established, are required to be balanced against the harm done by releasing personal customer information without the customer's knowledge or consent. [Emphasis added in original]

[Exhibit E-4, p. 18]

[76] The CA was not convinced that E1 had provided sufficient evidence to demonstrate necessity in its original filing, and was "interested in seeing any additional comments on this topic in E1's reply submissions."

[77] At p. 2 of its submissions, the CA also commented on an aspect of NSPI's position:

One comment from NSP caught the attention of the Consumer Advocate. It occurs at line 17, page 27 of NSP's submission where NSP says:

The legislation does not require NS Power to deliver customer data to E1 so it may develop 'the best' marketing campaigns that allow E1 to directly interact with customers without first obtaining customers' consent.

To the degree that the "best" marketing campaigns yield the most cost effective DSM programming, rate payers are very much interested in ensuring that the best marketing campaigns are planned and executed by EfficiencyOne. Further ratepayers reasonably expect NSP to take all reasonable steps to fully support those marketing plans.

[Exhibit E-5, pp. 2-3]

[78] The SBA takes the position the potential benefit of more cost-effective and targeted DSM measures must be balanced against the release of the Names and Emails without the prior consent of NSPI's customers.

[79] The SBA says the following:

The application by EI asserts that it is imperative that it receives the first and last name, including business names, of all customers. The reasoning behind the request is premised on the belief that individually named letters and communications will receive a better response than *[sic]* those sent to owner or tenant. While that may be so, although there is no evidence provided by EI to confirm it, it is a significant breach of a customer's privacy. Whether a person residing at a residence is Bob, Sue or John's Tailors, the real issue is their electricity consumption, not their name. While names may be personal information, it has nothing to do with their electricity usage or load.

The SBA notes that while NSPI asks for the Board's direction with respect to all the information requests, it is the names and email addresses that are of most concern. The

SBA would add phone numbers to that list. Since a growing majority of individuals and small businesses, such as sole proprietorships and partnerships, are moving away from land lines to cell phones, the release of a confidential cell phone number may be considered as serious an invasion of privacy as an email address, if not more so. It is not known whether the number released will be the formal business number or a direct line to a manager or owner.

While the opt-in option suggested by NSPI has limitations and will likely result in limited responses, it is important that SBA classes, along with all NSPI customers, be given the option as to whom their information is to be provided.

...

The SBA submits that NSPI's position with respect to the transfer of information has significant merit. The SBA acknowledges that the vast amount of information being requested, such as peak demand values, amount billed to customer for peak demand etc. is important for EI to obtain in order to provide demand side management services. The SBA also agrees that the address and postal code for the customer's residences and businesses offer important data that EI can use to create targeted programs. It is the personal information - name, email, phone number - that the SBA believes should not be provided to EI by NSPI unless customers specifically authorize or allow it.

[Exhibit E-6, pp. 1-2]

[80] E1 argues the evidence it has presented supports the necessity for the disclosure of the Names and Emails. It says the evidence establishes it must directly target customers with programs that apply to them in order to increase participation rates. In its Reply Submissions, E1 says it has provided research, case studies, and analysis to support this position.

[81] E1 submits it has provided evidence as to the savings which can be achieved by targeted email campaigns when compared to mass mailings and other forms of media advertising.

[82] It is E1's position the relevant *PUA* provisions do not require it show that targeted programs would be "cost-ineffective" without the Names and Emails. It also says it would not be in the best interests of customers if E1 did not follow best practices in direct marketing.

[83] The Board finds that as the DSM market matures, it becomes more difficult to achieve greater energy efficiencies with mass generic DSM programming, which has been the focus of E1's service delivery to date.

[84] The Board agrees with E1 that the evidence presented supports the proposition that programs targeted to specific customers will be required in future to advance the goal of a change in pattern of electrical consumption by end-users. This could, for example, take the form of a reduction in usage, or altering the time of day of highest energy use.

[85] This goal, including targeted marketing and locational initiatives, might be advanced, to some degree, as NSPI suggests, by the use of methods other than direct marketing to named individuals, if the Board determines the release of the Customer Usage Data is appropriate, because this data contains postal codes, customer billing addresses, customer service addresses, and customer phone numbers. The SBA takes the same basic position, except for the opposition to the release of phones numbers.

[86] Presumably, this could involve unaddressed mailouts to specific types of customers, or a specific geographic location, based on billing codes and addresses; or, targeted telephone marketing based on customer billing codes and addresses.

[87] The Board finds the evidence presented by E1, and particularly the more detailed evidence in the responses to Board IRs and Reply Submissions, establishes that targeted emails and mailouts to a named recipient result in higher participation rates. The Board has sufficient evidence to support this proposition, and no evidence to the contrary.

[88] The Board accepts the evidence presented by E1 establishes that email marketing is the most cost-effective method of soliciting participants to targeted programs, and that the difference in per unit cost is significant. Direct mailouts are less expensive than other forms of advertising, aside from email marketing.

[89] When combined with a higher success rate, email and mailings targeted to specific named customers have a better chance of achieving better results at lower costs than the type of process suggested by NSPI, and to some extent, the SBA.

[90] The Board agrees with E1 and the CA that the legislation contemplates E1 utilizing best practices to achieve its goal. Concerns with cost-effectiveness and affordability of DSM measures are specifically contemplated by the *PUA* DSM provisions.

[91] The best interests of NSPI customers are also an overarching concern of the DSM provisions of the *PUA*. It is in the best interest of ratepayers that best practices, which seek to obtain the best results in the most cost-effective manner, are utilized by E1.

[92] The Board therefore finds that when the word “necessary” is interpreted in light of the history of the legislation, the object and goals of the legislation, and the result the legislation intended, s. 79K(1) relates to information which has the best chance of assisting to achieve DSM goals in the most cost-effective manner. Based on the evidence before it, this includes the Names and Emails.

[93] Privacy concerns are always deserving of serious consideration. This said, the disclosure of personal information is specifically contemplated by the relevant *PUA* provisions. *PIPEDA* was clearly in the contemplation of the Legislature, as the

PIPEDA definition of “personal information” is incorporated by reference in the *PUA* provisions. The fact this reference was not present in the *ENSCA* shows the Legislature turned its mind to the issue. As the CA and E1 say, a comprehensive scheme, to protect the confidentiality of information E1 receives from NSPI, is in place.

[94] Given NSPI’s customers have already consented to NSPI disclosing personal information required by third parties to provide services to NSPI, and as the Board has found this to be the case for the Names and Emails, the disclosure of this information is reasonable. In fact, NSPI has already divulged this type of information to the agent of E1’s predecessor, because it was required for the Home Energy Report Program.

[95] E1 presented cogent evidence on how it would safeguard the confidential personal information it receives from NSPI. No party argued E1’s systems were inadequate.

[96] In addition to the strict confidentiality requirements imposed on E1 by s. 79K of the *PUA*, it will also maintain a “no-contact” list. Upon receiving a request from an NSPI customer indicating the customer does not want to be contacted with E1’s targeted marketing initiatives, the customer will be placed on the list.

[97] It therefore follows that the Names and Emails must be disclosed to E1. As disclosure is required by law pursuant to this Board’s decision, even absent the wording in NSPI’s privacy policy, it is exempt from *PIPEDA* requirements that consent be obtained in relation to this request.

iv) Targeted Marketing Initiatives and CASL

[98] The CASL prohibits the sending of unsolicited commercial electronic messages (CEMs) to individuals, subject to certain exceptions.

[99] CEMs are defined as follows, in s. 1(2) of the CASL:

Meaning of commercial electronic message

(2) For the purposes of this Act, a commercial electronic message is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that

- (a)** offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
- (b)** offers to provide a business, investment or gaming opportunity;
- (c)** advertises or promotes anything referred to in paragraph (a) or (b); or
- (d)** promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so.

[100] All parties agree that E1's proposed targeted email marketing of DSM services would consist of CEMs subject to the CASL.

[101] Section 6(1)(a) of the CASL requires a proponent to have the consent, express or implied, of the intended recipients of CEMs. It states, in part:

6 (1) It is prohibited to send or cause or permit to be sent to an electronic address a commercial electronic message unless

- (a)** the person to whom the message is sent has consented to receiving it, whether the consent is express or implied; ...

[102] There are currently potentially significant monetary penalties for violations of the CASL. As well, there are provisions in the CASL, that have not yet been proclaimed, which create a private right of action for recipients of CEMs who have not provided consent.

[103] NSPI is concerned if it provides the Names and Emails to E1, even if directed to do so by a Board Order, it could be seen as the person on “whose behalf it is sent”, or who “causes it to be sent”, given that the names were provided by NSPI to allow E1, as its sole DSM provider, to engage in mass email marketing campaigns related to DSM. It seeks an indemnity from E1 to protect it from this potential liability.

[104] E1 argues it has the implied consent of NSPI’s customers pursuant to s. 9(a) of the *CASL*, which states:

(9) Consent is implied for the purpose of section 6 only if

(a) the person who sends the message, the person who causes it to be sent or the person who permits it to be sent has an existing business relationship or an existing non-business relationship with the person to whom it is sent;

[105] E1 says it has an existing business relationship with NSPI’s customers because of the definition of this term set out in s. 10(10)(a) of the *CASL*, which states:

(10) In subsection (9), **existing business relationship** means a business relationship between the person to whom the message is sent and any of the other persons referred to in that subsection — that is, any person who sent or caused or permitted to be sent the message — arising from

(a) the purchase or lease of a product, goods, a service, land or an interest or right in land, within the two-year period immediately before the day on which the message was sent, by the person to whom the message is sent from any of those other persons;

[106] E1 submits that under the DSM regulatory scheme, NSPI customers pay a fee to NSPI for E1’s DSM services. It argues this means NSPI’s customers are acquiring a service from E1 within the meaning of ss. 10(10)(a) of the *CASL*.

[107] NSPI’s concern as to its potential liability appears to be answered by s. 10(9)(a) and 10(10)(a) of the *CASL*. If the Board’s direction to supply the Names and Emails to E1 results in E1 being seen as NSPI’s agent in transmitting electronic messages, or in NSPI having caused or permitted the electronic message to be sent, NSPI would also be seen as having an existing business relationship with its customers.

It is therefore difficult to see how NSPI would not have the implied consent to cause or permit the transmission of the CEM, if E1 is found to be sending the CEM on its behalf, given NSPI's continuing supply of electricity service to its customers.

[108] Whether the DSM service model established by the relevant *PUA* provisions means that NSPI's customers are E1's customers is less clear. Until the provisions enabling private rights of actions are proclaimed, monetary penalties for breaches of the *CASL* are administered by the Canadian Radio-Television and Telecommunications Commission (CRTC). Private rights of action will proceed in courts of competent jurisdiction. The Board was provided with no case law from the CRTC, or courts, as a precedent for this analysis.

[109] In the Board's view, it need not make a determination as to whether E1's position is correct. The Board expects E1 to comply with all laws applicable to it. It is for E1 to ensure it so complies, and it is responsible for any failure to do so.

[110] The Board notes that because of the paramountcy doctrine, E1 and NSPI may not be able to avail themselves of the immunity from liability set out in s. 79K(8) of the *PUA*. The relevant provisions of the *CASL* have not been considered in relation to the fact situation arising in the Application. The Board is therefore prepared to order that E1 indemnify NSPI in relation to any breach of the *CASL*, as requested.

VI CUSTOMER USAGE DATA

a) Evidence

[111] E1 does not have access to customer data on approximately 70% of electricity ratepayers. For the remaining 30% of ratepayers, E1 maintains basic, static information.

[112] The Customer Usage Data requested by E1 consists of data fields such as:

- Activation and termination dates for an account;
- Meter and meter reading data;
- Customer usage data;
- Peak demand values;
- Amounts billed to a customer for peak demand;
- Postal codes of customers;
- Customer billing addresses;
- Customer service addresses;
- Customer phone numbers.

[113] E1 says that Customer Usage Data is required:

- To select and design new pilot programs based on consumption levels, household types, and other physical attributes, such as building types;
- To make determinations on eligibility for certain programs;
- To conduct analysis to understand customer needs across various geographic regions and sectors;

- To inform new research initiatives and build on methods of analysis developed by other energy efficiency organizations;
- To improve customer service lag times and other administrative burdens, by having a customer's information available when E1 is contacted by an NSPI customer;
- Unique customer identifier data fields would enable E1 to more reliably track unique customers across individual programs and data fields.

[114] In combination with the Names and Emails, E1 says targeted programs can be marketed to those who will most benefit from them.

[115] E1 indicates that in order to be able to properly research, assess and design new, targeted programs, the requested data is required first, and on a regular ongoing basis, rather than awaiting the design of a specific program before obtaining the data.

b) Analysis and Findings

[116] E1 submits the Customer Usage Data falls squarely within the ambit of s. 79K(1) of the *PUA*, in that it will provide it with customer electricity usage and load information for specific locations, on an ongoing basis, which will assist it in developing refined and targeted DSM activities.

[117] NSPI takes the position that some or all of the data fields may fall within the scope of s. 79K(1) of the *PUA*. It does not specifically identify any data fields which might not fall within such scope.

[118] The CA's submissions were generally supportive of E1's approach to statutory interpretation. The CA expressed a general concern about whether E1 has established the necessity of the requested information, and the general proposition that marketing campaigns should be designed to achieve the most cost-effective DSM programming.

[119] While supporting the transfer of much of the information in the Customer Usage Data, the SBA says that customer telephone numbers should not be released, given that a large number of individuals and small businesses exclusively use confidential cell phone numbers. He argues divulging these would be as serious a breach of personal privacy as the release of the Names and Emails, which the SBA also opposes.

[120] The Board has analysed the type of information found in the Customer Usage Data. With the possible exception of telephone numbers, none of the information appears to raise the same *PIPEDA* concerns, as it does not combine names with the remaining non-identifying information. None of the data raises *CASL* issues.

[121] With the exception of the telephone numbers, which the Board will address separately, all of the requested data is clearly "respecting electricity usage and load", in that it identifies the length of such usage for particular customers, the amount and timing of such usage, the location of the usage or user, and the type of user.

[122] All the data can be used by E1 to produce a comprehensive picture of energy consumption for particular types of customers at particular locations and particular points in time.

[123] The data can therefore be used to create the targeted programs described by E1, and to create a faster flow of information, and less cumbersome process for both E1 and NSPI's customers.

[124] There was no evidence before the Board contrary to the above findings.

[125] Insofar as the telephone numbers are concerned, while the Board appreciates the issues raised by the SBA, they would be subject to the same confidentiality requirements set out in s. 79K of the *PUA* applicable to all the other data disclosed by NSPI. As previously stated, E1 has provided evidence of the systems it has in place to protect such data.

[126] Although perhaps not as cost-efficient as mass emails, the data can be used for targeted direct telemarketing, and to advance a personalized, customer-centric approach, as envisaged by the 2016-2018 DSM Plan.

[127] As well, combining the data such as the Names and Emails, addresses, telephone numbers and customer billing codes will assist E1 in creating unique customer profiles, thereby allowing E1 to more accurately and efficiently track program results, and help prevent redundancies in customer contacts and statistical analyses. In the end, the same principles discussed in relation to the Names and Emails would generally apply to telephone numbers.

[128] The Board is aware that telemarketing is subject to the regulatory scheme administered by the CRTC pursuant to the *Telecommunications Act*, S.C.1993, c. 38, as amended, which regime includes a National Do Not Call List. As with the *CASL*, which does not apply to telephone communications, the Board expects E1 to be compliant

with all laws associated with telemarketing, if it engages in such activities, directly, or through an agent.

[129] The Board therefore orders the disclosure of the Customer Usage Data by NSPI to E1.

VII TIMELINE OF DATA REQUEST

[130] E1 has requested the transfer of the requested data within 30 days of the Board's decision, and that, thereafter, the information be provided on a monthly basis. NSPI asks that it have 60 days to provide the requested data.

[131] The Board finds that 60 days, as requested by NSPI, is a reasonable period for the initial transfer of the Names and Emails and Customer Usage Data.

[132] The Board is also of the view that the Names and Emails should be provided on an ongoing basis, in order to allow E1 to have the best available information while conducting its ongoing research, analysis and program marketing.

[133] Once the initial data transfer has taken place, the Board would expect that a process could be put in place to allow for the ongoing transfer of data to take place on a monthly basis. If this proves to be unworkable, and a solution cannot be reached between NSPI and E1, the parties may request further direction from the Board.

VIII ADMINISTRATIVE COSTS

[134] NSPI has requested compensation for its reasonable administrative costs for providing the Names and Emails and Customer Usage Data. E1 agrees to pay NSPI's reasonable costs.

[135] The Board finds NSPI should receive its reasonable administrative costs. As the Board has no direct evidence on the magnitude of these administrative costs, except the historical data in the OPower example, the parties are to attempt to agree on the amount of such costs. If agreement cannot be reached, the Board will require further particulars and make a determination.

IX SUMMARY AND CONCLUSION

[136] E1 applied to the Board for an Order requiring NSPI to disclose Names and Emails, and Customer Usage Data, pursuant to s. 79K(1) of the *PUA*.

[137] The Board has determined that the Names and Emails, and the Customer Usage Data are information respecting customer electricity usage and load necessary to enable E1 to provide NSPI with reasonably available cost-effective DSM programs.

[138] The Board finds that:

- a) NSPI shall provide E1 with the Names and Emails and the Customer Usage Data, within 60 days of the date of this Decision; and, thereafter on a monthly basis. If providing the data on a monthly basis is unworkable, either party may apply to the Board for further directions;
- b) E1 shall pay NSPI's reasonable administrative costs associated with the data transfer. If the parties cannot agree on the amount, the matter can be referred to the Board for a determination;
- c) E1 shall indemnify NSPI from any potential liability which could arise pursuant to the *CASL*.

[139] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 15th day of November, 2017.

Peter W. Gurnham

Roberta J. Clarke

Richard J. Melanson

Tab 4

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittreer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appellants*

c.

Zittreer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «LNE») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40a de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40a sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words “terminated by an employer” must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer’s bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40a of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l’historique législatif pour déterminer l’intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l’*Employment Standards Amendment Act, 1981*, étaient exemptés de l’obligation de verser des indemnités de cessation d’emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l’obligation de verser une indemnité de cessation d’emploi. Si tel n’était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l’ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40a sont examinés dans leur contexte global, les termes «l’employeur licencié» doivent être interprétés de manière à inclure la cessation d’emploi résultant de la faillite de l’employeur. Les raisons qui motivent la cessation d’emploi n’ont aucun rapport avec la capacité de l’employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l’encontre des sens, intention et esprit véritables de la *LNE*. La cessation d’emploi résultant de la faillite de l’employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l’art. 121 de la *LF* en vue d’obtenir une indemnité de licenciement et une indemnité de cessation d’emploi en conformité avec les art. 40 et 40a de la *LNE*. Il était inutile d’examiner la question de l’applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d’avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. *ibid.*, s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

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Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40a(1) [abr. & rempl. *ibid.*, art. 5(1)].

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Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
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Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. n° 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et Kathleen Martin, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur.

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

³ Pursuant to the receiving order, the respondent, Zittler, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittler, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

⁴ In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately \$2.6 million and for severance pay totalling \$14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «LNE»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 \$). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

⁵ The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

- (a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
- (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la «LF») et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la «LNE»).

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7... .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi*.

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

- a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;
- b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

- (c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
 - (d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
 - (e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
 - (f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;
 - (g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;
 - (h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,
- and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

- (a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

- (a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or
- (b) one or more employees have their employment terminated by an employer with a payroll of \$2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

- c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;
 - d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;
 - e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;
 - f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;
 - g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;
 - h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,
- et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

- a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40a . . .

[TRANSLATION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

- a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;
- b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

- (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRANSDUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

- (3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujéti à la date de la faillite, ou auxquels il peut devenir assujéti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the “*ESAA*”), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo’s former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

n’avaient pas soutenu que les indemnités de licenciement et de cessation d’emploi devaient être prioritaires dans la distribution de l’actif, mais tout simplement qu’elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu’il ne convenait pas d’invoquer la jurisprudence et la doctrine portant sur l’interprétation des dispositions relatives à la priorité de la *LF*.

Même si la faillite ne met pas fin à la relation entre l’employeur et l’employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d’emploi de la *LNF*, le juge Farley était d’avis que les employés en l’espèce avaient néanmoins droit à ces indemnités, car il s’agissait d’engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d’une part qu’aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d’une indemnité de licenciement et d’une indemnité de cessation d’emploi au moment de la cessation d’emploi et d’autre part que l’employeur en faillite est assujéti à l’obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l’employeur et l’employé, soit bien avant la faillite.

Le juge Farley a également examiné le par. 2(3) de l’*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l’*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l’indemnité de cessation d’emploi jusqu’à ce que les modifications aient reçu la sanction royale. Il était d’avis que cette disposition n’aurait pas été nécessaire si le législateur n’avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d’un licenciement s’appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d’obtenir des indemnités de licenciement et de cessation d’emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l’appel formé contre la décision du syndic.

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B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

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Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as “[n]o employer shall terminate the employment of an employee” (s. 40(1)), “the notice required by an employer to terminate the employment” (s. 40(2)), and “[a]n employer who has terminated or who proposes to terminate the employment of employees” (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase “employees have their employment terminated by an employer”. Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40a(1)a), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

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In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

[TRADUCTION] Le libellé clair des art. 40 et 40a ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40a.

Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40a de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

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the words, “Where . . . fifty or more employees have their employment terminated by an employer. . . .” Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated “by an employer”.

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated “by an employer”, but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase “terminated by an employer” is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee’s employment is involuntarily terminated by reason of their employer’s bankruptcy, this constitutes termination “by an employer” for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-André Côté, *The Interpretation of Legisla-*

licier un employé . . . » Le paragraphe 40a(1a) contient également les mots: «si [. . .] l’employeur licencie cinquante employés ou plus . . . » Par conséquent, la question dans le présent pourvoi est de savoir si l’on peut dire que l’employeur qui fait faillite a licencié ses employés.

La Cour d’appel a répondu à cette question par la négative, statuant que, lorsqu’un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l’employeur mais par l’effet de la loi. La Cour d’appel a donc estimé que, dans les circonstances de l’espèce, les dispositions relatives aux indemnités de licenciement et de cessation d’emploi de la *LNE* n’étaient pas applicables et qu’aucune obligation n’avait pris naissance. Les appelants répliquent que les mots «l’employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d’emploi volontaire et la cessation d’emploi forcée. Ils soutiennent que ce libellé visait à décharger l’employeur de son obligation de verser des indemnités de licenciement et de cessation d’emploi lorsque l’employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d’emploi forcée résultant de la faillite de l’employeur est assimilable au licenciement effectué par l’employeur pour l’exercice du droit à une indemnité de licenciement et à une indemnité de cessation d’emploi prévu par la *LNE*.

Une question d’interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d’appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l’obligation de verser une indemnité de licenciement et une indemnité de cessation d’emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l’interprétation législative ait fait couler beaucoup d’encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2^e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act “shall be deemed to be remedial” and directs that every Act shall “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit”.

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of “...the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2^e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l’interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

[TRADUCTION] Aujourd’hui il n’y a qu’un seul principe ou solution: il faut lire les termes d’une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’esprit de la loi, l’objet de la loi et l’intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l’approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

Je m’appuie également sur l’art. 10 de la *Loi d’interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s’interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

Bien que la Cour d’appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n’a pas accordé suffisamment d’attention à l’économie de la *LNE*, à son objet ni à l’intention du législateur; le contexte des mots en cause n’a pas non plus été pris en compte adéquatement. Je passe maintenant à l’analyse de ces questions.

Dans l’arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l’importance que notre société accorde à l’emploi et le rôle fondamental qu’il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C’est dans ce contexte que les juges majoritaires dans l’arrêt *Machtinger* ont défini, à la p. 1003, l’objet de la *LNE* comme étant la protection «...[d]es intérêts des employés en exigeant que

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certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, "... an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«... une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a, qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2^e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40a, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40a de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes, op. cit.*, à la p. 88).

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

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until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40a, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40a, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1^{er} janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

2. . . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

(3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

... any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *E.S.A.* ... it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

This interpretation is also consistent with statements made by the Minister of Labour at the time

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40a, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

[TRADUCTION] ... tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la *L.N.E.* [...] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

Cette interprétation est également compatible avec les déclarations faites par le ministre du

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he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . . .

. . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

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Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

. . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the “intent” of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

[TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.

. . . .

. . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1^{er} janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

[TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

. . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40a de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

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amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats, supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'ESA de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'ESA de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'ESA de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40a of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40a de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words “terminated by the employer” must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer’s bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer’s bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40a of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

mots «l’employeur licencié» doivent être interprétés de manière à inclure la cessation d’emploi résultant de la faillite de l’employeur. Adoptant l’interprétation libérale et généreuse qui convient aux lois conférant des avantages, j’estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l’intention du législateur, qui ressort du par. 2(3) de l’*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d’emploi en application de la *LNE* lorsque la cessation d’emploi résulte de la faillite de leur employeur serait aller à l’encontre des fins visées par les dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi et minerait l’objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d’employés possible.

À mon avis, les raisons qui motivent la cessation d’emploi n’ont aucun rapport avec la capacité de l’employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inequitable. De plus, je pense qu’une telle interprétation irait à l’encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d’emploi résultant de la faillite de l’employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l’art. 121 de la *LF* en vue d’obtenir une indemnité de licenciement et une indemnité de cessation d’emploi en conformité avec les art. 40 et 40a de la *LNE*. En raison de cette conclusion, j’estime inutile d’examiner l’autre conclusion tirée par le juge de première instance quant à l’applicabilité du par. 7(5) de la *LNE*.

Je fais remarquer qu’après la faillite de Rizzo, les dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, “[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law”. As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

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I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo’s former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed with costs.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l’emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d’emploi résulte de l’effet de la loi à la suite de la faillite de l’employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l’art. 17 de la *Loi d’interprétation* dispose que «[l]’abrogation ou la modification d’une loi n’est pas réputée constituer ou impliquer une déclaration portant sur l’état antérieur du droit», je précise que la modification apportée subséquemment à la loi n’a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Dispositif et dépens

Je suis d’avis d’accueillir le pourvoi et d’annuler le premier paragraphe de l’ordonnance de la Cour d’appel. Je suis d’avis d’y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d’indemnité de licenciement (y compris la paie de vacances due) et d’indemnité de cessation d’emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n’ayant produit aucun élément de preuve concernant les efforts qu’il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d’autorisation de pourvoi auprès de notre Cour en leur nom, je suis d’avis d’ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d’avis de ne pas modifier les ordonnances des juridictions inférieures à l’égard des dépens.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs de l’intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureur du ministère du Travail de la province d’Ontario, Direction des normes d’emploi: Le procureur général de l’Ontario, Toronto.

Tab 5

NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*,
2019 NSCA 22

Date: 20190326
Docket: CA 467211
Registry: Halifax

Between:

The Attorney General of Nova Scotia, representing
Her Majesty the Queen in the Right of the Province of Nova Scotia
Appellant (Cross-respondent)

v.

S&D Smith Central Supplies Limited
Respondent (Cross-appellant)

v.

Nova Scotia Utility and Review Board
Respondent

Judge: The Honourable Justice Joel E. Fichaud
The Honourable Justice Duncan R. Beveridge (dissenting)

Appeal Heard: September 12, 2018, in Halifax, Nova Scotia
Final submission filed November 7, 2018

Subject: Expropriation – appealable issues – standard of review

Summary: S&D Smith Central Supplies Limited (“Central”) operates a home hardware business from its lands in Antigonish County. At a public meeting in May 1998, the Province announced that there were three routes to reconfigure the Trans Canada Highway. Two of those possible routes would trigger expropriation of a corridor across Central's parcel. The Province’s representative also told Central that, as Central was now aware of the potential expropriation, Central would not be compensated for any future capital improvements on the

parcel. These messages disrupted Central's plans to develop the parcel with a new distribution centre and retail outlet. Over the following several years, Central made other arrangements for those developments.

In May 2012, the Province expropriated the corridor across Central's land. Central claimed compensation under the *Expropriation Act*, R.S.N.S. 1989, c. 156. The Utility and Review Board ("Board") heard the matter and awarded Central compensation for the taken parcel, an amount for injurious affection to the remnant, interest, and \$6,739,281 for "disturbance" to Central's business. An award for "disturbance" is a category of compensation under ss. 26(b) and 27(3) of the *Expropriation Act*.

The Province appealed. Central cross-appealed. The appeal and cross-appeal were taken under s. 30(1) of the *Utility and Review Board Act*, S.N.S. 1992, c. 11, which confines appeals to questions of jurisdiction and law.

Issues:

- (1) What issues are appealable and what is the standard of review to the Board's Decision?
- (2) On the Province's appeal, did the Board commit an appealable error:
 - (a) by ruling that Central was entitled to compensation for disturbance under ss. 26(b) and 27(3),
 - (b) by finding that Central's plans for business expansion were thwarted by the impending expropriation,
 - (c) in its quantification of compensation,
 - (d) in its award of interest?
- (3) On Central's cross-appeal, did the Board commit an appealable error by declining to award compensation for Central's alleged future disturbance losses?

Result:

The Court of Appeal (per reasons of Fichaud J.A., Saunders J.A. concurring) dismissed the appeal and cross-appeal.

Under the *Utility and Review Board Act*, questions of fact are not appealable. The standard of review to the appealable issues is reasonableness.

As to the Province's appeal:

- (a) The Board's ruling that Central was entitled to compensation for disturbance reasonably interpreted and applied the *Expropriation Act*'s provisions and objectives.
- (b) The Board's ruling that Central's plans for expansion were disrupted by the impending expropriation was based on the Board's application of Supreme Court of Canada's three-part test for disturbance compensation in an expropriation: (a) causation, (b) remoteness and (3) reasonable mitigation. The Board made no error of law, its rulings were reasonable, and its findings of fact were supported by evidence.
- (c) The Board's awards of compensation for the taking, injurious affection and disturbance involved no error of law, were quantified from factual and appraisal evidence, and were reasonable.
- (d) The Board's award of interest was based on evidence and a reasonable interpretation and application of the provisions in the *Expropriation Act*.

As to Central's cross-appeal, the Board's denial of compensation for the claimed future disturbance losses was based on findings of fact and weight of evidence. The findings were supported by the evidence and, to the extent they were appealable, were reasonable.

Beveridge J.A., in dissent, favoured application of correctness as the standard of review on the issues engaged on the appeal. But on either correctness or reasonableness, the Board erred: in law in its award of \$6.7 M, not for any costs or expenses

caused by expropriation, but for Central's claim it would have made more money had it gone ahead with its planned business plans as if the expropriation had not occurred, when nothing prevented them from proceeding with their plans; and, in its award of interest on \$1.4M from 2001 for market value for the lands taken in 2012 and injurious affection. The dissent would quash the award for disturbance damages and vary the interest award to the date of expropriation.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 102 pages.

NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*,
2019 NSCA 22

Date: 20190326
Docket: CA 467211
Registry: Halifax

Between:

The Attorney General of Nova Scotia, representing
Her Majesty the Queen in the Right of the Province of Nova Scotia
Appellant (Cross-respondent)

v.

S&D Smith Central Supplies Limited

Respondent (Cross-appellant)

v.

Nova Scotia Utility and Review Board

Respondent

Judges: Fichaud, Saunders and Beveridge JJ.A.

Appeal Heard: September 12, 2018, in Halifax, Nova Scotia
Final submission filed November 7, 2018

Held: Appeal and cross-appeal dismissed with costs to the
Respondent S&D Smith Central Supplies Limited, per reasons
for judgment of Fichaud J.A., Saunders J.A. concurring;
Beveridge J.A. dissenting

Counsel: Mark V. Rieksts, for the Appellant (Cross-respondent)
Bruce MacIntosh, Q.C., Sarah MacIntosh, and Julie MacPhee
for the Respondent (Cross-appellant) S&D Smith Central
Supplies Limited
The Respondent Nova Scotia Utility and Review Board not
appearing

Reasons for judgment:

[1] S&D Smith Central Supplies owns land in Antigonish County. From there it operates a home hardware business. Over forty years the enterprise has grown significantly. On May 1, 2012, the Province filed a notice at the Registry of Deeds that expropriated a corridor through Central's land. The purpose was to reconfigure the Trans-Canada Highway. The Utility and Review Board fixed Central's compensation under Nova Scotia's *Expropriation Act*. The award is appealed to this Court.

[2] One of the *Act*'s categories of compensation is for loss from "disturbance" due to the expropriation. On May 30, 1998, a Provincial official told Central that a parcel of Central's land may be expropriated for the highway and, as Central was now aware of a prospective expropriation, Central's future capital costs on that parcel would not be compensated. That message disrupted Central's planned development of the parcel over the following years. The disruption was the disturbance that caused the losses for which Central claimed compensation at the Board. The losses occurred before the expropriation document was filed at the Registry in May 2012.

[3] The Board awarded Central over \$6,700,000 in disturbance compensation. Citing authority from the Supreme Court of Canada, the Board held that expropriation is a "process", not an event, and Central's disturbance stemmed from an early step in the process. The Province says the Board redressed a non-compensable "pre-expropriation" loss. From that point of departure, this appeal spreads to litigate almost every aspect of disturbance compensation under the *Act*.

Background

[4] Mr. Stephen Smith is the principal of S&D Smith Central Supplies Limited ("Central"). Central retails home hardware and building supplies.

[5] In 1975, Mr. Smith and his brother started the business. They rented premises, but Mr. Smith said they "outgrew that space dramatically". So, in 1979, Central bought 16 acres at Lower South River in Antigonish County. The land is about three kilometers from the boundary of the Town of Antigonish. On the land was an existing retail store to which they added some small buildings. The following year, Central acquired 33 adjacent acres at the rear.

[6] Mr. Smith testified “our vision was to keep growing as we had the opportunity”. The Board’s Decision (2017 NSUARB 124, para. 22) said “while they had no idea of how much they would grow, they shared a vision of continued growth when opportunities presented themselves”, and (para. 24) “Central’s practice was to reclaim existing land when it needed room to expand”.

[7] Mr. Smith’s brother ended his involvement. But their vision materialized. Central added a branch store in New Glasgow and a cabinet assembly and retail store in Sydney. Central built warehouses, a 6,000 square foot retail supply store and an office building in Lower South River, a truss mill in 1987 and a modernized truss mill in 2011-12. The Lower South River property has eight buildings. Central has a window manufacturing and steel door businesses in New Brunswick, and stores in Windsor, Stellarton, Antigonish, Guysborough, Inverness and Port Hawkesbury.

[8] To resume the early chronology – in January 1999, after Mr. Smith’s repeated requests, the County extended its water service to Central’s property at Lower South River. This would allow the installation of a fire protection system in his planned buildings. Until then, the fire marshal would not approve those developments. Mr. Smith testified that, with the new water service, Central would have had a new retail store in operation by the fall of 1999, to be soon followed by a new distribution centre.

[9] Mr. Smith explained his view of the distribution centre and “big box store” concept. This would permit Central to bulk purchase, obtain vendors’ volume discounts, eliminate the distributor middle men and quickly replenish inventory. His testimony elaborates on the benefits of vertically integrated distribution. The Board said (para. 29) “Mr. Smith then had in mind building a big box store and expanding his existing warehousing to a distribution centre on the Lower South River property for all of the stores”.

[10] However, Central’s plans met a roadblock.

[11] In the mid-1990s, the provincial Department of Transportation (“Department”) had begun to study the twinning of the Trans-Canada Highway (Highway 104) through Antigonish County. The Department hosted public meetings to gather input. On May 30, 1998, Mr. Smith and Central’s Mr. Kevin White attended one of the meetings. The Department revealed three possible routes, coloured on a map, for the alignment of Highway 104. The “red” and “blue” routes would cut through Central’s property at Lower South River. The

“brown” route would not. The highway corridor would sever Central’s land into two parcels, rendering the southern remnant unable to serve the operations on the northern remnant. The northern portion had insufficient space to platform Central’s planned developments. The Board recited Mr. Smith’s reaction:

[31] . . . He believed that, including the south remnant, about two-thirds of his property would be “taken”. His reaction was that if either of the two routes were selected, Central would be “shut down”.

[12] After the meeting, Mr. Smith spoke with the Department’s Mr. Graydon Bushell. The Board’s Decision describes the conversation and its paralyzing effect on Central’s plans:

[32] . . . Mr. Smith expressed his concern about the impact on his property and his plans to expand Central’s business. He testified that Mr. Bushell told him the highway plans were not finalized yet; the route was not settled and could be changed, describing it as “preliminary”, and that Central would not necessarily be affected. However, Mr. Smith testified Mr. Bushell told him that, because he was now aware of the potential routes, while he could do anything he chose on the corridor area, he would not be compensated because of that knowledge. Mr. Smith said that was the moment when he concluded he could not do anything on that land. He “knew we were in trouble”.

...

[36] As a result of the conversation with Mr. Bushell, Mr. Smith was unwilling to undertake any expansion at Lower South River and turned to other projects, including continuing with capital improvements for the new location in New Glasgow, and later, the new Sydney store. He said he had planned to do the Lower South River store immediately after finishing up in New Glasgow, starting in late 1998 or early 1999. That would have led to an opening in Lower South River in 2001.

[13] After hearing testimony from Messrs. Smith and Bushell, the Board found that Mr. Smith’s testimony was factual:

[759] The Board accepts Mr. Smith’s evidence regarding his conversation with Graydon Bushell at the May 1998 meeting.

[14] In April 2000, the Department’s Minister approved the “blue route”. But there was no official announcement until 2005, after the completion of an environmental assessment. In the meantime, public meetings continued.

[15] The Board summarized how the uncertainty surrounding the proposed routing impeded Central's business planning in the years up to the formal expropriation:

[39] Mr. Smith said he was aware that there was a lot of discussion and controversy in the area about the proposed routes during that time. Neither he nor anyone at Central was involved with the Atlantic Expressway Committee. He was waiting to see what would happen. As time went on, he realized that the brown route was not preferred. He then had a clearer picture of Central's situation. While Mr. Smith did not participate in the environmental review process, and no one involved consulted him in any way, it was not until it was completed that it was certain which would be the recommended route. In 1999, he understood a preferred route had been identified; he testified he then started "looking around" but did not want to make any decisions until a route was fixed. He remained hopeful that the route might not affect Central, but as time went on, the "danger" became clearer. Once the route was announced, Mr. Smith realized how his Lower South River property would be affected.

[16] There was a trailer park on a neighbouring parcel. In the spring and summer of 2003, Mr. Smith saw the trailers being moved from that property. Then, according to the Board (para. 41) Mr. Smith "knew exactly where the corridor for the highway would be and how much Central's property would be impacted". He learned that the Department had acquired the neighbouring parcel. The Board said:

[41] ... In his words, he was not left with half of his property north of the corridor, but about one-third only, and with no room for expansion as he had planned. He could not have both the big box store and the distribution centre on his land-there was not enough room. He knew he had to do something.

[17] Consequently, Mr. Smith looked for another location for its big box store. In 2004, Central purchased a parcel off Market Street, south of the "old highway" west of Antigonish. In May 2005, Central opened its big box store there with some additional storage space. The Board's Decision terms this the "Market Street store".

[18] Also in 2005, Central converted part of the Lower South River property into a distribution centre for building materials for all Central's stores. Because of spatial constraints due to the prospective expropriation, the distribution centre was smaller than Central originally had planned.

[19] As Central's retail operations grew, it was apparent that the distribution centre at the Lower South River site was insufficient. In 2012-13, Mr. Smith

looked for a secondary site. In late 2015, Central purchased a property at Pomquet for warehousing and a laydown area. The Board recited:

[46] ... Mr. Smith said he would not have needed the second site if it were not for the expropriation. He saw clear benefits from being on one site.

[20] From 2006 to early 2012, Mr. Smith discussed options for highway routing and configuration with the Department's Acquisition Officers. There was brief consideration of a tunnel that would have lessened the impact on Central's property. Nothing was resolved.

[21] On January 18, 2012, Mr. Smith received an email from the Department requesting access to Central's land to begin clearing. There followed a letter of February 27, 2012, under s. 71 of the *Expropriation Act*, R.S.N.S. 1989, c. 156, formally requiring access on March 1, 2012.

[22] An Order-in-Council dated February 29, 2012 approved the expropriation of Central's land. The OIC was registered at the Antigonish Registry of Deeds on May 1, 2012. The Province expropriated a corridor of some 11 acres, close to one-quarter of Central's land at Lower South River. The corridor bisected Central's land. It left the southern remnant effectively inaccessible and, as the Board later determined (para. 613), "almost worthless". The northern remnant had been developed with structures and related infrastructure.

[23] On March 12, 2015, Central filed with the Utility and Review Board a Notice of Hearing and Statement of Claim under the *Expropriation Act*. Central claimed compensation for: (1) the market value of the lands expropriated, (2) business disturbance damages, (3) injurious affection, (4) loss of special economic advantage in the expropriated and remaining lands, (5) costs, expenses and losses caused by the disturbance, including fencing, legal, appraisal and other professional fees and disbursements, (6) costs of developing and operating a replacement property, (7) prejudgment interest and (8) an access order.

[24] During the proceeding before the Board, Central adjusted its claim. It withdrew its claim for compensation for loss of special economic advantage under s. 26(d) of the *Expropriation Act*. Central focused its claim on disturbance from economic obsolescence and delay under ss. 26(b) and 27(3). Central quantified its claimed interest at 12% per annum further to s. 53(4). The *Act's* provisions are quoted later. Central sought an award for HST and accelerated tax consequences of the expropriation and asked the Board to reserve on these points. In its rebuttal

submission, Central calculated its claim – less any awards for interest, HST and tax consequences – as exceeding \$12.2 million.

[25] The Province submitted that Central’s award should be between \$820,000 to \$4.69 million, excluding interest and any tax items.

[26] Ms. Roberta J. Clarke, Q.C., sitting as the Board, heard the matter in February and March 2016. The transcribed evidence and exhibits exceed 15,000 pages, and the briefs plus oral submissions exceed 900 pages. The post-hearing briefs were filed through early June 2016.

[27] On December 20, 2016, while the Decision was under reserve, The Province applied to offer new evidence. On May 17, 2017, the Board declined to reopen the evidence (2017 NSUARB 75).

[28] On July 26, 2017, the Board issued a 291-page decision (2017 NSUARB 124) and Order. The Order required the Province to pay Central compensation of \$8,180,497 plus interest on the market value and injurious affection at 10% per annum from May 1, 2001 to the date of payment, with no interest payable on disturbance damages. The Board reserved jurisdiction to consider costs and tax consequences, on the motion of either party. The compensation of \$8,180,497 comprised: (1) \$615,375 for the market value of lands taken under s. 26(a) of the *Expropriation Act*, (2) \$788,841 for injurious affection to the southern remnant under s. 26(c) of the *Act*, (3) nil for injurious affection to the northern remnant, (4) \$6,739,281 for business losses and disturbance damages under s. 26(b), and (5) \$37,000 for “Other Claims – Fencing” (Board Decision, para. 900).

[29] For the market value of the taken parcel and the injurious affection to the southern remnant, the Board accepted the opinion of Central’s appraisal expert, Mr. Daniel Doucet. The Board rejected the opinion of the Province’s expert, Mr. John Ingram.

[30] Central’s disturbance claim related to the delay and alteration of Central’s implementation of its expansion plans. Central alleged the disturbance was caused by the “shadow of expropriation” after May 1998.

[31] The Province disputed that Central had expansion plans and that any plans were delayed or affected by the impending expropriation.

[32] The Board's Decision reviewed the evidence and made the critical findings of fact that Central had expansion plans and, but for the prospect of expropriation, Central would have implemented them:

[723] Consequently, the Board is satisfied, on a balance of probabilities, that Central planned a new retail store to open at Lower South River in 2000, to be followed by a distribution centre, and would have proceeded with this expansion, but for the expropriation, or more precisely, the shadow of expropriation.

[33] The Board (para. 743) accepted January 31, 2001 as the starting date for the delay caused by the disturbance. Quantification of the disturbance losses was the subject of opinion evidence by Central's experts from Pricewaterhouse Coopers, Mr. Paul Bradley and Ms. Charlene Rodenhiser, and the Province's expert, Mr. Ian Wintrip. The Board considered their evidence in detail and concluded:

[899] The Board finds, on a balance of probabilities, that Central did have expansion plans. It accepts, for the most part, the evidence of PwC, and agrees with the losses for profits at the new retail store and distribution centre, vendor discounts, and incremental operating costs which had been incurred. The Board does not, however, accept the full extent of the loss period determined by PwC, but ends it one year earlier. Further, the Board does not accept the claims for future losses, finding them to be less reliable because they were built on estimates the Board considers too uncertain.

[34] As to the 10% interest, the Board determined:

[902] Further, the Board finds, pursuant to s. 53(4) that the conduct of the expropriating authority, i.e. the Province, caused delay in determining compensation and therefore warrants the rate of interest on the market value of the land and injurious affection (a total of \$ 1,404,216) to be charged at 10% per year from May 1, 2001, to the date of payment. No interest is recoverable for disturbance damages.

The Board held that interest would run from May 1, 2001, the date when, in the words of s. 53(1), Central ceased to "make productive use of the lands" from the chilling effect of the impending expropriation.

[35] On August 23, 2017, the Province filed a Notice of Appeal from the Board's order of July 26, 2017.

[36] On September 5, 2017, Central filed a Notice of Cross-Appeal.

[37] On September 12, 2018, this Court heard the matter and reserved.

[38] Since the appeal hearing, the parties have filed supplementary briefs and rebuttals on costs of the appeal.

Issues

[39] The Province's Notice of Appeal lists 30 grounds with 18 sub-grounds. The submissions narrowed the focus somewhat. I will group the arguments into four issues:

1. Did the Board commit an appealable error by ruling that Central was entitled to compensation for disturbance under ss. 26(b) and 27(3) of the *Expropriation Act*?
2. Did the Board commit an appealable error by finding that Central's plan for business expansion was thwarted by the impending expropriation?
3. Did the Board commit an appealable error in its quantification of compensation for market value, injurious affection and disturbance?
4. Did the Board commit an appealable error by awarding 10% interest under s. 53 of the *Expropriation Act* from May 1, 2001?

[40] Central's cross-appeal addresses one issue:

5. Did the Board commit an appealable error by concluding that Central's claimed future disturbance losses were too speculative to be compensable?

What Issues are Appealable?

[41] The reviewing court's "first order of business" is to determine what grounds of appeal are permitted by the legislation. Next is the selection of a standard of review to the appealable grounds. *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para. 18, and paras. 36, 41 and 51, per Binnie J. for the majority. See also *Teal Cedar Products Ltd. v. British Columbia*, [2017] 1 S.C.R. 688, paras. 41-42.

[42] The Board is established under the *Utility and Review Board Act*, S.N.S. 1992, c. 11 ("*UARB Act*"). The assignment of the Board's substantive authority is left to other statutes. One is the *Expropriation Act*. These substantive statutes do not discuss appeals of the Board's awards. Appeals are governed by the following generic provisions in the *UARB Act*:

Jurisdiction

22(1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.

(2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact.

Effect of judgement of court on pending matter

23(1) In determining a question of fact, the Board is not bound by the finding or judgment of a court in a proceeding involved in the determination of the fact, but such finding or judgment is, in proceedings before the Board, *prima facie* evidence only.

(2) The Board has jurisdiction to hear and determine a question of fact notwithstanding that a proceeding involving the same question of fact is pending in a court.

...

Effect of finding

26 *The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.*

...

Appeal

30(1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any *question as to its jurisdiction or upon any question of law*, upon filing with the Court a notice of appeal within thirty days after the issue of the order.

[italicized emphasis added]

[43] By s. 30(1), the grounds of appeal and cross-appeal are confined to issues of jurisdiction or law. The parties have identified no jurisdictional issue, leaving us with issues of law. This is pertinent because a number of issues in this appeal and cross-appeal are distinctly factual.

[44] Several statutes in Nova Scotia provide for appeals to this Court from administrative tribunals – not just the Utility and Review Board – on questions of “jurisdiction or law”. Under those provisions, a body of authority has developed to explain when an issue with a factual undertone may be appealed as a “question of law”.

[45] In *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6, this Court summarized the authorities:

[42] ... Where, as here, the statutory right of appeal is limited to an issue of law, the Court may review a finding of fact only if there is *no* supporting evidence from which the finding may be made or the inference reasonably drawn. That is because a finding based on no evidence is arbitrary, and a tribunal errs in law by acting arbitrarily in any aspect of its process, including fact-finding. The standard of review would be reasonableness (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, paras. 34, 38-39, 42), though it is difficult to conceive how an arbitrary finding could be reasonable. Alternatively, if there is *some* evidence, then the tribunal's factual findings and inferences are not appealable under the statute, nor are assessments of credibility, meaning the standard of review is not an issue. *Fashoranti v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 25, paras. 20-21, leave denied Sept 3, 2015 [[2015] S.C.C.A. no. 211]; *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26, paras. 12-17, and authorities there cited. See also *Nova Scotia v. Play it Again Sports Ltd.* [2004 NSCA 132], para. 50. [italics in *Adekayode*]

[46] Paragraphs 15 and 16 of *Fadelle*, cited by this passage, referred to Justice Cory's comments in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, para. 44. Justice Cory referenced *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, page 277. Also helpful are: *Re Can-Euro Investments Ltd.*, 2008 NSCA 123, para. 24; *Colchester County (Municipality) on Behalf of Tatamagouche Water Utility v. Wall*, 2018 NSCA 67, at para. 66; *R. v. H. (J.M.)*, [2011] 3 S.C.R. 197, para. 25.

[47] Appealable questions of law include, of course, the interpretation of a legal principle or a statute, but also the legal effect of a factual finding, the tribunal's failure to appreciate evidence because the tribunal misapprehended the law, and the tribunal's failure to consider a required element of the test: *R. v. H. (J.M.)*, paras. 28-30; *R. v. Morin*, [1992] 3 S.C.R. 286, pages 294-95; *Teal Cedar Products*, para. 44.

Standard of Review

[48] If the ground is appealable, what is the standard of review?

[49] On paper, the parties were *ad idem* that the standard was reasonableness:

- The Province's appellant's factum:

17. The Appellant submits that the standard of review on all issues on appeal is reasonableness.
- Central's respondent's factum:

14. Reasonableness is the applicable standard for all grounds of appeal. ...

- Central's cross-appellant's factum:

17. Central respectfully submits the issues in the cross appeal are questions of law. The standard of review with respect to remoteness, speculation and uncertainty is reasonableness. ...

- The Province's cross-respondent's factum:

1. The Appellant agrees with the standard of review for the issues referenced at paragraph 17 of the Respondent's Cross Appeal Factum. ...

[50] At the hearing in this Court, however, the Province had second thoughts. Counsel for the Province suggested that correctness should govern the Board's interpretation of the *Expropriation Act*'s provisions. This would be because s. 30(1) of the *UARB Act* assigns appellate authority over "any question of law" and, submits the Province, appellate authority connotes correctness.

[51] With respect, the proposition is unpersuasive. The Supreme Court of Canada has rejected it. Repeated rulings of this Court on appeals from the Board under s. 30(1) have confirmed that, with rare exceptions, the Board's interpretation of its "home or related statutes", including the *Expropriation Act*, are reviewed for reasonableness. The Supreme Court has explained its reasons for the textured, rather than a linear approach to deference. Whether that approach should be revisited is for the Supreme Court, not this Court.

[52] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 68, Justices Bastarache and LeBel expressed the presumption of "relative expertise" for administrative tribunals' interpretation of "the legislation they might often encounter in the course of their functions".

[53] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, Justice Rothstein for the majority converted that proposition into a presumption of reasonableness for the tribunal's interpretation of its home or related statutes:

[34] ... unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[54] In *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, s. 470(1) of Alberta’s *Municipal Government Act* permitted an appeal, with leave, from a decision of an assessment review board on an issue of “law or jurisdiction” (see para. 11). The Alberta Court of Appeal applied correctness based on the presumed legislative intent that there be an undeferential analysis of issues of law. The Supreme Court allowed the appeal. Justice Karakatsanis for the majority squarely rejected the submission that a statutory appeal on a question of “law” connotes correctness:

[27] The Court of Appeal concluded that when the decisions of a tribunal are subject to a statutory right of appeal (or a right to apply for leave to appeal), rather than ordinary judicial review, the standard of review on such appeals is correctness. It determined that a statutory appeal should be recognized as “an addition to or a variation of” the list of correctness categories in *Dunsmuir* (Court of Appeal reasons, at para. 24). Slatter J.A. reasoned that the existence of a statutory right of appeal is a strong indication that the legislature intended the courts to show less deference than they would in an ordinary judicial review.

[28] **I disagree. In my view, recognizing issues arising on statutory appeals as a new category to which the correctness standard applies – as the Court of Appeal did in this case – would go against strong jurisprudence from this Court.** [bolding added]

[29] At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (*McLean* [*McLean v. British Columbia (Securities Commission)*], [2013] 3 S.C.R. 895; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219).

[30] In *Saguenay* [*Mouvement laïque québécois v. Saguenay (City)*], [2015] 2 S.C.R. 3], this Court confirmed that whenever a court reviews a decision of an administrative tribunal, the standard of review “must be determined on the basis of administrative law principles ... regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal (para. 38, per Gascon J.; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 17, 21, 27 and 36; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 2 and 21.

[31] The Court of Appeal relied on this Court’s decision in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, where the statutory appeal clause was referred to when finding the standard of review

was correctness (para. 36). However the Court in *Tervita* relied upon the unique statutory language of that particular appeal clause: a decision of the tribunal was appealable “as if it were a judgment of the Federal Court” (*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp), s. 13(1)). Obviously, judgments of the Federal Court do not benefit from deference on appeal (except on questions of fact, for entirely different reasons). *Tervita* does not stand for the proposition that all issues arising on all statutory appeals are reviewable on the correctness standard.

(3) Contextual Analysis

[32] The Court of Appeal also conducted a review of the relevant contextual factors to support the conclusion that the standard of review is correctness. The presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness (*Saguenay*, at para. 46; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 16).

[33] The presumption of reasonableness is grounded in the legislature’s choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. ... However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: “... at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions” (*Dunsmuir*, at para. 68). ...

[34] ... In light of this strong line of jurisprudence – combined with the absence of unusual statutory language like that at issue in *Tervita* – there was no need for the Court of Appeal to engage in a long and detailed contextual analysis. Inevitably, the result would have been the same as in those cases. The presumption of reasonableness is not rebutted.

[55] Earlier, in *Canada v. Khosa*, *supra*, at paras. 21-26, Binnie J. for the majority had dismissed a submission similar to that rejected by Karakatsanis J. in *Edmonton (City)*. The Supreme Court regularly has reiterated the presumption of reasonableness for a tribunal’s interpretation of its home or related statutes: *Smith v. Alliance Pipelines Ltd.*, [2011] 1 S.C.R. 160, para. 26; *McLean*, paras. 19-22; *Tervita*, para. 35; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, paras. 24-25; *Commission scolaire de Laval v. Syndicat de l’enseignement de la région de Laval*, [2016] 1 S.C.R. 29, paras. 32 and 34; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, paras. 45-47.

[56] Recently, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, at paras. 45-47, Justice Gascon for the majority

said that contextual analysis may overcome this presumption of reasonableness only “occasionally”, “sparingly” and in “exceptional” cases.

[57] Next is Nova Scotia’s caselaw under s. 30(1) of the *UARB Act*.

[58] This Court frequently has ruled that reasonableness governs appeals under s. 30(1) of the *UARB Act* from the Board’s decisions that interpret the various statutes within the Board’s administrative authority. Since 2015, these rulings include: *Colchester County v. Wall, supra*, paras. 40, 48-52, 61; *Antigonish (Town) v. Nova Scotia (Utility and Review Board)*, 2018 NSCA 8, paras. 21-25; *Tasty Budds Compassion Club Inc. v. Nova Scotia (Attorney General)*, 2017 NSCA 22, para. 3; *Ghosn v. Halifax (Regional Municipality)*, 2016 NSCA 90, paras. 20-21; *West Hants District (Municipality) v. Nova Scotia (Utility and Review Board)*, 2016 NSCA 57, paras. 12-15; *Richmond County (Municipality) v. Nova Scotia (Attorney General)*, 2016 NSCA 11, paras. 16-25 (correctness applied to constitutional issue only); *Martell v. Halifax (Regional Municipality)*, 2015 NSCA 101, paras. 12-13; *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 43, paras. 27-28; *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*, 2015 NSCA 35, paras. 40-41.

[59] Those passages cite authorities of this Court to the same effect from before 2015.

[60] One statute in the Board’s bailiwick is the *Expropriation Act* which, by ss. 3(1)(aa), 24 and 47(1), says the Board is to determine compensation and related issues in accordance with the provisions of that *Act*. This means s. 22(2) of the *UARB Act* authorizes the Board to “determine all questions of law and of fact” in an expropriation proceeding such as this one.

[61] Clearly the *Expropriation Act* is “related legislation that [the Board] might often encounter in the course of [its] functions” [*Edmonton (City)*, para. 33] and is a statute “closely connected to its function, with which it will have particular familiarity” [*Alberta Teachers’*, para. 34]. This triggers the presumption that the reasonableness standard applies.

[62] *Nova Scotia v. Johnson*, 2005 NSCA 99, leave denied [2005] S.C.C.A. no. 446, was an expropriation appeal from the Utility and Review Board. This Court applied correctness for issues of pure law and patent unreasonableness for issues of mixed law and fact:

[46] After considering the four contextual factors of the functional and pragmatic approach, in my view **the standard of review to be applied to questions of law**, such as any entitlement for compensation for owner's time and for pension loss, the standard of review **is correctness**. For questions of mixed law and fact, such as matters related to compensation for market value and injurious affection, the standard is patent unreasonableness. For findings of fact, the standard is patent unreasonableness. [bolding added]

[63] *Johnson* pre-dated *Dunsmuir*, the re-structuring of three standards into two, *Dunsmuir*'s definition of reasonableness methodology and the formal presumption of reasonableness for the interpretation of "home and related statutes". Since *Johnson*, the Supreme Court of Canada has thoroughly refashioned the landscape. As Justice Moldaver put it in *McLean v. British Columbia*, *supra*:

[33] ... as this Court has repeatedly indicated since *Dunsmuir*, ... the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. ...

In *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, [2013] 1 S.C.R. 594, para. 16, the Supreme Court applied reasonableness to the judicial review of an expropriation award. To similar effect: *Smith v. Alliance*, paras. 23-27 and *Teal Cedar Products*, paras. 74-75, 79.

[64] *Yarmouth (Town) v. Gateway Importers and Exporters Ltd.*, 2011 NSCA 17, and *Guysborough (District) v. PEV International Research and Development Incorporated*, 2012 NSCA 87, were appeals from expropriation rulings of the Utility and Review Board. Both decisions post-dated the Supreme Court of Canada's enunciation of the "home and related statute" presumption of reasonableness. This Court accepted reasonableness as the standard of review: *Yarmouth*, paras. 4, 15, 21, 22, 25; *Guysborough*, paras. 15-17. In *Guysborough*, Justice Hamilton (para. 16) quoted the following from this Court's decision in *Nova Scotia (Assessment) v. van Driel*, 2010 NSCA 87, para. 14, a property assessment appeal from the Utility and Review Board:

... Reasonableness governs the Board's use of its institutional expertise to apply and administer its home statutes, including the *Assessment Act*.

In *Guysborough*, Justice Hamilton then said:

[17] While this appeal concerns expropriation rather than assessment, the same standard applies.

[65] The courts of other provinces similarly have held that a tribunal's interpretation of an expropriation statute is reviewed for reasonableness: *e.g.* *D.D.S. Investments Ltd. v. Toronto (City)* (2010), 261 O.A.C. 12 (Div. Ct.), para. 36; *Houle v. Manitoba*, [2016] M.J. No. 223 (C.A.), para. 22; *Zahmol Properties Ltd. v. Calgary (City)*, [2012] A.J. No. 284 (C.A.), para. 9.

[66] The legal issues in this appeal turn on the interpretation of provisions in the *Expropriation Act*, particularly ss. 2(1) for statutory purpose, ss. 26(b), 27(2) and 27(3) for disturbance compensation and s. 53(4) for interest. As I will discuss, the analyses of those issues involve a choice whether to imply criteria to modify general statutory standards. See below paras. 79-97, 108-113, 121-26, 157 and 210. Those choices pivot significantly on the application of the *Act's* policy and objectives. That is a “home statute” function under the Supreme Court's directives for selection of a standard of review. The Board's interpretation of those provisions is subject to the presumption of reasonableness and nothing in this case rebuts the presumption. Reasonableness governs all the appealable issues on this appeal and cross-appeal.

[67] What does reasonableness mean?

[68] Generally, the reviewing court follows the tribunal's reasoning path to assess whether the tribunal's reasoning is understandable and leads to an outcome that is permitted by the legislation. If the answer is Yes, the court does not ask whether the court would prefer another outcome. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras. 14-17, per Abella J. for the Court; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, para. 54, per Abella J. for the majority; *McLean*, *supra*, paras. 32-33.

[69] On the other hand, “[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance”: *McLean*, para. 38.

[70] Recently, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, Justice Gascon for the majority summarized:

[55] ... When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing

courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa [Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339], at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

Issue #1 – Entitlement to Compensation for Disturbance

[71] The following provisions of the *Expropriation Act* pertain to disturbance:

PART III COMPENSATION

...

Aggregate of items to be compensated

26 **The due compensation** payable to the owner for lands expropriated **shall be** the aggregate of

- (a) the market value of the land or a family home for a family home determined as hereinafter set forth;
- (b) **the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance as hereinafter set forth;**
- (c) damages for injurious affection as hereinafter set forth; and
- (d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation.

Value

...

27(2) Subject to this Section, the value of land expropriated is the market value thereof, that is to say, the amount that would have been paid for the land if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.

(3) Where the owner of land expropriated **was in occupation** of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the land expropriated is **the greater of**

- (a) the **market value** thereof determined as set forth in subsection (2); and
- (b) the **aggregate of**

- (i) the **market value** thereof determined on the basis that **the use to which the land expropriated was being put** at the time of its taking was the highest and best use; and
- (ii) **the costs, expenses and losses arising out of or incidental to the owner's disturbance including** moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),

plus the market value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated.

[emphasis added]

...

Business loss from relocating and loss of goodwill

29(1) Where a business is located on the land expropriated, the statutory authority shall pay compensation for business loss resulting from the relocation of the business made necessary by the expropriation and, unless the owner and the statutory authority otherwise agree, the business losses shall not be determined until the business has moved and has been in operation for twelve months or until a three-year period has elapsed from the date of expropriation, whichever occurs first.

(2) Where it is not feasible for the owner of a business to relocate, there shall be included in the compensation payable an amount for the loss of the business where the compensation for the land taken is based on the existing value of the land.

(3) For the purposes of determining the compensation for loss of goodwill, the value of goodwill shall be determined in accordance with generally accepted accounting principles.

[72] Under ss. 26(b) and 27(3), the Board awarded \$6,739,281 for "Business losses/disturbance damages" plus \$37,000 for "Other Claims – Fencing".

[73] In this Court, the Province submits that Central is not entitled to disturbance compensation for five reasons:

- under s. 27(3), the owner must be in "actual" occupation of the land at the expropriation date and Central's land was not actually occupied at that date;

- the actual occupation must be by the owner's "business", rather than in another capacity;
- disturbance compensation is unavailable for losses that predate the deposit of the expropriation document at the Registry of Deeds; and
- disturbance compensation is recoverable only when the entire parcel is taken, and not after a partial taking;
- Central's awards of market value and disturbance compensation offend the formula in s. 27(3).

[74] I will address these points in turn.

[75] **First – meaning of “occupation”:** Section 27(3) prescribes as a condition for recovery of disturbance damages that “the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited”.

[76] The Province submits that “occupation” means “actual occupation” which requires an operating business structure. The Province's factum says:

32. ... As of the date of expropriation, Central was not actually occupying the lands expropriated as part of the expanded retail/distribution centre which it said it was going to construct in 2001, which is what the Board assessed loss for. ...

33. “Occupation” means “actual occupation” at the date of expropriation when read in context with other sections of the *Act*

...

39. The pre-expropriation damages sought in this claim were not based on actual occupation by the owner of the expropriated lands on the date of expropriation. It was an error by the Board to interpret the section to allow compensation without considering the actual occupation being made by Central on the lands as of the date of expropriation. ...

[77] The Board's definition of “occupation” in s. 27(3) is an appealable issue of law and is governed by reasonableness.

[78] The *Expropriation Act* does not define “occupation”. Neither does s. 27(3) use the adjective “actual” or say that “occupation” must involve “use of a building”. The Province asked the Board to read in those qualifications by implication.

[79] The Board (paras. 665, 667) noted that “occupation” was undefined, then turned to the statute’s objective, context and scheme. This is consistent with the accepted approach to legislative interpretation.

[80] As to the legislative objective, the Board (para. 675) cited the *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 9(5)(c), that the legislation is to be interpreted as remedial to achieve its object. The Board said the *Expropriation Act*’s object was full compensation:

[676] The Board considers that “the ‘object to be attained’ in the [Expropriation] Act is the full compensation of a land owner whose property has been taken. This is confirmed in *Dell [Toronto Area Transit Operating Authority v. Dell Holdings Ltd.]*, [1997] 1 S.C.R. 32] and recognized by the Board in previous decisions. The Board also considers that it should interpret the Act to consider the “mischief to be remedied.” Thus, it should not interpret the provision of the Act and, in particular, s. 27(3) so as to interfere with or prevent compensation by a narrow interpretation of occupation.

[81] The Board’s view is consistent with s. 2(1) of the Act: “[i]t is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation”. It also applies the Supreme Court of Canada’s directives on the interpretation of expropriation statutes: *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, paras. 20-21, 23, 26-27 (quoted below, para. 104).

[82] As to context and scheme, neither ss. 26(b) nor 27(3) refers to “actual” occupation. The Board (para. 665) noted that s. 26(d) requires “actual occupation” for recovery of the value of a “special economic advantage”. From that juxtaposition, the Board deduced that s. 27(3) contemplated something wider than “actual” occupation.

[83] Absent a statutory definition of “occupation”, the Board (para. 667) sought guidance from the common law. The Board cited *Morrison v. Muise*, 2010 NSSC 163, which (para. 26) adopted a passage from Professor Anne La Forest’s well-known text, Anger and Honsberger, *The Law of Real Property*, 3rd ed. (Aurora: Canada Law Book, 2006), p. 29-19 – 29-20:

Whether there has been sufficient possession of the kind contemplated by the statute is **largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute**. Possession must be considered in every case **with reference to the peculiar circumstances**, for the facts constituting possession in one case may be wholly inadequate to prove it

in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession. [bolding added; footnotes omitted]

[84] From this perspective, the Board (para. 667) concluded that “what constitutes occupation depends on the nature of the land”.

[85] To apply that test, the Board turned to the evidence on the nature of Central’s land.

[86] The Board found that the evidence established Central’s “occupation” at the date of expropriation:

[669] Additionally, the photographic evidence referred to by Mr. MacIntosh and the evidence of Mr. Smith persuade the Board that areas of the taking were occupied by the owner, Central, and that it constructively occupied and controlled the other areas, including the southern remnant.

[670] The matter is distinguishable from *Harrison Blueberry* where the Board found there was no evidence of occupation.

[87] On May 6, 2016, the Chair attended at the site for a visual inspection (Decision, paras. 553-57). This Court has not had such an opportunity.

[88] The record contains many aerial and surface photographs, taken at various dates. The photos were discussed in the appraisal reports and in the testimony. That evidence supports the Board’s findings in para. 669.

[89] Central’s memorandum to the Board (Appeal Book, Vol XII, pp. 7902-08, paras. 48-69) fairly describes the particulars of Central’s usage that appear from the evidence.

[90] Some of the taken parcel was treed or wetland. Much was cleared and grubbed by Central. Central had trenched, excavated and harvested lumber, and installed pathways. Central had placed storage containers and a gas tank, at one point a greenhouse, and utilized a laydown area for lumber materials. Central’s trucks used the property, leaving tracks. Central exerted control over the land to support its operations.

[91] The Province emphasizes that Central had no actively functioning buildings on the taken parcel when the expropriating document was filed at the registry on

May 1, 2012. That was because, on May 30, 1998, the Province warned Central the parcel might be expropriated and, as Central had been told of the pending expropriation, there would be no compensation for future capital improvements on the land. But for that warning, in the normal course Central would have erected structures (Board’s findings quoted above, paras. 12-13, 32-33, and below, paras. 148-49 and 206). It was the Province’s warning that disturbed Central’s planned use of the land. Now, with deft sleight of hand, the Province says that Central’s failure to erect a structure by May 1, 2012 disentitles Central to compensation for that disturbance.

[92] Later (para. 104), I will refer to the remedial interpretive principles that govern an expropriating statute. Rewarding the expropriating authority’s disingenuous stewardship of the process isn’t one of them.

[93] The passage from Professor La Forest’s text, cited above, says “[p]ossession must be considered in every case with reference to the peculiar circumstances”. Those circumstances, in Central’s case, include the ongoing chill from the Province’s warning to Central on May 30, 1998.

[94] When the expropriating document was filed at the registry, Central had tailored its usage of the taken parcel to suit its objectives, though the nature of that usage had been constrained by the Province’s warning on May 30, 1998. The Board concluded that Central’s usage sufficed as occupation.

[95] The Board applied the proper test, then found as a fact that there was occupation at the critical date. Except in the limited circumstances described above (paras. 45-47), findings of fact are not appealable to this Court under s. 30(1) of the *UARB Act*.

[96] The Board’s reasoning path was understandable. The steps in its interpretation of “occupation” were permitted by the legislation and authorities. The Board’s findings of occupation were supported by evidence.

[97] The Board’s ruling that Central “was in occupation of the land” under s. 27(3) was reasonable.

[98] **Second – occupation by the “business:** The Board said:

[668] Further, the Board agrees with Mr. MacIntosh that it is the owner, and not the business, which must be in occupation.

[99] The Province’s factum, without citing authority, submits that mere occupation by an “owner” is insufficient. Rather, the owner must occupy in a “business” capacity:

40. The Board erred in finding that it is only the owner, and not the business that must be in occupation of the lands under s. 27(3). ...

42. Central is a business, and is claiming business losses under disturbance damages as a business. “Occupation” by the owner, therefore, as required under Section 27 is actual occupation by the owner’s business on the lands expropriated at the date of expropriation.

[100] Section 27(3) says simply disturbance is compensable “[w]here the owner of land expropriated was in occupation”. It neither qualifies occupation nor says that an owner’s atypical occupation will be uncompensated. In any case, Central was both owner and operator of the business and its occupation served the business. There is neither a legal nor an evidential basis to split Central’s occupational personality. The Board reasonably applied the plain meaning of the statute.

[101] **Third – losses pre-dating deposit of the expropriation document:** The Province submits that Nova Scotia’s *Expropriation Act* does not compensate for disturbance losses that pre-exist the deposit of the expropriation document in the Registry of Deeds which, in Central’s case, was May 1, 2012.

[102] The Board disagreed. The Board held that expropriation is a process, not an event, and Central’s disturbance losses were caused by an early step in the process. So the losses were recoverable. The Board applied the principles stated by Cory J. for the majority in *Dell*. The Board’s Decision says:

[741] The Board agrees that expropriation is a process. It is a process that should be broadly and liberally interpreted, and not restrictively interpreted. In *Dell*, just prior to the passage quoted by the Province, the Court said:

The courts have long determined that the actual act of expropriation of any property is part of a continuing process. [*Dell*, para. 37]

[742] The Court went on to say, at paragraph 42, before embarking on its analysis of *Shun Fung* [*Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111 (P.C.)]:

It would be unfair if Dell were to be denied compensation for disturbance damages simply because the nature of its business was such that no action could be taken to mitigate the damages caused by the expropriation. Indeed, damages caused by the expropriation can and frequently do occur prior to the actual date of expropriation. In my view, the expropriated

party should be and is entitled to recover those damages. I find support for that conclusion in the reasoning and conclusions set out in *Shun Fung*, *supra*. [Board's underlining]

[103] In this Court, the Province submits that *Dell* applied Ontario's *Expropriations Act* whose wording differed materially from Nova Scotia's ss. 26(b) and 27(3). The Province says the Board erred in law by applying *Dell*.

[104] To address the submission, it is necessary to understand *Dell*:

- Dell Holdings was a land developer. It owned 40 acres for which it had applied to the City for residential development approval. Meanwhile, the Toronto Transit Authority was considering two sites for a transit station. Both were on Dell's land. The City withheld development approval for Dell's residential project until the Toronto Transit Authority decided which parcel it wanted. While the Toronto Transit Authority was considering which parcel to expropriate, the development of Dell's un-expropriated parcel was delayed for two years.
- Ontario's Municipal Board held that Dell's losses from that delay, quantified at \$500,000, were recoverable disturbance damages under s. 13(2)(b) of the *Expropriations Act*, R.S.O. 1980, c. 148. The Board found that the delay was caused by an integral step in the expropriating process – namely, the decision of which parcel to acquire. The Board held that Dell was entitled to pre-expropriation disturbance damages caused by that delay as if the damages arose from the expropriation itself (Board's reasons summarized in Cory J.'s Decision, para. 6).
- The pertinent provisions of Ontario's *Expropriations Act* said (Supreme Court's reasons, para. 5):
 - 13(1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.
 - (2) Where the land of an owner is expropriated, **the compensation payable to the owner shall be based upon,**
 - (a) the market value of the land;
 - (b) **the damages attributable to disturbance;**
 - (c) damages for injurious affection; and
 - (d) any special difficulties in relocation,

but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using land for such other use.

...

18(l) **The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation, including,**

...

- (b) where the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation; and
- (c) relocation costs, including,
 - (i) the moving costs, and
 - (ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.

19(1) Where a business is located on the land expropriated, the expropriating authority shall pay compensation for business loss resulting from the relocation of the business made necessary by the expropriation and, unless the owner and the expropriating authority otherwise agree, the business losses shall not be determined until the business has moved and been in operation for six months or until a three-year period has elapsed, whichever occurs first.

[emphasis added]

- The Divisional Court and Court of Appeal held that Dell's damages were not compensable. Both courts held that pre-expropriation delay was not "disturbance", under Ontario's *Expropriations Act*. The Supreme Court of Canada allowed the appeal and restored the Municipal Board's award.
- Justice Cory for the majority (6 of 7 judges) began with the legislative objective. He said (para. 19) that the *Expropriations Act* "is clearly a remedial statute enacted for the specific purpose of adequately compensating those whose lands are taken to serve the public interest". From that objective, Cory J. extrapolated the interpretive principles for an expropriating statute:

20. The expropriation of property is **one of the ultimate exercises of governmental authority**. To take all or part of a person's property

constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that **the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected**. This principle has been stressed by eminent writers and emphasized in decisions of this Court. [citations omitted]

21. Further, since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor. ...

...

23. It follows that the *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the Act **to fully compensate a land owner** whose property has been taken.

[bolding added]

- Cory J. then characterized Dell's claim:

24. ... In essence, as the Divisional Court described it, the damages represented the financial loss suffered from the extra costs incurred and profits which were lost as a result of the delay by the Authority in acquiring the site. ...

- Ontario's s. 13 was the menu for compensation. Cory J. cited s. 13, then said:

26. This, then, is a charging section which provides that compensation is to be awarded on the total of the amounts calculated under each of the four components. I agree with the view expressed by K.J. Boyd in *Expropriation in Canada* (1988), at p. 109, that the objective of these provisions is to ensure "that on the one hand double recovery does not occur, and on the other hand that no legitimate item of claim is overlooked". Indeed, the overriding objective of the entire Act is to provide **fair and proper indemnity** for the owner of the expropriated land. ... [bolding added]

- Next Cory J. turned to disturbance damages, governed by s. 13(2)(b):

D. How Should the Provisions as to Disturbance Be Interpreted?

27. The words of the section should be given their natural and ordinary meaning in the context of the clear purpose of the legislation to provide fair indemnity to the expropriated owner for losses suffered as a result of the expropriation. In *Laidlaw* [*Laidlaw v. Toronto (Municipality)*, [1978] 2 S.C.R. 736], Spence J., on behalf of the Court, attached **particular significance to three factors**: first, the legislative intent to provide indemnity for losses suffered; second, that the right to disturbance damages is conferred in broad, inclusive language and, third, that the

legislature chose to illustrate, but not define the term “disturbance”:
[passage from pp. 744-45 of *Laidlaw* omitted]

Thus it is clear that the Act should be interpreted in a broad, liberal and flexible manner in considering the damages flowing from expropriations.
[Cory J.’s underlining] [bolding added]

- Cory J. then determined that Dell’s delay damages were a “natural and reasonable consequence of the expropriation” under s. 18(1):

28. ... When the Authority determined that some portion of Dell’s 40 acres might be required for a GO Station, that entire parcel of land was frozen. The municipality could not grant zoning approval for the development of any part of the property within the 40 acres. ... It follows that **it was the expropriation which caused the delay**. Damages resulting from the delay in the development are therefore **the natural and reasonable consequence of the expropriation**. [bolding added]

- Cory J. squarely rejected the submission that losses occurring before the formal expropriation could not be caused by the expropriation. He said:

H. The Process of Expropriation

37. **The courts have long determined that the actual act of expropriation of any property is part of a continuing process.** In *McAnulty Realty* [*City of Montreal v. Daniel J. McAnulty Realty Co.*, [1923] S.C.R. 273], at p. 283, Duff J. noted that the term “expropriation” is not used in the restrictive sense of signifying merely the transfer of title but in the sense of the process of taking the property for the purpose for which it is required [Cory J.’s underlining]. Thus whether the events that affected the value of the expropriated land were part of the expropriation process, or, in other words, a step in the acquisition of the lands, is a significant factor for consideration in many expropriation cases. See *Tener, supra*, at pp. 557-59. Here there can be no doubt that Dell’s land would have come on stream for sale as developed lands in 1981 rather than 1984 but for the process of expropriation. **Damages should therefore be awarded for the losses occasioned as a result of the process of expropriation.**

I. Should Compensation Be Payable for Damages Which Arose Prior to the Actual Expropriation?

38. The Court of Appeal accepted the approach taken by the Divisional Court which characterized the delay in this case as “pre-expropriation delay” which was not compensable. With respect **I cannot agree** with that position. The approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. It is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation. ...

...

42. ... Indeed, **damages caused by the expropriation can and frequently do occur prior to the actual date of expropriation.** In my view, **the expropriated party should be and is entitled to recover those damages.** I find support for that conclusion in the reasoning and conclusion set out in *Shun Fung [Director of Buildings and Lands v. Shun Fung Ironworks Ltd.]*, [1995] 2 A.C. 111 (P.C.)]

43. ... The claimant [in *Shun Fung*] sought compensation for loss of profit which occurred in the “shadow period” after the announcement of the intended expropriation but before the land was actually taken. The majority of the Law Lords found that the losses sustained in this period were caused by the expropriation and that damages should be awarded. Lord Nicholls of Birkenhead put forward his position in this way (at pp. 135-37):

This claim raises the question whether a loss occurring *before* resumption can be regarded, for compensation purposes, as a loss *caused* by the resumption. At first sight the question seems to admit of only one answer. Cause must precede effect. That is a truism. A loss which precedes resumption cannot be caused by it. Hence, it is said with seemingly ineluctable logic, a pre-resumption loss cannot be the subject of compensation.

The difficulty with this approach is that it leads to practical results from which one instinctively recoils. Pursued to its logical conclusion it would mean that the businessman who moves out the week before resumption cannot recover his removal expenses; he should have waited until after resumption. It would also run counter to the reasoning underlying *Pointe Gourde Quarrying and Transport Co. v. Sub-Intendent of Crown Lands*, [1947] A.C. 565. A landowner cannot claim compensation to the extent that the value of his land has increased by the very scheme of which the resumption forms a part. The principle applies also in reverse. A loss in value attributable to the scheme is not to enure to the detriment of a claimant [citation omitted]. The underlying reasoning is that if the landowner is to be fairly compensated, scheme losses should attract compensation but scheme gains should not. Had there been no scheme those losses and gains would not have arisen. But if business losses arising in the period post-inception of the scheme and pre-resumption are to be left out of account, a claimant will not receive compensation for those losses although they were attributable to the scheme. ... [Cory J.’s underlining]

...

The starting point for a consideration of this conundrum must be to remind oneself that, far from furthering the legislative purpose of providing fair compensation, the Crown's contention would have the opposite effect. It would stultify fulfilment of that purpose. Coming events may cast their shadows before them, and resumption is such an event. **A compensation line drawn at the place submitted by the Crown would be highly artificial, for it would have no relation to what actually happens. That cannot be a proper basis for assessing compensation for loss which is in fact sustained.** [bolding added]

44. He [Lord Nicholls of Birkenhead] summarized his position in this way at pp. 137-38:

... losses incurred in anticipation of resumption and because of the threat which resumption presented are to be regarded as losses caused by the resumption as much as losses arising after resumption. ...

45. I am in complete agreement with these reasons....

Cory J. noted (para. 35) that the term “resumption” used in *Shun Fung's* reasons was synonymous with expropriation.

[105] The Supreme Court has reiterated the application of *Dell's* approach to the interpretation of expropriation statutes: *Smith v. Alliance*, para. 55; *Teal Cedar Products*, para. 91.

[106] The Province submits that *Dell* does not apply to Central's case because Nova Scotia's statute has different wording than Ontario's.

[107] I disagree. The elements that supported Cory J.'s interpretation of Ontario's provisions exist in Nova Scotia's provisions, though their placement differs:

- Nova Scotia's s. 2(1) says “[i]t is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation”. This represents the legislative intent to indemnify for losses caused by the expropriation, *i.e.* the first of the three factors that Cory J. (para. 27) cited from the reasons of Spence J. in *Laidlaw*.
- Ontario's ss. 13(2)(b) and 18(1) say that compensation “shall” relate to damages “attributable to disturbance” that are “the natural and reasonable consequences of the expropriation”.

Nova Scotia's ss. 26(b) and 27(3)(b)(ii) each say that the owner shall be compensated for the costs, expenses and losses "arising out of or incidental to the owner's disturbance". Nova Scotia's "or incidental to" is, if anything, broader than Ontario's formulation.

- Nova Scotia's s. 26(b) provides that compensation shall be the reasonable costs, expenses and losses "determined as hereinafter set forth". The Province notes that "determined as hereinafter set forth" does not appear in Ontario's statute.

Nova Scotia's "determined as hereinafter set forth" incorporates the formulae to quantify the losses set out in ss. 27(3) and 29. Section 29 compensates for "business loss resulting from the relocation", does not use the term "disturbance", and does not pertain to Central's claim. Section 27(3)(b)(ii) is wider and compensates for "the costs, expenses and losses arising out of or incidental to the owner's disturbance **including** ...". This is akin to Ontario's s. 18(1) that compensates for costs "including ..."

Both statutes use the "inclusive" formulation for disturbance losses. This is *Laidlaw*'s second factor that Cory J. (para. 27) cited in *Dell*.

- Cory J. (para. 27), citing *Laidlaw*'s third factor, thought it was significant that Ontario's statute did not define "disturbance". Neither does Nova Scotia's *Expropriation Act*. So "disturbance" has its common meaning, as Cory J. described it in *Dell*:

31. ... the entire business of developing the land was disturbed during the waiting period. These damages were suffered as a consequence of the disturbance of Dell's land development business, which included both the expropriated and remaining lands.

- The formula in Nova Scotia's s. 27(3)(b) (compensation for disturbance losses plus market value of existing use) is phrased somewhat differently than the equivalent passage at the end of Ontario's s. 13(2). The difference is immaterial to this case because, as discussed later (paras. 127-39), Central's award of market value assumed the existing use, meaning the disturbance award satisfies the formula in s. 27(3)(b).

- Nova Scotia's s. 27(3) says that the owner's "occupation of the land at the time the expropriation document was deposited in the registry" is a prerequisite to disturbance damages. The Province correctly points out that no such condition appears in Ontario's statute.

The condition means that, had Central not occupied the land at the date of deposit, Central would be disentitled to compensation for disturbance. Here, the Board found that Central was in occupation at that date. As discussed above, the Province's appeal from that finding should be dismissed. Central satisfied the prerequisite.

[108] The crux of the Province's submission is the proposition that Nova Scotia's *Expropriation Act* effectively says:

The owner is not entitled to disturbance compensation for losses that occurred before the deposit of the expropriation document at the Registry of Deeds.

Consequently, according to the Province, all losses caused by an earlier step in the expropriation process – however clear the disruption, direct the linkage to the expropriation process and substantial the proven loss – are unrecoverable by law.

[109] The difficulty with the Province's proposition is that the *Act* doesn't say it. Rather, ss. 26(b) and 27(3)(b)(ii) combine to say that an owner (who occupied at the date the expropriating document was filed) "shall be" compensated for the losses "arising out of or incidental to the owner's disturbance", with "disturbance" being undefined. The Province's proposition would have to be read in by implication.

[110] The question for the Board was – Does the *Expropriation Act* impliedly adopt the Province's proposition? The Board said – No.

[111] The question for this Court is – Did the Board's reasoning on that point intelligibly lead to an outcome that is permitted by the *Expropriation Act*?

[112] To address that question, it is helpful to identify some features of the Province's proposition:

- The proposition conflicts squarely with Cory J.'s ruling that expropriation is a continuing process, not an event, and a disturbance loss caused by an early step in the process is compensable.
- It is antithetical to the rationale for that ruling, adopted by Cory J. from Spence J.'s decision in *Laidlaw*, Duff J.'s ruling in *McAnulty Realty* and particularly the Privy Council's compelling reasons in *Shun Fung*.
- It is inconsistent with the authorities throughout Canada that have applied *Dell*'s ruling that expropriation is a process, not an event, with

consequences for compensation: e.g. *Bernard Homes Ltd. v. York Catholic District School Board* (2004), 188 O.A.C. 115 (Div. Ct.), paras. 41-42; *D.D.S. Investments Ltd. v. Toronto (City)* (2010), 261 O.A.C. 12 (Div. Ct.), paras. 31-33; *Toronto (City) v. Simone Group Properties Ltd.* (2012), 303 O.A.C. 354 (Div. Ct.), paras. 23-24; *Thunderbird Entertainment Ltd. v. Greater Vancouver Transportation Authority*, 2011 BCSC 636, para. 162, appeal dismissed 2012 BCCA 294; *Jardins Lachenaie inc. v. Québec (Attorney General)*, [2006] R.J.Q. 619 (C. du Q.), para. 278.

- By denying compensation for a proven economic loss caused by the expropriation, the Province's proposition would stifle the Legislature's declaration in s. 2(1) that "[i]t is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation".
- The proposition thwarts Cory J.'s exposition of that interpretive directive – *i.e.* unless there is clear legislative language to the contrary, an expropriation enactment should be construed to indemnify the owner for losses that are a proven consequence of the government's exercise of its ultimate power of eminent domain.

[113] If the Province wants to deny compensation for a proven economic loss caused by the Province's expropriation process, the Province should invite the Legislature to say so by clear wording. It is not for the Board or reviewing court to patch penurious implications over holes in this remedial statute.

[114] The Board's ruling is reasonable under the standard of review.

[115] **Fourth – partial taking:** In *Johnson, supra*, this Court said:

[202] ... Even if I had accepted disturbance damages under s. 26(b) as urged by the Johnsons, which I have not, such damages are **only applicable where an entire parcel of land has been taken**. That is not the case here where the Province acquired only portions of each of the four parcels taken from the Johnsons. [bolding added]

[116] Only part of Central's land was expropriated. The Province submitted that *Johnson* precludes Central's recovery of disturbance damages.

[117] In *Dell*, the Supreme Court explicitly rejected that submission. Cory J. said:

F. Should Disturbance Damages Be Limited to Losses Which Can Be Related Only to the Expropriated Land and not to any Remaining Portion of the Land?

29. The Authority contended that disturbance damages are only available if they arise in relation to the expropriated land itself and not to any adjoining land which the owner retained after the expropriation. **I cannot accept that position.** There is nothing in the words of the section to indicate that there should be such a restriction imposed on those disturbance damages which can accurately be described as the natural and reasonable consequences of an expropriation. If it is a reasonable and natural consequence of the expropriation that the owner experiences losses with regard to the remaining land then this, just as much as losses relating solely to the expropriated land, must come within the definition of disturbance damages. If it had wished to do so, the legislature could have limited disturbance damages to the expropriated land. However it chose to enact an open-ended and flexible definition. ...

30. The reasons expressed by Donnelly J., in *Lafleche v. Ministry of Transportation and Communications* (1975), 8 L.C.R. 77 (Ont. Div. Ct.), are in my view correct and apposite. ... Donnelly J. on behalf of the court stated:

We adopt the statements of the Land Compensation Board in *Blatchford Feeds Ltd. v. Board of Education for City of Toronto* (1974), 6 L.C.R. 355, where it was stated at p. 388 that the Act clearly intends to provide a statutory code of full and fair compensation for lands expropriated and that the Act is intended to provide full and fair compensation for all aspects of disturbance damages provided the damage incurred is not too remote and is the natural and reasonable consequence of the expropriation. [Cory J.'s underlining]

This is, I think, the appropriate approach to take to disturbance damages.
[bolding added]

[118] In Central's case, the Board (paras. 672-81) analyzed the Province's submission and, based on Cory J.'s para. 29, concluded:

[680] Provided there is a causal connection and they are not too remote, the Board finds that business losses may be compensated under s. 27(3). The Board concludes this is so in the event of any expropriation, whether full or partial, and that, as noted in *Dell*, a remnant parcel may suffer disturbance damages.

[119] On appeal, the Province repeats its submission that para. 202 of *Johnson* bars disturbance compensation after a partial taking in Nova Scotia.

[120] I respectfully disagree.

[121] Nothing in the *Expropriation Act* excludes compensation for a proven disturbance loss caused by a partial taking. The Supreme Court of Canada's ruling in *Dell* explicitly supports the availability of such a claim. If, in *Johnson*, this Court had meant to bar such a claim as a matter of law, one would see in the

Court's reasons some reference to a supporting provision in the *Act* and an explanation of why *Dell* is distinguishable.

[122] The Province's position would mean that an expropriating authority could avoid paying disturbance compensation simply by leaving a bite-sized parcel un-expropriated. If *Johnson* had intended to make a binding pronouncement of law, the Court's reasons would have addressed that artifice.

[123] In *Johnson*, the Court said:

[196] ... The case law wherein s. 27(3) has been considered has **usually** involved the relocation of a business. ... [bolding added]

[124] Disturbance loss is more likely when there is an entire taking, after which relocation is the owner's only option. With a partial taking, depending on the circumstances, the owner may have the option of remaining on the remnant parcel and may adjust the usage perhaps with minimal or no disturbance. The Court's reference to what "usually" occurs signals a factual distinction.

[125] I read the statement in *Johnson*'s para. 202 as addressing the circumstances of that case, by an *obiter* comment after the Court had rejected the claim on other grounds.

[126] Compensation for a proven disturbance loss caused by a partial taking is available in appropriate cases under Nova Scotia's *Expropriation Act*. The Board's conclusion, applying *Dell*, is reasonable.

[127] **Fifth – the formula in s. 27(3):** Section 27(3) says the compensation shall be the greater of:

(a) the market value of the taken parcel, calculated under s. 27(2) at the parcel's highest and best use; and

(b) the total of the disturbance losses plus the market value of the taken parcel based on its existing use at the date of the taking.

Depending on the numbers, option (a) may exceed option (b) when the highest and best use is appreciably more valuable than the existing use with which the disturbance losses are associated. On the other hand, if the market value under s. 27(2) assumes the existing use, the proven disturbance losses are recoverable.

[128] The formula rests on common sense. The owner may not recover two heads of compensation derived from mutually exclusive assumptions. If the current use is sustenance farmland, but the land is suited for conversion to a more profitable use for a shopping centre, then the owner may recover the higher of (a) the market value of the land's potential use as a shopping centre, or (b) the market value of the farming use plus the owner's disturbance losses to sustain the farming. As a farm and a shopping centre would not coexist, the owner cannot have both.

[129] The Province says the Board's award offended s. 27(3). The Province submits that the Board's award of market value assumed a higher and better use than the existing use for which disturbance losses were awarded.

[130] To address this submission, it is necessary to discuss the valuation evidence.

[131] The Board had appraisal reports from Mr. Daniel Doucet of Altus Group Limited for Central, and Mr. John Ingram of ARA Ingram Varner for the Province. The reports dealt with the market value of the taken parcel and injurious affection.

[132] The Board accepted Mr. Doucet's appraisal and rejected Mr. Ingram's. The Board set out various reasons (paras. 581-93) for its finding that Mr. Doucet's opinion was more reliable. The Board concluded:

[593] After considering these matters, the Board accepts Mr. Doucet's opinion of the market value of the taking at \$630,000, less \$14,625 as estimated by Alva Construction (Exhibit S-17), for a total compensation for market value of the land taken of \$615,375.

[133] Mr. Doucet used the direct sales comparison approach. He examined eleven transactions in the Antigonish area, adjusted for time and comparability, then arrived at a market value of \$1.50 per square foot for the land. The total came to \$630,000. The Board subtracted \$14, 625, being a contractor's estimate to fill and compact part of the land for use as a laydown area.

[134] Mr. Doucet testified that Central held the parcel as a site for future development of Central's business. That was consistent with Mr. Smith's evidence. Mr. Smith spoke of his plans for a distribution centre and retail outlet which were delayed because of the prospective expropriation (above, paras. 9, 15, 32-33, and below paras. 148-49).

[135] Mr. Doucet valued the parcel as a continuation of that use. His report, p. 38, said:

Highest and Best Use – “Before the Antigonish By-pass”

In the absence of the construction of the Antigonish By-pass, the highest and best use of the property would have been the continuation of the current use as a distribution centre and truss plant with +/- 28.83 acres of available land suitable for continued expansion of the business.

Highest and Best use – “The Taking”

The highest and best use of the taking is part of the larger parent property. The “taking lands” would have been used to expand the site.

[136] Counsel for the Province cross-examined Mr. Doucet at length on highest and best use. Mr. Doucet was adamant that the use underlying his valuation was a continuation of the use for which Central held the land before the expropriation. The Board accepted Mr. Doucet’s opinion. The Province has cited nothing to suggest that the Board’s view was unreasonable or erroneous in law. In this Court, the Province’s submission basically reiterates the proposition that made no headway in Mr. Doucet’s cross-examination.

[137] Mr. Doucet’s use for market value matched the premise of the PwC valuers for their calculation of the delay costs that constituted the disturbance claim.

[138] PwC assumed (and the Board found) that, but for the shadow of expropriation that emanated in May 1998, Central would have used the taken parcel for a distribution centre and “big box” retail outlet. Given the expropriation process, Central first delayed that development, then made alternate arrangements elsewhere. PwC calculated the disturbance loss as the cost to Central of that delay and alteration, attributable to the impending expropriation, in the implementation of its planned initiatives. In other words, PwC assumed that, but for the shadow of expropriation, Central would have used the taken parcel for business expansion associated with Central’s existing hardware business. This is the same as Mr. Doucet’s highest and best use.

[139] Both the market value and disturbance assumed the expropriated parcel’s use for potential business expansion. The disturbance was the delay and disruption of that expansion. This is not a case of mutually exclusive uses for different heads of compensation. The disturbance compensation satisfies s. 27(3)(b).

[140] **Summary:** I would dismiss the Province’s grounds of appeal that challenge Central’s entitlement to compensation for disturbance.

Issue #2 – Central’s Business Plans and Causation

[141] The Board found that the impending expropriation thwarted Central’s business plans:

[718] ... Here, Central had property of considerable size to accommodate its growth, and had engaged, and would have continued, in the Board’s view, to engage in using increasing areas of its land, but for the expropriation.

...

[719] ... Central’s plans were part of an ongoing, and in Mr. Doucet’s words, “logical”, expansion of its business. ...

[720] ... the lack of documentation on which the Province relies, does not lead the Board to conclude that Central had no credible plans for expansion.

...

[722] The Board finds that Central’s plans were not remote or speculative.

[723] Consequently, the Board is satisfied, on a balance of probabilities, that Central planned a new retail store to open at Lower South River in 2000, to be followed by a distribution centre, and would have proceeded with this expansion, but for the expropriation, or more precisely, the shadow of expropriation.

...

[737] The thrust of the Province’s position on causation is based on its submissions on a lack of expansion plans which were impacted by the expropriation or the shadow of expropriation.

[738] The Board has, in this Decision, found that Central did have such plans. The Board agrees that the plans could not be implemented as a result of the expropriation. Therefore, the requirement of causation has been met.

...

[763] The Board notes that the burden of proof of the failure to mitigate, or insufficiently mitigate, is on the Province. The Province did not lead any evidence to support its submissions. Thus, the Board finds that the Province has not discharged its burden.

...

[899] The Board finds, on a balance of probabilities, that Central did have expansion plans.

[142] On the appeal, the Province submits the evidence did not support the Board’s findings. Its factum says:

55. At the hearing, Central provided no evidence that it had any active business plan to expand its operations, other than what its principal said he planned to do. ...

58. The Province submits that the Board's decision was unreasonable in awarding disturbance damages for pre-expropriation delay, in the absence of evidence at, or prior to the time these plans were allegedly to be carried out, or in any subsequent records that any such plans existed or were delayed. ...

[143] The legal test has three steps. In *Dell*, Cory J. said (1) “the approach to damages flowing from expropriation ... should be based upon causation” (para. 38), (2) “provided the damage incurred is not too remote” (para. 30), and (3) also provided it is “not a loss which a reasonable person would have avoided” (para. 44, quoting *Shun Fung*).

[144] The Board (paras. 722-23, 763) applied those tests to Central's claim. The northern remnant had been developed, leaving insufficient space for the planned retail outlet and distribution centre, while the southern remnant was cut off by the new highway, leaving it unusable and “almost worthless” according to the appraisers and the Board (para. 613). The taken parcel was necessary for Central's new retail outlet and distribution centre. The Board found that the pending expropriation – *i.e.* the “shadow” of expropriation as *Dell* and *Shun Fung* termed it – impeded Central's plans for those developments.

[145] The Province challenges the Board's assessment of the sufficiency of evidence. This a factual matter that is unappealable, save for the limited bases set out earlier (paras. 44-47). The Board heard witnesses who generated a 7,200-page transcript while discussing thousands of pages of exhibits. Sections 26 and 30(1) of the *UARB Act* say the Board's findings of fact are binding and conclusive and an appeal is limited to issues of jurisdiction or law. These provisions do not contemplate that, after hearing counsel cite some extracts from the appeal books for a few hours, this Court may reweigh the trial evidence.

[146] As to the existence of Central's business plans, Mr. Smith testified at length about Central's planned business expansion, in general and at the critical time, including the future retail outlet and distribution centre on the subject property. Central's growth trajectory over the years is apparent, as discussed earlier, and corroborates Mr. Smith's described vision of expansion.

[147] The Board (para. 713) found that Mr. Smith's testimony about Central's plans was corroborated also by the evidence of: (1) senior management at Central, (2) the Municipal Warden, (3) Mr. Doucet, a real estate appraiser, (4) an exchange

of correspondence between Ms. Tse of the County and Mr. Croft, (5) correspondence from Central's Mr. White and Mr. Croft, (6) Mr. Welsh, (7) Mr. Chiasson, (8) the Province's investigation of a tunnel route which, the Board found, resulted from the Province's belief that the expropriation thwarted Central's expansion plan, and (9) the observations of PwC's witnesses.

[148] Then there is the thwarting. Earlier (paras. 10-18) I set out the Board's narrative of Mr. Smith's reaction to Mr. Bushell's message at the meeting of May 30, 1998, when Mr. Smith first learned of the pending expropriation. Mr. Smith's testimony on the point includes:

Well, it was going to shut us down. I mean, it was - you know, we had a lot of plans, we had short-term plans. You know, we had - at that time we had plans on expanding the truss mill, on building a new store, on expanding our distribution centre. ...

...

But he [Mr. Bushell] also told me that now that you know about this and you see this corridor, that anything you do on your land in the corridor, where the corridor was, you can do it. I said - well, I actually said to him, "What if I just go and build on there, you know?" And he said, you know, "We don't own the land you do, you can. We haven't expropriated it. But anything you do from now on you would not be compensated for it." So in other words, he said, "If you go and put a building on that land or expand your yard in that land, the cost to replace that you will not be compensated for because now you know about the path."

...

... that's when I said, "I can't do anything on this land. I can't make future plans. I can't build a building and then lose that land," because you not only didn't get compensated for the building, whatever land you were using, you know - or if I did put a building up and I used the land behind it, what would be the good of it, you know, if I didn't have enough there, you know?

[149] The Board accepted Mr. Smith's testimony:

[759] The Board accepts Mr. Smith's evidence regarding his conversation with Graydon Bushell at the May 1998 meeting. Mr. Bushell acknowledged that Mr. Smith's recollection could be clearer than his. The Board accepts that Mr. Smith considered it was appropriate to put aside his plans for the Lower South River site and focus on other aspects of his business. ...

To similar effect, see the Board's paras. 723 (quoted above, para. 32) and 862 (quoted below, para. 206) and see paras. 9, 15 and 33 above.

[150] The evidence supports the Board’s findings that Central had business plans which were thwarted by the impending expropriation, with no proven failure to mitigate by Central. To the extent the Board’s findings may be appealable, they were reasonable.

[151] My colleague would overturn the Board’s finding that there was causation of loss. My colleague says that, at any time before the expropriation in May 2012, Central was legally free to build on the parcel to be expropriated, meaning Central’s failure to do so was Central’s choice. Hence there was no “legal causation” of loss and the Board had no jurisdiction to award compensation based on the Board’s view that Central acted reasonably.

[152] With respect, the test is not whether Central was *legally* obligated to follow a course that caused a disturbance loss. Nor is it whether Central was *legally* precluded from avoiding one. The test is (1) whether Central followed a course for which, *in fact*, a disturbance was the “reasonable and natural consequence” and which (2) was “not too remote”, provided that (3) Central’s loss was not one that “a reasonable person would have avoided” by mitigating (*Dell*, paras. 28, 29-30, 44-45 adopting Lord Nicholls’ reasons in *Shun Fung*, pages 137-38).

“[R]easonable and natural consequence” appears in the Ontario *Act*. Nova Scotia’s ss. 26(b) and 27(3)(b)(ii) compensate for “reasonable” losses “arising out of or incidental to the owner’s disturbance”. The difference in statutory wording is immaterial. In *Dell*, para. 38, Cory J. said:

The approach to damages flowing from expropriation should not be a temporal one; rather it should be based on causation. It is not uncommon that damages which occurred before the expropriation can **in fact** be caused by that very expropriation. [bolding added]

[153] The Board, after extensively reviewing the evidence in several passages throughout its decision, said:

[723] Consequently, the Board is satisfied, on a balance of probabilities, that Central planned a new retail store to open at Lower South River in 2000, to be followed by a distribution centre, and would have proceeded with this expansion, but for the expropriation, or more precisely, the shadow of expropriation.

[154] These are findings of fact. If the Board’s findings are supported by some evidence – *i.e.* they are not arbitrary – they are unappealable under s. 30(1) of the *UARB Act*. (*Adekayode*, quoted above, para. 45).

[155] The Board’s findings were well-supported.

- Neither Central, nor any reasonable operator, would invest substantial sums and effort to establish a new retail store and distribution centre on land that it expects to be expropriated. After the expropriation, Central would just have to duplicate the investment and effort somewhere else, likely on an emergency timeline after being suddenly dispossessed by the notice of expropriation. Had Central chosen that wasteful course, Central's claim would have faced an argument of failure to mitigate. Central wanted one retail outlet and distribution centre to serve its ongoing operations, functionally and without disruption, not as a legal object lesson for a compensation claim. That business reality is a matter of factual causation.
- Further, and apart from the above, in May 1998 the Province's Mr. Bushell told Mr. Smith that, if Central did choose to erect a structure, as Central was aware of the impending expropriation there would be no compensation. To Mr. Smith, this was the *coup de grâce*.

[156] It was for the Board to draw inferences from the evidence. It is not for this Court to retry the facts.

[157] My colleague says that Mr. Bushell's comment – that Central would not be compensated – was wrong in law, and Central could recover the market value of improvements at the date of expropriation in the expropriation proceeding, but that Central's only recourse to recover consequential disturbance-type damages was to sue in tort, e.g. for negligent misrepresentation. I respectfully disagree with the last point.

- The *Expropriation Act*'s scheme, proclaimed by s. 2(1) and explained by Cory J., is “to fully compensate a land owner” for its loss caused by the expropriation (*Dell*, para. 23). Assessing this full compensation is the function of the proceeding before the Board. The owner need not launch a collateral lawsuit in the Supreme Court of Nova Scotia.
- In that comprehensive proceeding before the Board, if there is causation, the loss is not too remote, and the owner acted reasonably to mitigate, the owner is entitled to compensation for disturbance (*Dell*, paras. 30, 38 and 44 – quoted above, para. 143). There is no requirement to prove fault, such as a tort, by the expropriating authority. The Board did not make a ruling of tortious misrepresentation under the guise of “disturbance”. The Board merely applied the evidence to the legal prerequisites of “disturbance” under the *Expropriation Act*.

[158] I would dismiss this ground of appeal.

Issue #3 – Quantification of Compensation

[159] The Province submits that the Board:

- erred by accepting Mr. Doucet’s depth analysis;
- erred by accepting PwC’s calculation of disturbance loss; and
- erred by finding that disturbance loss continued after 2005.

[160] I will address these points in turn.

[161] **First – Mr. Doucet’s depth analysis:** The Province says that Mr. Doucet applied an incorrect discount for depth to value both the taken lands and injurious affection of the northern remnant.

[162] Mr. Doucet derived a value per square foot from the comparable market data. Then he adjusted the value for depth and checked his adjustments against what is termed the “rule of thumb called the 4-3-2-1 rule”. The Board’s Decision explains:

[171] Based on a relative comparison of the market data, Mr. Doucet concluded that a value of \$65,240 per acre, or \$1.50 per sq. ft., reflects the market value of the developed area of the Claimant’s property. He said:

Size, depth and utility are perhaps the most important site characteristics requiring adjustment because larger parcels often sell for less per unit (per acre or square foot) than smaller parcels, all other factors being relatively similar. ... Depending on the use, the depth of a commercial/industrial property can impact its utility and thus value. The impact of depth is lessened for a DC [distribution centre] site since much of the land is used for storage and laydown area... [Board’s underlining]

[172] Mr. Doucet said, in taking depth into consideration, certain portions of the property have a greater land value than others, and he therefore adopted a “rule of thumb called the 4-3-2-1 rule” to create a depth table. Under this rule, the first 25 percent of depth equates to 40 percent of the market value, the next 25 percent to 30 percent of the market value, the next 25 percent to 20 percent of the market value and the final 25 percent to 10 percent of the market value. In using this table, Mr. Doucet found an average per sq. ft. value of the property to be \$1.18, and the total value to be \$2,519,000. He confirmed, in his evidence, that exact 25 percent areas were not applied because the Claimant’s property did not divide into four parts of equal size.

[173] This rule is usually applied to irregularly shaped property. Mr. Doucet agreed it is subjective and some flexibility is allowed to arrive at a reasonable value. On cross-examination, he acknowledged that the percentages in the rule and the table he prepared were “a bit skewed”. However, he maintained that it was reasonable and not enough to make a difference. He had used the rule in other appraisals. He based the percentages used in the report on the data available to him, using a range of sales from his overall market analysis.

[174] Mr. Doucet did not agree that the rule was not applicable and confirmed he had used it as “a check” to his conclusions about the value of land at various depths. In response to Board questions, he said that his conclusion would not have changed if he had not used the “4-3-2-1 rule”.

[163] The Board accepted Mr. Doucet’s approach:

[610] Mr. Doucet had assigned a lower value to the southern remnant lands when calculating the value of the entire Central parcel with his use of the “4-3-2-1 Rule”. While the Province submitted this is an inappropriate method, the Board sees merit in the conclusion that the value of the rear lands is not as great as lands closer to the highway.

[164] In this Court, the Province says the Board’s adoption of Mr. Doucet’s view is an appealable error.

[165] Mr. Doucet testified that he derived the discounts for depth from his analysis of market data, then checked the results against the 4-3-2-1 rule of thumb. He said the rule of thumb is recognized in the professional literature. His eventual numbers were adjusted to his view of the circumstances involving Central’s land and did not precisely match a 4-3-2-1 allocation.

[166] The Board applied the expert opinion of a qualified appraiser. The opinion derived from the appraiser’s tenable view that the land’s per square foot value reduces with distance from a road. The expert exercised his professional judgment and used a recognized appraisal approach to check his conclusion.

[167] This is standard fare in a valuation case. The Province has identified no error, certainly not an appealable error of law. I would dismiss this ground of appeal.

[168] **Second – PwC’s calculation of disturbance loss:** The Board had expert reports authored by Mr. Paul Bradley, C.A. and Ms. Charlene Rodenhiser, C.A., both chartered business evaluators with Pricewaterhouse Coopers, on behalf of Central. The Board had opinion reports from Mr. Ian Wintrip, CA, assisted by Mr. Donald Thompson, Ph.D., for the Province.

[169] Ms. Rodenhiser's testimony explained in simple terms the value of a distribution centre:

For Central in particular, you know, Mr. Smith has always stated that his fill rates are very important. And what he means by that he doesn't want a customer walking into his store and finding, you know, that the screws they need to do their project that day are not on the shelves, and a distribution centre allows the individual stores to ensure that their inventory is always maintained, and yet they can maintain it at such a level that they're controlling their costs as well.

And so that's – you know, a DC really does improve the profitability of an operation overall because of that inventory management. So you've got savings by bringing in bulk, by getting discounts you're able to fulfil your store's requirements through inventory management. So it's very beneficial in that way.

[170] Central's actual performance reflected this view. Ms. Rodenhiser testified:

Well, we, you know, visually saw once they did establish their modified DC, the impact that had on their operations. We saw the improvement in profitability. We saw the improvement in their gross profit margin.

[171] Mr. Bradley explained the parameters of the PwC opinion:

... They had intended to build a retail store and to build a distribution centre on the Lower South River site in 2000 and they were not able to do that.

They ultimately did proceed with a new box store and they proceeded with a new box store on Market Street in 2005 and then they built a distribution centre at the Lower South River site. But in general there was a five-year delay caused by the expropriation.

So what we endeavoured to do was measure the financial impact of that delay on the business so that's generally what we're trying to do. ...

...

... so we've got a "but for" and what would have happened but for the delay, and then the bottom line is the actual. And if you look over at the right-hand side, the years 2000 to 2005, they're, for want of a better phrase, the missing years or they're the years of delay when Central did not do the expansion that it intended.

...

So the loss period for us started at the year 2000 because we're trying to measure the profits but for the delay, and we effectively used the actual results from 2005 through 2014 as a measure, as a basis for estimating what would have happened but for the delay.

...

So subject to being able to make adjustments for things like inflation, which we did, we believe that the market information and the sales and the earnings information from operating the retail store at Market Street provided the best information and the best evidence to estimate what would have happened but for the delay.

[172] PwC's Report, pp. 16-21, accompanied by the testimony of Mr. Bradley and Ms. Rodenhiser, explained the quantification of Central's loss. Briefly:

- Using Central's performance after 2005 (when the Market Street store and the distribution centre at Lower South River began to operate) as a guide, PwC estimated the profits that would have been earned had Central established its planned retail outlet and distribution centre at Lower South River at the start of 2001.
- PwC made evidence-based adjustments, as explained by their witnesses, for items such as inflation.
- The distribution centre at Lower South River was significantly smaller than the planned distribution centre, had there been no expropriation. This was the result of the space constraints at Lower South River due to the impending expropriation. The smaller-than-planned distribution centre meant that certain products were not carried there and had to be delivered directly to retail stores. Central was unable to bulk purchase those items and lost the benefit of vendor discounts. PwC added the value of the lost vendor discounts to the loss column.
- The smaller-than-planned distribution centre at Lower South River increased Central's operating costs over those that Central would have incurred, but for the impending expropriation, had Central established the planned distribution centre at Lower South River. PwC calculated and added the sum of those incremental costs to the loss column.
- The change from the planned distribution centre and retail outlet at Lower South River as of the start of 2000 to the actual operations in 2005, resulted in an earlier than planned expansion of Central's Sydney retail store and a delay in financing costs for the distribution centre. These were benefits to Central that PwC calculated and subtracted from the loss claim.

[173] PwC's conclusions on these amounts, in its initial report, were adjusted in several supplementary reports. The Board's Decision, para. 826, summarized and accepted PwC eventual amounts for "past losses":

•	lost profit – Antigonish retail:	\$5,301,499
•	lost profit – distribution centre:	\$2,112,504
•	lost profit – vendor discounts:	<u>\$1,086,279</u>
	Subtotal	\$8,500,282
•	Less - delay in financing costs:	\$118,530
	- Sydney early profits:	<u>\$2,206,328</u>
	Subtotal	<u>\$6,175,424</u>
•	Plus – incremental operating costs:	<u>\$563,857</u>
	Total	\$6,739,281

[174] PwC also calculated “future losses” after January 31, 2013. These losses are the subject of Central’s cross-appeal and will be discussed under Issue #5.

[175] The Board’s Decision described its approach to the quantification of Central’s loss from disturbance:

[777] The Board is mindful that the burden is on the Claimant to satisfy the Board, on a balance of probabilities, of the amount of compensation that should be paid for business losses as disturbance damages. ...

...

[780] ... the Board considers that PwC undertook a comprehensive review of the industry, the economy, and the situation of Central. The Board notes it relied on information it received from Mr. Smith and others of Central’s senior management; however, the Board is satisfied that they appropriately assessed the basis on which they concluded that their assumptions were reasonable.

...

[784] The Board has concerns about the influence of Mr. Thompson on the Wintrip Report. While perhaps it was not as overt as Mr. MacIntosh alleged, the Board considers that the various email exchanges where Mr. Thompson expressed doubt over the ability of Mr. Smith to have the plans “in his own head”, taken with his persistent misapprehension about the distribution centre which Central planned, imported a flavour of doubt or disbelief to the report. Further, the Board found Mr. Thompson to be somewhat flippant as a witness, casting doubt on his objective assessment of Central’s plans.

[785] The Board understands that the PwC determination of the losses suffered by Central resulted from delay. Their premise is that, but for the expropriation, or more accurately, the shadow of expropriation which fell over the Lower South

River property, Central would have built a new retail store and distribution centre from which it would have earned profits in 2000.

[786] Part of the profits it would have earned would be in the form of increased vendor discounts because it would have had sufficient space to accommodate more products. Buying products in greater bulk warrants discounts by the vendors. Further, Central would have earned transfer profit with a larger distribution centre as it would have had more product to “sell” to the stores within its group.

[787] Additional losses arose from increased operating costs already incurred, and according to PwC to be incurred in the future, as well as future capital costs for a second site.

[788] To calculate the losses, PwC took a period from the end of the year ending January 31, 2001, to the year ending January 31, 2014. It projected that the results from the year ending January 31, 2006 (the year when Market Street opened) would have been earned starting at the beginning of the loss period (January 31, 2001).

[789] It used cumulative net income before income taxes for the full period as if the new Lower South River store and distribution centre had opened in 2000, and deducted from that the cumulative actual net income before income taxes, and then further deducted the actual income earned during the period from the 2000 to 2005 fiscal years. PwC did this for both the retail operation and the distribution centre.

[790] It calculated the lost vendor discounts by examining the discounts which were being earned, and estimating what would have been earned in the period.

[791] PwC set off income earned at the new Sydney retail store, which Central opened earlier than it would have because it could not expand at Lower South River, against the losses. PwC also set off the financing costs of the planned expansion which were delayed and thus saved.

[792] Mr. Wintrip’s main adjustments to these amounts resulted from his use of a shorter loss period, one which ended in May 2005. He made other adjustments to the assumptions used by PwC.

[793] The incremental operating costs which had been incurred were taken from Central’s financial records. The Board notes that Mr. Wintrip accepted those amounts. The future incremental operating and capital costs were based on estimates. Mr. Wintrip opined that these costs were too uncertain.

[794] The Board notes that as this is a claim for loss due to delay or, as some cases describe it, the “loss of a chance”, it must, by its very nature, be hypothetical. It would be difficult, if not impossible, to do anything other than estimate the amounts. The Board must be satisfied that the estimates are based on reasonable assumptions.

[795] The Province had argued that speculative profits are not recoverable, and cited the *Loren and Neulib* decision [*Loren and Neulib v. Nova Scotia* (1978), 25 N.S.R. (2d) 463 (Exp. Comp. Bd.), paras. 10-12]... .

[796] In the Board's view, Central's claim can easily be distinguished on the facts. The Board does not consider that Central's expansion plans were "... the product of a penchant for optimistic overstatement ...", nor could it be said that there is a "... lack of business experience ..." on the part of Mr. Smith or Central. The degree of speculation in that case does not exist here, and Central had a clear record of its past performance.

[797] In this matter, the Board generally prefers the PwC loss calculations with respect to past losses, finding them to be reasonable and based on the available information and the experience of the business valuers undertaking the task. ...

[176] In this Court, the Province submits:

- the Board's use of foregone profit and incremental operating costs was duplicative;
- the Board's use of foregone profit and foregone vendor discounts was duplicative;
- the Board erred by assuming that foregone vendor discounts negatively affected potential profit;
- the Board wrongly adjusted post-2005 results;
- the Board erroneously used actual results at Market Street without making appropriate adjustments;
- the Board erred by insufficiently discounting for risk and in calculating the losses from the available data;
- the Board erred by not considering the impact on all Central's retail operations;
- the Board erred by not using Mr. Wintrip's calculations instead of PwC's.

[177] The Province's factum delivers these submissions as pithy salvos. They are unaccompanied by references to the explanatory reasoning in the testimony of the PwC witnesses. Underscoring the Province's submission is the *sotto voce* proposition: this award just can't be right.

[178] Mr. Bradley and Ms. Rodenhiser explained why there is no duplication. Their calculation of loss assumed the performance of the reduced-scale distribution

centre at Lower South River meant: (1) there was insufficient space for certain lines of inventory, so those items were shipped directly to the retail outlets (without a vendor discount), instead of being purchased in bulk (with a vendor discount) and stored at the distribution centre; (2) Central incurred incremental costs, compared to the costs Central would have incurred at the planned larger distribution centre had there been no shadow of expropriation. These assertions were supported by Central's evidence that the Board accepted as factual. Consequently, the foregone vendor discounts and incremental costs should be added to the disturbance loss.

[179] Mr. Bradley and Ms. Rodenhiser explained their reasons, based on market circumstances, for making an adjustment when occasion warranted, and for not adjusting when it didn't. They considered and adjusted for the performance of Central's other outlets. For instance, they reduced Central's claim by the earlier profits from the Sydney store. They were cross-examined on these matters. Their cross-examination did not disturb the cogency of their explanations. The Board accepted their conclusions.

[180] Mr. Bradley and Ms. Rodenhiser explained at length their use of the available data from Central's operations – particularly the post-2005 data from the distribution centre at Lower South River – to calculate Central's loss from disturbance “but for” the projected expropriation. This was the heart of their opinion. The cross-examination left their approach solidly intact. The Board accepted their calculations.

[181] Mr. Bradley and Ms. Rodenhiser made some adjustments to their calculations because of Mr. Wintrip's opinions. Their testimony itemized and explained why they disagreed with the other aspects of Mr. Wintrip's conclusions. The Board accepted PwC's view of “past losses” and preferred Mr. Wintrip's assessment that the claimed “future losses” were too remote. The Province's factum does not cite any error of law by the Board. The Province simply asks this Court to replace PwC's conclusion on past losses with Mr. Wintrip's. Mr. Wintrip's report calculated Central's past losses as somewhere between \$560,291 and \$4,428,071, a spread that is more question-begging than helpful.

[182] The Board committed no error of law. I decline the Province's invitation to make an end run around the PwC evidence. To the extent the factual issues are appealable, the Board's findings were well-supported by the testimony of Mr. Bradley and Ms. Rodenhiser. The Board's reasoning path is clear. Its conclusions

are reasonable. I would dismiss the Province's grounds of appeal that challenge the Board's quantification of the disturbance loss.

[183] **Third – disturbance loss after 2005:** The premise of Central's claimed disturbance loss was that, but for the shadow of expropriation that appeared in May 1998, Central would have established a "big box" store and distribution centre at Lower South River in 2000. Those initiatives would have increased Central's revenue and lowered its expenses, for instance from vendor discounts attributable to volume purchases. However, with the expropriation in the offing, Central delayed and altered the implementation of those initiatives: in 2005, Central opened both a big box store at the Market Street location, near Antigonish, and a reduced-area distribution centre at Lower South River. Central's disturbance loss was the forgone profit caused by the delay and alteration.

[184] The Board's findings accepted the factual premises for the loss. The issue here is whether the Board committed an error of law in its quantification of compensation.

[185] The Province's expert, Mr. Wintrip, opined that Central's loss period should stop in 2005 when the new premises opened.

[186] The PwC experts said that Central's loss did not end so tidily. Mr. Bradley noted that the exercise was to compare what would have happened, but for the shadow of expropriation, to what actually happened. He said Central's disturbance loss did not end with a curtain drop in 2005 but would diminish over time as the Market Street operation became established.

[187] The Board accepted PwC's approach over Mr. Wintrip's.

[188] At the Board hearing, under cross-examination by the Province's counsel, Mr. Bradley of PwC explained:

... I think there's more to it than just the time period of opening the doors at Market Street. There is a – by being disadvantaged, the company has permanently lost those incremental sales, and then there's a continued growth with respect to those incremental sales that, if you will, ripples into succeeding years.

And that's why, when you look at the graphical trend of the profit, it shows that the projected profit and the actual don't converge until much later, 2010, 2011.

So it's like any business, if a business interruption event happens and a business has to close for two years and then it opens its doors, it doesn't follow that the loss period stops there; if they've lost customers, if there's growth opportunities

on those customers that have been lost it's not going to be a tidy end of the loss period just when the two year interruption happens. There's growth because of the other ripple effects on the broader business.

So that's why I think it's more appropriate to look at what the results have been but for the delay and looking at it in a longer term horizon. But then looking back retrospectively, we're looking at really the cumulative profits to date and I think that more effectively captures the long-term effect on the business, rather than just looking arbitrarily at the five-year delay period itself. Because the business isn't that simple that it just – you just deal with an event and then the event stops and then you get on with business as normal. There's a period of catch-up before the business gets back to where it would have been.

...

I don't think it's appropriate to stop it when the Market Street store opens. I just don't think five years – I don't think the opening of the Market Street store signals the end of the loss period. For me, the loss period ends when the Claimant is back in the position that it would have been but for the delay.

And when you look at the trend of the earnings that happens around 2011 or 2012... .

[189] The Board (para. 262) quoted this passage and then accepted Mr. Bradley's methodology as realistic.

[190] The Board cited another factor that extended the loss after the 2005 openings:

[268] With respect to vendor discounts, Ms. Rodenhiser said that when the Market Street retail store opened, Central was able to use the Lower South River location for a distribution centre. She said, however, that the size of the location did not permit Central to have the extent of products for which they could have obtained vendor discounts. PwC examined a sample of vendors and determined what discounts, and the level of discounts which Central was not able to obtain.

[191] The Board had a reasoned opinion from experts in business valuation. The experts' view was that market exigencies would taper the loss over time after 2005. Central's post-2005 financial results supported that view. Further, PwC's projections at the outset of the loss period assumed a graduated incremental loss; an example is foregone vendor discounts. PwC's tapering approach at the end of the loss period was consistent and realistic.

[192] On the appeal, the Province reiterates its submission to the Board. Essentially, the Province asks the Court for a do-over and substitution of Mr. Wintrip's opinion for PwC's opinion.

[193] Whether there were losses after 2005 is an issue of fact. This is not a trial *de novo*. The Province identifies no error of law by the Board.

[194] The assessment of valuation evidence is at the heart of the Board's function under the *Expropriation Act* and is basic to the presumption of its expertise under *Dunsmuir* and *Alberta Teachers*. The Board's view was well-supported by evidence. To the extent the point is appealable, the Board's conclusion is reasonable under the standard of review.

[195] **Summary:** I would dismiss the Province's grounds of appeal related to the quantification of the award.

Issue #4 – Interest

[196] Interest is governed by s. 53 of the *Expropriation Act*:

Interest on outstanding compensation

53 (1) Subject to Sections 13 and 15, the owner of lands expropriated is entitled to be paid interest on the portion of the market value of his interest in the land and on the portion of any allowance for injurious affection to which he is entitled, outstanding from time to time, at the rate of six per cent a year calculated **from the date the owner ceases to reside on or make productive use of the lands.**

(2) Subject to subsection (3), where the Board is of the opinion that any delay in determining the compensation is attributable in whole or in part to the owner, it may refuse to allow him interest for the whole or any part of the time for which he might otherwise be entitled to interest, or may allow interest at such rate less than six per cent a year as appears reasonable.

(3) The interest to which an owner is entitled under subsection (1) shall not be reduced for the reason only that the owner did not accept the offer made by the expropriating authority, notwithstanding that the compensation as finally determined is less than the offer.

(4) Where the board is of the opinion that **any delay in determining compensation is attributable in whole or in part to the expropriating authority**, the Board may order the expropriating authority to pay to the owner interest under subsection (1) **at a rate exceeding six per cent** a year but not exceeding twelve per cent a year.

[bolding added]

[197] The Province makes two submissions respecting the Board's award of interest.

[198] **Interest rate:** Section 53(4) permits the Board to raise the interest rate if “delay in determining compensation” was partly attributable to the Province. The Board (para. 856) found that the expropriating authority delayed the determination of compensation. Under s. 53(4), the Board raised the interest rate to 10%.

[199] The Board found there were several instances of such delay. The findings were supported by evidence.

[200] On the appeal, the Province challenges the increased rate. The Province submits that “delay in determining compensation” under s. 53(4) applies only to the delays in the compensation proceeding that follows the notice of expropriation, and any other delay is irrelevant.

[201] The Board rejected that submission. The Province notified Central of the prospective expropriation in May 1998, effectively freezing Central’s development of the parcel, but did not file the notice of expropriation until 14 years later. The Board said, reasonably in my view:

[849] Further, the Board concludes that “determining compensation” does not mean simply the Board making a finding. It is clear from a plain reading of the *Act* (e.g., s. 12, s. 13, s. 15) that compensation may be settled before, or without, the involvement of the Board.

[850] Therefore, the Board finds that it can consider the kinds of conduct referred to by Mr. MacIntosh in setting an increased interest rate if that conduct delayed compensation.

[202] In any case, there is evidence of delay, attributable to the Province, after the notice of expropriation, and directly related to the ascertainment of compensation. The evidence materialized particularly during the cross-examination of the Department’s Acquisition Officer, Mr. Rod MacInnis. Fourteen years after announcing the prospective expropriation, the notice of expropriation was filed in May 2012. Then the Province delayed over a year the delivery of its appraisal and offer. The timing was inconsistent with the statutory protocol in s. 13. Mr. MacInnis testified this was further to the direction of the Department’s Manager of Acquisition and Disposals, Mr. Stephen MacKenzie. Mr. MacInnis said that he was unaware of any other expropriation where there had been such a delay. He testified:

Mr. MacINTOSH: Thank you.

So when you’re writing this email to Mr. Smith and you’re talking about, “We believe it’s a benefit for both parties to advance expropriation” and so on, that

was a successful delay tactic on the part of the department because it could get in and get control and ownership over the lands and not have to deal with the valuation part. Correct?

Mr. MacINNIS: Correct.

[203] The Board said (para. 855) “the Province, in the person of Mr. MacKenzie, delayed the determination of compensation”.

[204] The Board’s findings of fact are supported by evidence, and the weight of that evidence is un-appealable.

[205] The Board’s decision to raise the interest rate to 10% is reasonable.

[206] **Commencement date of interest:** Section 53(1) says the interest runs “from the date the owner ceases to reside on or make productive use of the lands”. The Board decided that interest should run from May 1, 2001. The Board (para. 862) found that was the date when the impending expropriation persuaded Central that “it would not be prudent to develop the Lower South River property any further”.

[207] On appeal, the Province says the Board erred by not starting the interest from the date of expropriation. As authority, the Province cites *Partition Holdings Ltd. v. Ontario (Minister of Transportation and Communications)* (1986), 56 O.R. (2d) 738 (C.A.), leave to appeal dismissed [1987] S.C.C.A. No. 79. The Province takes the unconventional approach of relying on Thorson J.A.’s dissenting reasons.

[208] In *Partition Holdings*, s. 35(1) of Ontario’s *Expropriations Act* was worded similarly to Nova Scotia’s s. 53(1). Both statutes permitted interest from “the date the owner ceases to ... make productive use of the lands”.

[209] With due respect to Thorson J.A., I prefer the majority’s reasons in *Partition Holdings*. Cory J.A. (as he then was), with whom Tarnopolsky J.A. concurred, said:

... In this case, it was found by the Ontario Municipal Board that the owner was unable, as a result of the actions of the Minister, to make productive use of his land after March, 1972, almost three years before the date of expropriation.

Fairness would seem to dictate that interest should be payable from that earlier date when the land could no longer be used productively. ...

...

It has long been recognized that it is most unfair for an expropriating authority effectively to tie up or prohibit the productive use of vacant land. To do so without paying any interest as compensation is unconscionable. ...

...

Fairness requires that interest should be paid from the date that it is found that the owner can no longer make productive use of the land. The clear wording of s. 35(1) indicates that interest should be calculated and paid from that same date. ...

[210] The Province would read the concluding words of s. 53(1) to say that interest is “calculated from the date the owner ceases to reside on or make productive use of the lands, *but no earlier than the date of deposit of the expropriating document at the registry*”. The italicized words are not in the statute. The Board saw no basis to imply such a condition. In the Board’s view, “calculated from the date the owner ceases to ... make productive use of the lands” applies when the owner ceased to make productive use of the land because of an earlier step in the expropriation process. The Board’s view was consistent with the wording, context and purposes of the *Expropriation Act*, and Cory J.’s interpretive directives in *Dell*, paras. 20-21, 23, 37-45 (above, para. 104).

[211] The Board’s ruling on the commencement date of interest is reasonable. I would dismiss this ground of appeal.

Issue #5 – Central’s Cross-appeal: Future Losses

[212] The Board found that the loss period for Central’s disturbance award ended January 31, 2013. The Board said:

[824] ... the Board considers that it should use January 31, 2013, the end of the fiscal year in which the expropriation occurred, and when Central was likely in the position it would have been in, as the end of the loss period.

[213] The Board disallowed Central’s claim for future costs. These included vendor discounts and incremental operating costs for a two-year period, and indefinite incremental operating costs and future capital costs. That total claim was \$3.35 million, reduced from an earlier estimate of \$3.5 million (Exhibit S-62). The amounts of future costs were estimated by Central’s experts, Mr. Bradley and Ms. Rodenhiser of PwC. (Board Decision, paras. 816-17)

[214] The Board summarized PwC’s development of the numbers:

[818] For vendor discounts, PwC stated that Central estimated an additional two years before they would have an additional facility at Lower South River to allow them to do the necessary bulk buys. Using the average lost vendor discounts and an average profit margin, they calculated a loss for a two-year period.

[819] The future incremental operating costs were based on the need for a second location and were based on costs incurred. PwC estimated that these costs would apply for a two-year period and then would continue for the second location. They required them to capitalize estimated annual costs "... using a capitalization rate based on the Company's estimated weighted average cost of capital" and the present value of the costs. This exceeded \$2.7 million.

[820] The future capital costs were based on an estimate of capital for the second site, not including the cost of land.

[215] The Board noted that the experts disagreed on whether these estimates were too speculative:

[821] PwC maintained that these costs were reasonable and were the result of the expropriation. Mr. Wintrip [the Province's expert] maintained that there was insufficient information to assess whether the costs were reasonable. The amounts, the timing and the nature of the costs caused him to question whether they were necessary, or perhaps would have been incurred in any event, or not at all.

[216] The Board found that the claimed future costs were too remote:

[822] The Board has noted above that, of necessity, estimates must be employed in calculating a claim of this nature. However, the Board is not persuaded, on a balance of probabilities, that the future costs, whether operating or capital, should be recovered by Central. They rely on layers of estimates which contributes, in the Board's view, to an unacceptable degree of speculation. Further, the Board considers that there is merit in the submissions of the Province that these costs are too remote to be compensable in the circumstances of this matter. Accordingly, the Board denies these elements of the claim.

...

[899] ... The Board does not, however, accept the full extent of the loss period determined by PwC, but ends it one year earlier. Further, the Board does not accept the claims for future losses, finding them to be less reliable because they were built on estimates the Board considers too uncertain.

[217] Central's cross-appeal targets the future costs that the Board disallowed. Essentially, Central makes two arguments.

[218] First, Central challenges Mr. Wintrip’s evidence. Central’s factum criticizes Mr. Wintrip’s reliability and credibility at length, then says:

48. Despite all of this implied skepticism about the weight and credibility of Wintrip’s opinions, the Board in a single paragraph embraced the consequences of his opinion with respect to uncertainty of future costs. ...

[219] Second, Central submits that the Board improperly used inadmissible evidence to support the Board’s rejection of the future costs claim. This would be the evidence tendered for the Province’s motion to re-open the hearing, that the Board dismissed on May 17, 2017 (above, para. 27). Central acknowledges that nothing in the Board’s decision cites inadmissible evidence. Central’s factum says:

50. The Decision of the Board appropriately makes no reference to the evidence on sale presented to the Board at the Province’s post-hearing Motion to Re-Open, which Motion was dismissed by the Board in its Decision dated May 17, 2017. However, because of the absence of any reasoning path or evidence that would otherwise support the Board’s rejection of future losses, the undeclared elephant remains in the room. Central submits that the Board was improperly distracted by that post-hearing evidence, which should not have had any influence on uncertainty.

[220] Then Central joins its two submissions:

60. ... Central acknowledges that it is pure speculation to infer from the Decision that the fact of sale influenced the Board’s finding. However, other than the discredited opinions of “uncertainty” expressed by Wintrip, there was no other such evidence. ...

[221] I respectfully disagree.

[222] In *Dell*, Cory J. said “the approach to damages flowing from expropriation ... should be based upon causation” (para. 38), “provided the damage incurred is not too remote” (para. 30) and provided there was no failure to mitigate.

[223] Applying that test, the Board (para. 822) found that Central’s claim for future losses was “too remote” based “on a balance of probabilities”, which is the appropriate standard of proof.

[224] There was admissible evidence from which the Board could make that finding. The Board was entitled to draw its own inferences, whether positive or negative, from PwC’s evidence. In addition, the Board had the evidence of Mr. Wintrip.

[225] Mr. Wintrip’s testimony included:

... And so, again, going back to trying to assess what future operating costs are, we now have new information about this new site being purchased. We’re not really sure about what the status is of adding additional space at the DC [distribution centre], and we also don’t really understand what the impact will be with the existing secondary DC, which is at Market Street. And so the introduction of this new information just adds another layer of complexity to the calculation and uncertainty with estimating not just what future costs may be, but what the incremental future costs would be in the future.

...

... it has to deal with estimates and also you have to extract out, again, what the “but for” plan was, because ultimately everything has to be compared to that “but for” plan to determine what’s incremental. And I suggest the “but for” plan wasn’t initially documented so we’re relying on what actually happened at Market Street, we’re now relying on a new piece of property that was purchased for the purposes of expanding the DC. At the end of the day we don’t have a kind of consolidated here’s what would have happened, but for the expropriation to compare this estimate of costs going forward into the future.

[226] The Board summarized Mr. Wintrip’s views on the uncertainty of Central’s claimed future losses:

[348] With respect to incremental future costs, Mr. Wintrip said that PwC had estimated temporary and longer term costs, based on management estimates. He said these are not “out of pocket” costs, and they may not be incurred at all, or may be different, and therefore, uncertain. He said PwC had not done any analysis of what the incremental costs would be, because they had not looked at costs which would have been incurred but for the expropriation.

[349] ... He said that, in his opinion, there was insufficient evidence to support it; one could never know what the costs would be and there was nothing to compare it to in order to look at incremental costs. ...

[350] Mr. Wintrip noted that, in its first report, PwC had talked about the possibility of a second site, and by the time of his revised report, a second site had been acquired. Because the incremental costs were unknown, this, in his view, added complexity to determining any loss. In the absence of a plan for what would have happened but for the expropriation, there is no basis for comparison. As a result, he estimated future costs at nil. ...

[227] As this Court said in *Adekayode* (quoted above, para. 45):

[42] ... if there is *some* evidence, then the tribunal’s factual findings and inferences are not appealable under the statute, nor are assessments of credibility, meaning the standard of review is not an issue. ... [emphasis in *Adekayode*]

[228] The weight and credibility of a witness’s testimony are “quintessentially questions of fact”: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, para. 38, per McLachlin C.J.C. for the Court. Mr. Wintrip’s credibility and the weight of his evidence are not appealable issues of jurisdiction or law under s. 30(1) of the *UARB Act*. This is not a re-trial.

[229] As to Central’s second point, nothing suggests that the Board applied inadmissible evidence to assist its finding of remoteness. The Board merely found that Central’s estimates of future losses were not established on the balance of probabilities.

[230] The Board did its job. To the extent the ground of cross-appeal is appealable on these factual points, the Board’s findings were supported by evidence and the Board’s ruling is reasonable. I would dismiss Central’s cross-appeal.

Conclusion and Costs

[231] I would dismiss the appeal and the cross-appeal.

[232] The parties filed submissions on costs of the appeal.

[233] Neither the *UARB Act* nor the *Expropriation Act* expressly addresses costs of an appeal to this Court.

[234] Section 52 of the *Expropriation Act* speaks to costs up to the Board level. Section 52(2) says that, subject to s. 52(5), the owner is entitled to “the reasonable costs necessarily incurred by the owner for the purpose of asserting a claim for compensation”. Section 52(5) permits costs to be adjusted downward when the compensation does not exceed the expropriating authority’s offer to settle.

[235] In this case, the Board has not determined costs. The Board left costs for the parties to settle and reserved jurisdiction to deal with the matter, if necessary, on the motion of either party.

[236] *Civil Procedure Rule* 90.48(1)(c) gives this Court discretion to fashion a costs award for a civil appeal. By Rule 90.51, on a tribunal appeal, no costs are awarded “unless the Court of Appeal orders otherwise”. This Court’s award of

costs on a tribunal appeal should follow a principled analysis: *Smith v. Nova Scotia (Human Rights Board of Inquiry)*, 2017 NSCA 27, paras. 72-87 and 92.

[237] Generally, in an expropriation case, there is a principled basis for a significant costs award to the owner. The courts and expropriation tribunals have interpreted “reasonable costs” in s. 52(2) and similar provisions of other expropriation statutes, to mean solicitor and client costs. This follows from the guiding directive of indemnity, or full compensation, established by *Dell* and like authorities: e.g. *Smith v. Alliance*, paras. 67-77; *Thoreson v. Alberta (Minister of Infrastructure)*, 2007 ABCA 272, para. 23; *Town of Mahone Bay v. Lohnes* (1983), 59 N.S.R. (2d) 65 (S.C.A.D.), para. 12.

[238] Based on this principle of indemnity, costs are treated as an element of compensation and appeal costs on a solicitor and client basis have been awarded to an expropriated owner who succeeds in the appeal court: *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69, para. 22, and declaratory ruling on motion, [1997] S.C.J. No. 115; *Smith v. Alliance*, para. 111; *Bishop v. Nova Scotia (Attorney General)*, 2006 NSCA 114, para. 25; *R. v. Superior Propane Inc.*, 2004 NSCA 73, para. 22; *Yarmouth*, para. 26.

[239] It is reasonable to extrapolate that principle to the appeal court level, subject to any adjustment that the Court considers to be appropriate in the circumstances of the particular appeal.

[240] An example is *A.M. Souter & Co. Ltd. v. City of Hamilton*, [1973] O.J. No. 2217 (C.A.). The Court dismissed an expropriating authority’s appeal with costs and dismissed the owner’s cross-appeal without costs. Section 32(2) of Ontario’s *Expropriations Act* generally applied the practice of civil appeals to an expropriation appeal, and s. 33(1) said that costs at the expropriation Board level would be “the reasonable legal, appraisal and other costs actually incurred by the owner”. Section 33(1) was similar to Nova Scotia’s current s. 52(2). As to the quantum of costs for the expropriating authority’s dismissed appeal, Kelly J.A. said:

6 In our opinion, there is in the Expropriations Act an expressed intention that a claimant who, involuntarily, has to resort to the procedures set down in the Act in order to secure the compensation to which he is adjudged entitled, is to have, in addition to this compensation, the reasonable legal, appraisal and other costs actually incurred by him for the purpose of determining the compensation payable and that the provisions of s. 32(2) do not derogate from that principle.

7 The discretion of the Court with respect to costs is not disturbed by the provisions of the statute referred to, although the principle above stated must be kept foremost in mind. In a case such as this one the Court should give effect to the principle set forth in s. 33(1) and the costs of successfully resisting the appeal taken by the municipal corporation from the award should be taxed as between solicitor and client.

[241] On the other hand, the expropriated owner has been denied costs for his unsuccessful submissions on appeal. In *A.M. Souter*, the Court dismissed the owner's cross-appeal without costs to either party. In *Johnson*, para. 213, this Court ordered that the parties bear their own costs after the Province's arguments on appeal partially succeeded. The adjustment attributable to an expropriated owner's unsuccessful submission is within the Court's discretion in the circumstances of the appeal.

[242] The calculation or taxing function, to implement the Court's ruling on appeal costs, may be performed by the Board: *e.g. Yarmouth*, para. 26.

[243] Based on the above principles, I would award costs of the appeal and cross-appeal as follows:

- For the Province's dismissed appeal, Central shall have its costs on a solicitor and client basis, *i.e.* calculated as described in s. 52(2) of the *Act*, being its "reasonable costs necessarily incurred" to resist the Province's appeal.
- For Central's dismissed cross-appeal, the parties shall bear their own costs.
- As these parties have been unable to agree on almost anything, I will not leave it there. In my view, the Province's exhaustive appeal consumed 80% of the effort in this Court, and Central's cross-appeal 20%. Consequently, the outcome is – the Province shall pay Central 80% of Central's reasonable costs necessarily incurred (*i.e.* solicitor and client costs) for the entire proceeding (appeal plus cross-appeal) in this Court.

- Any dispute respecting the calculation of appeal costs, according to the above directions, is to be resolved by the Board on the motion of either party.

Fichaud J.A.

Concurred: Saunders J.A.

Dissenting Reasons:

[244] I have read my colleague's comprehensive reasons for judgment. With respect, while I would agree with his proposed disposition of the cross-appeal, I am unable to agree on the main appeal. I would allow the appeal and quash the Board's award of business losses as disturbance damages and vary the interest on the compensation awarded.

[245] The whole premise for the claimed compensation for disturbance damages is without legal precedent and is plainly wrong in law. It amounts to this: based on a claimed comment by a government employee at a public meeting in 1998, Central was somehow precluded from developing its business as it wanted; and, by reason of the delay said to have been caused by the shadow of expropriation, it deserves compensation under the *Expropriation Act* for all profit that it would have otherwise made from 2001 to 2013 as if it had gone ahead with its business plans.

[246] The premise is wrong because there was no causal connection between Central's decision not to proceed with its plans and the expropriation that eventually occurred on May 1, 2012. Without business loss caused by the process or the fact of expropriation, there is no compensation.

[247] Before exploring these issues in detail, I will comment on the appropriate standard of review.

STANDARD OF REVIEW

[248] In my view, the standard of review is correctness not reasonableness.

[249] It is not necessary that I write a treatise on this subject, because even if the standard of review is reasonableness, the Board made an unreasonable legal error by ordering compensation for damages that were not caused by the expropriation of Central's land.

[250] The last ten years of judicial debate has, with respect, lost its focus on the key issue of legislative intent. Compensation to be paid to a landowner for the compulsory taking of land by the Crown or one of its statutory agents is entirely governed by legislation (*Sisters of Charity of Rockingham v. The King*, [1922] 2 A.C. 315). In Nova Scotia, that legislation is currently the *Expropriation Act*, R.S.N.S. 1989, c. 156. There have been amendments since 1989 that I will discuss in due course.

[251] For now, it is sufficient to say that the history of expropriation legislation in Nova Scotia, the law in existence when the current provisions were enacted, and the controlling jurisprudence of our Court permits but one answer: the legislature intended this Court to ensure that the Board did not commit legal error. The standard of review is one of correctness.

[252] There is no need to trace the complete pedigree of the legislated compensation provisions. In terms of process, the legislature chose the Courts as the arbiter of compensation that must be paid. Absent an agreement between the landowner and the Crown, a judge of the County or Supreme Court determined compensation. An appeal lay to the Supreme Court *en banc* (now the Court of Appeal) by leave if the amount exceeded \$500.00 (R.S.N.S. 1923, c. 21).

[253] This basic procedure existed until the so-called modern expropriation code was introduced in Nova Scotia by the *Expropriation Act*, 1973 (S.N.S. 1973, c. 7). This *Act* set out the guiding principles to determine compensation. They remain unchanged.

[254] With respect to process, the 1973 *Act* introduced a new structure to determine compensation. It created the Expropriations Compensation Board to hear and determine compensation in the first instance. The Courts were given a major supervisory role to play. First, the Board, on its own motion or upon application by a party, could request the opinion of the Appeal Division of the Supreme Court (now the Court of Appeal).

[255] Secondly, and more relevant, there was no "privative clause" protecting the decision of the Board from judicial scrutiny. Instead, the legislature chose a broad

right of appeal to the Trial Division of the Nova Scotia Supreme Court. A party could appeal upon any question of jurisdiction, law, mixed law and fact, and fact:

60 (1) An appeal shall lie to the Trial Division of the Supreme Court from any order of the Board upon any question as to its jurisdiction or upon any question of law or fact or mixed law and fact upon application made within thirty days after the rendering of the decision by the Board, but on such appeal no new evidence shall be adduced except with leave of the Court and only to the extent that fresh evidence may be adduced on an appeal to the Appeal Division of the Supreme Court under the *Civil Procedure Rules*.

[256] Pursuant to the *Judicature Act*, an appeal was then available as of right to the Appeal Division (see *Park Projects v. City of Halifax* (1982), 54 N.S.R. (2d) 116 (A.D.) at para. 39).

[257] Despite the breadth of the Trial Division's appellate role, deference was accorded the Board on findings of fact. The appellant was required to demonstrate palpable and overriding error or that the Board's factual findings were "plainly wrong" (see, for example: *Burke v. Province of Nova Scotia* (1983), 57 N.S.R. (2d) 1 (T.D.); *Park Projects v. City of Halifax*, *supra*; *Reiss and Hammerling v. City of Dartmouth* (1979), 36 N.S.R. (2d) 482 (T.D.)).

[258] There is not a hint that the Supreme Court owed any deference to the Board on questions of law or principle. On these questions, the appellate court was there to correct such errors (*POW Investments Limited v. Province of Nova Scotia* (1973), 5 N.S.R. (2d) 121 (N.S.S.C.A.D.); *aff'd* [1975] 2 S.C.R. 86). It was unheard of that the Supreme Court or the Appeal Division would uphold a decision of the Board that was tainted by legal error, reasonable or otherwise.

[259] The *Expropriation Act*, 1973 was repeated verbatim in the 1989 Revised Statutes (R.S.N.S. 1989, c. 156). Process changes were made in 1992 by the *Utility and Review Board Act*, S.N.S. 1992, c. 11. This *Act* amalgamated a number of Boards, including the Expropriations Compensation Board, into one tribunal, the Nova Scotia Utility and Review Board. The appeal provisions of the *Expropriation Act* were repealed.

[260] The new appeal structure retained the ability of the Board, with leave by either the Attorney General or the Appeal Division, to request its opinion on questions of law. The main appeal provision for all matters heard by the Board provided for an appeal as of right on any question as to the Board's jurisdiction or upon any question of law:

Appeal

30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.

[261] This Court has decided that the appropriate standard of review on appeals from the Board in relation to the *Expropriation Act* is correctness. In *Nova Scotia (Attorney General) v. Williams*, 1996 NSCA 134, Freeman J.A., writing for the majority, cited the relevant provisions of the *Utility and Review Board Act*:

17 In considering the appropriate standard of review, the following provisions of the *Utility and Review Board Act* are relevant:

22 (1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.

(2) The Board, as to all matters within its jurisdiction pursuant to this *Act*, may hear and determine all questions of law and of fact.

26 The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.

30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law.

[262] Justice Freeman concluded that the standard of review was patent unreasonableness on an appeal from findings of fact or mixed law and fact, but for questions of law or jurisdiction, the general rule of concurrence or correctness applied:

18 Therefore, decisions of the Board are protected by a privative clause respecting its findings of fact, and the general rule is that the standard of review is patent unreasonableness. **Questions of law or jurisdiction are not so protected; they are subject to a statutory right of appeal, which generally invokes the standard of concurrence or correctness.** Questions of mixed fact and law occur with frequency under the *Expropriation Act*. In the absence of error of law, the Board's findings of mixed fact and law should be entitled the same to deference due to its findings of fact alone, the standard of patent unreasonableness. ...

[Emphasis added]

[263] Hallett J.A. dissented, but not with respect to the standard of review.

[264] One of the leading cases on expropriation in Nova Scotia is *Nova Scotia v. Johnson*, 2005 NSCA 99 (leave denied, [2005] S.C.C.A. No. 446). Justice Oland

wrote the unanimous reasons for judgment. She canvassed the then leading authorities on standards of review. Guided by the “polar star of legislative intent” Oland J.A. considered the contextual factors, and decided that questions of law are reviewable on a standard of correctness, but to disturb questions of mixed law and fact or fact, patent unreasonableness must be established. She concluded:

[46] After considering the four contextual factors of the functional and pragmatic approach, in my view the standard of review to be applied to questions of law, such as any entitlement for compensation for owner’s time and for pension loss, the standard of review is correctness. For questions of mixed law and fact, such as matters related to compensation for market value and injurious affection, the standard is patent unreasonableness. For findings of fact, the standard is patent unreasonableness.

See also: *Harrison Blueberry Enterprises Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 26 at para. 6; *R. v. Superior Propane Inc.*, 2004 NSCA 73 at para. 21.

[265] I know of no decision by our Court that clearly says the standard of review on appeals from Board expropriation decisions is otherwise. Nonetheless, my colleague says *Johnson* pre-dates *Dunsmuir v. New Brunswick*, *supra* and the subsequent pronouncements by the Supreme Court of Canada that reasonableness is the default position on court hearings which challenge tribunal decisions.

[266] I am unable to agree that cases post *Dunsmuir* pre-determine the appropriate standard of review in this case. Recall that *Dunsmuir* was a case where the appellant challenged the adjudicator’s decision by way of judicial review. The relevant statute, in the words of the Supreme Court, stated “in no uncertain terms” that “every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court” (para. 67). Despite the strength of this privative clause, the adjudicator’s decision was reviewable on a standard of reasonableness.

[267] The majority reasons in *Dunsmuir*, written by Justices Bastarache and LeBel, direct that a reviewing Court need not engage in a standard of review analysis if the existing jurisprudence has already decided the degree of deference owed (paras. 57 and 62).

[268] As demonstrated above, this Court has already decided that the standard of review on an expropriation appeal on questions of law is correctness under s. 30 of the *UARB Act*.

[269] My colleague cites *Yarmouth (Town) v. Gateway Importers and Exporters Ltd.*, 2011 NSCA 17 and *Guysborough (District) v. PEV International Research and Development Incorporated*, 2012 NSCA 87 as cases that post-date *Dunsmuir* and the Supreme Court’s enunciation of the “home and related statute” presumption of reasonableness.

[270] With respect, the law is not so clear. In *Yarmouth*, the dispute was not about legal entitlement to compensation for injurious affection but about the Board’s quantification of compensation. This was clearly a question of mixed fact and law. Furthermore, the parties conceded that the reasonableness standard of review applied (paras. 1 and 4). Justice Bryson, writing for the Court, acknowledged that deference was appropriate on the issue of assessment of the appraisal evidence (para. 25).

[271] In *Guysborough*, the respondent asserted it had an interest in land that entitled it to compensation under the *Expropriation Act*. In a preliminary decision, the Board found for the respondent. Guysborough appealed. Hamilton J.A. penned the unanimous reasons that dismissed the appeal. As my colleague points out (para. 64), Justice Hamilton cited a decision of our Court that reasonableness governs a property assessment appeal and that the same standard applied (paras. 16-17). However, as it turns out, this comment was plainly *obiter*.

[272] In *Guysborough*, both parties agreed that the standard of review was correctness. Justice Hamilton expressly declined to decide the issue. She wrote:

[18] Both parties say we ought to apply a standard of review of correctness. It is not necessary for me to determine whether the standard of correctness or reasonableness applies in this case, because I am satisfied the Board’s decision is correct.

[273] My colleague has thoroughly canvassed the current use of presumptions to determine the appropriate role of an appeal court hearing a statutory appeal from a tribunal. Reliance on a presumptive standard started in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61. The tribunal’s decision was challenged on judicial review. The Court concluded that deference was presumptively owed to a challenge of a tribunal’s interpretation of its home or closely-connected statutes (para. 34).

[274] In *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, the Board, under the *Alberta Municipal Government Act*, decided it had the jurisdiction to increase a tax assessment on a taxpayer’s appeal. On

statutory appeal to the Queen's Bench, the decision was reversed, which was upheld by the Alberta Court of Appeal. The Alberta Courts resisted the concept that a presumption guided their standard of review choice. While the presence of a statutory right of appeal may not invariably signal a correctness standard of review, it was enough to displace a presumption that reasonableness applies (2015 ABCA 85 at para. 24).

[275] After considering the contextual factors, the Alberta Court of Appeal unanimously concluded that correctness was the standard of review. On further appeal, the Supreme Court reversed by a five-four plurality.

[276] I need not analyse the extensive majority and minority reasons. Karakatsanis J. wrote for the majority. She referenced recent Supreme Court jurisprudence that applied reasonableness to statutory appeals and the applicability of administrative law principles, including a presumption of deference to tribunal decisions:

29 At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (*McLean; Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219).

30 In *Saguenay*, this Court confirmed that whenever a court reviews a decision of an administrative tribunal, the standard of review “must be determined on the basis of administrative law principles ... regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal” (para. 38, per Gascon J.; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 17, 21, 27 and 36; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 2 and 21).

[277] Justice Karakatsanis acknowledged that the presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions and its consequent expertise (para. 33). However, this rationale is only part of the legislative equation. It says nothing of the legislature's choice to provide a right of appeal on questions of law and jurisdiction to a Court of Appeal.

[278] With respect, reliance on a presumption of legislative intent in favour of deference, created by the Supreme Court in 2015, spurns well-established norms of statutory interpretation (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 46). It is to those norms that I turn.

[279] In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, the Supreme Court gave clear direction that the starting point for statutory interpretation is the “modern rule” espoused by Professor Driedger. Iacobucci J., for the Court, wrote:

[21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.

[280] Iacobucci J., again writing for the Court, in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, elaborated:

[26] ... Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court’s preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

[27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article “Statute Interpretation in a Nutshell” (1938), 16 *Can. Bar Rev.* 1, at p. 6, “words, like people, take their

colour from their surroundings”. This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger’s principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as “the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter”. (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

[281] What then was the intent of the Nova Scotia Legislature when it provided for a right of appeal to the Court of Appeal on questions of law and jurisdiction? Was it to ensure that the Nova Scotia Utility and Review Board did not render decisions tainted by legal error, or was it only to correct such errors that it considered not just to be wrong, but unreasonably wrong? The answer comes from the application of well-established common law and statutory rules of interpretation.

[282] The original meaning rule directs that the words of a statute are to be construed as they would have the day after they were passed. This principle is explained by Ruth Sullivan in *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at pp. 140-41:

The leading Canadian case on the original meaning rule is *Perka v. R.*, in which Dickson J. wrote:

The doctrine of *contemporanea expositio* is well established in our law. “The words of a statute must be construed as they would have been the day after the statute was passed...”: *Sharpe v. Wakefield*. See also Driedger, *Construction of Statutes*: “Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held”; *Maxwell on the Interpretation of Statutes...*: “The words of an Act will generally be understood in the sense which they bore when it was passed.

This passage makes it clear that the original meaning rule applies in Canada...

(footnotes omitted)

[283] The learned author goes on to explain:

Original meaning rule distinguished from contemporanea expositio. In *Perka*, Dickson, J. refers to the doctrine of *contemporanea expositio*, but what he actually goes on to describe is the original meaning rule. To avoid confusion, it is helpful to distinguish the two. The original meaning rule is a substantive rule

which provides that the meaning of words used in legislation is fixed at the time of enactment and does not change, regardless of linguistic evolution or other change. The doctrine of contemporaneous exposition is a rule of evidence which provides that the best evidence of original meaning is found in judgments or other authoritative sources dating from the time the legislation was first enacted and showing how the legislation was understood by contemporary interpreters.

(footnote omitted)

[284] Other leading texts echo the principle. *Côté on The Interpretation of Legislation in Canada*, 2nd ed (Cowansville, QC: Yvon Blais, 1991), describes the rule as follows (pp. 224-25):

As a general rule, the interpreter of a law should place himself at the time of enactment. His task is to rethink the thoughts of the legislator as expressed by the terms of the enactment. It seems logical, therefore, to give the words their ordinary meaning at the time of the legislation's adoption, while taking into account, of course, the context in which they were enacted.

This principle was expressed by Lord Esher in *Sharpe v. Wakefield*:

...the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute.

[285] This approach is in harmony with the *Interpretation Act*, R.S.N.S. 1989, c. 235 that sets out the general principles to guide courts in the interpretative process. It provides:

9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[286] With the 1992 *UARB Act*, it is not hard to conclude that the legislature wished to amalgamate the diverse tribunals that oversaw different statutory

responsibilities into one, thus simplifying the law, removing administrative duplication and expense.

[287] The right to appeal on matters decided by the former Expropriations Compensation Board was broad. It included appeals from findings of fact and mixed law and fact, and of course, questions of law and jurisdiction. The 1992 legislation restricted appeals to “any question as to its jurisdiction or upon any question of law”. That change signalled deference should be the standard for findings of fact untainted by legal error.

[288] But what of an appeal on “any question of law”? As observed by Freeman J.A. in *Williams, supra*, at the time of this legislation change, correctness or concurrence on law or jurisdiction was the general rule. The legislature is deemed to know the current law.

[289] If the legislature intended a more deferential standard it was open to it then, as now, to say so. Just beginning was the notion that while a statutory appeal gave the right to the appellate court to disagree with the lower tribunal on issues that fall within the scope of a statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues that fall squarely within its area of expertise (see for ex. *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at paras. 31-33; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557).

[290] But long past 1992, correctness governed matters of law, including statutory interpretation where a tribunal, unprotected by a privative clause, adjudicated claims (see: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54).

[291] The NSUARB, when deciding matters under the *Expropriation Act*, is not setting policy or pursuing objectives. It is not administering a regulatory scheme. It adjudicates claims for compensation by owners. There is a Statement of Claim and a Reply by the expropriating authority. The Board is required to determine entitlement and then quantify compensation. These contextual factors were considered by Oland J.A. in *Re Johnson, supra* and appropriately led her to fix the standard of review on questions of law as correctness.

[292] When the Board is faced with competing appraisals or evidence, deference is owed to its resolution of those questions. Absent an extricable legal issue, they are inherently questions of fact or of mixed law and fact. But whether an owner is

entitled to compensation under the various statutory heads is generally a question of law.

[293] Even if entitlement must be resolved by statutory interpretation of the *Expropriation Act*, I fail to see how the legislature intended this Court to defer to the Board's possibly reasonable but erroneous interpretation or application of the law. The Board has no greater expertise in statutory interpretation in general nor in relation to the *Expropriation Act* than this Court.

[294] There are numerous examples of specific Courts having actual and institutional expertise in highly specialized areas of the law, but no deference is accorded to them on questions of law, including, of course, statutory interpretation and application of their "home statutes".

[295] Provincial Court Judges are required to interpret and apply the *Criminal Code* every day. What deference is given to their legal determinations? Zero. On questions of law, they must be correct (see: *R. v. Shepherd*, 2009 SCC 35 at paras. 18-20; *R. v. MacKenzie*, 2013 SCC 50 at para. 54; *R. v. J.(C.)*, 2011 NSCA 77 at para. 19; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 21).

[296] Tax Court Judges interpret and apply the *Income Tax Act* and related statutes daily. What deference is given to their legal determinations? Zero. On questions of law, they must be correct (see: *1392644 Ontario Inc. v. Minister of National Revenue*, 2013 FCA 85 at para. 16).

[297] Judges of the various provincial and federal Unified Family Courts interpret and apply their home statutes. A deferential standard is set for their discretionary decisions, but what deference is given to their expressions of legal principle and interpretation? Zero. On matters of law and principle, they must be correct (see: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at p. 526; *Contino v. Leonelli-Contino*, 2005 SCC 63; *N. (H.A.) v. Nova Scotia (Minister of Community Services)*, 2013 NSCA 44 at para. 32; *Johnson v. Barker*, 2017 NSCA 53 at paras. 19-20).

[298] In each of these examples, Parliament and/or the legislature has bestowed jurisdiction on the tribunals. Appellate Courts hearing appeals from these highly specialized tribunals afford no deference to statutory interpretation of their respective home statutes or articulation of and application of the law. I fail to see any rationale to say that the Nova Scotia legislature intended that this Court would defer to the Board's interpretation of the *Expropriation Act* and related legal principles.

[299] In my view, the plain meaning of the appeal provisions on matters dealing with the *Expropriation Act* require this Court to determine questions of law and jurisdiction on the standard of correctness or concurrence. This is not a situation of bygone years when courts, said to be jealous of administrative tribunals, evaded privative clauses by searching for jurisdictional error or patently unreasonable interpretations or findings.

[300] By applying concurrence or correctness, this Court is simply respecting the rule of law. That was what the Nova Scotia legislature asked us to do. With all due respect to those that hold a contrary view, it is what we are required to do.

[301] I will repeat my earlier conclusion: given the history of expropriation legislation in Nova Scotia, the law in existence when the current provisions were enacted, and the controlling jurisprudence of our Court, the legislature intended this Court to ensure that the Board did not commit legal error. The standard of review is correctness.

[302] Before leaving this subject, I want to say that I echo the comment by Karakatsanis J. that perhaps it is time for clear legislative guidance to hopefully end the seemingly endless debate about the applicable standard for judicial review and statutory rights of appeal (2016 SCC 47 at para. 35).

ERROR BY THE BOARD RE DISTURBANCE

[303] Even if the standard of review is reasonableness, the Board made an unreasonable error in law to award pre-expropriation disturbance damages for Central's claimed loss of profit, vendor discounts and incremental operating costs had it gone ahead in 2001 with its expansion plans.

[304] I agree with my colleague's comments about what is the measure for reasonableness (above, paras. [67]-[68]). The seminal definition of the appropriate approach is from *Dunsmuir*:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[305] With respect, the Board's decision does not fall within a range of possible acceptable outcomes that are permitted by the legislation.

[306] The Board awarded Central \$8.1 million plus interest on some parts of that award. The disturbance damages make up \$6.7 million of the total compensation award. Central did not actually lose any money because of the expropriation, nor from being in the "shadow of expropriation". The award is based on a claimed loss of opportunity.

[307] With respect, the Board failed to properly understand the requirement that disturbance damages be legally caused by the expropriation and hence come within s. 27(3)(b)(ii) of the *Act*.

[308] The first case in Canada to award disturbance damages for losses said to have occurred prior to the actual date of expropriation was *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32. To recognize the Board's error, we must understand the facts of that case and the Ontario statutory regime.

[309] Dell was a land developer. It owned approximately 40 acres of land in Mississauga. It sought municipal approval for residential development. The Transit Authority announced it wanted to build a new GO transit station on one of two sites. Both of those sites were on Dell's lands in Mississauga that it wanted to develop. The municipality withheld from Dell all requisite approvals pending the expropriation.

[310] Three years passed before the Authority proceeded with its planned expropriation. The parties agreed that Dell suffered \$500,000 in damages caused by the delay. The sole issue was whether those damages were compensable under the Ontario *Expropriation Act*. The Ontario Municipal Board found that the delay was directly caused by the Authority because the municipality was required to withhold approval until the Authority decided which lands to expropriate.

[311] The award of disturbance damages was reversed on appeal to the Divisional Court and the Ontario Court of Appeal. The Supreme Court reinstated the Board's award. Interestingly, the Court endorsed the standard of review on appeals from

the Board to be correctness, albeit in the face of different statutory appeal provisions.

[312] In any event, Cory J., for the majority, adopted the majority reasons of the Privy Council in *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111 that expropriation is a process, and disturbance damages caused are recoverable even if they were incurred prior to the date of expropriation.

[313] The relevant Ontario statutory provisions are:

13. (1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.

(2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,

- (a) the market value of the land;
- (b) the damages attributable to disturbance;
- (c) damages for injurious affection; and
- (d) any special difficulties in relocation,

but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.

[. . .]

18. (1) The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation, including,

- (a) where the premises taken include the owner's residence,
 - (i) an allowance to compensate for inconvenience and the cost of finding another residence of 5 per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, provided that such part was not being offered for sale on the date of the expropriation, and
 - (ii) an allowance for improvements the value of which is not reflected in the market value of the land;
- (b) where the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation; and

- (c) relocation costs, including,
 - (i) the moving costs, and
 - (ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.

19. (1) Where a business is located on the land expropriated, the expropriating authority shall pay compensation for business loss resulting from the relocation of the business made necessary by the expropriation and, unless the owner and the expropriating authority otherwise agree, the business losses shall not be determined until the business has moved and been in operation for six months or until a three-year period has elapsed, whichever occurs first.

[314] The Supreme Court endorsed the view that the enumerated heads of compensation in s. 13 ensured “on the one hand double recovery does not occur, and on the other hand no legitimate item of claim is overlooked” (para. 26). Further, because the municipality had no alternative but to wait for the Authority to decide how much and what portion of land it required, it was the expropriation that caused the delay. Damages caused by the delay were the natural and reasonable consequences of the expropriation within s. 18 of the *Ontario Act*.

[315] There are differences between the *Ontario Act* and the *Expropriation Act* in Nova Scotia. I will set out the Nova Scotia provisions in order to provide context for the claim advanced by Central to the Board.

[316] Like the Ontario statute, our legislation specifies that the intent and purpose of the *Act* is that every person whose land is expropriated shall be compensated for such expropriation (s. 2). Part III of the *Act* sets out the duty to pay the owner compensation as is determined in accordance with the *Act* (s. 24). The *Act* defines value of land to be the amount that would have been paid for the land had it been sold in the open market by a willing seller to a willing buyer (s. 27(2)) at the time of the taking. Due compensation is to be paid for the aggregate of itemized heads:

26 The due compensation payable to the owner for lands expropriated shall be the aggregate of

- (a) the market value of the land or a family home for a family home determined as hereinafter set forth;
- (b) the reasonable costs, expenses and losses arising out of or incidental to the owner’s disturbance determined as hereinafter set forth;
- (c) damages for injurious affection as hereinafter set forth; and

- (d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation.

[317] The other relevant provisions are sections 27 and 29. They provide:

27 (2) Subject to this Section, the value of land expropriated is the market value thereof, that is to say, the amount that would have been paid for the land if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.

(3) Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the land expropriated is the greater of

- (a) the market value thereof determined as set forth in subsection (2); and

- (b) the aggregate of

- (i) the market value thereof determined on the basis that the use to which the land expropriated was being put at the time of its taking was its highest and best use, and

- (ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),

plus the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated

...

29 (1) Where a business is located on the land expropriated, the statutory authority shall pay compensation for business loss resulting from the relocation of the business made necessary by the expropriation and, unless the owner and the statutory authority otherwise agree, the business losses shall not be determined until the business has moved and been in operation for twelve months or until a three-year period has elapsed from the date of the expropriation, whichever occurs first.

(2) Where it is not feasible for the owner of a business to relocate, there shall be included in the compensation payable an amount for the loss of the business where the compensation for the land taken is based on the existing value of the land.

CENTRAL'S CLAIM

[318] Central's land was expropriated by deposit of the expropriation documents in the Antigonish County Land Registration Office on May 1, 2012. That date is important.

[319] The parties agreed to waive the *Expropriation Act* timelines. No negotiated settlement was reached. Eventually, the Province made an offer of \$260,000 for the fair market value of the lands taken and for injurious affection to a portion of the lands remaining.

[320] Central filed its claim with the Board on March 12, 2015. It claimed compensation for: the market value of lands expropriated; business disturbance, injurious affection and loss of special economic advantage for its interests in both the expropriated and remaining lands; costs, expenses and losses "arising out of or incidental to [its] disturbance", including fencing; legal, appraisal and other professional fees and disbursements; the costs of developing and operating a replacement property; an order for access to rear lands; and, prejudgment interest.

[321] Central filed an Amended Claim on June 15, 2015. In all material respects, it is the same.

[322] However, before the Board, Central abandoned its claim for costs to develop a replacement property, an access order and for loss of special economic advantage. This left the Board to resolve three basic questions: what is the market value of property taken; what amount should be awarded, if any, for injurious affection; and, what amount should be awarded for business loss and disturbance?

[323] Central's Claim set out the parameters of its business loss as follows:

15. The particulars of the afore described injurious affection, business disturbance and loss of special economic advantage suffered by the Claimant have been made known to the Province as early as 1998 and have been sporadically described to the Province over the ensuing years on a variety of occasions. Without restricting the generality of the foregoing, from 1998 to and including the date herein, the Claimant has carried on discussions with representatives of the Province with respect to such claims, including with Department of Transportation and Infrastructure Renewal (DOTIR) representatives Steve Chaisson and Rod MacInnis, and post-expropriation with legal counsel for the Province. At an early stage in those discussions, with no accompanying declaration under Section 3 of the *Public Highways Act*, **Steve Chaisson** on behalf of the Province advised the Claimant's President Stephen Smith that the Claimant would not be permitted to further expand its business onto the lands which were being considered for expropriation.

[Emphasis added]

[324] As I will detail later, the bolded reference to Steve Chaisson is a typographical error—it should read Mr. Bushell.

[325] The Province consistently disputed that Central had actual plans to build a new store and distribution centre at the Lower South River property. There is no need to review the conflicting evidence on this point. The Board did so and found as a fact that Central did have such expansion plans. It concluded:

[722] The Board finds that Central's plans were not remote or speculative.

[723] Consequently, the Board is satisfied, on a balance of probabilities, that Central planned a new retail store to open at Lower South River in 2000, to be followed by a distribution centre, and would have proceeded with this expansion, but for the expropriation, or more precisely, the shadow of expropriation.

[326] It cannot be disputed that the Board found as a fact that Central planned to open a new store and then a distribution centre at Lower South River. There is an evidentiary foundation for that finding. It is therefore not a determination that amounts to legal error and is beyond our purview.

[327] The Board's reasoning on causation followed shortly thereafter:

[738] The Board has, in this Decision, found that Central did have such plans. The Board agrees that the plans could not be implemented as a result of the expropriation. Therefore, the requirement of causation has been met.

[328] To award compensation on this basis confuses cause and effect with legal causation. Furthermore, there is absolutely no evidence that whatever Central wanted to do with its lands, it could not have gone ahead. As noted by my colleague, a finding that is without evidence is legal error (see *International Association of Fire Fighters Local 268, supra*). It is arbitrary and perforce, an unreasonable error in law.

[329] In other words, Central may well have altered its plans because of the potential expropriation, which later materialized, but the Province is not legally responsible for Central's decision, nor for the claimed foregone profits it says it would have earned had it gone ahead with its expansion plans in 2001. This is what the Province argued before the Board, but it failed to understand this point. Some further details will assist to illustrate.

[330] As set out above, Central plead that Provincial employee, Steve Chaisson, told Central's President, Stephen Smith, that Central would not be permitted to further expand its business onto lands being considered for expropriation. The same claim was repeated in its Amended Claim.

[331] However, at the Board hearing, Mr. Smith advanced no evidence that he was told by Steve Chaisson, Rod MacInnes, Graydon Bushell, or by any Provincial employee that Central could not proceed with its business plans in the key period of 1998-2000. I will review the Provincial employees' evidence later. First, Mr. Smith's.

[332] Stephen Smith is a sophisticated landowner and businessman. His background and business success are detailed in the Board's decision. Mr. Smith described how he wanted to build a bigger store at Lower South River and a distribution centre. He needed to persuade the Municipality to extend water services to his land.

[333] It was around this time that he went to a widely-attended public meeting on May 30, 1998. At this meeting, the Provincial Department of Transportation and Infrastructure described the three possible routes to twin Highway 104. One of those options would have no impact on his lands located at Lower South River, the other two would cut his lands into two remnants, which could greatly impact Central's ability to expand and grow at that location.

[334] Mr. Smith described approaching Graydon Bushell, who he knew through family connections. He says he told Mr. Bushell of his concerns. Mr. Smith said Mr. Bushell was nice and said the route was not settled—the land is yours and you can do with it what you want, but if you improve it with buildings, you will not be compensated if it is expropriated:

MR. SMITH: Yes, I do. And he -- you know, he -- you know, he was being nice but he said this wasn't settled but he said that if -- you know, it could be changed and, you know, this is very preliminary.

But he also told me that now that you know about this and you see this corridor, that anything you do on your land in the corridor, where the corridor was, you can do it. I said -- well, I actually said to him, "What if I just go and build on there, you know?" And he said, you know, "We don't own the land you do, you can. We haven't expropriated it. But anything you do from now on you would not be compensated for it." So in other words he said, "If you go put a building on that land or expand your yard in that land, the cost to replace that you will not be compensated for because now you know about the path."

[335] Mr. Smith later repeated that the Province never told him what to do:

MR. MacINTOSH: When you were at that meeting in May 30th and they encouraged feedback like Kevin White's letter.

Did they ever say, "You must list each and every project you have in mind that will be impacted by this"?

MR. SMITH: No. No. They said that if they -- if something happens, you will be -- you know, we're going to compensate you fairly for, you know -- I said, "Well, we don't want this [to] happen." You know, this is -- but you know, they never told us what to do. They didn't, you know -- and believe me, I had no idea of the process. You know, I just had -- I just was going through the process of hoping that this wouldn't happen.

[336] On cross-examination, Mr. Smith confirmed that he only had contact with three provincial employees, Messrs. Bushell, MacInnes and Chaisson. Of these three, only Mr. Bushell discussed with him expropriation process, and only in the first meeting in 1998:

MR. SMITH: They didn't tell me anything about the expropriation, except Mr. Bushell. Mr. Bushell told me in that first meeting. I questioned him. I said, "Holy gosh, look, that's going -- that's going right behind us," because that doesn't even show the -- the swamp and the highway.

He explained that to me and I said -- and I said to him right there, "Okay what -- you know, I have plans. What if I -- what if I just go build over this?" He said, "Well, if you do" -- he told me that, I mean you're -- "you know about this now." And he didn't say shadow expropriation, he just said if you know -- "You know about this now and everybody knows about this, so if -- now if you do any developing on that land, then you won't be compensated for it." So I -- that was the end of my plans right there. And I clearly remember that.

Now, perfect wording to that? I can't tell you, but he certainly didn't say you're in the shadow of expropriation, because I would have probably kind of figured that out.

[337] There were no meetings with Provincial officials, no Departmental correspondence to Central or to any landowner that prohibited development on any of the corridors that might be expropriated.

[338] In May 2001, the Committee struck to study the options announced its selection of the Blue Route—one of two possible routes that would bisect Central's lands. Several assessments and studies confirmed that the Blue Route was the safest of the three. As one Department official put it, in light of the safety studies, an alignment other than the Blue Route would be very difficult to defend.

[339] But the Province could not proceed with expropriation until an Environmental Assessment was done. This was not complete until August 6, 2005. It passed.

[340] Mr. Smith said that he knew that the Blue Route was still not “solid” as it was subject to Environmental Assessment. Despite his claim that landowners on the proposed corridor could not develop, he noticed his neighbour putting in a huge trailer park in 2002 on the very Blue Route—and the Province then acted quickly to acquire his neighbour’s land because “they [the Province] would be on the hook”.

[341] This trailer park development was repeatedly referred to by Mr. Smith and by Central’s counsel throughout the hearing. The development was apparently owned by a Mr. Arsenault. Central’s counsel suggested that Mr. Arsenault received very favourable terms from the Province for the trailer park lands, whereas Central received no purchase offer and was forced into the expropriation process.

[342] When Mr. Smith saw the trailers being removed from his neighbour’s land in 2003, he decided that he had to act. Central bought a lot on Market Street in Antigonish and built a 52,000 sq. foot store which opened in May 2005. He closed the retail store in Lower South River and turned it into a Distribution Centre and truss mill.

[343] In September 2005, Central engaged legal counsel (not Mr. MacIntosh) about a potential expropriation claim. Mr. Smith sought the advice of the firm that had represented Mr. Arsenault—a firm acknowledged to be experienced in expropriation issues. Internal notes and counsel’s detailed opinions were in evidence before the Board. They make no mention of any impediment to Central’s expansion plans due to the comments made by Mr. Bushell on May 30, 1998.

[344] What did the Provincial witnesses say about the notion that Central was somehow precluded from pursuit of its plans? Mr. Bushell retired in 2005. He had been the Manager of Acquisitions and Disposals. He testified that there were 3-400 people at the May 30, 1998 meeting. He had no recollection of speaking with Mr. Smith at that meeting. Mr. Bushell was not cross-examined on the advice he supposedly gave to Mr. Smith.

[345] Michael Croft is a Professional Engineer. At the relevant times, he was responsible for the overall management of the new Highway 104 alignment. He

attended the May 30, 1998 public meeting. He had no contact with Mr. Smith whatsoever.

[346] Mr. Croft explained the four phases of route location, environmental assessment, detailed design and field survey and land purchase. They do not usually purchase properties prior to environmental assessment unless absolutely necessary because they may have to move the route.

[347] The Department wanted to know of any development plans so they can keep costs down. For that reason, they had written to the municipality to request notification of development plans. They received no response that Central had development plans. Mr. Croft ended his involvement in the project in 2001. With respect to telling landowners what they could or could not do with their properties, Mr. Croft was emphatic: no such advice came from him:

MR. CROFT: All I can advise as the -- in my position as the engineer in charge of planning for the project, I wouldn't have advised any landowner as far as what they should or shouldn't do with regards to filing plans for development.

...

MR. CROFT: I wouldn't have told them that they should put development plans in. I wouldn't have told them that they shouldn't put development plans in. My job was basically to provide information to the landowners on the alignment options and how they may or may not impact somebody's property. But as far as what they did with their properties regarding development, I didn't provide any advice.

[348] Steven Chaisson was a right of way officer (acquisition and disposal) with the Department from 1993 to 2010. He first became involved in the 104 project in 2007. He met with Mr. Smith about the pending expropriation of other lands (Trunk 7) on which Mr. Smith wanted to build condominiums, and in relation to the expropriation of the lands at Lower South River.

[349] Mr. Chaisson acknowledged that Mr. Smith brought up Central's current desire to expand its business on the Lower South River lands. That is why discussions ensued about the Province perhaps building a tunnel under the 104 so Central could access the severed lands. He had no discussion with Mr. Smith about any aborted plans dating from 1999 or 2000.

[350] Mr. Chaisson denied any knowledge that the owners on the corridor had been told in 1998 that their properties were under the "shadow of expropriation".

[351] At some point in 2008, or later, he may have said to Mr. Smith as they were looking out his office window that it would be hard for him to expand his business to the south, as that is where the alignment was going through:

MR. MacINTOSH: So you're trying to tell us there, what, that you never told Mr. Smith he couldn't expand or he could expand? What did you tell -- Let's start again; what did you try to explain to Mr. Smith about what he could do with his lands?

MR. CHAISSON: What I recall is I possibly could have said, "You can't expand on the -- you can't expand your business there because the alignment's going through there."

[352] What was said to Mr. Smith in 2008 was irrelevant to the claim for disturbance damages said to have been caused by Central's delay in building a new store and distribution centre in 2001. Furthermore, during the hearing of this appeal, counsel for Central acknowledged that the reference in its pleadings to Mr. Chaisson was a typographical error—it should read Mr. Bushell (see para. [324] above).

[353] The Board accepted Mr. Smith's evidence that Mr. Bushell had told him in 1998 that, although he could not tell him what to do with his lands, he would not be compensated on any subsequent capital improvements to the corridor lands. Such advice was wrong. That is not the law.

[354] There is no doubt that capital improvements made to lands after expropriation attract no additional compensation. It is indisputable—the value as of the date of expropriation governs (*R. v. Thompson* (1916), 18 Ex. C.R. 23; *R. v. Lynch's Ltd.* (1920), 20 Ex. C.R. 158). This rule can sometimes work to the advantage of a landowner as in *R. v. Clarke* (1896), 5 Ex. C.R. 64, where the authority expropriated in 1885, but the owner remained in possession. In 1889, a fire destroyed many of the buildings on the land, but the authority had to compensate the owner the value as of 1885. Or as in *Drache v. Winnipeg (City)* (1970), 13 D.L.R. (3d) 368 (Man. C.A.) where the authority was required to pay the owner the value as of the date of expropriation unabated by fire insurance proceeds paid to the owner (see also: *Manitoba v. Paletta*, [1985] M.J. No. 115 (C.A.), (1985), 19 D.L.R. (4th) 143).

[355] The Nova Scotia *Expropriation Act* specifically directs that the value of the land expropriated shall be the value at the time the expropriation documents are deposited at the Registry of Deeds office:

25 (1) The rules set forth in this Part shall be applied in determining the value of land expropriated.

(2) The value of land expropriated shall be the value of that land at the time the expropriation documents are deposited at the office of the registrar of deeds.

[356] Recall that the deposit date was May 1, 2012. There can be no other date of valuation. Whatever capital improvements Central did to its land would be compensated for as of the deposit date.

[357] Compensation for a compulsory taking by an expropriation is entirely determined by statute. Sections 24-33 of the *Act* constitute a code to determine the amount of compensation (see: *Bank of Nova Scotia v. Nova Scotia* (1977), 22 N.S.R. (2d) 568 (C.A.) at para. 68). Compensation is the aggregate of the market value of the land, the disturbance damages caused by the expropriation, damages for injurious affection caused by the expropriation, and the value of any special economic advantage (s. 26).

[358] Sections 27 to 32 contain specific provisions that detail how these are to be calculated. Section 33 lists four factors that cannot affect the calculation of the value of the land at the time the documents are deposited. None of them are applicable, but for completeness I will quote the provision:

33 In determining the value of land expropriated, no account shall be taken of

- (a) any anticipated or actual use by the expropriating authority of the land at any time after the depositing of the expropriation document in the registry of deeds;
- (b) any value established or claimed to be established by or by reference to any transaction or agreement involving the sale, lease or other disposition of the interest or any part thereof, where such transaction or agreement was entered into after the deposit of the expropriation document in the registry of deeds;
- (c) any increase or decrease in the value of the land resulting from the anticipation of expropriation by the expropriating authority or from any knowledge or expectation, prior to the expropriation, of the purpose for which the land was expropriated; or
- (d) any increase in the value of the land resulting from its having been put to a use that was contrary to law.

[359] The reality of the statutory imperative to claim compensation as of the date of expropriation explains entirely the consistent evidence from the Provincial employees: that they wanted to know about any developments so they could act

and thereby keep costs to the taxpayer down; and, their quick action to acquire Mr. Smith's neighbour's property (the trailer park development by Mr. Arsenault) when the development started to go ahead.

[360] Indeed, Mr. Smith acknowledged that he "theoretically" could have gone ahead and been fully compensated. This exchange illustrates:

MR. MacINTOSH: And with the mobile park one that was done somewhere around 2002, was there a significant business loss payment compensation paid as part of that?

MR. SMITH: There was. And I did also address that with Mr. Chaisson, you know, because I didn't know the figures, but there was always, you know, the word in -- on the street; and I knew George, but George never gave me the figures of what the deal was.

MR. MacINTOSH: M'hm.

MR. SMITH: Not to this day, even though at one time -- I wasn't as close to him today. He is a car salesman who I know fairly well and he has never told me his figures. And -- but in learning, I was quite surprised that the Province paid him even though he was fully in the shadow -- my understanding of the shadow expropriation, from what I'd been told by Mr. Graydon Bushell. Mr. Bushell said if you do anything on that land you're not going to get compensated for your infrastructure that you build there, as of this meeting.

MR. MacINTOSH: That's the May 30th, '98 meeting?

MR. SMITH: Yes. Now, Mr. Arsenault, well after that meeting, as can be witnessed, the land wasn't even re-zoned until 1998. We have letters to that or -- 1998 or 1999 he built a great big park up there and in his deal he was fully compensated for all his costs. **I -- and, you know, theoretically if I had just gone ahead I would have been compensated for everything.**

[Emphasis added]

[361] How is it then that an offhand comment at a public meeting three years before the Blue route was even selected can amount to a legal cause of business losses for 12 years within s. 27(3)(b)(ii) when Mr. Smith himself acknowledged that he could have gone ahead?

[362] Counsel for Central repeatedly told the Board that Mr. Bushell's view, as described by Mr. Smith, was wrong—Central was misled. These rebuttal submissions demonstrate:

[116] The Claimant does not intend to provide the lengthy list of culpable conduct by the Respondent that resulted in a delay in determining compensation.

Such conduct commenced initially with Graydon Bushell when he wrongfully misled Steve Smith by convincing him that he could not proceed with business expansion because of the imminent highway expansion.

(p. 7925)

...

The Respondent inquires why nothing was done in 1999 regarding expansion. That same question has been asked and answered innumerable times through the hearing: by May 30, 1998, the Province had directed Central not to expand further. Rather than ignoring the Province like Arsenault [the trailer park development] or running to legal advice like others might do, Steve Smith adopted a responsible corporate attitude and complied with the directive. Nothing was done in 1999 because the Province had directed Central to do nothing.” (A.B. p. 8051)

[Emphasis added]

[363] Of course, there was no “directive” by the Province. The Board did not, nor could it, make any such finding. It merely referenced a cause and effect. There was a possibility in 1998 of expropriation. Mr. Smith sought no legal advice. He decided not to proceed with his business expansion plans.

[364] At the hearing of this appeal, the flawed Bushell advice was explored with counsel for Central. Initially, Mr. MacIntosh agreed that he had submitted to the Board that the Bushell advice was wrong in law, and perhaps even amounted to negligent misrepresentation. Later in the hearing, Mr. MacIntosh returned to his “too easy agreement” and offered that it was an interesting question, and he could add nothing further.

[365] To me, it is more than an interesting question. The off-hand patently incorrect comment cannot translate into a legal cause of 12 years of forgone profit as disturbance damages under s. 27(3)(b)(ii) of the *Act*.

[366] To qualify as disturbance damages under s. 27(3)(b)(ii), the owner must have incurred “costs, expenses and losses arising out of or incidental to the owner's disturbance”. None of the Board’s award for disturbance damages is based on any outlay of money by Central for “costs, expenses and losses arising out of or incidental to the owner’s disturbance...”, but rather on more money it says it would have made had it gone ahead with its expansion plans in 2001. Nowhere in the Board’s lengthy and detailed reasons does it even address how Central’s claim for the additional money it says it would have earned comes within s. 27(3)(b)(ii).

[367] The Board’s award of \$6.7 million in disturbance damages is based entirely on the concept that a landowner can suffer compensable harm from being in the “shadow of expropriation”. *Dell Holdings, supra*, established this principle in Canada.

[368] The appellant argues that there are important differences in wording between the Ontario and Nova Scotia *Expropriation Acts* that preclude an award for costs, expenses or losses prior to the date of expropriation. The difference in language does not justify a discordant approach. The award in *Dell* for disturbance damage caused prior to expropriation was by no means unique. The possibility of an award for pre-expropriation disturbance damage has long been recognized under comparable legislation in Scotland, England and Hong Kong on the basis that compensation for disturbance depends on a causal, not a strictly temporal connection (see: *Venables v. Dept. of Agriculture for Scotland*, [1932] S.C. 573; *Aberdeen City District Council v. Sim*, [1982] 2 E.G.L.R. 22; *Prasad and another v. Wolverhampton Borough Council*, [1983] 2 All E.R. 140 (C.A.); *Director of Buildings and Lands v. Shun Fung Ironworks Ltd., supra*).

[369] In my respectful view, disturbance damages can be awarded in Nova Scotia pursuant to s. 27(3) of the *Act* for losses that were incurred prior to the date of expropriation. However, the principle in *Dell Holdings* had no application to this case. The Board incorrectly and unreasonably thought otherwise. I will explain by a return to *Dell*.

[370] In *Dell*, the landowner was a developer. It was in the business of buying and developing lands. It was precluded from doing business. Its inventory was frozen. The expropriation process caused them an agreed loss of \$.5 million. The Supreme Court found that such a loss was a “natural and probable consequence” of the expropriation and hence recoverable as disturbance damage.

[371] Central was not in the business of land development. It operated building supply stores at various locations, one of them on lands that they owned at Lower South River. The announced possible expropriation of corridor lands in May 1998 did not freeze their land or their business. They could still do whatever they wanted with either.

[372] At the highest, Mr. Smith says he was told by Mr. Bushell that if they did proceed with capital improvements, there would be no compensation for them. Based on that plainly erroneous advice, Mr. Smith says he delayed his expansion plans. If Central was wronged by reliance on that comment, as they say they were,

they can or could have pursued whatever common law recourse may be available to them, but any such putative loss cannot come within a compensable award for business disturbance under s. 27(3) the *Expropriation Act*.

[373] It is insufficient for the Board to merely find that but for the erroneous Bushell advice, Central would have built its flagship store and Distribution Centre at Lower South River in 2001, and therefore its claimed reduction of profits it might have earned are disturbance damages caused by the shadow of expropriation. This equates to a damage award for a wrong caused by a breach of contract or a tort.

[374] Central was not “wronged” by the expropriation authority. It acted lawfully within the parameters of the *Expropriation Act*. Different considerations may apply if a taking is done otherwise than by statute, but here it was. Hence, Central is entitled to compensation under the *Act*, not for an award that puts it back in the same position it would have been but for the fact of the expropriation.

[375] Professor Eric Todd, in his seminal work, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough, ON: Butterworths, 1992), refers to the important principle that disturbance damages must be caused directly by the expropriation:

The Canada, Manitoba and Nova Scotia Acts refer to “the costs, expenses and losses arising out of or incidental to the owner’s disturbance.” The Ontario, New Brunswick and Alberta Acts provide for “such reasonable costs as are the natural and reasonable consequences of the expropriation.” The British Columbia Act refers to “reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused ... by the expropriation.”

These are merely statutory affirmations of the general “common law” principle that disturbance damage is only recoverable if it is “direct and consequential upon the dispossession.”

(p. 303, footnotes omitted)

[376] And that disturbance damages are not analogous to the law of contract (that seeks to put the wronged party in the same position). He explains:

Disturbance damages are not analogous to the law of damages in contract. The claimant and the expropriating authority do not have a relationship in law such as exists between parties to a contract. Consequently, a land developer who is compensated for the market value of the expropriated land is not entitled to additional compensation for the loss of profit that might have been realized from a

development which, but the for expropriation, might have taken place. In such a case the claim for loss of profits which “might have been” is too remote.

(pp. 305-306, footnote omitted)

[377] The authorities amply demonstrate that to attract compensation, the business losses must have been legally caused by the expropriation and not be too remote (see for example: *Associated Building Credits Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2007 BCCA 546; *Gadzala v. Toronto (City)* (2006), 211 O.A.C. 29 (Div. Ct.) at paras. 114-116; *747926 Ontario Ltd. v. Upper Grand District School Board* (2001), 150 O.A.C. 297 (C.A.); *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, *supra*; and, of course, *Dell Holdings*, *supra*).

[378] Central’s decisions to delay construction of its store and distribution centre and subsequent development of the Market Street store and distribution centre at Lower South River may well have been reasonable business decisions made by a responsible corporate citizen. But the expropriating authority is not responsible for Central’s theoretical profits it may have made had it gone ahead with its business plans in 1998.

[379] My colleague suggests at para. [155] a line of reasoning for Central’s decision not to proceed with its claimed plans for a new retail store and distribution centre. The problem is this: Central did not plead that rationale; Central led no evidence to that effect; Central did not argue that position to the Board; and, the Board made no such findings. Instead, Mr. Smith’s sole rationale was his purported reliance on Mr. Bushell’s comment that if it proceeded with any capital improvements, it would not be compensated.

[380] Further, at para. [157] my colleague writes that I propose Central could recover the market value of improvements at the date of expropriation but its only recourse to recover consequential disturbance-type damages would be to sue in tort for negligent misrepresentation. With respect, I say no such thing. I also certainly do not suggest that Mr. Bushell’s comment amounted to an actionable negligent misrepresentation.

[381] Central was fully entitled to claim market value as of the date of expropriation and for costs, expenses and losses arising out of or incidental to the owner’s disturbance. As I have explained elsewhere, Central’s claim was not for any costs, expenses or losses arising out of or incidental to its disturbance but was

for more money it says it would have earned had they gone ahead with their planned expansion and there had been no expropriation.

[382] The fundamental problem is that the Board appeared to find: Mr. Bushell's comment was wrong; Mr. Smith was reasonable to rely on it; the Province was somehow liable; and, then award damages to Central to put it back in the same position it would have been in had there been no subsequent expropriation. The Board has no jurisdiction to award damages on that basis, and as I have endeavoured to explain, that is just what it did under the guise of disturbance damages.

[383] Central deliberately made no claim for development or moving costs to its new store on Market Street and abandoned any claim of special economic advantage under s. 27(3) of the *Act*.

[384] I would therefore allow the appeal from the order of the Board that the Attorney General pay disturbance damages for "business losses" by way of lost profit of \$6,739,281.00.

[385] I agree with my colleague that the Board did not commit any reversible error with respect to the award of: \$615,375 as the fair market value of the land expropriated; \$788,841 for the injurious affection award to the southern remnant; and, \$37,000 for fencing.

INTEREST

[386] With respect, I am unable to agree with my colleague's proposed disposition of this ground of appeal. There is no legal justification to award 10% interest on the compensation awards of fair market value and injurious affection to the southern remnant from 2001. It smacks of double compensation and is unsupported by the *Act*.

[387] The evidence about delay post expropriation was murky at best. The parties agreed to waive the statutory timelines and obligations. Correspondence from counsel before the Board acknowledged Central's delay in completing their valuations and appraisals.

[388] In any event, assessment of that evidence was for the Board, and it found delay attributable to the appellant. That finding empowered the Board with a

discretion under s. 53(4) to increase a landowner's interest award from 6% up to 12%.

[389] I also see no basis that would permit interference with the Board's selection of 10% as the appropriate interest rate.

[390] However, I respectfully disagree that the Board was correct or reasonable to order interest on the compensation award for market value and injurious affection prior to the date of expropriation. I say this for two reasons: first, the Board erred in its interpretation of the *Act*; secondly, even if it had the power to award interest prior to the date of expropriation, it was legally wrong and unreasonable to fix the start date as of May 1, 2001. I will address each of these points in turn.

Interpretation of the Act

[391] With respect, the interpretation of the *Act* adopted by the Board was not only incorrect, it was unreasonable. My colleague has appropriately referred to the guidance set out by the Supreme Court in *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, where Moldaver J., for the majority wrote:

[38] It will not always be the case that a particular provision permits multiple reasonable interpretations. **Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable - no degree of deference can justify its acceptance;** see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation - and the administrative decision maker must adopt it.

[Emphasis added]

[392] I will now turn to the ordinary tools of statutory interpretation.

[393] As described earlier, the modern rule of statutory interpretation requires that the words of an *Act* are to be read 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 Shoes*, *supra* and its progeny). There are many complementary rules: each word in an enactment, if possible, is to be given meaning, and an interpretation must be one that respects the overall scheme of the enactment, including how the provisions of the *Act* work together.

[394] *Driedger On the Construction of Statutes*, *supra*, introduced the topic “The Act as a Whole” with the following fundamental principles:

The governing principle. In *A.G. v. Prince Ernest Augustus of Hanover*, Viscount Simonds wrote:

... the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.

The importance of looking to the Act as a whole was also emphasized by Lord Herschell in *Colquhoun v. Brooks*:

It is beyond dispute ... that we are entitled and indeed bound when constructing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and part from the rest of the Act.

In *Greenshields v. The Queen* Locke J. wrote:

The broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.

Each provision or part of a provision must be read both in its immediate context and in the context of the Act as a whole. When words are read in their immediate context, the reader forms an impression of their meaning. This meaning may be vague or precise, clear or ambiguous. Any impressions based on immediate context must be supplemented by considering the rest of the Act, including both other provisions of the Act and its various structural components.

(pp. 245-246, footnotes omitted)

[395] In the latest edition of this seminal work, *Sullivan on the Construction of Statutes*, 6th ed (Markham: Butterworths, 2014), Ms. Sullivan refers to the presumption of coherence to be virtually irrebuttable (p. 338). She describes it as follows:

§11.2 ***Governing principle.*** It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

§11.3 The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. [...]

(p. 337)

[396] With these principles in mind, what does s. 53 of the *Act* provide? It directs that the power to award interest on an award for market value and injurious affection is *subject to* the provisions of sections 13 and 15 of the *Act*. For convenience, I will reproduce the section as it appears in the legislation:

Interest on outstanding compensation

53 (1) **Subject to Sections 13 and 15**, the owner of lands expropriated is entitled to be paid interest on the portion of the market value of his interest in the land and on the portion of any allowance for injurious affection to which he is entitled, **outstanding from time to time**, at the rate of six per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands.

[Emphasis added]

[397] No compensation is ever payable to an owner for lands taken under the *Act* unless expropriation occurs (s. 24). Furthermore, the value of the land expropriated is as of the date the expropriation documents are deposited (s. 25). This reality has long been recognized, even in cases where the owner may be subject to a loss by pre-expropriation events (*Dell Holdings, supra* at para. 36).

[398] The heading for s. 53 clearly suggests that the entitlement of an interest award is for compensation that is “outstanding”. Furthermore, the actual words in s. 53 direct that an award of interest is only in relation to any portion of the market value or allowance for injurious affection that is “outstanding from time to time”. There can be no compensation award outstanding until the fact of expropriation occurs, which in this case was May 1, 2012. That is the earliest date any compensation can be said to be outstanding.

[399] The power to award interest on outstanding amounts is made subject to sections 13 and 15. Those sections impose on the expropriating authority a duty to make offers of compensation within so many days after deposit of the expropriation document. Failure to do so does not invalidate the expropriation, but interest on any unpaid portion of the compensation payable to the owner shall be calculated from the date of the deposit of the expropriation document in the registry of deeds.

[400] Section 13 is as follows, with the relevant portion emphasized:

Offer to registered owner if no agreement

13 (1) In this Section, “registered owner” means a known registered owner.

(2) Where no agreement as to compensation has been made with the owner, the expropriating authority shall, within ninety days after the deposit of the expropriation document under Section 11 and before taking possession of the land, serve upon the registered owner

- (a) a true copy of the expropriation documents;
- (b) an offer of an amount in full compensation for his interest; and
- (c) where the registered owner is not a tenant, a statement of the total compensation being offered for all interests in the land, excepting compensation for business loss for which the determination is postponed under subsection (1) of Section 29.

(3) The expropriating authority shall base its offer of compensation made under subsection (2) upon a report appraising the market value of the lands being taken and damages for injurious affection, and shall serve a copy of the appraisal report upon the owner at the time the offer is made.

(4) The expropriating authority may, within the period mentioned in subsection (2) and before taking possession of the land, upon giving at least two days notice to the registered owner, apply to a judge for an order extending any time referred to in subsection (2), and a judge may in his order authorize the statutory authority to take possession of the land before the expiration of the extended time for serving the offer or statement under clause (a) of subsection (2) upon such conditions as may be specified in the order.

(5) If any registered owner is not served with the offer required to be served on him under subsection (2) within the time limited by subsection (2) or by an order of a judge under subsection (4) or by agreement, the failure does not invalidate the expropriation **but interest upon the unpaid portion of any compensation payable to such registered owner shall be calculated from the date of the deposit in the registry of deeds of the expropriation document.**

[Emphasis added]

[401] Section 15 contains a similar provision with respect to making an offer of compensation after deposit of the expropriating document to persons who are not registered owners:

Offer to other owners

15 (1) Where the owner is a person other than those described in Sections 13 and 14 and no agreement as to compensation has been made, the expropriating authority shall, within one hundred and eighty days after the deposit of the

expropriation document under Section 11, make, to each person who is entitled to compensation under this Act in respect of land expropriated to which the expropriation document relates, an offer in writing of compensation in an amount estimated by the expropriating authority to be equal to the compensation to which that person is then entitled in respect of his interest therein.

(2) An offer of compensation made to a person under this Section in respect of land expropriated shall be based on a written appraisal of the value of such interest, and a copy of the appraisal shall be sent to such person at the time of the making of the offer.

(3) Failure to comply with subsection (1) does not invalidate the expropriation **but interest upon the unpaid portion of any compensation payable to the owner shall be calculated from the date of the deposit in the registry of deeds of the expropriation document.**

[Emphasis added]

[402] So, failure to comply with a statutory offer triggers a mandatory interest order back to the date of deposit. But s. 53(1) refers to interest on any “outstanding amount” for market value and injurious affection at the rate of 6% from “the date the owner ceases to reside on or make productive use of the lands”. How can these words be read harmoniously with the scheme of the *Act*?

[403] The answer is straightforward. Interest is meant to compensate an owner for the loss of the use of his capital asset. The value of that loss is calculated, at the earliest, as of the date of deposit of the expropriation document. That is because deposit vests title in the expropriating authority (s. 11), but it does not deprive the owner of the use of his land. He may or may not continue to reside on or use it.

[404] This reality is reflected in numerous provisions of the *Act* that physical possession or use of the land remains for some time with the owner, although the land or its use can be required by the Attorney General (s. 11(7)) or by court order (s. 13(4)).

[405] Subject to those provisions, it appears that the earliest the authority can gain possession is between three and six months after deposit:

Possession of land after offer served

18 (1) Where land that has been expropriated is vested in an expropriating authority and the expropriating authority has served the registered owner with an offer in accordance with Section 13, the expropriating authority, subject to any agreement to the contrary and if no application is made under subsection (4) of Section 13, shall take possession of the land on the date specified in the notice.

(2) Subject to subsection (4) of Section 13, the date for possession shall be at least three months after the date of the serving of the offer required by Section 13

[406] The interplay between these provisions is explained by the Supreme Court of Canada in *Judson v. Governors of University of Toronto*, [1972] S.C.R. 553.

[407] The only reasonable interpretation of s. 53(1) is that the earliest date interest can be awarded is from the date of deposit of the expropriation document. If the authority fails in its statutory duty to appraise and make a timely compensation offer, then interest is mandatory from that date. If the authority is responsible for any delay in *determining* compensation, the rate can be increased pursuant to s. 53(4), but only from the date the owner ceased to reside on or make productive use of the lands.

[408] In this case, the Board attempted no statutory interpretation of s. 53. It went no further in its analysis than reliance on a decision from the Ontario Municipal Board in *Boyd v. Ontario (Ministry of Transportation)*, [1995] O.M.B.D. No. 783, which in turn relied on the decision of the Ontario Court of Appeal in *Partition Holdings Ltd. v. Ontario (Minister of Transportation and Communications)*, *supra*, discussed earlier by my colleague.

[409] To state the obvious: we are not bound by the majority decision of the Ontario Court of Appeal in *Partition Holdings*, but I do not brush it aside on that account. While there are obvious similarities between the Ontario and Nova Scotia interest provisions, there are clear differences in the legislative schemes which make the reasoning of the majority easily distinguishable.

[410] In Ontario, notice must be given to an owner of an intent to expropriate. No such provision exists in Nova Scotia. Neither is there any opportunity in Nova Scotia for an owner to choose a date prior to expropriation to fix compensation. However, s. 10 of the Ontario *Act* gave to the owner the option to choose the date of the notice of hearing to object to the expropriation, the date of plan registration or the date of service of the notice of expropriation. Cory J.A. referred to these provisions and reasoned:

22 It can be seen that the owner has three choices as to the date upon which the compensation is to be fixed and assessed. The date upon which an owner receives the notice of hearing before the inquiry officer would, of necessity, precede the date of expropriation. In fact, there are instances where the notice of hearing long preceded the date of expropriation: see, for example, *St. Catharines Crushed Stone Ltd. v. City of St. Catharines* (1975), 15 L.C.R. 363. In that case, the notice of hearing and the termination of the productive use of the

land preceded the date of expropriation by a little over a year. **In such a situation, if the appellant's interpretation of the Act were correct and interest were only payable from the date of expropriation, it would deprive a landowner choosing the earlier date for fixing compensation from receiving interest on that compensation for over a year. This would make the choice of dates for fixing compensation a trap and a delusion for the landowner and make a mockery of the clear intent of the Act.**

[1986] O.J. No. 1032

[Emphasis added]

[411] As already mentioned, there is no such option in the Nova Scotia *Act*. There is but one date available to fix compensation in Nova Scotia, the date of deposit. That is the earliest date to require interest to be paid, since that is the earliest date that compensation is fixed as owing.

[412] Furthermore, the interpretation favoured by Cory J.A. makes no reference to the actual words of the provision that speak of an award of interest on the amount "outstanding from time to time". These words must mean something. According to the interpretation adopted by the Board, they do not. With respect, I agree with the reasons of Thorson J.A., in particular as they apply to our legislative scheme.

Unreasonable to fix May 1, 2001 as the commencement date

[413] Although I need not address this in light of the above, even if the Board had the jurisdiction to fix a date earlier than the date of expropriation it erred in law by unreasonably back-dating the commencement date to May 1, 2001.

[414] I say this for two reasons. The Board accepted that Central used the land taken and the southern remnant as of May 2012. Central erected a greenhouse on a corner of the taking, and the Board found that the entire area of the taking was occupied (paras. 655, 669). It is illogical and arbitrary to accept that Central continued to use and occupy the land for 11 more years but require the expropriating authority to pay interest on \$1,404,216.00 at the rate of 10% per year from May 1, 2001.

[415] The Board seemed well aware that interest is to be awarded from the date that the owner ceased to reside on or make productive use of the lands. Obviously Central did not cease to reside on the lands. The Board actually made no finding that Central ceased to make "productive use" of the lands taken. The complete reasons of the Board are as follows:

[860] The submissions on behalf of Central are that the shadow of expropriation fell in May 1998. The Board has, earlier in this Decision, accepted that the loss period began on January 31, 2001. The environmental approval was not granted until August 29, 2005.

[861] The Province made no submissions on when interest should begin to run.

[862] **The Board concludes that when Central decided to accelerate the plans for the Sydney store it had determined it would not be prudent to develop the Lower South River property any further. According to the evidence of the Claimant, that occurred in May, 2001. Therefore, the Board finds that interest should accrue from May 1, 2001.**

[Emphasis added]

[416] As described earlier, Central was in no way prevented or precluded from proceeding with its business plans. Had it done so, the Province would have been spurred into action to purchase or expropriate. Central's decision to proceed with the expansion of the Sydney store does not equate to the cessation, by reason of expropriation, of the productive use of the lands that were eventually taken at Lower South River.

[417] Secondly, the commencement date is flawed as it clearly amounts to overcompensation. The fair market value and injurious affection were valued as of 2012. It cannot get that valuation and interest on it for 11 years.

[418] I would vary the interest award by ordering interest at 10% on the award of market value and the allowance for injurious affection from the date of expropriation of May 1, 2012.

CROSS-APPEAL

[419] In light of my conclusion that no award of business loss as disturbance damages is appropriate, perforce, I would dismiss Central's cross-appeal that the award should extend beyond January 31, 2013.

COSTS

[420] Central has lost its cross-appeal in which it sought to increase the compensation award by \$3.35 million, while the appellant has been largely successful by elimination of a compensation award for disturbance damages of \$6.7 million and removal of the requirement to pay 10% interest on a roughly \$1.4 million award for over ten years.

[421] Ordinarily costs follow success. I see no reason to depart from that principle in these circumstances. I would therefore award costs, on a party and party basis, to the Attorney General on its appeal but would not order costs against the respondent on the cross-appeal.

Beveridge J.A.

Tab 6

Interpretation Act

CHAPTER 235 OF THE REVISED STATUTES, 1989

as amended by

1990, c. 31; 1995-96, c. 21; 1995-96, c. 13, s. 81;
2002, c. 10, s. 4; 2003, c.7, s. 2; 2005, c. 34; 2013, c. 35, s. 3



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CHAPTER 235 OF THE REVISED STATUTES, 1989
amended 1990, c. 31; 1995-96, c. 21; 1995-96, c. 13, s. 81;
2002, c. 10, s. 4; 2003, c.7, s. 2; 2005, c. 34; 2013, c. 35, s. 3

**An Act Respecting the Form
and Interpretation of Statutes**

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(The table of contents is not part of the statute)

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Short title

- 1** This Act may be cited as the *Interpretation Act*. R.S., c. 235, s. 1.

FORM OF ENACTING STATUTES

Form and place of enacting clause

2 (1) The following style of words may be used to indicate the authority by virtue of which statutes of Nova Scotia are passed: “Be it enacted by the Governor and Assembly as follows”.

(2) After the insertion of those words, which shall follow the preamble, if any, of the statute, the various provisions of the statute shall follow in concise and enunciative form. R.S., c. 235, s. 2.

PROMULGATION

Indorsement on and effective date of Act

3 (1) The Clerk of the House of Assembly shall indorse on every Act of the Legislature, immediately after the title of the Act, the day, month and year when the Act was, by the Lieutenant Governor, assented to or reserved, and in the latter case the Clerk shall also indorse thereon the day, month and year when the Lieutenant Governor has signified, either by speech or message to the Legislature or by proclamation, that the Act was laid before the Governor General in Council and that the Governor General in Council was pleased to assent thereto.

(2) The indorsement shall be taken to be a part of the Act, and the day of the assent or signification, as the case may be, is the date of the commencement of the Act, if no later commencement is therein provided.

(3) Where an enactment is expressed to come into force on a particular day or on a day fixed by proclamation or otherwise, it comes into force immediately on the expiration of the previous day and, where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it ceases to have effect immediately on the commencement of the following day.

(4) Where an Act contains a provision that the Act or any portion thereof is to come into force on a day later than the date of assent, that provision shall be deemed to have come into force on the date of assent to the Act.

(5) Where an Act provides that certain provisions thereof are to come or shall be deemed to have come into force on a day other than the date of

assent, the remaining provisions of the Act shall be deemed to have come into force on the date of assent to the Act.

(6) Where an Act or a part of an Act is expressed to come into force on a day to be fixed by proclamation, judicial notice shall be taken of the issue of the proclamation and the day fixed thereby without being specially pleaded.

(7) Where an Act heretofore or hereafter enacted is expressed to come into force on a day to be fixed by proclamation, a proclamation may extend to the whole or any part or portion of the Act. R.S., c. 235, s. 3.

Evidence of Act

4 Printed copies of Acts published in the Royal Gazette, or purporting to be published by the Queen's Printer, are evidence of those Acts. R.S., c. 235, s. 4.

Judicial notice

5 Every Act shall be judicially noticed by all judges, justices of the peace and others without being specially pleaded. R.S., c. 235, s. 5.

RULES OF CONSTRUCTION

Application of this Act and judicial rule of construction

6 (1) Except where a contrary intention appears, every provision of this Act applies to this Act and to every enactment made at the time, before or after this Act comes into force.

(2) Nothing in this Act excludes a judicial rule of construction that is applicable to an enactment and not inconsistent with this Act. R.S., c. 235, s. 6.

Interpretation of words and names

7 (1) In this Act and in any other enactment,

(a) "Assembly" means the Legislative Assembly of the Province;

(b) "bank" or "chartered bank" means a bank to which the *Bank Act* (Canada) applies, a credit union incorporated pursuant to the *Credit Union Act* or a trust or loan company that is authorized to carry on business by or pursuant to the *Trust and Loan Companies Act* and receive or accept deposits within the meaning of that Act, and includes a branch, agency or office of a bank, credit union or trust or loan company;

(c) "declaration", "statutory declaration" or "solemn declaration" means a solemn declaration in the form and manner from time to time provided by the *Evidence Act* or by the *Canada Evidence Act*;

(d) “duly qualified medical practitioner”, “legally qualified medical practitioner” or any other words or expressions importing legal recognition of a person as a medical practitioner or member of the medical profession means a person registered under the *Medical Act*;

(e) “enactment” means an Act or a regulation or any portion of an Act or regulation and, as applied to a territory of Canada, includes an ordinance of the territory;

(f) “folio” means ninety words;

(g) “Governor of Canada” or “Governor General” means the Governor General of Canada, or other chief executive officer or administrator carrying on the Government of Canada on behalf and in the name of the Sovereign, by whatever title he is designated;

(h) “Governor General in Council” means the Governor General acting by and with the advice of, by and with the advice and consent of or in conjunction with the Queen’s Privy Council for Canada;

(i) “Her Majesty”, “His Majesty”, “the Queen”, “the King” or “the Crown” means the Sovereign of the United Kingdom, Canada and Her other realms and territories and Head of the Commonwealth;

(j) “holiday” includes Sunday, New Year’s Day, Good Friday, Canada Day, Christmas Day, the birthday or the day appointed for the celebration of the birth of the reigning Sovereign, Victoria Day, Labour Day, Remembrance Day, the third Monday in February and any day appointed by any statute in force in the Province or by proclamation of the Governor General or of the Lieutenant Governor as a general holiday or for general fast or thanksgiving, and whenever a holiday other than Remembrance Day falls on a Sunday the expression holiday includes the following day;

(k) “issue”, as applied to the descent of an estate, includes all lawful lineal descendants of the ancestor;

(l) “jail” means the common jail for a county, city, town or municipality;

(m) “justice” means a justice of the peace and includes a judge of the provincial court;

(n) “land”, “lands”, “real estate” and “real property” include, respectively, lands, tenements, hereditaments and all rights thereto and interests therein;

(o) “Legislature” means the Lieutenant Governor and the Assembly;

(p) “Lieutenant Governor” or “Governor” means the Lieutenant Governor of the Province or the chief executive officer or

administrator carrying on the Government of the Province on behalf and in the name of the Sovereign by whatever title he is designated;

(q) “Lieutenant Governor in Council”, “Governor in Council” or “Government” means the Lieutenant Governor acting by and with the advice of the Executive Council of the Province;

(r) “oath” or “affidavit”, in the case of persons for the time being allowed or required by law to affirm or declare instead of swearing, includes affirmation and declaration and the word “swear” in the like case includes “affirm” and “declare”;

(s) “person” includes a corporation and the heirs, executors, administrators or other legal representatives of a person;

(sa) “Personal Property Registry” means the Personal Property Registry established by the *Personal Property Security Act*;

(t) “proclamation” means a proclamation under the Great Seal of Nova Scotia;

(u) “Province” means the Province of Nova Scotia;

(v) “province”, when used in reference to a part of Canada other than Nova Scotia, includes a territory of Canada;

(w) “public officer” includes a person in the public service of the Province;

(x) “registered mail” includes certified mail, signature mail and a service provided by private couriers commonly known as signature service;

(y) “repealed” includes revoked or cancelled, expired, lapsed or otherwise ceased to have effect;

(z) “representatives” includes executors and administrators;

(aa) “Revised Statutes” means the Revised Statutes of Nova Scotia for the time being in force by virtue of a proclamation issued by the Governor in Council acting under authority of a statute of the Province;

(ab) “will” includes a codicil;

(ac) “writing”, “written” or any term of like import includes words printed, painted, engraved, lithographed, photographed, or represented or reproduced by any mode of representing or reproducing words in a visible form.

(2) In an enactment, a name commonly applied to a country, place, body, corporation, society, officer, functionary, person, party or thing means the country, place, body, corporation, society, officer, functionary, person, party or thing to which the name is commonly applied although the name is not the formal or extended designation.

(3) In this Act and every enactment made at the time, before or after this subsection comes into force, “regulation” includes any rule, rule of court, order prescribing regulations, tariff of costs or fees, form, by-law, resolution or order made in the execution of a power given by an enactment except where the definition of “regulation” as defined by the *Regulations Act* applies or where a contrary intention appears from the enactment.

(4) Where, in this Act and every enactment made at the time, before or after the coming into force of this subsection, there is a reference to any interest in personal property to secure the payment or performance of an obligation, including a charge, lien, mortgage or pledge, that reference, unless the context otherwise requires, includes a security interest as defined in the *Personal Property Security Act*. R.S., c. 235, s. 7; 1990, c. 31, s. 1; 1995-96, c. 21; 1995-96, c. 13, s. 81; 2013, c. 35, s. 3.

Powers prior to commencement of enactment

8 Where an enactment is not to come into force or operation immediately on its being passed and it confers power to

- (a) make appointments;
- (b) make regulations;
- (c) hold elections;
- (d) make, grant or issue instruments;
- (e) give notices;
- (f) prescribe forms; or
- (g) do any other thing,

that power may, for the purpose of making the enactment effective upon its coming into force, be exercised at any time after the enactment has been passed, but a regulation made thereunder before the enactment comes into force has no effect until the enactment comes into force, except in so far as is necessary to make the enactment effective. R.S., c. 235, s. 8.

Interpretation of words and generally

9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

(2) “Now”, “next”, “heretofore” or “hereafter” in an enactment refer to the time when the enactment comes into force.

(3) In an enactment, “shall” is imperative and “may” is permissive.

(4) “Herein” used in a Section or provision of an enactment relates to the whole enactment and not to that Section or provision only.

(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

(6) Where in an enactment the Sovereign is referred to or a person, body, office, officer, place, property, article or thing is described or qualified by words descriptive of the Sovereign, the reference or words shall be read as if written in the masculine gender when the Sovereign is male and as if written in the female gender when the Sovereign is female. R.S., c. 235, s. 9.

Public versus private Act

10 Every Act is a public Act unless by express provision it is declared to be a private Act. R.S., c. 235, s. 10.

Preamble and interpretation provision

11 (1) The preamble shall be read as part of an enactment to assist in explaining its purport and object.

(2) An interpretation or definition section or provision contained in an enactment applies to the whole enactment unless

- (a) a different intention is expressed; or
- (b) the meaning of the interpretation or definition section or provision is inconsistent with the context or purpose of the enactment. R.S., c. 235, s. 11.

Header or appended citation

12 Marginal notes or headers and appended citations of former enactments form no part of the enactment but shall be deemed to have been inserted for convenience of reference only. R.S., c. 235, s. 12.

Meaning of expression in regulation or order

13 Except when a contrary intention appears, where an enactment confers power to make regulations or to grant, make or issue an order, writ, warrant, scheme or letters patent, expressions used therein have the same respective meanings as in the enactment conferring the power. R.S., c. 235, s. 13.

Binding of Crown

14 No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby. R.S., c. 235, s. 14.

Powers and privileges of corporation

15 Words in an enactment establishing or providing for establishing a corporation

(a) vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is constituted and to alienate the same at pleasure;

(b) vest in a majority of the members of the corporation the power to bind the others by their acts; and

(c) exempt from personal liability for its debts, obligations or acts such individual members of the corporation as do not contravene the provisions of the enactment incorporating them. R.S., c. 235, s. 15.

Form of proclamation

16 Where the Governor is authorized to do an act by proclamation, it is to be understood that the proclamation is a proclamation issued under an order of the Governor in Council, but it is not necessary to mention in the proclamation that it is issued under the order. R.S., c. 235, s. 16.

Term of office of public officer

17 Except when otherwise expressed in the enactment or in his commission or appointment, a public officer, appointed before or after this Act comes into force under authority of an enactment or otherwise, holds office during pleasure only. R.S., c. 235, s. 17.

Public officers and ministers of the Crown

18 (1) Words authorizing the appointment of a public officer include the power of

- (a) removing or suspending him;
 - (b) reappointing or reinstating him;
 - (c) appointing another in his stead or to act in his stead;
- and
- (d) fixing his remuneration and varying or terminating it, in the discretion of the authority in whom power of appointment is vested.

(2) Words directing or empowering a public officer to do any act or thing, or otherwise applying to him by his name of office, include his successors in the office and his or their deputy.

(3) Words directing or empowering a minister of the Crown to do an act or thing, or otherwise applying to him by his name of office, include a minister acting for him or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council, and also his successors in the office and his or their deputy.

(4) Where a power is conferred or a duty imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office. R.S., c. 235, s. 18; revision corrected.

Continuation of jurisdiction upon resignation, retirement, etc.

18A (1) For the purpose of this Section, the Governor in Council may designate a board, tribunal, commission or other body that has adjudicative powers.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*.

(3) Where a member of a body designated by the Governor in Council pursuant to this Section resigns office or retires or the member's term of office expires or is terminated, the member shall, during such period of time as the Governor in Council orders, have and exercise the jurisdiction of a member in respect of any application, appeal, proceedings, matter or thing heard before the member or commenced by the member as a member of that body, including the power to complete any unfinished matter and give a decision in that matter as if the member had not so resigned or retired or the member's term of office had not expired or been terminated.

(4) For greater certainty, nothing in subsection (3) precludes the appointment of a new member to fill a vacancy created by such resignation, retirement, expiry or termination and such appointment does not affect the operation of subsection (3).

(5) A designation by the Governor in Council pursuant to subsection (1) or an order by the Governor in Council pursuant to subsection (3) may be made before or after such resignation, retirement, expiry or termination, and may be retroactive in effect. 2003, c. 7, s. 2.

Implied provisions in enactment

19 In an enactment,

(a) where anything is directed to be done by or before a public officer, it shall be done by or before one whose jurisdiction or power extends to the place where such thing is to be done;

(b) where power is given to the Governor in Council or a public officer to do or enforce the doing of any act, all necessary powers are also given to enable him to do or enforce the doing of the act;

(c) where the doing of an act that is expressly authorized is dependent upon the doing of any other act by the Governor in Council or by a public officer, the Governor in Council or public officer, as the case may be, has the power to do that other act;

(d) where any act is required or permitted to be done by more than two persons, a majority of them may do it;

(e) where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed, from time to time, as occasion requires;

(f) where power is conferred to make regulations, the power includes power, exercisable in like manner and subject to like consent and conditions, if any, to rescind, revoke, amend or vary the regulations and make others;

(g) where a form is prescribed, deviations therefrom not affecting the substance or calculated to mislead do not invalidate the form used;

(h) words importing male persons include female persons and corporations;

(i) words in the singular include the plural, and words in the plural include the singular;

(j) where a word is defined, the definition applies to other parts of speech and tenses of that word;

(k) where the time limited for the doing of any act expires or falls upon a Saturday or a holiday, the time so limited extends to and the act may be done on the first following day that is not a Saturday or a holiday;

(l) where a period of time dating from a given day, act or event is prescribed or allowed for any purpose, the time shall be reckoned exclusively of that day or of the day of the act or event;

(m) where an oath is required or provided for, the person to be sworn may substitute for the oath a solemn affirmation in the same form as the oath with the necessary changes. R.S., c. 235, s. 19; 2002, c. 10, s. 4.

Citation of Act

20 (1) In an enactment or document, an Act of Nova Scotia or any other province of Canada or of Canada may be cited by reference to its title or its short title, if any, either with or without reference to the chapter, or by reference to the number of the chapter of the revised statutes or revised ordinances or of the statutes or ordinances for the year of Our Lord or the regnal year in which the Act was passed.

(2) A citation of or reference to an Act of Nova Scotia or any other province of Canada or of Canada shall be deemed to be a citation of or a reference to the Act as amended. R.S., c. 235, s. 20.

Reference in enactment

21 (1) A reference in an enactment by number or letter to two or more Parts, divisions, Sections, subsections, paragraphs, subparagraphs, clauses, subclauses, schedules or forms in an enactment includes the number or letter first mentioned and the number or letter last mentioned.

(2) A reference in an enactment to a Part, division, Section, schedule or form, except when a contrary intention appears, is a reference to a Part, division, Section, schedule or form of the enactment in which the reference occurs.

(3) A reference in an enactment to a subsection, paragraph, subparagraph, clause or subclause, except when a contrary intention appears, is a reference to a subsection, paragraph, subparagraph, clause or subclause of the Section, subsection, paragraph, subparagraph or clause, as the case may be, in which the reference occurs.

(4) A reference in an enactment to regulations, except when a contrary intention appears, is a reference to regulations made under the enactment in which the reference occurs.

(5) A reference in an enactment by number or letter to any Section, subsection, paragraph, subparagraph, clause, subclause or other division or line of another enactment is a reference to the Section, subsection, paragraph, subparagraph, clause, subclause or other division or line of such other enactment as printed by authority of law. R.S., c. 235, s. 21; revision corrected 1998.

REPEAL AND AMENDMENT

Amendment and repeal of enactment

22 (1) An enactment reserves to the Legislature the power of repealing or amending it and revoking, restricting or modifying a power, privilege or advantage by it vested in or granted to a person.

(2) An enactment may be amended or repealed by an enactment passed in the same session.

(3) An amending enactment, so far as consistent with its tenor, is part of the enactment that it amends. R.S., c. 235, s. 22.

Effect of repeal or repeal and substitution

23 (1) Where an enactment is repealed, the repeal does not

(a) revive any enactment or provision of law that was repealed by the enactment or prevent the effect of any saving clause contained in the enactment;

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered under it;

(c) affect a right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment;

(d) affect an offence committed against or a violation of the provisions of the enactment, or any penalty, forfeiture or punishment incurred under the enactment; or

(e) affect an investigation, legal proceeding or remedy concerning any right, privilege, obligation, liability, penalty, forfeiture or punishment acquired or incurred under the enactment.

(2) An investigation, legal proceeding or remedy, of the kind described in clause (e) of subsection (1), may be begun, continued or enforced as if the enactment had not been repealed.

(3) Where an enactment is repealed and other provisions are substituted for it,

(a) every person acting under the enactment shall continue to act as if appointed under the provisions so substituted until another is appointed in his stead;

(b) every bond and security given by a person appointed under the enactment remains in force, and all offices, books, papers and things made or used under the enactment shall continue to be used as before the repeal as far as consistent with the substituted provisions;

(c) every proceeding taken under the enactment shall be taken up and continued under and in conformity with the provisions so substituted, as far as consistently may be;

(d) in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights, existing or accruing under the enactment or in a proceeding in relation to matters that have happened before the repeal, the procedure established by the substituted provisions shall be followed as far as it can be adapted thereto; and

(e) when any penalty, forfeiture or punishment is reduced or mitigated by any of the provisions so substituted, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly. R.S., c. 235, s. 23.

Repeal and substitution by amendment or revision

24 (1) Where an enactment is repealed and other provisions are substituted by way of amendment, revision or consolidation,

(a) all regulations made under the repealed enactment remain in force, in so far as they are not inconsistent with the substituted enactment, until they are annulled or others made in their stead; and

(b) a reference, in an unrepealed enactment to the repealed enactment, shall, as regards a subsequent transaction, matter or thing, be read as a reference to the provisions of the substituted enactment relating to the same subject-matter as the repealed enactment, but where there are no provisions in the substituted enactment relating to the same subject-matter, the repealed enactment shall be read as unrepealed as far as is necessary to maintain or give effect to the unrepealed enactment.

(2) Where an enactment of any other province of Canada or of Canada is repealed and other provisions are substituted by way of amendment, revision or consolidation, a reference in an enactment of Nova Scotia to the repealed enactment is, as regards a subsequent transaction, matter or thing, a reference to the provisions of the substituted enactment relating to the same subject-matter as the repealed enactment. R.S., c. 235, s. 24.

Effect of repeal, re-enactment, revision, consolidation or amendment

25 (1) Repeal of an enactment is not a declaration that the enactment was, or was considered by the Legislature or other body or person by whom the enactment was passed or made to have been, previously in force.

(2) A re-enactment, revision, consolidation or amendment of an enactment is not to be construed as an adoption of the construction that has by judicial decision or otherwise been placed upon the language used in the enactment or upon similar language. R.S., c. 235, s. 25.

MISCELLANEOUS**Administration of oath**

26 Where by any enactment or by any rule of the Legislature, or by any order, regulation or commission made or issued by the Governor in Council under any law authorizing him to require the taking of evidence under oath, an oath is authorized or directed to be made, taken or administered, such oath may be administered, and a certificate of its having been made, taken or administered may be given, by anyone named in the enactment, rule, order, regulation or commission or by a judge of any court, a notary public, a commissioner for taking affidavits or a justice of the peace having jurisdiction or authority in the place in which the oath is administered. R.S., c. 235, s. 26.

Manner of administration of oath

27 Where an oath may be lawfully taken it may be administered to any person while such person holds in his hand a copy of the Old or New Testament without requiring him to kiss the same or, when he objects to being sworn in this manner or declares that the oath so administered is not binding upon his conscience, then in such manner and form and with such ceremonies as he may declare to be binding. R.S., c. 235, s. 27.

Recovery of penalty or forfeiture

28 (1) Where a pecuniary penalty or a forfeiture is imposed for contravention of any enactment, then, if no other mode is prescribed for its recovery and it cannot be recovered upon summary conviction, the penalty or forfeiture is recoverable with costs by civil action or proceeding at the suit of the Crown only, or of a private party suing as well for the Crown as for himself, before a court having jurisdiction to the amount of the penalty in cases of simple contract.

(2) If no other provision is made for the appropriation of the penalty or forfeiture, one half thereof belongs to the Crown, and the other half belongs to the private plaintiff, if there is any, and if there is none the whole belongs to the Crown. R.S., c. 235, s. 28.

Disposition of penalty

29 Any penalty or sum of money, or the proceeds of any forfeiture which is by any enactment given to the Province, shall, if no other provision is made respecting it, be paid into the Consolidated Fund, and be accounted for and otherwise dealt with accordingly. R.S., c. 235, s. 29.

Place of imprisonment

30 Where in any enactment, a person is directed to be imprisoned or committed to prison, the imprisonment or committal shall, if no other place is mentioned or provided by law, be in or to the common jail of the locality in which the order for the imprisonment or committal is made or, if there is no common jail there, then in or to that common jail which is nearest to such locality, and the keeper of any such common jail shall receive such person and him safely keep and detain in the common jail under his custody until discharged in due course of law or bailed in cases in which bail may by law be taken. R.S., c. 235, s. 30.

Source of funds for municipal charge

31 Where it is declared that any matter is to form a municipal charge, it shall be rated, levied and collected with and by the same means as are by law directed with respect to other moneys for municipal purposes. R.S., c. 235, s. 31.

Judicature Act

32 Unless a contrary intention appears, the interpretation Section of the *Judicature Act*, so far as the terms defined can be applied, extends to all matters relating to legal matters. R.S., c. 235, s. 32.

Application of Sections 52A to 52G of Trade Union Act

32A Sections 52A to 52G of the *Trade Union Act* apply to collective bargaining between a police bargaining unit as defined by Section 52A of that Act and an employer on and after the seventeenth day of March, 2005, whether the collective bargaining commenced before, on or after that day. 2005, c. 34, s. 1.

Effect of penalty on liability for damage

33 The imposition of a penalty does not relieve a person from liability to answer for special damages to the person injured. R.S., c. 235, s. 33.

Liability to punishment for same offence

34 Where an act or omission constitutes an offence under two or more enactments, or an offence both under an enactment and at common law, the offender, unless the contrary intention appears, is liable to be prosecuted and punished under either or any of the enactments or at common law, but is not liable to be punished twice for the same offence. R.S., c. 235, s. 34.

Bond by public officer

35 (1) Where bonds are required to be given by a public officer, whether appointed under the provisions of an enactment by the Governor in Council or otherwise, they shall be taken in Her Majesty's name when not otherwise directed.

(2) Sureties to any such bond may at any time give to the Attorney General notice of their desire to withdraw from liability thereunder, and in such case the liability of the sureties does not extend to any act done or matter omitted more than three months after the receipt of the notice.

(3) Upon the receipt of any such notice, the principal shall be required to furnish new security in the same manner as if bonds had not been previously executed. R.S., c. 235, s. 35.

Powers of judge or officer of court

36 Where, by any enactment enacted either before or after the enactment of this Section, judicial or quasi-judicial powers are given to a judge or officer of a court, the judge or officer shall, in the absence of express provision to the contrary, be deemed to exercise such powers in his official capacity and as representing the court to which he is attached, and, for the purpose of performing the duties imposed upon him by the enactment subject to the provisions thereof, may exercise the powers he possesses as a judge or an officer of that court. R.S., c. 235, s. 36.

Reference to Canadian Navy, Army or Air Force

37 Where in any enactment or in any will, deed, lease, contract or other document there is a reference to the Canadian Armed Forces, to Her Majesty's Canadian or Royal Canadian Navy, Army or Air Force or to the Naval, Army or Air Forces of Canada, or to a commissioned officer or member thereof or any similar

reference, the reference shall be construed as including a reference to the Canadian Forces or a commissioned officer or member thereof, as the case may be. R.S., c. 235, s. 37.

Tab 7

Public Utilities Act

CHAPTER 380 OF THE REVISED STATUTES, 1989

as amended by

1992, c. 8, s. 35; 1992, c. 11, s. 43; 1992, c. 37, s. 3;
1997, c. 4, s. 43; 2001, c. 35, s. 30; 2005, c. 25, s. 1; 2006, c. 45;
2008, c. 31; 2010, cc. 24, 71; 2012, c. 41; 2014, c. 5, s. 15;
2015, c. 31, ss. 29-33; 2019, c. 38



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CHAPTER 380 OF THE REVISED STATUTES, 1989
amended 1992, c. 8, s. 35; 1992, c. 11, s. 43; 1992, c. 37, s. 3;
1997, c. 4, s. 43; 2001, c. 35, s. 30; 2005, c. 25, s. 1; 2006, c. 45;
2008, c. 31; 2010, cc. 24, 71; 2012, c. 41; 2014, c. 5, s. 15;
2015, c. 31, ss. 29-33; 2019, c. 38

An Act to Regulate Public Utilities

title *amended 1992, c. 11, s. 43.*

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Short title

1 This Act may be cited as the *Public Utilities Act*. R.S., c. 380, s. 1; revision corrected 1997.

Interpretation

2 In this Act,

- (a) “Board” means the Nova Scotia Utility and Review Board;
- (b) *repealed 1992, c. 11, s. 43.*
- (c) “extension” includes any reasonable extension of the service and facilities of every public utility;
- (d) “net income or revenue” means money available for dividends and surplus, according to the accounts prescribed by the Board and required to be kept by every public utility;
- (e) “public utility” includes any person that may now or hereafter own, operate, manage or control

- (i) any tramway,
- (ii) any trolley bus or motor vehicle, other than one being operated as a taxi, for the conveyance of passengers from any point within a city or incorporated town to any other point within such city or town, including any such person who also operates any trolley bus or motor vehicle for the conveyance of passengers to or between points outside such city or town but not including any such person whose revenue from the operation of any trolley bus or motor vehicle for the conveyance of passengers between points within any city or town does not, in the opinion of the Board, exceed ten per cent of the gross revenue of such person from the operation of trolley buses or motor vehicles,
- (iii) any plant or equipment for the conveyance of telephone messages,
- (iv) any plant or equipment for the production, transmission, delivery or furnishing of electric power or energy, water or steam heat either directly or indirectly to or for the public,
- (v) *repealed 1997, c. 4, s. 43.*
- (vi) any plant or equipment for the extraction, transmission, delivery or furnishing of a geothermal resource or for the production, transmission, delivery or furnishing of geothermal energy or heat either directly or indirectly to or for the public;
- (f) “service” includes
 - (i) the conveyance for compensation by a public utility of passengers,
 - (ii) the conveyance or transmission for compensation by a public utility of telephone messages,
 - (iii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power,
 - (iv) *repealed 1997, c. 4, s. 43.*
 - (v) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of water,
 - (vi) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of steam heat,
 - (vii) the extraction, transmission, delivery or furnishing to or for the public by a public utility for compensation of a geothermal resource,
 - (viii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of geothermal energy or heat;

(g) “telephone line” includes all devices, real estate, franchises, easements, apparatus, fixtures, property, appurtenances and routes used, operated, controlled or owned by any public utility to facilitate the business of affording telephonic communication for hire, and all conduits, ducts, poles, wires, cables, cross-arms, receivers, transmitters, instruments, machines and appliances, connected or used therewith;

(h) “tramway” includes a street railroad, railway or tramway for the conveyance of passengers, operated by motive power other than steam, and usually constructed in whole or in part in, under or above public streets, roads, ways and places, and the poles, wires and other appliances and equipment connected therewith. R.S., c. 380, s. 2; 1992, c. 37, s. 3; 1992, c. 11, s. 43; 1997, c. 4, s. 43.

3 to 14 *repealed 1992, c. 11, s. 43.*

POWERS AND DUTIES OF THE BOARD

Expenses of Board

15 (1) The expenses of the Board incurred in carrying out its functions and duties pursuant to this Act and exercising its powers pursuant to this Act, including the salaries and allowances of the members, officers and employees of the Board, counsel, experts, accountants, stenographers and other assistants and reasonable allowance for travel of all such persons, shall annually be estimated by the Board and assessed upon and borne by the public utilities which carried on business the whole or part of the preceding year in such proportions as the Board shall determine, due regard being given by the Board to the gross earnings of each such public utility as shown by the balance sheets, reports and other information filed with the Board by such public utilities and relating to such preceding year.

(2) Where any such balance sheet, report and other information are not filed by a public utility, or the Board deems the same inadequate or insufficient, the question of the amount of such gross revenue of the public utility shall be a matter relating to the public utility within the meaning of Section 19.

(3) On or before the first day of July in each year, or such later date in any year as the Board in its discretion, with or without notice, may order, the Board shall notify each of such public utilities the amount of its proportion of such expenses. R.S., c. 380, s. 15; 1992, c. 11, s. 43.

Payment and recovery of amount assessed

16 (1) The amount so assessed on a public utility shall be paid by it within one month after it has been notified by the Board of such amount, and in default of payment the Board may sue for and recover the same in any court of law in the name of the Nova Scotia Utility and Review Board as fully and effectually to all intents and purposes as if the Board were incorporated under such name or title, and no such proceedings shall abate by reason of any change in the membership of

the Board by death, resignation or otherwise, but such proceedings may be continued as if such change had not occurred.

(2) Any costs adjudged or ordered in such proceedings to be paid by the Board, and any costs and expenses incurred by the Board, by reason of such proceedings shall be held to be part of the expenses of the Board for the year in which the same are paid, and any costs adjudged or ordered in such proceedings to be paid to the Board shall, if and when the same are paid, be credited to the expenses of the Board for the year in which the same are paid. R.S., c. 380, s. 16; 1992, c. 11, s. 43.

Expenses of annual report

17 The expenses incurred by the Queen's Printer in printing and publishing the annual report of the Board shall be defrayed by the Board and shall form part of the annual expenses of the Board. R.S., c. 380, s. 17.

Supervision of utility by Board

18 The Board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by the said public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties. R.S., c. 380, s. 18.

Summary investigation by Board

19 Whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory, or that any reasonable service is not supplied, or that an investigation of any matter relating to any public utility should for any reason be made, it may, on its own motion, summarily investigate the same with or without notice. R.S., c. 380, s. 19.

Power to exclude certain corporations from Act

20 (1) The Board may, by order or regulation, exclude from the scope of this Act any corporation which does not, at the time of such exclusion, own, operate, manage or control any tramway for the conveyance of passengers or any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public and the Board may, from time to time, revoke, alter or modify any such order or regulation, provided that any corporation so excluded may be afterwards declared by the Board to be within the scope of this Act.

(2) Any such order or regulation shall have the effect of excluding from the scope of this Act any such corporation from any time after the fourteenth day of April, 1943, or after such corporation was incorporated or otherwise according to the tenor of such order or regulation until the same is revoked, altered or modified as herein provided. R.S., c. 380, s. 20.

Power to hear proposals and recommend legislation

21 Whenever any public utility or person shall propose any change in any law relating directly or indirectly to the property or operations of any public utility, the proposed change may be submitted to the Board, which may take evidence and give public hearing thereon, and the Board may recommend such bills as will, in its judgement, protect the interests of the public and such public utility, and transmit the same to the Attorney General. R.S., c. 380, s. 21.

Annual report

22 The Board may publish annual reports showing its proceedings and showing in tabular form the details as provided by this Act for all the public utilities of each kind in the Province. R.S., c. 380, s. 22.

May be included in annual report

23 The Board may also publish in its annual report the value of all the property actually used and useful for the convenience of the public, and the value of the physical property actually used and useful for the convenience of the public of every public utility as to whose rates, charges, service or regulations any public hearing has been held by the Board under the provisions of this Act, or the value of whose property has been ascertained by it under this Act. R.S., c. 380, s. 23.

Powers imposed by contract or other Act preserved

24 Subject to this Act, the powers, rights, privileges and obligations secured to or imposed upon any public utility by any statute, or by any contract or agreement made under the authority of any statute, shall not be subject to the provisions of this Act, and nothing in this Act contained shall authorize the Board to alter, enlarge or diminish such rights, powers, privileges or obligations or to impair the obligations of any contract, except any contract or agreement relating to rates, tolls, charges or schedules which the Board is authorized by this Act to regulate and control, but the Board may at any time inquire into any such rights, powers, privileges or obligations in so far as the exercise or observance thereof affects the public interest and may make such recommendations to the Legislature in connection therewith as may be deemed just and proper. R.S., c. 380, s. 24.

Regulations respecting practice and procedure

25 The Board may, from time to time, make, revoke and alter rules and regulations for the effectual execution of its duties and of the intention and objects of this Act, and the regulation of the practice and procedure with regard to the matters over which it has jurisdiction and such rules and regulations, when approved by the Governor in Council, shall have the force of law. R.S., c. 380, s. 25.

Regulations respecting poles and pole lines

26 (1) The Board may make rules and regulations for the erection, construction, maintenance and repair of all poles and pole lines, specifying the type, character, quality and dimensions of such poles and the cross arms and other equipment to be attached thereto, and for the stringing, construction, erection, mainte-

nance and repair of all wires, including drop wires and service wires, or other conductors for the transmission of electric energy, messages or signals, and for the construction, erection, maintenance and repair of all conduits, ducts, pins, insulators, attachments, transformers or any structure or device used or useful in connection with the transmission of electric energy, messages or signals by wire, as the Board may deem in the public interest, and may require every public utility to bring its existing poles, pole lines, wires, conductors, devices, attachments and equipment into conformity with such rules and regulations.

(2) Such rules and regulations shall have the force of law, and any provisions contained in the Act of incorporation of any public utility or in any city charter or in the *Towns Act*, or in any by-laws and ordinances thereunder, conferring upon any public utility or any city, town or municipality, or any official thereof, powers which are by this Act conferred upon the Board, are repealed. R.S., c. 380, s. 26.

Form of books and records of utility

27 The Board may prescribe the forms of all books, accounts, papers and records required to be kept by any public utility and every public utility is required to keep and render its books, accounts, papers and records accurately and faithfully in the manner and form prescribed by the Board and to comply with all directions of the Board relating to such books, accounts, papers and records. R.S., c. 380, s. 27.

Blank forms from Board

28 The Board may cause to be prepared suitable blank forms for carrying out the purposes of this Act and shall, when necessary, furnish such blank forms to each public utility. R.S., c. 380, s. 28.

Examination and audit of accounts

29 (1) The Board may provide for the examination and audit of all accounts, and all items shall be allocated to the accounts in the manner prescribed by the Board.

(2) The agents, accountants or examiners employed by the Board shall have authority under the direction of the Board to inspect all and any books, accounts, papers or records and memoranda kept by any public utility. R.S., c. 380, s. 29.

Power to determine value of property of utility

30 (1) The Board may at any time, with the assistance of such engineers, accountants, valuers, counsel and others as it deems wise or advisable to employ, inquire into and determine the extent, condition and value of the whole or any portion of the property and assets of any public utility used and useful in furnishing, rendering or supplying a particular service to or for the public, as of a date to be fixed by the Board.

(2) The Board shall determine the value of such property and assets on the basis of the prudent original cost thereof or by such other method as the Board may from time to time prescribe, deducting therefrom the amount of the accrued depreciation of such property and assets as determined by the Board.

(3) For the purposes of this Section, annual and accrued depreciation shall be calculated by the straight line method, so called, or such other method as the Board may from time to time prescribe.

(4) The Board may make such rules and regulations to facilitate inquiries under this Section as it may deem convenient, and the rules and regulations so made shall be binding on all public utilities. R.S., c. 380, s. 30.

Liability for costs and expenses of valuation

31 (1) Where a valuation is ordered by the Board under this Act, the Board may order that all costs and expenses of counsel, engineers, valuers, clerks, stenographers and other assistants retained and employed by the Board, as well as the salary and expenses of the members of the Board while employed in and about the making of such valuation, shall be paid by the public utility whose assets and property are the subject of the inquiry and valuation.

(2) Amounts chargeable under this Section may, by order of the Board, be made payable as the work of valuation proceeds and before its completion and the certificate of the Chairman of the Board shall be sufficient to fix on the public utility the liability for the payment of any amount so certified to have been incurred in respect of such valuation.

(3) All expenses in connection with any valuation ordered by the Board, including all expenses incurred by the public utility whose property is the subject of such valuation, may, when the Board so directs, be charged to capital account and added to the rate base of the public utility. R.S., c. 380, s. 31.

Revaluation

32 The Board may at any time make a revaluation of such property. R.S., c. 380, s. 32.

Duty of utility to furnish information

33 (1) Every public utility shall furnish to the Board from time to time, and as the Board may require, maps, profiles, contracts, reports of engineers and other documents, records and papers, or copies of any and all of the same in aid of any investigation and to determine the value of the property of such public utility, and every public utility shall co-operate with the Board in the work of the valuation of its property in such further particulars and to such extent as the Board may direct.

(2) The Board shall, thereafter, in like manner, keep itself informed of all extensions and improvements or other changes in the condition of

the property of the said public utilities, and from time to time may revise and correct its valuation of the property of such public utilities.

(3) To enable the Board to make such changes and corrections in its valuation, every public utility shall report correctly to the Board changes in its property and file with the Board copies of all contracts for changes and improvements at the time the same are executed. R.S., c. 380, s. 33.

Duty to furnish financial information on operations

34 Each public utility shall furnish to the Board, whenever required in connection with any investigation by the Board, in such form and at such times as the Board shall require such accounts, reports and information as shall show in itemized detail, depreciation, salaries, wages, legal expenses, taxes and rentals, quantity and value of material used, receipts from residuals, by-products services, or other sales, total and net costs, net and gross profits, dividends and interest, surplus or reserve, prices paid by consumers, and in addition such other items, whether of a similar nature to those hereinbefore enumerated or otherwise, as the Board may prescribe, in order to show completely and in detail the entire operation of the public utility in furnishing its product or service to the public. R.S., c. 380, s. 34.

Independent savings review of N.S. Power Inc.

34A (1) The Board may order and thereupon Nova Scotia Power Incorporated shall furnish to the Board an independent savings review of Nova Scotia Power Incorporated to identify potential savings by Nova Scotia Power Incorporated.

(2) The Board may order that the independent savings review include

(a) an assessment of the operations of Nova Scotia Power Incorporated;

(b) an assessment of Nova Scotia Power Incorporated's fiscal management of its revenue and expenses;

(c) a value-for-money assessment examining the economy, efficiency and effectiveness of the operations and management of Nova Scotia Power Incorporated; and

(d) such other matters as the Board may determine, if the Board considers the matters relevant to the assessment of potential savings.

(3) An order made pursuant to subsection (1) may include such terms and conditions as the Board considers necessary or advisable. 2012, c. 41, s. 2.

Approval of improvement over \$250,000

35 No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in

furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board. R.S., c. 380, s. 35; 2001, c. 35, s. 30; 2010, c. 24, s. 1.

Annual capital expenditure program of public utility

35A (1) Notwithstanding Section 35, a public utility may submit to the Board for approval an annual capital expenditure program.

(2) Where the plan referred to in subsection (1) is approved by the Board, a public utility may make the capital expenditures referred to in the plan without any further approval by the Board.

(3) A public utility may make a capital expenditure not contained in the capital expenditure program referred to in subsection (1), without the approval of the Board, where that expenditure does not exceed two hundred and fifty thousand dollars. 1992, c. 8, s. 35; 2010, c. 24, s. 2.

Exemption for large-scale public utility

35AA (1) In this Section, “large-scale public utility” means a public utility with an annual revenue of one hundred million dollars or more.

(2) A large-scale public utility is not required to secure the approval of the Board under Section 35 for new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any service that requires the expenditure of one million dollars or less. 2019, c. 38, s. 1.

Valuation of South Canoe Wind Project

35B Notwithstanding Section 2A and subsection 4B(13) of the *Electricity Act* and clause 2(f) of this Act, any property and assets owned by Nova Scotia Power Incorporated that are part of the South Canoe Wind Project are deemed to be used and useful in Nova Scotia Power Incorporated providing a service to or for the public, and the Board shall include in its determination of Nova Scotia Power Incorporated’s rate base and revenue requirement the capital and other costs in respect of such property and assets on the same basis as the capital and other costs relating to property and assets in other wind farms owned by Nova Scotia Power Incorporated and included in its rate base on a cash tax basis with deferred taxes offset to a regulatory asset or liability as appropriate. 2015, c. 31, s. 29.

Board Case Number M05416

35C (1) The order of the Board dated April 30, 2013, in proceedings bearing Board Case Number M05416 is deemed to be an approval pursuant to Section 35 for the construction of the property and assets owned by Nova Scotia Power Incorporated as part of the South Canoe Wind Project, except to the extent that it may be inconsistent with an express requirement of this Section or Section 35B.

(2) Notwithstanding subsection (1), Nova Scotia Power Incorporated may not, in respect of the amount of the original construction cost included in the order, seek approval from the Board, and the Board may not approve an Authorization to Overspend under Nova Scotia Power Incorporated's approved Capital Expenditure Justification Criteria. 2015, c. 31, s. 29.

Valuation of Sable Wind Project

35D Notwithstanding Section 2A and subsection 4B(13) of the *Electricity Act* and clause 2(f) of this Act, any property and assets owned by Nova Scotia Power Incorporated that are part of the Sable Wind Project are deemed to be used and useful in Nova Scotia Power Incorporated providing a service to or for the public, and the Board shall include in its determination of Nova Scotia Power Incorporated's rate base and revenue requirement the capital and other costs in respect of such property and assets on the same basis as the capital and other costs relating to property and assets in other wind farms owned by Nova Scotia Power Incorporated and included in its rate base on a cash tax basis with deferred taxes offset to a regulatory asset or liability as appropriate. 2015, c. 31, s. 29.

Board Case Number M06083

35E (1) The order of the Board dated September 22, 2014, in proceedings bearing Board Case Number M06083 is deemed to be an approval pursuant to Section 35 for the construction of the property and assets owned by Nova Scotia Power Incorporated as part of the Sable Wind Project, except to the extent that it may be inconsistent with an express requirement of this Section or Section 35D.

(2) Notwithstanding subsection (1), Nova Scotia Power Incorporated may not, in respect of the amount of the original construction cost included in the order, seek approval from the Board, and the Board may not approve an Authorization to Overspend under Nova Scotia Power Incorporated's approved Capital Expenditure Justification Criteria. 2015, c. 31, s. 29.

Retroactive effect of Sections 35B and 35D

35F Sections 35B and 35D apply retroactively, as if the Board orders referred to in subsections 35C(1) and 35E(1) had been valid since they were issued by the Board, except to the extent that they may be inconsistent with an express requirement of Sections 35B to 35E. 2015, c. 31, s. 29.

Exemption and approval for N.S. Power Inc.

36 (1) Notwithstanding anything contained in this Act or any enactment, this Act does not apply to new construction, improvements or betterments in, extensions or additions to, or conversions of the generation and transmission plant or like facilities of the Nova Scotia Power Incorporated.

(2) In an application by the Nova Scotia Power Incorporated to the Board for approval of rates, tolls and charges or in ascertaining and determining what are proper and adequate annual rates of depreciation of the Company's property, the Board shall include in its determination of the Company's rate base and

revenue requirement the capital and operating costs of its generation and transmission plant or like facilities determined in accordance with generally accepted accounting principles.

(3) Subsections (1) and (2) apply only to the generation and transmission plant or like facilities of ~~the~~ Nova Scotia Power Incorporated to be constructed at or near Point Aconi in the County of Cape Breton for which an approval or permit has been received from the Department of the Environment prior to the sixteenth day of April, 1992. R.S., c. 380, s. 36; 1992, c. 8, s. 35.

Application of Section 36

37 Section 36 does not change the law applicable to the Board with respect to new construction, improvements or betterments in, extensions or additions to, or conversions of the generation and transmission plant or like facilities of ~~the~~ Nova Scotia Power Incorporated built primarily for the export of electricity. R.S., c. 380, s. 37; 1992, c. 8, s. 35.

Annual depreciation

38 (1) Every public utility shall make provision for proper and adequate annual depreciation of its property and assets used and useful in furnishing, rendering or supplying each type or kind of service, and shall in respect thereof keep necessary and proper accounts.

(2) Such annual depreciation shall be calculated by the straight line method or by such other method as the Board may from time to time prescribe.

(3) Every public utility shall report to the Board the annual rates of depreciation from time to time applied to the several classes of property in such public utility.

(4) The Board may ascertain and determine what are proper and adequate annual rates of depreciation of the several classes of property in any public utility, and such public utility shall thereupon and thereafter conform its depreciation account to the rates so ascertained and determined.

(5) The Board may revise such rates of depreciation from time to time as it deems necessary or expedient. R.S., c. 380, s. 38.

Depreciation fund

39 (1) All moneys provided under this Act for depreciation may be set aside out of the earnings and carried in a depreciation fund.

(2) Unless the Board otherwise directs, the moneys in any such fund may be expended only in new construction, extensions or additions to property of such public utility and for depreciation, provided that such public utility may from time to time invest all or any part of any such moneys in securities approved by the Board and may sell or dispose of any such securities and reinvest the pro-

ceeds of such sale in securities approved as aforesaid and while so invested, the income therefrom shall belong to and be payable to the public utility. R.S., c. 380, s. 39; 1992, c. 8, s. 35.

Regulations respecting depreciation

40 The Board may also prescribe rules, regulations and forms of accounts regarding depreciation which a public utility is required to observe, carry into effect and follow. R.S., c. 380, s. 40.

Rates of utility to include allowance for depreciation

41 In fixing rates, tolls and charges to be paid to a public utility for any service, the Board shall include proper allowances for depreciation. R.S., c. 380, s. 41.

Separate rate base for each service supplied

42 (1) The Board shall fix and determine a separate rate base for each type or kind of service furnished, rendered or supplied to the public by a public utility.

(2) In establishing a rate base the Board shall determine the value of the physical assets of the public utility in accordance with the provisions of this Act, including in such value the actual reasonable and necessary cost of labour and supervision up to and including gang foreman, and the Board may, in its discretion, make allowances for the following matters, and such other matters as the Board deems appropriate:

- (a) necessary working capital;
- (b) organization expenses to the extent of such sum as the public utility may establish to the satisfaction of the Board to have been reasonably and prudently expended out of capital account in respect of organization expenses as defined by the regulations of the Board;
- (c) construction overheads to the extent of such sum as the public utility may establish to the satisfaction of the Board to have been reasonably and prudently expended out of capital account in respect of engineering, superintendence, legal services, taxes and interest during construction, and like matters not included in the valuation of the physical assets;
- (d) expenses of valuations to the extent of such sums as may have been expended in respect of a valuation by the Board and, with the approval of the Board, charged to capital account;
- (e) costs in whole or in part of land acquired in reasonable anticipation of future requirements.

(3) The Board may direct that a public utility shall make such provision as to the Board seems proper for the amortization of the sums allowed in a rate base for organization expenses and expenses of valuations, and may direct that

the sums required annually for such amortization shall be charged as an operating expense.

(4) The Board may from time to time revise any rate base making due allowance for extensions and additions to, improvements or alterations in and withdrawals or retirements from, the property and assets of the public utility.

(5) Until a rate base is determined by the Board for any public utility pursuant to this Section, the present rate base for such public utility as from time to time revised or accepted by the Board shall continue in effect and shall be the rate base for such public utility, provided that the Board may direct that any such public utility shall make such provision as to the Board seems proper for the amortization of the sums allowed in such rate base for organization expenses, expenses of valuations or allowances not mentioned in subsection (2) and may direct that the sums required annually for such amortization shall be charged as an operating expense. R.S., c. 380, s. 42; 1992, c. 8, s. 35.

Each category of service treated as separate unit

43 Where any public utility furnishes, renders or supplies more than one type or kind of service, the Board shall segregate such types or kinds of service into distinct classes or categories of service, and, for the purposes of determining the rate base for a particular service furnished, rendered or supplied, and for the purpose of annual and other returns or reports to be made to the Board, each distinct class or category of service shall be considered as a separate and self-contained unit, the rate base for which shall be determined and fixed without regard to the rate base determined and fixed for any other unit. R.S., c. 380, s. 43.

Orders by Board respecting rates and charges of utility

44 The Board may make from time to time such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders or make new orders in substitution therefor. R.S., c. 380, s. 44.

Amount utility entitled to earn annually

45 (1) Every public utility shall be entitled to earn annually such return as the Board deems just and reasonable on the rate base as fixed and determined by the Board for each type or kind of service furnished, rendered or supplied by such public utility, provided, however, that where the Board by order requires a public utility to set aside annually any sum for or towards an amortization fund or other special reserve in respect of any service furnished, rendered or supplied, and does not in such order or in a subsequent order authorize such sum or any part thereof to be charged as an operating expense in connection with such service, such sum or part thereof shall be deducted from the amount which otherwise under this Section such public utility would be entitled to earn in respect of such service, and the net earnings from such service shall be reduced accordingly.

(2) Such return shall be in addition to such expenses as the Board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the Board according to this Act and the rules and regulations of the Board. R.S., c. 380, s. 45.

Power to compel compliance by utility

46 The Board shall have power, after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of this Act and any municipal ordinance or regulation relating to said public utility, and to conform to the duties imposed upon it thereby by the provisions of its own charter, if any charter has or shall be granted it, provided, that nothing herein contained shall be held to relieve any public utility or its officers, agents or servants, from any punishment, fine, forfeiture or penalty for violation of any such law, ordinance, regulation or duty imposed by its charter, nor to limit, take away or restrict the jurisdiction of any court or other authority which now has or which may hereafter have power to impose any such punishment, fine, forfeiture or penalty. R.S., c. 380, s. 46.

Inquiry into neglect or violation by utility

47 The Board may inquire into any neglect or violation of the laws or regulations in force in the Province by any public utility doing business therein, or by the officers, agents or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and it shall be its duty, to enforce the provisions of this Act as well as all other laws relating to public utilities. R.S., c. 380, s. 47.

POWERS AND DUTIES OF PUBLIC UTILITIES

Resources to be used

48 (1) Notwithstanding anything contained in this Act or any enactment, ~~the~~ Nova Scotia Power Incorporated may in the operation of its generation and transmission plant or like facilities take steps to maximize the use of indigenous Nova Scotia resources, and the Board shall, where an application is made to the Board to determine the revenue requirement of the Company, include in such requirement the cost of such use.

(2) ~~The~~ Nova Scotia Power Incorporated shall not construct a generating plant that utilizes nuclear energy to produce electricity.

(3) Where Nova Scotia Power Incorporated applies to the Board to increase its capacity to produce power, the Board shall consider, among other things, the ability of private power producers to supply to the Company a portion of the increased capacity. R.S., c. 380, s. 48; 1992, c. 8, s. 35; revision corrected 1997.

Accounts and returns

49 All public utilities shall keep such accounts, make such returns and otherwise render available to the Board all such information in respect of their business and affairs as the Board may from time to time order. R.S., c. 380, s. 49.

Annual balance sheet

50 (1) Unless otherwise ordered by the Board, all accounts required to be kept by a public utility shall be closed annually on the last day of December in each year, and a balance sheet of that date shall be promptly taken therefrom.

(2) On or before the first day of February following or such other date as may be set by the Board from time to time, such balance sheet, together with such other information as the Board shall prescribe, verified on oath by an officer of the public utility, shall be filed with the Board. R.S., c. 380, s. 50.

Duty to furnish information, return forms and deliver documents

51 (1) Every public utility shall furnish to the Board all information required by it to carry into effect the provisions of this Act, and shall make specific answers to all specific questions submitted by the Board.

(2) Any public utility receiving from the Board any blank forms with directions to fill in the same shall cause the same to be properly filled in so as to answer, fully and correctly each question therein propounded, and in case it is unable to answer any question it shall give a good and sufficient reason for such failure and such answers shall be verified under oath by the president, secretary, superintendent or general manager of such public utility, and returned to the Board at its office within the period fixed by the Board.

(3) Whenever required by the Board, every public utility shall deliver to the Board any and all maps, profiles, contracts, reports of engineers and all documents, books, accounts, papers and records, or copies of any or all of the same, with a complete inventory of all its property, in such form as the Board may direct. R.S., c. 380, s. 51.

Regulations respecting reports

51A (1) The Governor in Council may make regulations

(a) requiring a public utility to prepare and provide reports to the Minister of Energy and Mines and the Board, or either of them, including such content and in such form and manner as may be prescribed;

(b) with respect to the manner in which such reports or other information prescribed must be made available to the public by the Minister of Energy and Mines or the public utility.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is a regulation within the meaning of the *Regulations Act*. 2015, c. 31, s. 30; O.I.C. 2018-188.

Duty to furnish safe and adequate service

52 Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. R.S., c. 380, s. 52.

Performance standards for adverse weather conditions

52A (1) The Board shall establish performance standards for Nova Scotia Power Incorporated in respect of reliability and response to adverse weather conditions.

(2) For the purpose of subsection (1), performance standards relating to reliability must be determined by the Board based upon

(a) such North American electrical utility industry standards as it considers appropriate, modified, where necessary, to account for any circumstances or conditions existing in the Province; and

(b) any other factors or requirements prescribed by the regulations.

(3) For the purpose of subsection (1), performance standards relating to responses to adverse weather conditions must be determined by the Board based upon

(a) such standards as it considers appropriate in order to ensure that Nova Scotia Power Incorporated's response to adverse weather conditions is consistent with the standards of other electrical utilities operating along the North Atlantic seaboard having regard to the nature and severity of the adverse weather condition and the extent of the damage sustained; and

(b) any other factors or requirements prescribed by the regulations. 2015, c. 31, s. 31.

Performance standards for customer service

52B (1) The Board shall establish performance standards in respect of such areas of Nova Scotia Power Incorporated's customer service as it determines appropriate.

(2) For the purpose of subsection (1), performance standards relating to customer service must be established by the Board based upon

(a) information to be collected by the Board to determine a baseline in respect of the customer service provided by Nova Scotia Power Incorporated in the areas determined appropriate by the Board;

(b) the objective of gradually improving Nova Scotia Power Incorporated's performance in the areas of customer service determined appropriate by the Board; and

(c) any other factors or requirements prescribed by the regulations. 2015, c. 31, s. 31.

Release of reports related to performance standards

52C Whenever required in connection with any investigation by the Board or a person appointed pursuant to Section 82, Nova Scotia Power Incorporated shall provide the Board with such reports and information as the Board may require to show completely and in detail Nova Scotia Power Incorporated's conduct in relation to any performance standard established by the Board. 2015, c. 31, s. 31.

Status reports relating to performance

52D (1) The Board may require Nova Scotia Power Incorporated to provide it with periodic status reports, at such times and including such information as the Board may require, on Nova Scotia Power Incorporated's performance in respect of the standards established pursuant to Sections 52A and 52B.

(2) Within ninety days following the end of each calendar year, Nova Scotia Power Incorporated shall provide a written report to the Board on its performance in respect of the standards established pursuant to Sections 52A and 52B.

(3) The written report must be in such form and contain such information as the Board determines appropriate.

(4) Where, following receipt of the report referred to in subsection (2), the Board determines that Nova Scotia Power Incorporated has failed to achieve any performance standard established pursuant to Section 52A, the Board may order Nova Scotia Power Incorporated to pay an administrative penalty or to develop and file a plan for bringing itself into compliance with a performance standard, or both.

(5) Where, following receipt of the report referred to in subsection (2), the Board determines that Nova Scotia Power Incorporated has failed to achieve any performance standard established pursuant to Section 52B, the Board may order Nova Scotia Power Incorporated to pay an administrative penalty or to develop and file a plan for bringing itself into compliance with a performance standard, or both. 2015, c. 31, s. 31.

Administrative penalties

52E (1) In this Section, "Fuel Adjustment Mechanism" means the fuel adjustment mechanism approved by the Board for use by Nova Scotia Power Incorporated in orders dated December 10, 2007, (Board Case Number M00496) and December 8, 2008, (Board Case Number M00010) and any associated tariff and plan for administering the mechanism that has been approved by the Board[.]

(2) The amount of any administrative penalty ordered to be paid is the amount determined by the Board to be appropriate in order to promote future compliance with the performance standards and not for punitive purposes or effects or for redressing a wrong done to society at large.

(3) The cumulative total of administrative penalties levied against Nova Scotia Power Incorporated in a calendar year must not exceed one million dollars.

(4) Any administrative penalties levied against Nova Scotia Power Incorporated must be credited to customers through Nova Scotia Power Incorporated's Fuel Adjustment Mechanism or, where no such mechanism exists, in any manner the Board determines appropriate.

(5) Notwithstanding subsection (4), any amounts to be credited to customers may be allocated amongst Nova Scotia Power Incorporated's customers in any manner that the Board determines appropriate.

(6) Any administrative penalties levied against Nova Scotia Power Incorporated may not be included when determining Nova Scotia Power Incorporated's rate of return pursuant to this Act. 2015, c. 31, s. 31.

Regulations respecting Sections 52A to 52E

52F (1) The Governor in Council may make regulations

(a) applying Sections 52A to 52E, or any of them, *mutatis mutandis* to any other public utility;

(b) prescribing factors or requirements for the purpose of clauses 52A(2)(b) and (3)(b) and 52B(2)(c).

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is a regulation within the meaning of the *Regulations Act*. 2015, c. 31, s. 31.

Abandonment of operating line or works

53 No public utility shall abandon any part of its line or lines, or works, after the same has been operated, without notice to the Board, and without the consent in writing of the Board, which consent shall only be given after notice to the city, town or municipality interested and after due inquiry had. R.S., c. 380, s. 53.

Condition for construction if similar utility in area

54 (1) No public utility shall begin the construction of its line, plant or system or any extension thereof in any territory already served by a public utility of like character, without having first obtained from the Board a certificate that the present or future public convenience and necessity require or will require such construction.

(2) The Board shall have power, after a hearing involving the financial ability and good faith of the applicant and the necessity of additional service in the community, to issue such certificate as applied for, or to refuse to issue the same, or to issue it for the construction of a portion only of the contemplated line, plant or system, and may attach to the exercises of the rights granted by said

certificate such terms and conditions as in its judgement the public convenience and necessity may require.

(3) Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the Board shall be null and void. R.S., c. 380, s. 54.

If changes by utility detrimental to other utility

55 (1) No public utility shall make any extensions to or changes in its line, plant or system which are likely to be detrimental to the service supplied by any other public utility without first giving reasonable notice in writing by prepaid post of the same to the chief office in the Province of such other public utility, and the public utilities directly concerned may agree upon methods and specifications which will, so far as reasonably possible, minimize the detrimental effect on the service of such other public utility.

(2) In the event of the failure of a public utility to comply with the provisions of subsection (1) as to notice or in the event of failure so to agree, any of the parties directly concerned may make application to the Board for a hearing with respect to the matter in issue.

(3) The Board may, if it sees fit, hold such hearing without public advertisement or notice to any person other than to the parties directly concerned.

(4) After inquiry into the nature of the extensions and changes made or proposed to be made, the Board, subject to such terms and conditions as in the judgement of the Board the circumstances require, may grant or withhold approval or may order such changes as may be just and expedient.

(5) In the event of a dispute or disagreement between two or more public utilities as to which public utility should serve any particular territory, the Board shall, after each such examination and inquiry as it deems adequate, determine the matter and the Board may, by order, direct which public utility shall serve the said territory.

(6) Without being limited by the foregoing provisions of this Section, the Board may at any time order a public utility to serve any particular territory not then served, provided, however, that no such order shall be made if, in the opinion of the Board, it would place an unreasonable financial burden on the public utility. R.S., c. 380, s. 55.

Agreement with N.S. Power Inc.

55A (1) Subject to the approval of the Board, Nova Scotia Power Incorporated may enter into an agreement on commercial terms with the owner or operator of an interconnected electric generation plant to export from the Province electric power using the facilities of Nova Scotia Power Incorporated.

(2) Where the parties fail to reach an agreement for the transmission of power

(a) one or both of the parties may apply to the Board for a decision with respect to the proposed agreement; and

(b) the Board, in making its decision, may establish on commercial terms whatever criteria the Board deems suitable and attach any terms or conditions the Board deems appropriate. 1992, c. 8, s. 35.

Duty to customer respecting pressure and frequency

56 (1) Before commencing to supply electrical energy to any customer a public utility shall declare, in writing under the hand of its proper officer, or its agent thereunto duly authorized, to such customer the constant pressure, and, if from an alternating current source, the frequency, at which it proposes to supply such electrical energy at the customers' terminals.

(2) The variation of pressure, and in the case of alternating currents the frequency, at any customer's terminals, unless otherwise ordered by the Board, shall not under any conditions of the supply which the customer is entitled to receive, nor at any time, exceed four per cent from the declared constant pressure or frequency, whether such variation is due to the resistance of the service lines or apparatus belonging to such public utility, or to any action or effect produced by such apparatus, for which the customer cannot be shown to be responsible, or partly to a variation of pressure in the distributing mains from which the supply is taken. R.S., c. 380, s. 56.

Duty to maintain apparatus on premises of customer

57 The public utility shall be responsible for all electric lines, fittings and apparatus belonging to it or under its control upon the customer's premises, being maintained in a proper condition, and in all respects fit for supplying energy, but it shall not be responsible for any damages arising from the use of the electric current in lines, fittings and apparatus not belonging to it or under its control. R.S., c. 380, s. 57.

Right of entry if leakage suspected

58 If the public utility is reasonably satisfied, after making all proper examination by testing or otherwise, that at some part of a circuit, connection with the earth exists of such resistance as to be a source of leakage and that such connection does not exist at any part of the circuit belonging to the public utility, any officer or agent of the public utility duly authorized by it in writing, may, for the purpose of discovering whether such connection with the earth exists at any part of the wires upon any customer's premises, at all reasonable times, after giving one hour's notice of his intention to do so, enter such premises and disconnect the customer's wires from the service lines, and may require the customer to permit him to inspect and test the wires and fittings belonging to the customer and forming part of the circuits. R.S., c. 380, s. 58.

Discontinuance of supply of electrical energy

59 If, on such inspection and testing, the officer or agent discovers that a connection exists between the customer's wires and the earth and that such connection has an electrical resistance of less than five thousand ohms, or if the customer does not give all due facilities for such inspection and testing, the public utility shall forthwith discontinue the supply of electrical energy to the premises of the customer, giving immediate notice of such discontinuance to the customer and shall not recommence such supply until it is satisfied that such connection with the earth has been removed. R.S., c. 380, s. 59.

Dissatisfaction with action of utility

60 If any customer is dissatisfied with the action of the public utility, either as to the mode of making the test or in discontinuing the supply of electrical energy to his premises, the wires and fittings of such customer may, on his application to the Board, be tested, for the existence of such connection with the earth, by an inspector appointed by the Board. R.S., c. 380, s. 60.

Right of entry onto supplied premises

61 (1) Any officer or agent of the public utility authorized in writing by the public utility may, for the purpose of

- (a) inspecting the electric wires, meters, accumulators, fittings, works and apparatus of the public utility for the supply of electrical energy;
- (b) ascertaining the quantity of electrical energy consumed or supplied;
- (c) removing any electric wires, meters, accumulators, fittings, works and apparatus belonging to the public utility; or
- (d) in cases where a supply of electrical energy is no longer required, or the public utility is authorized to take away and cut off the supply of electrical energy from any premises, doing as little damage thereby as may be,

enter at all reasonable times any premises to which electrical energy is or has been supplied by the public utility.

(2) Such officer or agent shall repair all damage caused by such entry, inspection or removal. R.S., c. 380, s. 61.

Approval for transfer of undertaking

62 Notwithstanding the provisions of any Act of the Legislature, no public utility shall sell, assign or transfer the whole of its undertaking or any part thereof to any person or corporation except with the approval of the Board first had and obtained. R.S., c. 380, s. 62.

Approval of contract affecting or transfer of franchise

63 (1) No franchise nor any right under any franchise to own or operate any public utility, or to use the tracks of any tramways, shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting any such franchise or right be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement has been made under the authority of a statute or with the written approval of the Board.

(2) The approval of the Board of any such assignment, transfer, lease, contract or agreement under this Section shall not be held or construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture. R.S., c. 380, s. 63.

Approval of schedule of rates and charges of utility

64 (1) No public utility shall charge, demand, collect or receive any compensation for any service performed by it until such public utility has first submitted for the approval of the Board a schedule of rates, tolls and charges and has obtained the approval of the Board thereof.

(2) The schedule of rates, tolls and charges so approved shall be filed with the Board and shall be the only lawful rates, tolls and charges of such public utility until altered, reduced or modified as provided in this Act. R.S., c. 380, s. 64.

Restriction on general rate increase

64A (1) In this Section, “utility” means Nova Scotia Power Incorporated.

(2) The utility may not be granted a general rate increase to take effect sooner than twenty-four months following the effective date of the last preceding general rate increase, whether made before or after the coming into force of this Section.

(2A) Notwithstanding subsection (2), the utility may not be granted a general rate increase to take effect sooner than January 1, 2015.

(2B) Nothing in this Section restricts the authority of the Board to order a staged or multi-year general rate increase.

(2C) Subsections (2) and (2A) do not apply to a general rate increase arising out of the utility’s application dated May 8, 2012 (Matter No. M04972).

(3) Subsections (2) and (2A) do not apply if the Board determines that exceptional circumstances exist that have caused or will cause substantial financial harm to the ratepayers of the utility or to the utility.

(4) The Board shall not make a determination pursuant to subsection (3) until it has held a hearing to determine whether exceptional circumstances exist as set out in that subsection and it has determined that such exceptional circumstances exist.

(5) Where the Board has determined that exceptional circumstances exist as set out in subsection (3), it shall hold a separate hearing on the general rates.

(6) For greater certainty,

(a) a determination of the Board pursuant to subsection (3) may be appealed to the Nova Scotia Court of Appeal pursuant to Section 30 of the *Utility and Review Board Act*; and

(b) where the Board holds a hearing pursuant to subsection (4), the Board shall appoint a consumer advocate pursuant to Section 91. 2006, c. 45, s. 1; 2012, c. 41, s. 3.

Recovery of executive remuneration

64B (1) In this Section, “report” means the report required by subsection (2).

(2) Nova Scotia Power Incorporated shall submit to the Board

(a) on or before January 1, 2013; and

(b) with each application for a general rate increase made after January 1, 2013,

a report identifying who the executive employees of Nova Scotia Power Incorporated are, the position held by each executive employee and the remuneration to which each executive employee is entitled.

(3) The Board shall review the report and determine whether it accurately reflects who the executive employees of Nova Scotia Power Incorporated are, the position held by each executive employee and the remuneration to which each executive employee is entitled.

(4) The Board may prescribe the content and form of the report.

(5) The Board shall review the report either

(a) *ex parte*; or

(b) after such notice and public hearing as the Board in its discretion determines.

(6) The Board shall either

(a) approve the report; or

(b) reject the report and require Nova Scotia Power Incorporated to amend the report on such terms and conditions as the Board considers necessary or advisable.

(7) Where Nova Scotia Power Incorporated fails to amend the report within thirty days of being required to do so, the Board shall determine who is an executive employee of Nova Scotia Power Incorporated for the purpose of this Section.

(8) Nova Scotia Power Incorporated shall not recover from any rate, charge or fee approved by the Board

(a) any bonus or incentive compensation; or

(b) any other remuneration, except remuneration that is prescribed by the regulations,

paid to an executive employee of Nova Scotia Power Incorporated as identified in an approved report or determined by the Board. 2012, c. 41, s. 4.

Regulations respecting schedule

65 (1) A public utility shall submit for the approval of the Board with and as part of any schedule of rates all rules and regulations that in any manner relate to such schedule.

(2) Upon such rules and regulations being approved by the Board they shall be filed with the Board as part of the schedules of such public utility and thereafter shall be the lawful rules and regulations of such public utility until altered or modified by order of the Board. R.S., c. 380, s. 65.

Availability of schedule for inspection

66 A copy of so much of said schedule as the Board shall deem necessary for the use of the public shall be printed in plain type and kept on file in every office of such public utility where payments are made by the consumers or users, open to the public in such form and place as to be readily accessible to the public and so as to be conveniently inspected. R.S., c. 380, s. 66.

Equal rates and charges for similar services

67 (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

(2) The taking of tolls, rates and charges contrary to the provisions of this Section and the regulations made pursuant thereto is prohibited and declared unlawful. R.S., c. 380, s. 67.

Change in form of schedule

68 The Board may prescribe such changes in the form in which schedules are issued by any public utility as may be expedient. R.S., c. 380, s. 68.

Interim approval of schedule

69 (1) When a public utility has submitted for the approval of the Board a schedule of rates, tolls and charges, or a proposed change in any existing schedule of rates, tolls and charges, which, in the opinion of the Board, either constitutes a reduction in the existing schedule of rates, tolls and charges at the time being paid by the majority of the customers of such public utility affected by such change in the class of service to which such proposed change applies or which applies only in respect of a service for which no rates, tolls or charges have been previously approved, the Board may at any time before finally approving or disapproving of such schedule or change, grant an interim approval thereof, with or without modification, and thereafter the existing schedule of rates, tolls and charges of such public utility as amended by such schedule of charges, interim approval of which with or without modification, as the case may be, has been so granted by the Board, shall be the only lawful rates, tolls and charges of such public utility until the Board shall express its final approval or disapproval thereof, with or without modification or amendment.

(2) Thereafter the existing schedule of rates, tolls and charges of such public utility as amended by such schedules of rates, tolls and charges or change so finally approved by the Board, with or without modification or amendment, shall be filed with the Board and shall be the only lawful rates, tolls and charges of such public utility until altered, modified or reduced as provided in this Act.

(3) Notwithstanding any other provisions of this Act, the interim approval referred to in this Section may be given *ex parte* and without public hearing or notice. R.S., c. 380, s. 69.

Approval for change of telephone equipment

70 (1) A public utility that owns, operates, manages or controls, or is incorporated for the purpose of owning, operating, managing or controlling any plant or equipment for the conveyance of telephone messages either directly or indirectly to or for the public shall not at any time change the type of equipment installed in any of its exchanges without first obtaining the approval of the Board.

(2) Such approval may be given *ex parte* or after such notice and public hearing as the Board in its discretion determines in each case, and upon such conditions as the Board may prescribe. R.S., c. 380, s. 70.

No rate or charge by utility other than as in schedule

71 No public utility shall charge, demand, collect or receive a greater or less compensation for any service performed by it than is prescribed in such sched-

ules as are at the time in force, or demand, collect or receive any rates, tolls or charges not specified in such schedules. R.S., c. 380, s. 71.

Rescission or amendment of order of Board

72 The Board may, at any time, upon notice to the public utility and after hearing as provided in this Act, rescind, alter or amend any order fixing any rate or rates, tolls, charges or schedules, or any other order made by the Board, and certified copies of the same shall be served and take effect as herein provided for original orders. R.S., c. 380, s. 72.

Domestic rate or charge in certain cases

73 (1) In this Section, “municipality” means a municipality as defined by the *Municipal Affairs Act*.

(2) This Section does not apply to a customer that is the Government of Canada, the Province or a municipality or any of their departments, organizations or agencies.

(3) Subject to subsection (4), the rate or charge for electric energy supplied by an electric public utility to a customer that is a senior citizens’ club, service club, volunteer fire department, a Royal Canadian Legion, community hall or recreational facility owned by a community and used for general community purposes, a charitable or religious organization or institution shall be at a rate or charge not in excess of the domestic rate.

(4) Subsection (3) applies only to a customer for energy supplied on or after the fifth day of May, 1978, and upon an application from that customer.

(5) The Governor in Council may by order in council extend the application of subsection (3) to other organizations or institutions that are similar to or like those named or referred to in subsection (3). R.S., c. 380, s. 73.

Approval for issue of certain securities

74 (1) No public utility shall issue any shares, stocks, bonds, debentures or any evidence of indebtedness payable in more than one year from the date thereof, except as in subsection (2) provided, until it has obtained approval from the Board for such proposed issue.

(2) Without the approval of the Board and for the purpose of enabling a public utility to organize, it may make a first issue of its shares for cash as follows:

(a) if such shares have a nominal or par value it may issue at the par value thereof not exceeding fifty shares of one hundred dollars each;

(b) if such shares are without nominal or par value it may issue not more than fifty of such shares,

but for the purpose of enabling it to organize, no public utility shall issue shares to exceed five per cent in number of the shares of its nominal capital.

(3) An application to the Board by a public utility for approval of any issue of its shares, stocks, bonds, debentures or other evidence of indebtedness, shall comply with and conform to the rules of procedure of the Board.

(4) After hearing such application and when satisfied that the proposed issue by a public utility of its shares, stocks, bonds, debentures or other evidence of indebtedness is to be made in accordance with law and for a purpose approved by the Board, it shall be the duty of the Board to make an order approving the proposed issue to such amount as it deems proper, and also to prescribe the purpose to which the same or the proceeds thereof shall be applied.

(5) In such order the Board shall have power to fix, determine and prescribe the following matters:

(a) if the application is for an issue of shares, the issue price thereof, and in addition in the case of preferred shares the rate of dividend to be payable;

(b) if the application is for an issue of bonds, debentures, debenture stock or other evidence of indebtedness, the issue price thereof and the rate of interest to be payable thereon;

(c) the time within which the issue approved shall be sold or otherwise disposed of;

(d) such other provisions as the Board may deem necessary or proper.

(6) On the application of a public utility affected by an order under this Section and after notice, the Board may amend, vary or rescind such order or make a new order.

(7) An increase of capital by a public utility shall not be valid or effectual unless, in addition to all other requirements being complied with, the proposed increase of capital has been sanctioned by a resolution of a majority in interest of those shareholders of the public utility who are present in person or by proxy at a special general meeting duly called for the purpose or at an annual meeting of the shareholders of the public utility, if in the notice of such annual meeting, express reference is made to such purpose.

(8) Except as provided in subsections (10) and (12), all new common shares shall be offered to the shareholders unless the Board otherwise directs and new preference shares shall not be offered to the shareholders unless the Board directs that they shall be so offered.

(9) Where new shares are required to be offered to the shareholders, they shall be offered at such price as the Board may determine, in proportion to the number of shares held by such shareholders respectively, and such offer shall be

made by notice specifying, in the case of each shareholder, the number of shares to which such shareholder is entitled, and stating the time fixed by the Board within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on receipt of an intimation from the shareholder to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as the Board may approve, provided that the Board may direct that rights to purchase fractions of shares shall not be offered to the shareholders or may make such other order respecting the offering to the shareholders as the Board deems just.

(10) An issue of shares which does not exceed five per cent in number of shares of the capital stock previously issued, may be made in any calendar year by any public utility, without first or at all offering the shares of such issue to the shareholders, provided such shares are issued for any of the following purposes:

- (a) to acquire property which the public utility is authorized to acquire and hold;
- (b) to provide shares to be sold for cash to employees;
- (c) to provide shares to be sold for cash to or for an employees' benefit fund.

(11) Notwithstanding the provisions of subsection (10), the number of shares which may be sold to any employee out of such an issue of shares as is referred to in subsection (10) shall not exceed those which might be allotted or issued to such employee under a written agreement, plan or schedule adopted by the shareholders at an annual meeting or at any special meeting for which notice has been given that such agreement, plan or schedule will be discussed.

(12) Where the purpose of the issue of any shares is to implement any agreement made by a public utility with respect to the exchange of one class of shares for another class or to redeem preference shares issued subject to their redemption at par or at a premium, the provisions of subsection (8) shall not apply.

(13) Where application is made to the Board for approval of an issue of shares which are not required by this Act to be first offered to the shareholders, the Board may, in its discretion, on proper cause being shown, dispense with notice of hearings or any public notice whatever and at once, on application to the Board, may declare its approval of the proposed issue.

(14) This Section does not apply and shall be deemed not to have applied to a public utility that is a city or incorporated town or a municipality or the Nova Scotia Power Incorporated. R.S., c. 380, s. 74; 1992, c. 8, s. 35.

Distribution of surplus profit

75 (1) Nothing in this Act shall be taken to prohibit a public utility from entering into any reasonable arrangement with its employees for the division or distribution of its surplus profits.

(2) No such arrangements shall be lawful until it is found by the Board, after investigation, to be reasonable and just and not inconsistent with the purposes of this Act.

(3) Such arrangements shall be under the supervision and regulation of the Board. R.S., c. 380, s. 75.

Location of office and books

76 (1) Each public utility shall have an office in one of the cities, towns or villages of the Province in which its property or some part thereof is located and shall keep in said office all such books, accounts, papers or records as shall be required by the Board to be kept within the Province.

(2) No such books shall at any time be removed from the Province, except upon such conditions as may be prescribed by the Board. R.S., c. 380, s. 76.

Use of equipment by another utility

77 (1) Every public utility which furnishes telephone, heat, light or power service, and every telegraph company doing business within the Province, and having conduits, poles, wires or other equipment, shall, for a reasonable compensation, permit the use of the same by any other public utility furnishing any of said services whenever public convenience and necessity require such use, and such use will not result in any substantial detriment to the service to be rendered.

(2) In case of failure to agree upon such use, or the conditions or compensation for such use, any public utility or any person or corporation interested may apply to the Board, and if after investigation the Board shall ascertain that public convenience and necessity require such use, and that it would not result in any substantial detriment to the service to be rendered by such owners or other users of such equipment, it shall by order direct that such use be permitted and prescribe conditions and compensation for such joint use.

(3) Such use so ordered shall be permitted, and such conditions and compensation so prescribed shall be the lawful conditions and compensation to be observed, followed and paid.

(4) Any such order of the Board may be from time to time revised by the Board upon application of any interested party or upon its own motion. R.S., c. 380, s. 77.

Consent for erection of pole or wire in city or town

78 No public utility shall, in any city or town, erect or place in, upon, along, under or across any street, road or highway, any pole, wire, conduit or pipe, without first obtaining the consent of the council of such city or town, and the council may give such consent on such terms, including the rate or amount of taxation to be paid by such public utility, or may refuse its consent, as it deems fit, and if the council refuses or neglects to give such consent within one month after such appli-

cation has been received by the mayor or clerk of such city or town or agrees to give it only on terms which the company will not accept, the matter shall be referred to the Board, and the Board may make an order directing on what terms any such work shall be undertaken, or may refuse to make any order. R.S., c. 380, s. 78.

Complaint by public utility

79 Any public utility may make complaint as to any matter affecting its own product or service with like effect as though made by a municipal corporation as provided in this Act. R.S., c. 380, s. 79.

ELECTRICITY EFFICIENCY AND CONSERVATION

Interpretation

79A In this Section and Sections 79B to 79V,

(a) “affiliate” means an affiliate within the meaning of *Companies Act*, and includes a person that Nova Scotia Power Incorporated does not deal with at arm’s length;

(b) “electricity efficiency and conservation activities” means activities, programs or plans relating to

(i) the efficient use of electricity,

(ii) the conservation of electricity,

(iii) the alteration of the consumption pattern of an end-user of electricity that has the effect of reducing demand during Nova Scotia Power Incorporated’s periods of highest demand,

(iv) the utilization or management by Nova Scotia Power Incorporated of its electrical system in a more cost-effective manner,

(v) the delivery of a reduction in the amount of electrical energy or capacity that Nova Scotia Power Incorporated would otherwise be required to supply to its customers, or

(vi) any other prescribed activities, plans or programs;

(c) “franchise” means a franchise granted pursuant to Section 79C;

(d) “franchise holder” means a body corporate granted a franchise pursuant to Section 79C;

(e) “Implementation Date” has the same meaning as in the *Electricity Efficiency and Conservation Restructuring (2014) Act*;

(f) “Minister” means the Minister of Energy and Mines;

(g) “personal information” has the same meaning as in the *Personal Information Protection and Electronic Documents Act (Canada)*;

(h) “prescribed” means prescribed by the regulations. 2014, c. 5, s. 15; O.I.C. 2018-188.

Application for franchise

79B (1) Upon invitation by the Minister, a person may apply for a franchise.

(2) An applicant for a franchise shall provide the Minister with such information as may be prescribed, in such time and manner as may be prescribed.

(3) Neither Nova Scotia Power Incorporated or any of its affiliates may apply for a franchise. 2014, c. 5, s. 15.

Terms of franchise

79C (1) Upon application pursuant to Section 79B, the Minister may grant an electricity efficiency and conservation franchise pursuant to this Section.

(2) A franchise

(a) gives the franchise holder the exclusive right to supply Nova Scotia Power Incorporated with reasonably available, cost-effective electricity efficiency and conservation activities for the purpose of this Act;

(b) is for a term of nine years ending December 31st in the ninth year of the franchise;

(c) is subject to any terms or conditions specified by the Minister in the grant of the franchise; and

(d) may be terminated by the Minister for a breach of a term or condition specified by the Minister in the grant of the franchise, for a failure by the franchise holder to achieve a performance requirement established by the Board pursuant to subsection 79M(1) or 79R(4) or if the agreement between the franchise holder and Nova Scotia Power Incorporated is terminated by the Board pursuant to clause 79N(2)(c).

(3) At the request of the Minister, the Board shall review and assess the extent to which a franchise holder is in compliance with any of the terms, conditions or performance requirements referred to in subsection (2).

(4) A franchise holder and Nova Scotia Power Incorporated shall provide the Board with the information and evidence the Board considers necessary for the purpose of a review and assessment pursuant to subsection (3).

(5) No transfer or assignment of a franchise is effective without the approval of the Minister. 2014, c. 5, s. 15.

Early termination of franchise

79D Notwithstanding clause 79C(2)(b), where a franchise is terminated and a new franchise is granted, the term of the new franchise includes the balance of the current year in addition to the nine-year term. 2014, c. 5, s. 15.

Information and assistance for new franchise holder

79E (1) In the event of the termination or expiration of a franchise, the franchise holder shall provide a new franchise holder with the information in its possession or control, including personal information, and the assistance necessary for the uninterrupted delivery or evaluation of electricity efficiency and conservation activities, in such manner as the Minister directs.

(2) The information and assistance referred to in subsection (1) must be provided within a reasonable period to ensure the uninterrupted delivery of electricity efficiency and conservation activities.

(3) Where there is no new franchise holder, the information and assistance referred to in subsection (1) must be provided to Nova Scotia Power Incorporated for the uninterrupted delivery of electricity efficiency and conservation activities and to enable Nova Scotia Power Incorporated to provide the information and assistance to the new franchise holder when the new franchise holder is known.

(4) All persons shall keep confidential all information obtained pursuant to this Section except information that

- (a)** is in the public domain at the time it is obtained;
- (b)** comes into the public domain after it has been obtained, other than by virtue of a breach of this subsection; or
- (c)** is required by law to be disclosed, but only to the extent so required.

(5) Information provided pursuant to this Section is subject to the same conditions on the transfer or disclosure to which it was subject when held by the franchise holder, and the person to whom it is disclosed or transferred shall comply with any such conditions.

(6) The provision of information pursuant to this Section that is subject to any privilege, including solicitor-client privilege, does not constitute a waiver of the privilege.

(7) No person has or may maintain any cause of action or claim against Her Majesty in right of the Province, the Minister, Nova Scotia Power Incorporated, the franchise holder or the new franchise holder arising from or in relation to the provision of information to the new franchise holder or Nova Scotia Power Incorporated pursuant to this Section. 2014, c. 5, s. 15.

Transition of franchise activities to new franchise holder

79F (1) Notwithstanding any agreement to the contrary, in the event of the termination or expiration of a franchise, any agreement between the franchise holder and any other person with respect to the franchise may be assigned to a new franchise holder or such other person as the Minister directs in accordance with the terms of an order made by the Minister pursuant to Section 79U and, upon such assignment,

(a) the franchise holder is relieved of obligations pursuant to the assigned agreement on and after the date of the assignment but remains responsible for all payments accrued before the date of the assignment and all liabilities arising from any disputes arising from such agreement before the date of the assignment;

(b) the new franchise holder or other person to whom the agreement is assigned is entitled to any benefits, and is responsible for any obligations, pursuant to the assigned agreement on and after the date of the assignment, but is not responsible for any payments accrued before the date of the assignment or any liabilities arising from any disputes arising from such agreement before the date of the assignment; and

(c) no person has or may maintain any cause of action or claim against Her Majesty in right of the Province, the Minister, Nova Scotia Power Incorporated, the franchise holder, the new franchise holder or another person to whom an agreement is assigned pursuant to this Section arising from or in relation to the assignment.

(2) The Board has the general supervision of a franchise holder for the purpose of Section 79E and this Section, and may make all necessary examinations and inquiries, keep itself informed as to the compliance by the franchise holder with the law and obtain from the franchise holder all information necessary to enable the Board to fulfil its duties.

(3) Upon application by the Minister, Nova Scotia Power Incorporated, the franchise holder or the new franchise holder, the Board shall determine any matters required to be determined with respect to the termination or expiration of the franchise and the transition of franchise activities to the new franchise holder.

(4) Where a franchise holder, other than the holder of a franchise that is terminated for any of the reasons set out in clause 79C(2)(d), provides information or assistance pursuant to subsection 79E(1) or (3), the franchise holder may apply to the Board to determine the appropriate compensation, and the new franchise holder or Nova Scotia Power Incorporated, as the case may be, shall compensate the franchise holder for the information or assistance provided, subject to any terms or conditions that the Board considers appropriate, by paying the franchise holder the amount of compensation determined by the Board for that purpose.

(5) Where the new franchise holder pays compensation pursuant to subsection (4), the Board shall permit the new franchise holder to recover the

amount of compensation it pays from Nova Scotia Power Incorporated pursuant to their first agreement. 2014, c. 5, s. 15.

Board supervision

79G (1) The Board has the general supervision of a franchise holder in relation to the franchise holder's franchise activities, and may make all necessary examinations and inquiries, keep itself informed as to the compliance by the franchise holder with the law and obtain from the franchise holder all information necessary to enable the Board to fulfil its duties.

(2) For the purpose of Sections 15 to 19, 21, 22, 25, 27 to 29, 34, 46, 47, 49 to 51, 63, 76, 79, 80, 83 to 85, 88 to 106 and 111 to 118, a franchise holder is deemed to be a public utility in relation to its franchise activities and those Sections apply *mutatis mutandis* to the franchise holder with respect to those activities.

(3) The Board may order and thereupon a franchise holder shall furnish to the Board an independent savings review of the franchise holder's franchise activities to identify potential savings by the franchise holder.

(4) The Board may order that the independent savings review pursuant to subsection (3) include

- (a) an assessment of the franchise activities of the franchise holder;
- (b) an assessment of the franchise holder's fiscal management of its revenue and expenses relating to its franchise activities;
- (c) a value-for-money assessment examining the economy, efficiency and effectiveness of the operations and management of the franchise holder's franchise activities; and
- (d) such other matters as the Board considers relevant to the assessment of potential savings.

(5) An order made pursuant to subsection (3) may include such terms or conditions as the Board considers necessary or advisable.

(6) A franchise holder shall, on the request of the Board, by the date requested by the Board, provide reports to the Board, dealing with such matters and in such detail as the Board may require or as may be prescribed. 2014, c. 5, s. 15.

Board determines required activities

79H The Board shall determine the cost-effective electricity efficiency and conservation activities that must be undertaken for the purpose of this Act. 2014, c. 5, s. 15.

N.S. Power Inc. to undertake activities

79I (1) On and after the Implementation Date, Nova Scotia Power Incorporated shall undertake cost-effective electricity efficiency and conservation activities that are reasonably available in an effort to reduce costs for its customers.

(2) Nova Scotia Power Incorporated shall meet its obligation pursuant to subsection (1)

(a) by entering into an agreement with a franchise holder for the supply of electricity efficiency and conservation activities, if there is a franchise holder, that is approved by the Board pursuant to Section 79L; or

(b) where there is no franchise holder, in the manner approved by the Board, subject to any terms or conditions considered appropriate by the Board.

(3) Notwithstanding subsection (2) and clause 79C(2)(a) but subject to any other requirement for review or approval by the Board in this Act, Nova Scotia Power Incorporated may

(a) maintain or develop rate structures or technologies for its customers incorporating load management features, including load shifting and interruptibility;

(b) enter into financing arrangements with its customers or offer support for the supply of heating equipment, including heat pumps, to its customers;

(c) undertake any electricity efficiency and conservation activities with respect to its own property;

(d) undertake charitable giving with respect to electricity efficiency and conservation activities; and

(e) undertake any other activity, subject to approval by the Board, that, in the opinion of the Board, will not unduly interfere with the franchise holder's franchise. 2014, c. 5, s. 15.

Agreements with franchise holder required

79J (1) In order to purchase electricity efficiency and conservation activities from a franchise holder to meet its obligation pursuant to clause 79I(2)(a), Nova Scotia Power Incorporated shall enter into agreements with a franchise holder that meet the requirements of this Section.

(2) Each agreement must

(a) be for a term of three years, ending on December 31st of the third year of the agreement;

(b) not be terminable or terminated unless the franchise holder's franchise is terminated or the termination is approved by the Board pursuant to Section 79N;

(c) describe the electricity efficiency and conservation activities that the franchise holder will provide to Nova Scotia Power Incorporated; and

(d) identify the amount that Nova Scotia Power Incorporated will pay to the franchise holder for the supply of electricity efficiency and conservation activities.

(3) Where Nova Scotia Power Incorporated and the franchise holder are unable to finalize the required agreement, either or both of them may apply to the Board for a decision with respect to a proposed agreement and, upon considering the application, the Board shall establish a final agreement between the parties on such reasonable terms as the Board considers appropriate.

(4) An application made pursuant to subsection (3) is deemed to be an application for the approval of an agreement pursuant to Section 79L and Section 79L applies *mutatis mutandis* to the application. 2014, c. 5, s. 15.

Information for franchise holder

79K (1) Nova Scotia Power Incorporated shall provide a franchise holder with such information in its possession or control, including records and personal information, respecting customer electricity usage and load as is necessary to enable the franchise holder to provide Nova Scotia Power Incorporated with reasonably available cost-effective energy efficiency and conservation activities.

(2) Upon written notice from a franchise holder, Nova Scotia Power Incorporated shall, within a reasonable period, provide the franchise holder, for the purpose of enabling the franchise holder to provide Nova Scotia Power Incorporated with reasonably available cost-effective energy efficiency and conservation activities, such information in its possession or control, including records and personal information, respecting customer electricity usage and load as is specified in the notice.

(3) Subsections (1) and (2) apply whether or not an agreement has been entered into between Nova Scotia Power Incorporated and the franchise holder.

(4) A franchise holder that believes that Nova Scotia Power Incorporated has failed to provide the information required or requested pursuant to subsection (1) or (2) may apply to the Board for a determination of what information Nova Scotia Power Incorporated is required to provide and the period within which it must be provided.

(5) A franchise holder shall keep confidential all information obtained pursuant to this Section except information that

(a) is in the public domain at the time it is obtained;

(b) comes into the public domain after it has been obtained, other than by virtue of a breach of this subsection; or

(c) is required by law to be disclosed, but only to the extent so required.

(6) Information provided pursuant to this Section is subject to the same conditions on transfer or disclosure to which it was subject when held by Nova Scotia Power Incorporated, and the franchise holder shall comply with any such conditions.

(7) A transfer or disclosure for the purpose of this Section of information that is subject to any privilege, including solicitor-client privilege, does not constitute a waiver of the privilege.

(8) No person has or may maintain any cause of action or claim against Her Majesty in right of the Province, the Minister, Nova Scotia Power Incorporated or the franchise holder arising from or in relation to any provision of information by Nova Scotia Power Incorporated to the franchise holder pursuant to this Section. 2014, c. 5, s. 15.

Board's approval of agreements

79L (1) No agreement between Nova Scotia Power Incorporated and a franchise holder, including an agreement amending such an agreement, is valid until it has been approved by the Board pursuant to this Section.

(2) Where Nova Scotia Power Incorporated and a franchise holder have finalized an agreement, either or both of them may apply to the Board for approval of the agreement.

(3) Regardless of which makes the application, both Nova Scotia Power Incorporated and the franchise holder are applicants.

(4) Upon receiving the application, the Board shall, when establishing a process for the review and approval of the application, ensure that an applicant that did not file the application has sufficient time, as the Board may determine, to prepare the information or evidence required by subsection (5).

(5) Each of the applicants shall provide any information or evidence required by the Board for its determination of the application.

(6) Notwithstanding subsection (5), in the application, the franchise holder is primarily responsible to provide information and evidence to the Board to justify the electricity efficiency and conservation activities that it proposes to undertake for Nova Scotia Power Incorporated, and Nova Scotia Power Incorporated is entitled to rely upon the expertise of the franchise holder in respect of the delivery of the electricity efficiency and conservation activities.

(7) Notwithstanding subsection (6), in the application, the franchise holder is entitled to rely upon the written information and evidence filed with

the Board by Nova Scotia Power Incorporated for the purpose of the application and proceeding.

(8) The Board shall approve an agreement pursuant to this Section if, in addition to any other matters considered appropriate by the Board, it is satisfied that the agreement, including the proposed electricity efficiency and conservation activities that are the subject of the agreement, is in the best interests of Nova Scotia Power Incorporated's customers and satisfies the requirements of Section 79J.

(9) The Board's assessment of the proposed electricity efficiency and conservation activities for the purpose of the approval must take into account their affordability to Nova Scotia Power Incorporated's customers, along with any other matters considered appropriate by the Board or as may be prescribed. 2014, c. 5, s. 15.

Board's authority when approving agreements

79M (1) In making an order approving an agreement pursuant to Section 79L, the Board shall establish such performance requirements for the franchise holder as the Board considers appropriate.

(2) The failure of the franchise holder to achieve performance requirements established pursuant to subsection (1) is not the responsibility of Nova Scotia Power Incorporated except to the extent that the Board determines that Nova Scotia Power Incorporated materially contributed to the franchise holder's failure to achieve the requirements by failing to comply with the approved agreement.

(3) In making an order approving an agreement pursuant to Section 79L, the Board shall determine and approve the costs that are payable by Nova Scotia Power Incorporated to the franchise holder pursuant to the agreement.

(4) In making an order approving an agreement pursuant to Section 79L, the Board may attach such modifications to the agreement or such terms or conditions as the Board considers appropriate, and the agreement is subject to any modifications, terms or conditions that the Board attaches to its approval.

(5) In making an order approving an agreement pursuant to Section 79L, the Board shall include a provision to permit Nova Scotia Power Incorporated to recover any costs Nova Scotia Power Incorporated incurs pursuant to the approved agreement, including through its rate base, pursuant to Section 45, in the year in which the costs are incurred or as deferred by the Board.

(6) The Board may, in its discretion, defer the recovery of costs incurred by Nova Scotia Power Incorporated or the franchise holder pursuant to all approved agreements up to a cumulative amount of \$100,000,000, taking into account, in addition to any other matters considered appropriate by the Board,

(a) the extent to which the payment of the costs for electricity efficiency and conservation activities can be matched to the expected benefits; and

(b) the stability of the rates paid by Nova Scotia Power Incorporated's customers. 2014, c. 5, s. 15; 2015, c. 31, s. 32.

Termination of agreements

79N (1) Neither party to an agreement approved pursuant to Section 79L may terminate the agreement without the approval of the Board[.]

(2) Notwithstanding Sections 79I and 79J, upon receiving an application to terminate an agreement pursuant to this Section, the Board may, based on its assessment of the matter and its determination of what is in the best interests of Nova Scotia Power Incorporated's customers,

(a) provide directions to the parties as if the application were made pursuant to subsection 79P(1);

(b) terminate the agreement and establish a new agreement between the parties for any period up to the date on which the terminated agreement would have expired if not terminated as if the application were made pursuant to subsection 79J(3); or

(c) terminate the agreement and permit Nova Scotia Power Incorporated to meet its obligation pursuant to subsection 79I(1) in the manner approved by the Board, subject to any terms or conditions considered appropriate by the Board. 2014, c. 5, s. 15.

Term of agreement with new franchise holder

79O Notwithstanding clause 79J(2)(a), where an agreement is terminated and a new franchise is granted, the term of the first agreement between the new franchise holder and Nova Scotia Power Incorporated includes the balance of the current year in addition to the three-year term. 2014, c. 5, s. 15.

Disagreement between parties to approved agreement

79P (1) Where Nova Scotia Power Incorporated and a franchise holder are parties to an approved agreement, either or both of them may apply to the Board for directions relating to any disagreement between them in relation to the agreement.

(2) Upon receiving an application pursuant to this Section, the Board shall, when establishing a process for the review and disposition of the application, ensure that a party that did not file the application has such sufficient notice and time, as the Board may determine, to prepare the information or evidence required by subsection (3).

(3) Each of the parties shall provide any information or evidence required by the Board for its determination of the application.

(4) Notwithstanding Sections 79I and 79J, upon considering the application, the Board may, based on its assessment of the matter and its determination of what is in the best interests of Nova Scotia Power Incorporated's customers, provide directions to the parties. 2014, c. 5, s. 15.

First franchise

79Q (1) Notwithstanding clause 79C(2)(b), the first franchise granted after the coming into force of this Section expires December 31, 2025.

(2) Notwithstanding Sections 79I and 79J, for the purpose of Section 79I, Nova Scotia Power and the holder of the first franchise granted after the coming into force of this Section are deemed to have entered into an initial agreement for the supply of electricity efficiency and conservation activities by the franchise holder to Nova Scotia Power Incorporated, as set out in this Section, for a term commencing on the Implementation Date and ending on December 31, 2015.

(3) The franchise holder shall develop a proposal setting out electricity efficiency and conservation activities for the period referred to in subsection (2) and apply to the Board to approve the activities for the purpose of the agreement.

(4) An application pursuant to subsection (3) is deemed to be an application for the approval of an agreement pursuant to Section 79L and Section 79L applies, *mutatis mutandis*, to the application. 2014, c. 5, s. 15; 2015, c. 31, s. 33.

Spending and cost-recovery for activities of franchise holder

79R (1) In making an order approving electricity efficiency and conservation activities pursuant to Section 79Q, the Board shall approve the amount that the franchise holder may spend to supply the activities, which must not exceed the sum of

- (a) \$35,000,000; and
- (b) the amount of any over recovery of funds by Efficiency Nova Scotia Corporation during 2013.

(2) In making an order approving electricity efficiency and conservation activities pursuant to Section 79Q, the Board shall approve the amount that the franchise holder may charge to Nova Scotia Power Incorporated for the activities, which must not exceed the lesser of

- (a) \$35,000,000; and
- (b) the amount approved by the Board pursuant to subsection (1) less the amount of any over recovery of funds by Efficiency Nova Scotia Corporation during 2013.

(3) The recovery by Nova Scotia Power Incorporated from its customers of the amount charged to it by the franchise holder, as permitted by subsection (2), must be deferred, and must be recovered by Nova Scotia Power Incorporated.

porated, including through its rate base, over the eight-year period beginning January 1, 2016.

(4) In making an order with respect to an application pursuant to Section 79Q, the Board shall establish such performance requirements for the franchise holder as it considers appropriate and may establish such other terms or conditions for the initial agreement between Nova Scotia Power Incorporated and the franchise holder as the Board considers appropriate.

(5) The failure of the franchise holder to achieve performance requirements established pursuant to subsection (4) is not the responsibility of Nova Scotia Power Incorporated except to the extent that the Board determines that Nova Scotia Power Incorporated materially contributed to the franchise holder's failure to achieve the requirements by failing to comply with the approved agreement.

(6) Nova Scotia Power Incorporated shall pay the amount charged to it, as permitted pursuant to subsection (2), to the holder of the first franchise in equal monthly instalments, with the first instalment due on the later of January 1, 2015 and the first day of the month in which the Implementation Date occurs. 2014, c. 5, s. 15.

Allocation of costs recoverable

79S The Board may, when approving an application made pursuant to Section 79L or 79Q, determine the manner in which any costs recoverable by Nova Scotia Power Incorporated from its customers must be allocated amongst Nova Scotia Power Incorporated's customers, and in doing so may, in addition to any other factors considered appropriate by the Board, take into account the Rate Smoothing Adjustment approved by the Board in its order dated January 29, 2014. 2014, c. 5, s. 15.

Electricity Demand-side Management Fund addressed

79T Notwithstanding Sections 28 to 30 of the *Efficiency Nova Scotia Corporation Act*, any surplus or deficit relating to the Electricity Demand-side Management Fund established pursuant to that Act may be addressed by the Board, in any manner that the Board determines to be appropriate. 2014, c. 5, s. 15.

Order by Minister to assign agreement

79U (1) The Minister may make an order for the purpose of subsection 79F(1) assigning an agreement as referred to in that subsection, including attaching terms or conditions to any such assignment and consequences for failing to meet such terms or conditions, and respecting any other matter or thing the Minister considers necessary or advisable to achieve the assignment of such agreements.

(2) The exercise by the Minister of the authority contained in subsection (1) is not a regulation within the meaning of the *Regulations Act*. 2014, c. 5, s. 15.

Regulations

79V (1) The Governor in Council may make regulations for the purpose of Sections 79A to 79U, including regulations

- (a) prescribing activities, programs or plans that are electricity efficiency and conservation activities;
- (b) prescribing the information that must be included when applying for a franchise and the time and manner of such an application;
- (c) prescribing reports that a franchise holder must provide for the purpose of 79G(6);
- (d) prescribing matters that the Board must consider pursuant to subsection 79L(9);
- (e) defining any word or expression used but not defined in this Act;
- (f) respecting any matter or thing the Governor in Council considers necessary or advisable to effectively carry out the intent and purpose of these Sections.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is a regulation within the meaning of the *Regulations Act*. 2014, c. 5, s. 15.

PROCEDURE AND PRACTICE**Right of inspection and examination by Board**

80 (1) The Board or any member thereof, or any person or persons employed by the Board for that purpose, shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any public utility, and the Board or any such member shall have the power to examine, under oath, any officer, agent or employee of such public utility in relation to its business and affairs.

(2) Any person other than one of such members who shall make such demand shall produce his authority to make such inspection or examination. R.S., c. 380, s. 80; 1992, c. 11, s. 43.

81 *repealed 1992, c. 11, s. 43.*

Appointee to investigate safety or adequacy of service

82 The Board may, either with or without notice to a public utility, make an order appointing a person to make at any time or from time to time any examinations, investigations or tests for the purpose of ascertaining whether service reasonably safe and adequate and in all respects just and reasonable is being supplied by the public utility, and may in such order make provision as to the remuneration and expenses such person is to be paid and that the same shall be paid to such persons by

the public utility whenever the Board certifies that the same is payable. R.S., c. 380, s. 82.

Complaint against public utility

83 (1) Upon complaint made to the Board against any public utility by any municipal corporation or by any five persons, firms or corporations, that any of the rates, tolls, charges or schedules are in any respect unreasonable or unjustly discriminatory or that any regulation, measurements, practice or act whatsoever affecting or relating to the operation of any public utility is in any respect unreasonable, insufficient or unjustly discriminatory or that the service is inadequate or unobtainable, the Board shall proceed, with or without notice, to make such investigation as it deems necessary or expedient, and may order such rates, tolls, charges or schedules reduced, modified or altered, and may make such other order as to the modification or change of such regulation, measurements, practice or acts as the justice of the case may require, and may order on such terms and subject to such conditions as are just that the public utility furnish reasonably adequate service and facilities and make such extensions as may be required, but no such order shall be made or entered by the Board without a public hearing or inquiry first had in respect thereof.

(2) The Board, when called upon to institute an investigation, may, in its discretion, require from the complainants the deposit of a reasonable amount of money or other security to cover the costs of the investigation, which money or security shall be dealt with as the Board directs, should the decision be given against the complainants. R.S., c. 380, s. 83.

Notice of complaint and setting down

84 The Board shall, prior to such formal hearing, notify the public utility complained of that a complaint has been made, and after reasonable notice has been given, the Board may proceed to set a time and place for a hearing and an investigation as hereinafter provided. R.S., c. 380, s. 84.

Notice of hearing and investigation

85 (1) The Board shall give the public utility and the complainant, if any, ten days notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined.

(2) Both the public utility and complainant shall be entitled to be heard and shall have process to enforce the attendance of witnesses. R.S., c. 380, s. 85.

Notice of hearing of application for rate changes

86 Notice of the hearing of any application, for the approval of or providing for an increase or decrease in the rates, tolls and charges of any public utility, shall be given by advertisement in one or more newspapers published or circulating in the cities, towns or municipalities where such changes are sought, for three consecutive weekly insertions preceding the date of said hearing, unless otherwise ordered by the Board. R.S., c. 380, s. 86.

Unjust or unreasonable rate or charge, regulation or service or action

87 (1) If upon any investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this Act, the Board shall have power to cancel such rates, tolls, charges or schedules, and declare null and void all contracts or agreements in writing or otherwise, to pay or touching the same, upon and after a day to be named by the Board, and to determine and by order fix, and order substituted therefor, such rate or rates, tolls or schedules as shall be just and reasonable.

(2) If upon such investigation it shall be found that any regulation, time schedule, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of any of the provisions of this Act, or if it is found that reasonable service is not supplied, the Board shall have power to determine and substitute therefor such other regulations, time schedules, services or acts and to make such order respecting any such changes in such regulations, time schedules, services or acts as shall be just and reasonable.

(3) Upon any investigation for the purpose of determining upon and requiring any reasonable extension or extensions of lines, or of service that shall promise to be compensatory within a reasonable time, the Board shall have power to fix, determine, and require every such extension or extensions to be made and the terms and conditions upon which the same shall be made, provided that no hearing shall be had and no order shall be made respecting such extension or extensions, without notice to the public utility affected thereby as provided in this Act. R.S., c. 380, s. 87.

Where formal hearing warranted

88 (1) If after making any summary investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation.

(2) Ten days after such notice has been given the Board may proceed to set a time and place for a hearing and an investigation as in this Act provided. R.S., c. 380, s. 88.

Notice of formal hearing

89 Notice of the time and place for such hearing shall be given to the public utility and to such other interested persons as the Board shall deem necessary, as provided in this Act, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though a complaint had been filed with the Board relative to the matter investigated, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint. R.S., c. 380, s. 89.

Determination of question of fact

90 In determining any question of fact, the Board shall not be bound by the finding or judgment of any court in any suit, prosecution or proceeding involving the determination of such fact, but such finding or judgment shall in proceedings before the Board be *prima facie* evidence only. R.S., c. 380, s. 90.

Consumer advocate

91 (1) Where the Governor in Council directs or the Board on its own motion decides, the Board shall appoint a person to act as a consumer advocate in a hearing before the Board.

(2) A consumer advocate appointed pursuant to subsection (1)

(a) shall participate in all aspects of the hearing before the Board and represent the interests of residential consumers as a full intervenor with power to enter into settlement agreements with other parties; and

(b) has all the powers and authorities necessary to carry out the duties of a consumer advocate pursuant to this Section.

(3) The Board may fix fees and expenses of a consumer advocate in performing the functions and duties of a consumer advocate pursuant to this Section.

(4) The fees and expenses referred to in subsection (3)

(a) shall be paid to the Board by the applicant or applicants in such proportion as determined by the Board; and

(b) may include the cost of retaining experts and legal counsel to provide the consumer advocate with advice, including testimony, on technical and legal matters.

(5) The Board may make rules respecting practice and procedure, scope of work, fees and expenses and other matters respecting a consumer advocate appointed pursuant to subsection (1).

(6) The Governor in Council may make regulations respecting the qualifications and experience of a consumer advocate. 2005, c. 25, s. 1.

Small business advocate

92 (1) In this Section,

(a) “prescribed” means prescribed by the regulations made pursuant to subsection (7);

(b) “small business” means a business

(i) of a prescribed type,

(ii) to which prescribed rate classes and service tariffs approved by the Board for a utility apply, and

(iii) that annually consumes the services of the utility within prescribed limits.

(2) Where the Governor in Council directs or the Board on its own motion decides, the Board shall appoint a person to act as a small business advocate in a hearing before the Board.

(3) A small business advocate appointed pursuant to subsection (2)

(a) shall participate in all aspects of the hearing before the Board and represent the interests of small business as a full intervenor with power to enter into settlement agreements with other parties; and

(b) has all the powers and authorities necessary to carry out the duties of a small business advocate pursuant to this Section.

(4) The Board may fix fees and expenses of a small business advocate in performing the functions and duties of a small business advocate pursuant to this Section.

(5) The fees and expenses referred to in subsection (4)

(a) shall be paid to the Board by the applicant or applicants in such proportion as determined by the Board; and

(b) may include the cost of retaining experts and legal counsel to provide the business advocate with advice, including testimony, on technical and legal matters.

(6) The Board may make rules respecting practice and procedure, scope of work, fees and expenses and other matters respecting a business advocate appointed pursuant to subsection (2).

(7) The Governor in Council may make regulations

(a) prescribing the criteria and attributes that the type of business for the purpose of subclause (1)(b)(i);

(aa) prescribing the rate classes and service tariffs for the purpose of subclause (1)(b)(ii);

(ab) prescribing the limits of annual consumption of utility services for the purpose of subclause (1)(b)(iii)-[:];

(b) respecting the qualifications and experience of a business advocate. 2008, c. 31, s. 1; 2010, c. 71, s. 1.

Separate advocates

93 The same person must not be appointed as both the consumer advocate under Section 91 and the small business advocate under Section 92. 2010, c. 71, s. 2.

94 to 99 *repealed 1992, c. 11, s. 43.*

Incrimination

100 No person shall be excused from testifying or from producing books, accounts and papers in any proceeding based upon or growing out of any violation of the provisions of this Act, on the ground or for the reason that the evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may have testified or produced any documentary evidence. R.S., c. 380, s. 100.

101 to 105 *repealed 1992, c. 11, s. 43.*

OFFENCES AND PENALTIES**Penalty for false statement**

106 Every director, president, secretary or other official of any public utility who makes any false statement to secure the issue of any share, stock, certificate of stock, bond, mortgage or other evidence of indebtedness, or who shall, by false statement knowingly made, procure of the Board the making of the certificate herein provided or with knowledge of such fraud, issue, negotiate or cause to be negotiated any such share, stock, certificate of stock, bond, mortgage or other evidence of indebtedness in violation of this Act, shall be liable to a penalty of not less than five hundred dollars, or to imprisonment for a term of not less than one year, or to both, such penalty and imprisonment in the discretion of the court. R.S., c. 380, s. 106.

Offence and penalty for unjust discrimination

107 If any public utility or any agent or officer thereof shall directly or indirectly, by any device whatsoever, or otherwise, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than that prescribed in the public schedules or tariffs then in force or established, as provided in this Act, or than it charges, demands, collects or receives from any other person, firm or corporation other than one conducting a like business for a like and contemporaneous service, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful, and upon conviction thereof shall be liable to a penalty of not less than fifty dollars for each offence, and such agent or officer so offending shall upon conviction thereof be liable to a penalty of not less than twenty-five dollars for each offence. R.S., c. 380, s. 107.

No reduced compensation for provided facilities

108 It shall be unlawful for any public utility to demand, charge, collect or receive from any person, firm or corporation less compensation for any service rendered or to be rendered by said public utility in consideration of the furnishing by said person, firm or corporation of any part of the facilities incident thereto, provided that nothing herein shall be construed as prohibiting any public utility from renting any facilities incident to the operation of a tramway or to the production, transmission, delivery or furnishing of heat, light, water or power or the conveyance of telephone messages and paying a reasonable rental therefor or as requiring any public utility to furnish any part of such appliances which are situated in and upon the premises of any consumer or user, except telephone station equipment upon the subscriber's premises, and unless otherwise ordered by the Board, meters and appliances for measurements of any product or service. R.S., c. 380, s. 108.

Undue or unreasonable preference

109 (1) If any public utility shall knowingly or wilfully make or give an undue or unreasonable preference or advantage to any particular person, firm or corporation, or shall subject any particular person, firm or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful.

(2) Any person, firm or corporation violating the provisions of this Section shall on conviction thereof be liable to a penalty of not less than five dollars for each offence. R.S., c. 380, s. 109.

Unlawful rebate or concession

110 (1) It shall be unlawful for any person, firm or corporation knowingly to solicit, accept or receive any rebate, concession or discrimination in respect to any service in or affecting or relating to any public utility, or for any service in connection therewith, whereby any such service shall, by any device whatsoever or otherwise, be rendered free or at less rate than that named in the schedules and tariffs in force as provided in this Act, or whereby any service or advantage is received other than is in this Act specified.

(2) Any person, firm or corporation violating the provisions of this Section shall on conviction thereof be liable to a penalty of not less than twenty-five dollars for each offence. R.S., c. 380, s. 110.

Penalty on officer or agent or employee of utility

111 Any officer, agent or employee of any public utility who

- (a) fails or refuses to fill out and return any blanks, as required by this Act;
- (b) fails or refuses to answer any questions therein asked;
- (c) wilfully gives a false answer to any such question;

(d) evades the answer to any such question where he had the means of ascertaining the fact inquired of;

(e) upon proper demand, fails or refuses to exhibit to the Board or any member thereof, or any person authorized to examine the same, any book, paper, account, record or memoranda of such public utility, which is in his possession or under his control;

(f) fails to properly use and keep his system of accounting, or any part thereof, as prescribed by the Board under this Act; or

(g) refuses to do any act or thing in connection with such system of accounting when so directed by the Board or its authorized representative,

shall, upon conviction thereof, be liable to a penalty of not less than two hundred dollars for each offence, and a penalty of not less than five hundred dollars shall, on conviction, be imposed on the public utility for each such offence when such officer, agent or employee acted in obedience to the direction, instruction or request of such public utility or any general officer thereof. R.S., c. 380, s. 111; 1992, c. 11, s. 43.

Penalty on public utility

112 (1) If any public utility

(a) violates any provision of this Act;

(b) does any act by this Act prohibited;

(c) fails or refuses to perform any duty enjoined upon it for which a penalty has not been provided; or

(d) fails, neglects or refuses to obey any lawful requirement or order made by the Board or any judgment or decree made by any court upon its application,

for every such violation, failure or refusal, such public utility shall be liable to a penalty of two hundred dollars for each such offence.

(2) In construing and enforcing the provisions of this Section, the act, omission or failure of any officer, agent or other person acting for or employed by any public utility acting within the scope of his employment and instructions shall in every case be deemed to be the act, omission or failure of such public utility. R.S., c. 380, s. 112.

Penalty for unlawful destruction or interference

113 Any person who destroys, injures or interferes with any apparatus or appliance owned or operated by or in charge of the Board or its agents, shall, upon conviction, be liable to a penalty not exceeding one hundred dollars or imprisonment for a period not exceeding thirty days, or both. R.S., c. 380, s. 113.

Separate offence

114 Every day during which any public utility, or any officer, agent or employee thereof, fails knowingly or wilfully to observe and comply with any order

or direction of the Board, or to perform any duty enjoined by this Act, shall constitute a separate and distinct violation of such order or direction, or of this Act, as the case may be. R.S., c. 380, s. 114.

Recovery of penalty

115 (1) The penalties prescribed by this Act may be recovered or enforced

(a) by civil action or proceeding at the suit of the Attorney General, or of a private party with the consent of the Attorney General, in any court having jurisdiction to the amount of the penalty in cases of simple contract; or

(b) with the like consent under the *Summary Proceedings Act*.

(2) No action or proceeding for the violation of any of the provisions of this Act shall be commenced after the expiration of one year from the time of such violation. R.S., c. 380, s. 115.

GENERAL

Interpretation and construction of Act and powers of Board

116 (1) This Act shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Board by the provisions of this Act, the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this Act conferred on the Board.

(2) The Board hereby created shall have, in addition to the powers in this Act specified, mentioned and indicated, all additional, implied and incidental powers which may be proper or necessary to carry out, effect, perform and execute all the said powers herein specified, mentioned and indicated.

(3) A substantial compliance with the requirements of this Act shall be sufficient to give effect to all the rules, orders, acts and regulations of the Board, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. R.S., c. 380, s. 116.

Conflict with and application of

117 (1) Any Act whether enacted before or after the fourteenth day of April, 1943, relating to a public utility as defined by this Act shall be read and construed as subject in all respects to the provisions of this Act and, in case of conflict, the provisions of this Act shall prevail unless the contrary intention is expressly stated.

(2) This Act applies to ~~the~~ Nova Scotia Power Incorporated and the Nova Scotia Power Incorporated is a public utility within the meaning of this Act.

(3) *repealed 1992, c. 8, s. 35.*

R.S., c. 380, s. 117; 1992, c. 8, s. 35.

Regulations

118 (1) The Governor in Council may make regulations

(a) prescribing the remuneration of an executive employee of Nova Scotia Power Incorporated that Nova Scotia Power Incorporated may recover from a rate, charge or fee approved by the Board, which remuneration must be derived from the pay plan, as established from time to time, used for deputy ministers in the public service of the Province;

(aa) respecting requirements for the approval by the Board of contracts for the transportation of natural gas entered into by a public utility for a term of longer than two years;

(b) defining any word or expression used but not defined in this Act;

(c) further defining any word or expression defined in this Act;

(d) respecting any matter or thing the Governor in Council considers necessary or advisable to effectively carry out the intent and purpose of this Act.

(1A) A regulation made pursuant to clause (1)(aa) may be made retroactive to a date not earlier than June 4, 2019.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is a regulation within the meaning of the *Regulations Act*. 2012, c. 41, s. 5; 2019, c. 38, s. 2.

Tab 8

Utility and Review Board Act

CHAPTER 11 OF THE ACTS OF 1992

as amended by

1995, c. 7; 1998, c. 18, s. 582; 2007, c. 23;
2008, c. 68; 2018, c. 1, Sch. A, s. 153



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CHAPTER 11 OF THE ACTS OF 1992
amended 1995, c. 7; 1998, c. 18, s. 582; 2007, c. 23;
2008, c. 68; 2018, c. 1, Sch. A, s. 153

**An Act to Combine
the Board of Commissioners of Public Utilities,
the Expropriations Compensation Board,
the Nova Scotia Municipal Board and
the Nova Scotia Tax Review Board**

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(The table of contents is not part of the statute)

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Short title

1 This Act may be cited as the *Utility and Review Board Act*. 1992, c. 11, s. 1.

Interpretation

- 2** In this Act, unless the context otherwise requires,
- (a) “Board” means the Nova Scotia Utility and Review Board;
 - (b) “Chair” means the Chair of the Board;
 - (c) “Clerk” means the Clerk of the Board;
 - (d) “member” means a member of the Board;
 - (e) “municipality” means a city, an incorporated town or a municipality of a county or district;
 - (f) “predecessor board” means the Board of Commissioners of Public Utilities, the Expropriations Compensation Board, the Nova Scotia Municipal Board or the Nova Scotia Tax Review Board;
 - (g) “public utility” means a public utility within the meaning of the *Public Utilities Act*;
 - (h) “Vice-chair” means the Vice-chair of the Board. 1992, c. 11, s. 2.

Nova Scotia Utility and Review Board

3 The Board of Commissioners of Public Utilities, the Expropriations Compensation Board, the Nova Scotia Municipal Board and the Nova Scotia Tax Review Board are continued as the Nova Scotia Utility and Review Board. 1992, c. 11, s. 3.

Functions, powers and duties

- 4 (1)** The Board has those functions, powers and duties that are, from time to time, conferred or imposed on it by
- (a) this Act, the *Assessment Act*, the *Expropriation Act*, the *Gasoline and Diesel Oil Tax Act*, the *Health Services Tax Act*, the *Heritage Property Act*, the *Insurance Act*, the *Motor Carrier Act*, the *Municipal Government Act*, the *Public Utilities Act*, the *Education Act*, the *Shopping Centre Development Act*, the *Tobacco Tax Act* or any enactment; and

(b) the Governor in Council.

(2) The Governor in Council may assign to the Board the powers, functions and duties of any board, commission or agency and while the assignment is in effect, that board, commission or agency is discontinued and Sections 49 and 50 apply *mutatis mutandis* with respect to that board, commission or agency. 1992, c. 11, s. 4; 1998, c. 18, s. 582; 2018, c. 1, Sch. A, s. 153.

Composition, oath of office and term of office

5 (1) The Board consists of such number, not less than eight and not exceeding ten, of full-time members appointed by the Governor in Council and such number, not exceeding eight, of part-time members appointed by the Governor in Council as the Governor in Council determines.

(2) Each member of the Board shall be sworn to the faithful performance of that member's duties before entering office.

(3) Each full-time member holds office on good behaviour until the member reaches the age of seventy years.

(4) Each part-time member holds office for such term as the Governor in Council determines.

(5) Notwithstanding subsections (1) to (4) and notwithstanding any cross-appointments of members of a predecessor board to other predecessor boards, a member of the Board, who, immediately before the coming into force of this Section, is a member of a predecessor board, is a member of the Board and holds office as a member thereof on the same full-time or part-time basis as the case may be, for the same term and upon the same conditions as for the predecessor board to which the member was first appointed and of which the member is, immediately before the coming into force of this Section, still a member.

(6) Where a member of the Board resigns or retires from the Board, the member shall, during such period of time as the Governor in Council determines, in respect of any application, appeal, proceeding, matter or thing heard before the member or commenced by the member as a member, have and exercise the jurisdiction of a member, including the power to complete any unfinished matter and give a decision therein as if the member had not so resigned or retired.

(7) A determination by the Governor in Council pursuant to subsection (6) may be made before or after such resignation or retirement and may be retroactive in effect. 1992, c. 11, s. 5; 1995, c. 7, s. 1; 2007, c. 23, s. 1; 2008, c. 68, s. 1.

Chair and Vice-chair

6 (1) The Governor in Council shall designate one of the full-time members to be the Chair of the Board and another full-time member to be the Vice-chair.

(2) The Chair has the general supervision and direction over the conduct of the affairs of the Board.

(3) In case of the absence of the Chair or the Chair's inability to act, the Vice-chair shall perform the duties and exercise the powers of the Chair. 1992, c. 11, s. 6.

Remuneration and expenses

7 Notwithstanding subsection (5) of Section 5, a member shall be paid such remuneration as the Governor in Council determines and, subject to the regulations, shall be reimbursed for reasonable travelling and other expenses necessarily incurred by the member in connection with the work of the Board. 1992, c. 11, s. 7.

Conflict of interest

8 (1) No member who acts in a matter affecting a public utility shall be directly or indirectly employed by or interested in a public utility or interested in a share, stock, bond, mortgage, security or contract of the public utility and, if a member voluntarily becomes so interested, the member's office becomes vacant or, if the member becomes so interested otherwise than voluntarily, the member shall, within a reasonable time, dispose of the interest.

(2) Where a member fails to dispose of an interest as required by subsection (1), the Governor in Council may declare the office of the member vacant.

(3) No member is disqualified from acting in a matter affecting a public utility by reason only of being a purchaser of power, water or electric current or service from the public utility.

(4) No member is disqualified from acting in a matter affecting a municipality by reason only of being a resident or ratepayer of the municipality. 1992, c. 11, s. 8.

Clerk, personnel and experts

9 (1) The Chair shall appoint a Clerk, who shall keep a record of the proceedings of the Board, have the custody and care of all records and documents belonging to or pertaining to the Board and perform such duties as the Board requires.

(2) Such officers and employees as are required for the administration of this Act shall be appointed by the Chair in accordance with the *Civil Service Act*.

(3) The Chair may engage the services of professional persons, technical persons and experts to advise the Board, upon such terms and conditions as the Board deems fit.

(4) The Board may avail itself of the services of an officer or other employee of a board, commission or department of the Province, subject to the approval of the minister or other person in charge of the administration of the service in which the officer or employee is employed.

(5) For greater certainty and notwithstanding subsection (3), the persons who, immediately before the coming into force of this Section, are officers and employees of the predecessor boards are officers and employees, respectively, of the Board. 1992, c. 11, s. 9.

Public Service Superannuation Act

10 (1) For all purposes of the *Public Service Superannuation Act*, each full-time member and each full-time employee of the Board is and is deemed to be a person employed in the public service of the Province and full-time service in employment of the Board is and is deemed to be public service.

(2) The Board shall deduct from the salary of each full-time member and each full-time employee of the Board such amount as is directed by the Governor in Council to be deducted from the salary of employees in the public service of the Province, and shall pay the same to the Minister of Finance, and such amounts when so received shall be paid into and form part of the Superannuation Fund pursuant to the *Public Service Superannuation Act*.

(3) Where, by the *Public Service Superannuation Act*, a payment is directed to be made into the Superannuation Fund by the Government or by the Minister of Finance, or where by such Act a superannuation allowance or other sum is directed to be paid out of the Consolidated Fund of the Province, then, in respect of a full-time member of the Board or of a full-time employee of the Board, the payment, superannuation allowance or other sum shall be defrayed by the Board and shall form part of the annual expenses of the Board. 1992, c. 11, s. 10.

Payment of expenses and fiscal year

11 (1) The expenses of the Board shall be paid out of the levies made by the Board and out of money appropriated by the Legislature therefor and, until an appropriation is granted, out of the Consolidated Fund of the Province on the direction of the Minister of Finance.

(2) The fiscal year of the Board is the same as the fiscal year of the Province. 1992, c. 11, s. 11.

Rules of practice and procedure

12 The Board may make rules respecting practice and procedure in relation to matters coming before it. 1992, c. 11, s. 12.

Administration of Board

13 (1) The Chair has the responsibility for the administration of the Board and the members thereof and, without limiting the generality of the forego-

ing, shall, from time to time, assign the members of the Board to its various sittings and may change an assignment at any time.

(2) The Chair may, from time to time, direct an officer or employee of the Board to attend a sitting of the Board and may prescribe that person's duties.

(3) The Chair shall

(a) prescribe the number of members to attend the hearing of an application, appeal or other matter before the Board; and

(b) prescribe the quorum with respect to the application, appeal or other matter.

(4) The Chair, when present, shall preside at all sittings of the Board, and in the Chair's absence, the member designated by the Chair to preside shall preside. 1992, c. 11, s. 13.

Separate sittings and effect of vacancy

14 (1) The members may sit separately at the same time to hear and determine matters before the Board if there is a quorum in each case.

(2) A vacancy in the Board does not impair the right of the remaining members to act. 1992, c. 11, s. 14.

Inquiry

15 (1) The Chair may authorize a member of the Board to inquire into and report to the Board upon a matter within the jurisdiction of the Board or pending before it, and when so authorized that member has, for the purpose of taking evidence or obtaining information for the report, all the powers of the Board.

(2) The Board may appoint or direct a person to make an inquiry and report to the Board upon a matter within the jurisdiction of the Board. 1992, c. 11, s. 15.

Public Inquiries Act

16 In a matter over which the Board has jurisdiction, the Board and each member has all the powers, privileges and immunities of a commissioner appointed pursuant to the *Public Inquiries Act*. 1992, c. 11, s. 16.

Powers of member

17 (1) A member may administer oaths or affirmations, certify as to official acts and issue subpoenas to compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.

(2) Where a person fails to comply with an order of the Board or a subpoena or where a witness refuses to testify to a matter regarding which the wit-

ness may be interrogated before the Board or a member, a judge of the Trial Division of the Supreme Court shall, on application of the Board or a member, compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued by the Court or a refusal to testify therein. 1992, c. 11, s. 17.

Manner of taking evidence

18 The Board may, in an investigation, cause the evidence of witnesses residing within or without the Province to be taken in the manner prescribed by law for like depositions and civil actions in the Supreme Court. 1992, c. 11, s. 18.

Admissibility of evidence

19 The Board may receive in evidence any statement, document, information or matter that, in the opinion of the Board, may assist it to deal with the matter before the Board whether or not the statement, document, information or matter is given or produced under oath or would be admissible as evidence in a court of law. 1992, c. 11, s. 19; revision corrected.

Adjournment of hearing

20 A hearing may be adjourned from time to time by the Board on reasonable grounds on its own motion or on the request of a party to the proceedings. 1992, c. 11, s. 20.

Rights of a party

21 (1) A party may be represented before the Board by counsel.

(2) In a hearing before the Board, a party may call and examine witnesses, cross-examine opposing witnesses and present arguments and submissions. 1992, c. 11, s. 21.

Jurisdiction

22 (1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.

(2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact. 1992, c. 11, s. 22.

Effect of judgment of court or pending matter

23 (1) In determining a question of fact, the Board is not bound by the finding or judgment of a court in a proceeding involved in the determination of the fact, but such finding or judgment is, in proceedings before the Board, *prima facie* evidence only.

(2) The Board has jurisdiction to hear and determine a question of fact notwithstanding that a proceeding involving the same question of fact is pending in a court. 1992, c. 11, s. 23.

Order

24 In any matter before the Board, it shall grant an order, either as specified in the application or notice of appeal or as the Board decides. 1992, c. 11, s. 24.

Form of order

25 It is not necessary that an order of the Board show upon its face that any proceedings or notice were had or given or circumstances existed necessary to give it jurisdiction to make the order. 1992, c. 11, s. 25.

Effect of finding

26 The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive. 1992, c. 11, s. 26.

Written decision with reasons

27 (1) A final decision of the Board shall be in writing and shall set forth reasons for the decision.

(2) The reasons for the final decision shall include

- (a) any agreed findings of facts;
- (b) the findings of fact on the evidence; and
- (c) the conclusions of law based on the findings referred to in clauses (a) and (b).

(3) A copy of a final decision shall be certified by the Clerk and sent to each party to the proceeding. 1992, c. 11, s. 27.

Costs and witness fees

28 (1) Except in respect of a proceeding pursuant to the *Planning Act*, costs of and incidental to a proceeding before the Board are in the discretion of the Board and may be fixed at a sum certain or may be taxed.

(2) The Board may order by whom costs are to be taxed and may prescribe the scale under which costs are to be taxed.

(3) Where the Board so orders, witnesses summoned to give evidence before the Board are entitled to fees as determined by the Board. 1992, c. 11, s. 28.

Enforcement of order

29 (1) An order made by the Board may be made a rule or order of the Supreme Court, and shall thereupon be enforced in like manner as a rule, order, decree or judgment of that Court.

(2) To make an order of the Board a rule or order of the Supreme Court, the Clerk may make a certified copy of the order upon which shall be endorsed:

Make the within a rule or order of the Supreme Court of
Nova Scotia.

Dated this day of, 19.

.
Chair
Nova Scotia Utility and Review Board

(3) The endorsement shall be signed by the Chair and sealed with the seal of the Board.

(4) The Clerk shall forward the certified copy so endorsed to a prothonotary of the Supreme Court, who shall, upon receipt thereof, enter the same as of record, and it thereupon becomes and is an order of the Supreme Court and is enforceable as a rule, order, decree or judgment of the Court.

(5) Where a decision or order of the Board has been made a rule or order of the Supreme Court, a decision or order of the Board rescinding or varying the same shall and shall be deemed to rescind or vary the rule or order, and may in like manner be made a rule or order of the Supreme Court. 1992, c. 11, s. 29.

Appeal

30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.

(2) A notice of appeal shall contain the names of the parties and the date of the order appealed from.

(3) A copy of the notice of appeal shall be served upon the other parties within ten days of filing the notice of appeal with the Supreme Court.

(4) Where there is a conflict between this Section and another enactment, that enactment prevails. 1992, c. 11, s. 30.

Stated case

31 (1) The Board may, upon its own motion with leave of the Attorney General or the Appeal Division of the Supreme Court or upon the request of the Governor in Council, state a case in writing for the opinion of the Appeal Division of the Supreme Court upon a question that, in the opinion of the Board, is a question of law.

(2) The Appeal Division of the Supreme Court shall hear and determine the question of law arising thereon and remit the matter to the Board with the opinion of the Court thereon. 1992, c. 11, s. 31.

Evidence

32 (1) A document purporting to be certified by a member or by the Clerk to be a true copy of a document deposited with the Board or of any portion thereof is, without proof of signature or office of the person who purported to have signed the document, *prima facie* evidence

- (a) of the original document;
- (b) that the original is so deposited and is signed, certified, attested or executed as shown on or appearing from the certified copy; and
- (c) if the certificate states the time when the original was so deposited, that it was deposited at the time so stated.

(2) A copy of a regulation, order, plan or document in the custody of the Clerk or on record with the Board, purporting to be certified by a member of the Board or by the Clerk to be a true copy and purporting to be sealed with the seal of the Board, is *prima facie* evidence of the regulation, order, plan or document without proof of the signature of the person purporting to certify it.

(3) Upon application and upon payment of the fee prescribed by the Board, the Clerk shall provide a certified copy of a regulation, rule, decision or order of the Board or of a map, plan or document deposited with the Board. 1992, c. 11, s. 32.

Annual report

33 (1) The Board shall, in each year, make a report to the Governor in Council on its activities during the fiscal year ending in that year, and the report shall contain such particulars as the Governor in Council may prescribe.

(2) Each report shall be laid before the House of Assembly by the Attorney General or, if it is not sitting, within fifteen sitting days after it next sits.

(3) The Board shall, from time to time, publish and distribute such information in respect of its activities as in its judgement may be useful. 1992, c. 11, s. 33.

Regulations

- 34** (1) The Governor in Council may make regulations
- (a) prescribing the terms and conditions, including remuneration, for the Board engaging the services of professional persons, technical persons and experts to advise the Board;
 - (b) respecting the location of hearings of the Board;

(c) requiring public notice of hearings of the Board, with power to prescribe the manner in which and by whom the notice shall be given;

(d) prescribing the necessary parties to applications, appeals or other matters or proceedings before the Board;

(e) permitting persons who are not parties to an application, appeal or other matter or proceeding before the Board to participate in an application, appeal or other matter or proceeding, with power to prescribe the extent of the participation;

(f) respecting the keeping of a record of proceedings before the Board;

(g) respecting the release of information by the Board;

(h) respecting the publication of orders of the Board;

(i) defining any word or expression used in this Act and not defined herein;

(j) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

(2) A regulation made pursuant to subsection (1) may be of general application or may apply to such class or classes of hearings, applications, appeals or other matters or proceedings and to such class or classes of orders and information as the Governor in Council determines and there may be different regulations with respect to different classes.

(3) For greater certainty, where a regulation made pursuant to subsection (1) conflicts with any Act of the Legislature, that Act prevails.

(4) The exercise by the Governor in Council of the authority contained in subsection (1) shall be regulations within the meaning of the *Regulations Act*. 1992, c. 11, s. 34.

Assessment Act amended

35 *amendments*

Expropriation Act amended

36 *amendments*

Gasoline and Diesel Oil Tax Act amended

37 *amendment*

Health Services Tax Act amended

38 *amendments*

Municipal Board Act repealed

39 Chapter 297 of the Revised Statutes, 1989, the *Municipal Board Act*, is repealed. 1992, c. 11, s. 39.

Municipal Boundaries & Representation Act amended

40 *amendments*

Planning Act amended

41 *amendment*

Public Service Superannuation Act amended

42 *amendment*

Public Utilities Act amended

43 *amendments*

School Boards Act amended

44 *amendments*

Shopping Centre Development Act amended

45 *amendment*

Tobacco Tax Act amended

46 *amendments*

Substituted references

47 A reference in any Act of the Legislature or in any rule, order, regulation, by-law, ordinance or proceeding or in any document whatsoever to the Board of Commissioners of Public Utilities, the Expropriations Compensation Board, the Nova Scotia Municipal Board or the Nova Scotia Tax Review Board shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the Board. 1992, c. 11, s. 47.

Periodic report

48 Where the Board of Commissioners of Public Utilities, the Expropriations Compensation Board, the Nova Scotia Municipal Board or the Nova Scotia Tax Review Board is, immediately before the coming into force of this Act, required by an enactment to make a periodic report, the enactment, to the extent that it requires a periodic report, continues to apply to that Board except that the enactment shall be read and construed as requiring that compliance with the requirement be completed as soon as practical after the coming into force of this Act. 1992, c. 11, s. 48.

Continuation of existing matter

49 For greater certainty, every matter before a predecessor board immediately before the coming into force of this Act shall be continued before the Board and, where any such matter has been heard, in whole or in part, by any members of a predecessor board, it shall be heard by such of those members as are members of the Board. 1992, c. 11, s. 49.

Proclamation

50 This Act comes into force on and not before such day as the Governor in Council orders and declares by proclamation. 1992, c. 11, s. 50.

Proclaimed - December 10, 1992
In force - December 14, 1992

Tab 9

1 **HANSARD 09-29**
2 **DEBATES AND PROCEEDINGS**
3 **Speaker: Honourable Charlie Parker**

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6 **First Session**
7 **TUESDAY, OCTOBER 27, 2009**

8

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10 MR. SPEAKER: Order, please. The time allotted for the Oral Question Period has expired

11
12 **GOVERNMENT BUSINESS**

13 MR. SPEAKER: The honourable Government House Leader.

14 HON. FRANK CORBETT: Mr. Speaker, would you please call the order of business, Public Bills for
15 Second Reading.

16 **PUBLIC BILLS FOR SECOND READING**

17 MR. SPEAKER: The honourable Government House Leader.

18 HON. FRANK CORBETT: Mr. Speaker, would you please call Bill No. 49.

19 **Bill No. 49 - Efficiency Nova Scotia Corporation Act.**

20 MR. SPEAKER: The honourable Minister of Energy.

21 HON. WILLIAM ESTABROOKS: Mr. Speaker, it's nice to be able to stand on my feet in this
22 historic Legislature and make a few comments. I know the members opposite are encouraged to take
23 part in this debate. This is an important piece of legislation and I look forward to hearing from all
24 members on all sides as we discuss Bill No. 49, an Act to Establish the Efficiency Nova Scotia
25 Corporation in our province.

26 [4:15 p.m.]

27 This legislation follows the recommendations of the report submitted to the government by Dr. David
28 Wheeler, Dean of Management at Dalhousie University. I've had the opportunity to meet with Dr.
29 Wheeler on a couple of occasions and let me tell you, he's an impressive academic who has
30 wonderful skills, has gathered some great information on a number of issues for this government and
31 the previous government, and it's his advice that we are responding to.

Dr. Wheeler led the public consultation for demand side management and we've heard very clearly from those Nova Scotians who participated in this process. What they've told us is they want a new independent administrator of electricity efficiency for Nova Scotia. They also told us they don't want Nova Scotia Power or Conserve Nova Scotia to manage these programs.

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As a result, this legislation creates a new independent body to manage electricity efficiency programs in our province. Its main focus will be to help Nova Scotians use less electricity. I repeat, the main focus will be to help Nova Scotians use less electricity. When we use less electricity, we reduce our greenhouse gas emissions and we curb Nova Scotia Power's need to build more coal-fired power plants. This will help keep electricity affordable for Nova Scotians.

As demand for power continues to grow, energy efficiency and conservation are cost-effective ways to manage this demand. It's also the lowest-cost option to protect our environment and our environment, of course, remains a concern for us of all ages, I want to assure you. Nova Scotians want a clearer and greener province, and energy efficiency and conservation will help us achieve this goal. This is a sound investment that will help deliver long-term energy savings for Nova Scotians.

Dr. Wheeler and the process he was involved with and all Nova Scotians who took the opportunity to come forward with these opinions - we now are going to support them with a meaningful piece of legislation that will help Nova Scotians. With the creation of the Efficiency Nova Scotia Corporation, this government is ensuring that electricity remains affordable for Nova Scotians. This means that Nova Scotians will continue to have access to programs to help them use less electricity so they can save money on their power bills.

This legislation also allows the new corporation to manage energy efficiency and conservation programs other than electricity. We believe that a single access point through the new corporation is the best solution for Nova Scotians. I'd like to table for the members opposite and members of this side of the House a good piece of journalism by David Jackson, who on Friday covered the launch of Bill No. 49. I encourage members to pay attention to this article. In particular I would like to quote from it in one particular place, if I may.

Dr. Wheeler is quoted in this article by saying, "That's why it needed to be an independent agency where people are not worried about year-to-year budgets or not worried about political influence changing which programs are run or not run. This is an independent organization that will only focus on delivering programs to Nova Scotians, including small businesses and larger businesses that will help save them money." Dr. Wheeler has hit the nail on the head again when he says very clearly that independence is the key factor which we must be involved within Nova Scotia when it comes to delivering these important services.

A few weeks ago I had an opportunity to attend a home show on the Prospect Road, in my constituency, where I heard first-hand from Nova Scotians about the great work of the staff at Conserve Nova Scotia. In fact, there were people who were more interested in speaking with the staff, asking for them by name, and on one occasion I was identified as Donald Dodge who works at Conserve Nova Scotia - Mr. Dodge is a valued employee. A

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72 lady came forward and questioned me as we did this Conserve Nova Scotia program for people at the
73 home show at Exhibition Park on the Prospect Road.

74 When I told her I wasn't Mr. Dodge, that I was the Minister of Energy, I want you to know the
75 surprise. She wasn't interested in talking to the Minister of Energy, she was interested in talking to
76 Mr. Dodge. Mr. Speaker, that's okay with me, it just reinforces what a talented and committed group
77 we have had at Conserve Nova Scotia. Like those visitors to the home show, I truly appreciate the
78 efforts of staff to help deliver these quality programs for Nova Scotia.

79 Over the past few years, Conserve Nova Scotia has been helping people make energy efficiency and
80 conservation a part of their daily lives in this province. Thanks to the committed staff, thousands of
81 Nova Scotians have learned ways to save energy and money, and we want to ensure that Nova
82 Scotians continue to have access to these important programs. Our hope is that the new corporation
83 will draw on the expertise of staff at Conserve Nova Scotia. The people at Conserve Nova Scotia
84 have very efficiently and professionally talked to each member of the staff at Conserve Nova Scotia,
85 making sure that we will be there with them as we go through this transition period, and whether they
86 are absorbed into the bureaucracy of the government or whether they're working for this independent
87 identity, our hope is that the new corporation will draw on this expertise. This will ensure a smooth
88 transition and get the new corporation up and running as soon as possible. This will also ensure that
89 Nova Scotians can continue to access programs and information on practical, affordable, and
90 meaningful ways to use energy more efficiently.

91 With the creation of the new Energy Efficiency Corporation, our environment will also benefit, for
92 sure. Reducing the use of fossil fuels results in cleaner air for Nova Scotians. This brings us closer to
93 meeting our goals to have one of the cleanest and most sustainable environments in the world by
94 2020.

95 Dr. Wheeler said it best that day when the bill was launched last Friday on October 23rd, when he was
96 quoted as saying Christmas has come early for Nova Scotians with this bill. With those comments, I
97 will take my place.

98 MR. SPEAKER: The honourable member for Dartmouth East.

99 MR. ANDREW YOUNGER: Mr. Speaker, I'm happy to rise and speak to Bill No. 49. I'd like to
100 speak to, I guess, two elements of this bill: one, what is in the bill, and one, what is not in the bill,
101 and it's actually what's not in the bill that concerns me most of all.

102 First, with respect to what's in the bill, I think most people, if not all, as the minister suggested, agree
103 that moving to an independent corporation to manage the DSM funds is a smart move. It certainly is
104 something that the public asked for. I think that from an optics point of view, it's certainly better to
105 take it out of Nova Scotia Power's hands as well as the

106 [\[Page 1810\]](#)

107 government's. I'm not convinced that the corporation is as independent as it should be or could be in
108 this respect. I think that it certainly goes part of the way, but not necessarily far enough.

109 As well, I'm concerned in the bill that the bill really doesn't address the issue of governance and
110 oversight in any meaningful way. I've spoken to a number of people with some expertise in this field

to see whether my feelings the other day are similar to theirs when they look at it, and I've heard the same thing from them. Specifically what we've done here is, you've created a corporation that will report to the Utility and Review Board, which there's probably some sense in that if we truly want it to be independent. However, the fact is the Utility and Review Board is not given parameters around overhead costs, around how we deal with DSM breakdowns and so forth, and that's an issue because even the Act governing Nova Scotia Power has those sorts of regulations in it for the Utility and Review Board to use as guidelines.

What we ultimately end up with here is a situation where you have an independent corporation that, in fact, can really operate under a carte blanche with no real direction in terms of how much it can spend on CEO salaries, for example - which is always a hot topic in Nova Scotia - and so forth. Now, we may like to suggest that both the board of the new corporation and the URB would act in the most responsible manner, but the public has said before that they don't feel that many of these boards have done so in the past, and so I really find it hard to fathom why the government has introduced a bill that doesn't include parameters around things like percentage range, perhaps, of overhead expenditures that would be permitted.

As well, the end of the bill allows Nova Scotia Power to recover the start-up costs from ratepayers, and in speaking with the departmental staff, they admitted that it is in some ways a little bit unclear in that it's hoped that that money would come from the DSM funds - but there's actually no direction that it must come from that, it just says it has to be collected from ratepayers and so it actually can come from the general rate base. That's something that the departmental staff confirmed to me, that in fact the way it is worded currently it would allow that - I know that's not the intent, but I'm not sure why we would want to go forward and pass a bill that, before we even pass it, we know that there's a bit of a grey area.

Now I think we have to look at this and say that when we look at Conserve Nova Scotia, which obviously this bill doesn't roll up Conserve Nova Scotia, but it provides the power to do so - I agree with the minister in that I think there is some merit in combining two into one, but I think it will be incumbent on the minister to show the cost savings that are achieved. One of the things that, unfortunately, the minister was unable to fully answer at the press briefing the other day was what happens to the employees at Conserve Nova Scotia. Of course they're all civil servants at this point, and one would assume that if this is truly going to be an independent corporation that the staff there will not be members of the Public Service Commission.

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He had indicated, if I understood him correctly, that people there could apply for either other positions open within the provincial government - in which case, if they are new positions there's no savings of course from the windup of Conserve Nova Scotia - or they could alternatively go the other direction and they could apply for jobs at this new independent corporation, but he hasn't made it clear whether those would be secondments, whether they would lose their status as Nova Scotia Government & General Employees Union members, or what would happen in that case. So I think that there is no doubt that a number of employees who, as the minister said people know by name in many cases, are at Conserve Nova Scotia are also wondering exactly how their jobs become defined in that situation and, again, the bill is not clear on that - and maybe it's just the staff that need the clarity on that, because I'm not sure whether this was thrown in as an afterthought or not.

153 Let's not forget in all this that as much as this was a recommendation, as much as this makes sense to
154 go, that consumers will be paying for this on their electrical bill, starting January 1st. So electric bills
155 will rise on January 1st to pay for this.

156 Now, obviously, this is a direction that was decided to go and, in fairness, it was decided by previous
157 governments and there were hearings, and I participated in those hearings at the time, in a different
158 role, and obviously there were other - while they were all round consumer-based, there were other
159 methods suggested. This is the one that was selected and that's fine but, Mr. Speaker, what I don't
160 want to have happen is, it almost came out in the press briefing the other day that this is all good and
161 don't worry, nobody is going to pay for it and so forth, and in fact that of course isn't the case.
162 Consumers, industrials, commercial small business - they will all pay for this on their power bills,
163 and that's a rate that will undoubtedly go up over time.

164 One could argue that there is a cost saving associated with avoiding future generation capacity, and I
165 support that argument and I think there is merit in the DSM charge. Obviously we're not debating the
166 merits of the DSM charge today - that would be a whole different debate, we're debating what do you
167 do with it now that we have - but I am frustrated by seeing the government sort of gloss over the fact
168 that this does mean that as part of this, there is an increase in electric bills on January 1st for
169 everybody who pays for electricity in Nova Scotia and we shouldn't forget about that.

170 The question becomes - related to the second part of the bill which talks about Conserve Nova Scotia
171 and rolling Conserve Nova Scotia into this Efficiency Nova Scotia Corporation - what happens to
172 those programs. At the moment, I would suggest that the programs there, while good, are certainly
173 wanting when compared to the federal one and other provincial governments. At the moment,
174 members of all sides can make representations to the Minister of Energy, the Minister of Service
175 Nova Scotia and Municipal Relations, and the Minister of Environment suggesting other programs
176 and suggesting enhancements to

177 [\[Page 1812\]](#)

178 energy efficiency initiatives. That is because Conserve Nova Scotia falls under a government
179 department, so this is another area where the bill is unclear.

180 The bill does not make it clear how that new corporation will interact with the provincial government
181 and if Efficiency Nova Scotia is going to be responsible for these programs. Many of these types of
182 programs are, in fact, tax credits which would come under the Department of Finance.

183 [4:30 p.m.]

184 So the question is, and the bill actually does not at all deal with the issue of, what happens with a tax
185 credit for energy efficiency. At the moment, the Minister of Finance and his staff have to look at that
186 and determine if they can afford that but if Efficiency Nova Scotia is truly going to be an
187 independent corporation, does this mean that all the tax credits disappear and there's no option to
188 look at tax credits, or will there still need to be duplicate infrastructure and duplicate Public Service
189 operation of energy efficiency programs in Nova Scotia because the tax credits for energy efficiency
190 will have to be managed inside government whereas it's only truly the granting programs and the
191 financial grants that would be operated by Efficiency Nova Scotia?

192 So, Mr. Speaker, I don't have much of a problem with this going forward to the Law Amendments
193 Committee but I would like the minister to be able to address some of these concerns because at the
194 moment the bill is silent on a lot of issues that are going to become major issues for members on all
195 sides of this House in terms of how we deal with energy efficiency programs. So I really need to
196 know whether the minister is open to amendments in the governance language in the legislation as
197 well as the clarity on if all the programs from Conserve Nova Scotia are rolled into Efficiency Nova
198 Scotia, how the tax credit portion is dealt with.

199 Mr. Speaker, before we vote on it, I will wait to hear the minister's closing comments on it and
200 hopefully he'll take the time to address those or, at the very least, to indicate that he's open to
201 amendments at the Law Amendments Committee, I hope he will be, and with that I'll take my place.

202 MR. SPEAKER: The honourable member for Cape Breton North.

203 HON. CECIL CLARKE: Mr. Speaker, I'm pleased to rise to speak to Bill No. 49, an Act to Establish
204 the Efficiency Nova Scotia Corporation. As with many pieces of legislation, there have been some
205 carry-overs. We all know that this has been part of the work at Dalhousie University and a report that
206 was brought forward. However, I also know in responding last week to this, there have been some
207 changes that the current government has made in dealing with this. Questions are left outstanding.
208 Just from reading the paper today, the Halifax ChronicleHerald, those questions are being asked by
209 the media, about looking

210 [\[Page 1813\]](#)

211 at what the government's legislation is versus the reality associated with that legislation as it deals
212 with the measures in place to create the Efficiency Nova Scotia Corporation.

213 We now know that what they're going to do is in a way try to abolish Conserve Nova Scotia by just
214 saying that other ongoing aspects that were to be separate will come in and some sort of service
215 arrangement under Efficiency Nova Scotia, which from what I recall was not the intent of what this
216 legislation was about. It was to be very specific to demand- side management of electricity, and to be
217 focused on that in dealing with a number of programs and supports to help those individuals and
218 businesses deal with the demand-side management aspects.

219 So what we do have and, more importantly, what we don't have is clarity truly of what the other
220 functions of Conserve Nova Scotia will be - how they'll be, how they'll report, if there's a service
221 arrangement to a new board of directors. That board, which is yet to be picked, will also have to take
222 on other responsibilities that the legislation doesn't deal with. So we're setting up a board to oversee
223 demand-side management which came out of a report that we generally agreed with and understood
224 the approach, but now that board will oversee a mandate that will be added to it, yet with no
225 parameters, with no budget understandings at this point of what level of programs or service delivery
226 will be there, no indication as to what the government, through the Department of Energy and their
227 role, is going to provide, knowing that at the same time consumers are concerned about the role and
228 function of the Utility and Review Board with a new board and the concern they have of a board
229 increasing fees and increasing rates for programs or services that will be shifted and changed but no
230 parameters put in place, so that is a concern that I've heard already. It is a matter that the government
231 hasn't effectively dealt with in delivering on Efficiency Nova Scotia.

232 The other aspect, Mr. Speaker, that people are aware of is the cost to Nova Scotians. There's still
233 uncertainty as to the connections and the priorities within the government when it comes to demand-
234 side management, in other words, energy efficiency within the consumer base of Nova Scotia for
235 electricity. Yet at the same time, the government has chosen - I believe the number is \$15 million this
236 year for the HST off electricity that applies universally. That is a \$30 million item, at least for next
237 year. We're going to have the Utility and Review Board increase the rates through Nova Scotia
238 Power bills that will pay for this. While one media personality has indicated that it's a wash and it's a
239 windfall for the government, what we do know is that \$30 million will be added with regard to
240 removing the HST, or is projected to be, and that contradicts the very basis of what the demand-side
241 management is supposed to be. It was to target very specific things - to help people reduce electricity,
242 to use it more wisely, to look at alternative forms of energy utilization.

243 At the same time, we're taking off, through our government tax-funded rebate of \$30 million that
244 applies universally, that Efficiency Nova Scotia is, I know, directly trying to target low-income Nova
245 Scotians. Yet they're not helping those low-income Nova Scotians

246 [\[Page 1814\]](#)

247 deal with the cost pressures because they're universally applied, without an income test, without
248 recognizing, as a government, the benefits that would be derived of \$30 million going to those in
249 greatest need, because we have within Nova Scotia families in financial need that have to - they have
250 no choice but to consume electricity, have less capability to deal with implementing energy
251 efficiency programs. Yet those who have the ability, like myself and every member of this House,
252 that could do a lot of our own demand-side management activities and programs individually,
253 managing our household, the appliances that we use, the electrical devices that are employed within
254 our houses. All of those things, a lot of Nova Scotians with the means can do and are doing and are
255 very astute in their need to be stewards of the energy.

256 However, at the same time, what we also don't have is clarity about where the government is going
257 with the actual generator of electricity. We've heard sort of smatterings, here and there, of different
258 announcements when it comes to the energy in this province. We have certain initiatives that are
259 prototypes, which we've all encouraged and when we see our utilization of tidal, but we haven't
260 addressed something that's very key to the demand-side management side, and that's the cost of
261 power generation to the vast majority of Nova Scotians even with renewable sources being added in.
262 We haven't looked more effectively at the co-gen opportunities, the biomass that could be utilized
263 within the burning processes. We haven't had clarity with regard to the scrubbers and the reduction of
264 emissions.

265 So I step forward, albeit with many uncertain aspects to it that the government has not provided
266 clarity on. We also have other aspects that affect the direct rate base of this province, where we
267 haven't seen the ability to have efficiency. There are other things that come up that are very practical.
268 We've heard even about the dredging of Sydney Harbour and the ability to bring in larger vessels
269 with greater quantities of coal. That would help the rate base and stabilize that base so that
270 consumers don't have this revolving door at the URB by Nova Scotia Power looking for rate
271 increases.

272 So like my colleague, the member for Dartmouth East, we want to see this moved forward in the
273 process, but there are many outstanding questions that have to be answered. The consumers and
274 ratepayers of this province deserve the clarity of those answers. It would be a shame, Mr. Speaker, if

275 the minister or the government were to just default to the URB and say, you folks work it out, you
276 folks come up with all the rates and the like, and if we don't like it and the public doesn't like it, we're
277 just going to blame you because we're arm's length from it, and that's not good enough. We have a
278 minister that I do believe is sincere in wanting to make this work, however, there isn't a full
279 connection of programs that are being articulated.

280 I would think that we're going to want to look at that. I would hate to think that everything - there's a
281 disturbing trend as well from Nova Scotians who are paying at the pumps, that the government is
282 now putting that over to the Utility and Review Board because it's not politically convenient to deal
283 with the leadership of dealing with the realities of how

284 [\[Page 1815\]](#)

285 we manage that. But it was politically convenient to pick out a certain area in the province and say,
286 you get a better rate than the rest of Nova Scotia as an entry point, or gateway, but the people in
287 Digby and Yarmouth and North Sydney who are all part of being gateways in and out of this
288 province do not have the same benefits.

289 What we do know is the government has great discrepancy with regard to its approach to overall
290 energy-related policies and the legislation they have has a disconnect from the original purpose and
291 intent. There isn't a full disclosure of the true cost to the ratepayers of this province. There isn't a
292 sense of what the long-term costs are going to be, so we know. I know Sunday morning past, after
293 church, one of the women in the congregation was just talking about, what do you mean another fee?
294 What do you mean they're going to add more rates? They're taking something off our bill, then
295 they're adding something to it. What are they really doing?

296 The problem is, these are Nova Scotians who are ratepayers, who are taxpayers, who are seeing
297 confusion on the government's approach and how it integrates into a well-thought-out and, more
298 importantly, a process that achieves better outcomes. There has been nothing indicated by this that
299 produces better outcomes. Those are the types of things that I would call upon the minister to provide
300 to Nova Scotians and seek from the Minister of Energy and his department, that they're going to be
301 looking at this and in the interim where Conserve Nova Scotia will go, where Efficiency Nova Scotia
302 will be.

303 People will be mindful of what they're charging from the ratepayers versus the government's
304 responsibility to continue with other aspects of Conserve Nova Scotia. Again, if all we're going to do
305 is just continue to defer this to other agencies like the Utility and Review Board, and not produce
306 tangible outcomes that Nova Scotians were expecting, yet at the same time have the government
307 impose - in a sense because they're imposing a pressure on Nova Scotians, they're using tax dollars to
308 give relief but not really helping the ones in the greatest need who would benefit from what
309 Efficiency Nova Scotia would do.

310 There are some disconnects and I think the government needs to take those into account. There are
311 aspects about what these programs do in achieving the greatest outcome, serving those with the
312 greatest need and helping to encourage others with the ability to meet some of these targets
313 voluntarily without needlessly using their own utility rates and/or tax dollars to do something they're
314 willing to do and capable and competent enough to do on their own basis and not having to have an
315 agency telling them they have to do it, you're going to do it because we've decided you're going to do
316 it.

317 Those are some of the things that I've been hearing from individuals. However, we will recognize
318 and go back to the root cause of Dalhousie, the report and the intent of the legislation.

319 [\[Page 1816\]](#)

320 With that, I'll conclude. As we get to the Law Amendments Committee, there are some questions
321 we'll be seeking from the minister, but I do appreciate the indulgence of the House on discussion of
322 Bill No. 49. Thank you.

323 MR. SPEAKER: If I recognize the Government House Leader it will be to close the debate.

324 The honourable Government House Leader.

325 HON. FRANK CORBETT: Mr. Speaker, I move second reading of Bill No. 49.

326 MR. SPEAKER: The motion is for second reading of Bill No. 49. Would all those in favour of the
327 motion please say Aye. Contrary minded, Nay.

328 The motion is carried.

329 Ordered that this bill be referred to the Committee on Law Amendments

330

Tab 10

NOVA SCOTIA UTILITY AND REVIEW BOARD**IN THE MATTER OF THE PUBLIC UTILITIES ACT**

- and -

IN THE MATTER OF AN APPLICATION by **EFFICIENCYONE** for Approval of a Supply Agreement for Electricity Efficiency and Conservation Activities between EfficiencyOne and Nova Scotia Power Inc. and the establishment of a final agreement between the Parties, including approval of EfficiencyOne's 2019 Demand Side Management Resource Plan

BEFORE:



Peter W. Gurnham, Q.C., Chair
Roberta J. Clarke, Q.C., Member
Steven M. Murphy, MBA, P. Eng., Member

WHEREAS by Application dated April 6, 2018, EfficiencyOne (E1) applied to the Board for Approval of a Supply Agreement for Electricity Efficiency and Conservation Activities between E1 and Nova Scotia Power Inc. (NSPI) and the establishment of a final agreement between the Parties, including approval of E1's 2019 Demand Side Management (DSM) Resource Plan;

AND WHEREAS the Board determined this matter was to be considered in a paper hearing process, as set out in its Hearing Order dated April 10, 2018, which was sent to parties and posted on the Board's website;

AND WHEREAS Intervenor status was granted to the Consumer Advocate (CA), the Small Business Advocate (SBA), the Affordable Energy Coalition (AEC), Ecology Action Centre (EAC), Industrial Group, and Nova Scotia Department of Energy;

AND WHEREAS on May 2, 2018, the Board's DSM Verification Consultant, H. Gil Peach & Associates LLC, filed its Verification Review of Program Year 2017 Evaluation Results;

AND WHEREAS E1 and NSPI responded to Information Requests on May 30, 2018;

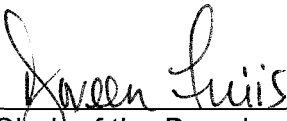
AND WHEREAS participants filed submissions and evidence on June 13, 2018 and Reply Submissions were filed by E1 and NSPI on June 30, 2018;

IT IS HEREBY ORDERED that:

1. The Board approves a DSM Plan for 2019 in the amount of \$34,050,000 with performance targets of 127.2 GWh in incremental annual net energy savings and 20.2 MW in incremental net annual peak demand savings.
2. The Board approves the executed Supply Agreement for electricity efficiency and conservation activities between E1 and NSPI made as of the 6th day of April, 2018 and effective as of the 1st day of January 2019, attached as Schedule "A".
3. If at any time during this 2019 period E1 determines that it cannot achieve the target energy or demand savings, then an application to adjust those targets must be filed with the Board.
4. The Board accepts E1's 2017 DSM Annual Progress Report dated March 29, 2018, which includes updates on the implementation status of the 2013-2015 and the 2016 evaluation and verification recommendations.
5. NSPI is directed to update avoided costs as required by E1 for use in preparation of the 2020-2022 DSM Resource Plan.
6. NSPI is also directed to provide E1, and the DSM Advisory Group, its suggested revisions to the rate and bill impact analysis (RBIA) by September 30, 2018.
7. E1 is directed to initiate a new DSM Potential Study for completion no later than July 31, 2019, to assess the availability of cost-effective DSM measures.
8. E1 is directed to keep the Board apprised of the status of its appeal to the Tax Court of Canada to overturn the CRA Appeals Division decision on the HST issue.
9. In advance of its 2020-2022 DSM Resource Plan application, E1 is also directed to proceed with the following items that were identified by participants and agreed upon by E1:
 - Improve the accuracy of the avoided GHG estimates by better accounting for the timing of DSM savings;
 - Incorporate the value of avoiding CO₂e emissions in its DSM cost effectiveness analysis;
 - Develop an improved RBIA;
 - Address the transparency concerns with respect to E1's electronic Technical Reference Manual (eTRM);
 - Improve the methodologies in developing and evaluating DSM planning and programming.

10. As was stated in Matter M06733, the Board directs E1, in future applications, to provide one or more alternate scenarios of DSM budgets for the Board to consider, and NSPI is to provide rate impact analysis on those scenarios.
11. E1 is directed to ensure that its 2020-2022 DSM Resource Plan application is prepared in accordance with the Standardized Filing Framework filed with the Board on July 22, 2016, as Appendix 1 to the Consensus Agreement in Matter M06733.

DATED at Halifax, Nova Scotia, this 23rd day of July, 2018.



Clerk of the Board

[Handwritten signature]



**Supply Agreement for
Electricity Efficiency and Conservation Activities**

Between

Nova Scotia Power Incorporated

and

EfficiencyOne

Effective Date – January 1, 2019

[Handwritten signature]

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5	Schedule "B":	Compensation
6	Schedule "C":	Performance Requirements
7	Schedule "D":	Confidentiality Agreement
8	Schedule "E":	Approved EECA Plan

THIS AGREEMENT made as of the 6 day of Nov, 2018 and effective as of the 1st day of January, 2019 (the "Effective Date").

BETWEEN:

NOVA SCOTIA POWER INCORPORATED,
a body corporate, organized under the laws
of the Province of Nova Scotia
(hereinafter called "NSPI")

- and -

EFFICIENCYONE,
a body corporate, organized under the laws of
Canada
(hereinafter called "EfficiencyOne")

WHEREAS:

- A. EfficiencyOne and NSPI are both public utilities pursuant to the Act; and
- B. Pursuant to the Act, EfficiencyOne has the exclusive right to supply NSPI with reasonably available, cost-effective Electricity Efficiency and Conservation Activities as the Franchise Holder; and
- C. Pursuant to the Act, NSPI is obligated to undertake cost-effective Electricity Efficiency and Conservation Activities that are reasonably available in an effort to reduce costs for its customers; and
- D. Pursuant to the Act, NSPI shall meet its obligations by entering into an agreement with the Franchise Holder for the supply of cost-effective Electricity Efficiency and Conservation Activities.

NOW THEREFORE witnesses that in consideration of the premises and the mutual covenants and obligations herein and other good and valuable consideration, the sufficiency and receipt of which are hereby acknowledged, the parties agree as follows:

1. INTERPRETATION

1.1 The following terms shall be interpreted as follows in this Agreement:

- (a) "Act" shall mean the *Public Utilities Act*, R.S.N.S. 1989, c.380, as amended from time to time.
- (b) "Agreement" means this agreement between NSPI and EfficiencyOne including all Schedules attached hereto.
- (c) "Business Day" means Monday to Friday, except federal, provincial, and civic holidays within the Province of Nova Scotia.

- 1 (d) **"Consequential Losses"** means consequential, special, incidental, multiple,
2 exemplary or punitive damages including lost profits, whether such claim of lost
3 profits is categorized as indirect, direct or consequential damages or under any
4 alternative theory of recovery.
- 5 (e) **"Contract Documents"** means without limitation, the following documents,
6 including any amendments thereto agreed in writing by the parties:
- 7 (i) this Agreement; and
- 8 (ii) all Schedules to the Agreement.
- 9 (f) **"Contract Price"** has the meaning ascribed to it in Section 4.1.
- 10 (g) **"EECA Plan"** means the plan prepared by EfficiencyOne and approved by the
11 UARB and attached hereto as Schedule "E".
- 12 (h) **"Electricity Efficiency and Conservation Activities"** or **"EECA"** means the
13 electricity efficiency and conservation activities as identified in Schedule "A"
14 attached hereto.
- 15 (i) **"Event of Default"** has the meaning ascribed to it in Section 20.4.
- 16 (j) **"Environmental Laws"** means all applicable federal, provincial, regional,
17 municipal or local laws with respect to environmental matters contained in the
18 statutes, regulations, rules, standards, requirements, ordinances, policies,
19 guidelines, orders, approvals, notices, permits or directives having the force of
20 law, in effect as at the date hereof and as may be brought into effect at future
21 date.
- 22 (k) **"Force Majeure Event"** means any event or circumstance not reasonably within
23 the control of the Party affected which wholly or partly prevents the performance
24 by that Party of its obligations under this Agreement, provided that such Party is
25 in good faith unable to perform such obligations by any commercially reasonable
26 substitute. A Force Majeure Event includes acts of God, war, riot, fire, explosion,
27 flood, hurricane, epidemics, acts of governmental authorities, acts of terrorism.
28 Notwithstanding anything else contained herein, a Force Majeure Event excludes
29 (a) any event or circumstance causing direct or indirect delay in, or failure to
30 perform any of a Party's obligations under this Agreement, attributable to a lack
31 of reasonable diligence on the part of a Party or on the part of any vendor or
32 subcontractor of a Party, including any event or circumstance which a Party or
33 any vendor or subcontractor, acting diligently, could reasonably have been
34 expected to foresee, avoid or overcome in the performance of its obligations; and
35 (b) any event or circumstance caused by the breach of a Party's obligations or
36 the fault or negligence of a Party or the fault or negligence of any vendor or
37 subcontractor, or by violation of applicable laws or regulations by a Party or any
38 of a Party's vendors or subcontractors. For certainty, adverse weather of any
39 kind other than events specified above shall not be considered a Force Majeure
40 Event.
- 41 (l) **"Franchise"** has the meaning ascribed to it in the Act.
- 42 (m) **"Franchise Holder"** has the meaning ascribed to it in the Act.

- 1 (n) **"Governmental Authority"** means any federal, provincial, regional, municipal or
2 local government or authority or other political subdivision thereof and entity or
3 person exercising executive, legislative, judicial, regulatory or administrative
4 functions of, or pertaining to, government.
- 5 (o) **"Hazardous Substances"** means any substance or material that is prohibited,
6 controlled or regulated by any Governmental Authority pursuant to Environmental
7 Laws, including any contaminants, pollutants, petroleum or other hydrocarbons
8 and their derivatives and by-products, dangerous substances or goods, including
9 asbestos, liquid wastes, special wastes, toxic substances, hazardous or toxic
10 chemicals, hazardous wastes, hazardous materials or hazardous substances as
11 defined in or pursuant to any Environmental Law, or any substance or material
12 not inherently hazardous but which would, in sufficient quantities, be hazardous.
- 13 (p) **"Indemnified Costs"** means all liabilities, claims, actions, causes of action,
14 judgments, orders, damages, costs (including those incurred in connection with
15 any investigation of site conditions or any clean-up, environmental remediation,
16 removal or restoration work), expenses (including all reasonable consultant,
17 expert and legal fees and expenses), fines, penalties, losses, or any resulting
18 damages, harm or injuries to the person or property of any third parties or to any
19 natural resources and for which the indemnified party is liable and has incurred
20 losses. Without limiting the foregoing, Indemnified Costs shall include:
- 21 (i) the costs of defending and/or counterclaiming or claiming over and
22 against third parties in such manner as the indemnified party in its sole
23 discretion may determine;
- 24 (ii) the costs relating to any governmental investigation, proceeding or claim;
25 and
- 26 (iii) any costs, liabilities or damages arising out of a settlement of a claim by
27 the indemnified party, with or without the consent of the indemnifying
28 party.
- 29 (q) **"Law"** means the common law, the law of equity and all federal or provincial
30 statutes or municipal by-laws and all regulations, orders, directives, permits and
31 licenses thereunder, which apply to or otherwise affect NSPI or EfficiencyOne
32 with respect to the supply of the EECA, or the property of NSPI or EfficiencyOne,
33 real or personal, or any part thereof, including the Act and all environmental,
34 occupational, health and safety laws.
- 35 (r) **"Liens Indemnities"** has the meaning ascribed to it in Section 18.1.
- 36 (s) **"Liens and Claims"** has the meaning ascribed to it in Section 18.1.
- 37 (t) **"Minister"** has the meaning ascribed to it in the Act.
- 38 (u) **"Party"** means either EfficiencyOne or NSPI. **"Parties"** means EfficiencyOne and
39 NSPI.
- 40 (v) **"Personal Information"** shall mean the information provided by NSPI to
41 EfficiencyOne pursuant to Section 79K of the Act.

- 1 (w) **"Release"** or **"Released"** means a releasing, adding, spilling, leaking, pumping,
2 pouring, emitting, emptying, discharging, injecting, escaping, leaching, migrating,
3 dispersing, dispensing, disposing or dumping.
- 4 (x) **"Significant Changes"** means any proposed change to the EECA Plan for which
5 the UARB orders or directs EfficiencyOne to obtain the approval of the UARB
6 prior to the implementation of such proposed change.
- 7 (y) **"Subcontractor"** means any contractor, supplier or consultant hired by
8 EfficiencyOne in accordance with this Agreement to perform any portion of the
9 EECA.
- 10 (z) **"Term"** has the meaning ascribed to it in Section 2.1.
- 11 (aa) **"UARB"** means the Nova Scotia Utility and Review Board.
- 12 (bb) **"CASL"** means An Act to promote the efficiency and adaptability of the Canadian
13 economy by regulating certain activities that discourage reliance on electronic
14 means of carrying out commercial activities, and to amend the Canadian Radio-
15 television and Telecommunications Commission Act, the Competition Act, the
16 Personal Information Protection and Electronic Documents Act and the
17 Telecommunications Act, S.C. 2010, c. 23, as amended from time to time.
- 18 1.2 Unless otherwise specified in this Agreement or unless the context otherwise requires:
- 19 (a) words of any gender include each other gender;
- 20 (b) using the singular or plural number also include the plural or singular number,
21 respectively;
- 22 (c) the insertion of headings in this Agreement is for convenience only and shall not
23 be construed so as to affect the interpretation or construction of this Agreement;
- 24 (d) the terms "hereof," "herein," "hereto," "hereunder" and words of similar or like
25 import refer to this entire Agreement and not to any particular Section, Schedule
26 or other subdivision of this Agreement;
- 27 (e) references to a particular "Section" or "Schedule" are, unless otherwise noted,
28 references to that Section of, or Schedule to this Agreement;
- 29 (f) the words "include," "includes" and "including" shall be deemed to be followed by
30 "without limitation" or "but not limited to";
- 31 (g) references to any applicable law, legislation or regulation shall be construed as a
32 reference to such law, legislation or regulation as each may be in effect from time
33 to time;
- 34 (h) references to any agreement or document (including this Agreement) shall (i)
35 include all Schedules, appendices, and other attachments thereto, and (ii) be
36 construed at the particular time as a reference to such agreement or document
37 as amended, modified or supplemented and in effect from time to time and shall
38 include a reference to any document which amends, modifies or supplements it,
39 or is entered into, made or given pursuant to or in accordance with its terms;

- 1 (i) references to (i) days shall refer to calendar days unless Business Day is
2 specified, (ii) weeks and months shall refer to calendar weeks and months,
3 respectively, and (iii) years shall refer to calendar years;
- 4 (j) in computing any period of time prescribed or allowed under this Agreement, the
5 day of the act, event or default from which the designated period of time begins
6 to run shall be included. If the last day of the period so computed is not a
7 Business Day, then the period shall run until the close of business on the next
8 Business Day;
- 9 (k) the Contract Documents are complementary, and what is required by any one
10 shall be as binding as if required by all;
- 11 (l) words and abbreviations which have well known technical or trade meanings are
12 used in the Contract Documents in accordance with such recognized meanings;
13 and
- 14 (m) as both Parties were actively involved in preparing the terms and conditions of
15 this Agreement and as they both had access to and relied upon counsel in this
16 process, there shall be no presumption that any one or the other Party prepared
17 this Agreement and no provision of this Agreement shall be construed against
18 either Party based upon the process of preparation of proposals and drafts of the
19 Agreement.
- 20 1.3 If there is a conflict within the Agreement, the order of precedence of documents, from
21 highest to lowest, shall be:
- 22 (a) Sections 1 to 27;
- 23 (b) Schedule "A" – Electricity Efficiency and Conservation Activities; and
- 24 (c) all other Schedules.
- 25 **2. TERM & RESERVATION OF RIGHTS**
- 26 2.1 The term of this Agreement shall be one (1) year from the Effective Date and shall
27 automatically terminate on December 31, 2019 unless terminated earlier in accordance
28 with the terms of this Agreement and the Act (the "**Term**").
- 29 2.2 During the Term, NSPI shall purchase from EfficiencyOne and EfficiencyOne shall
30 supply to NSPI, the EECA in accordance with the terms and conditions of this
31 Agreement and the Act.
- 32 2.3 Notwithstanding anything contained herein, and subject to any requirement for review or
33 approval by the UARB, nothing contained in this Agreement shall in any way effect the
34 rights of NSPI pursuant to Section 79I(3) of the Act.
- 35 **3. ELECTRICITY EFFICIENCY and CONSERVATION ACTIVITIES**
- 36 3.1 For the Term of this Agreement, EfficiencyOne will,
- 37 (a) provide the EECA in accordance with this Agreement;

- 1 (b) provide sufficient resources to enable EfficiencyOne to perform its obligations on
2 time and in accordance with this Agreement;
- 3 (c) carry out the EECA in a professional, expeditious and economical manner, in
4 accordance with the Act;
- 5 (d) manage the EECA in an efficient manner; and
- 6 (e) perform and supply the EECA in a safe and environmentally sound manner and
7 in compliance with applicable Law.

8 3.2 The Parties acknowledge and agree that EfficiencyOne shall be solely responsible for
9 the delivery of the EECA Plan. For greater certainty and notwithstanding the attachment
10 of the EECA Plan as Schedule "E" – Approved EECA Plan, NSPI shall have no liability
11 with respect to the EECA Plan saving and excepting any liability which may arise as a
12 result of NSPI's failure to comply with the Act.

13 **4. PRICE & PAYMENT**

14 4.1 NSPI agrees to pay EfficiencyOne for EECA as set out in Schedule "B" – Compensation
15 (the "Contract Price").

16 4.2 The Contract Price shall constitute full compensation for the EECA, and no additional
17 compensation shall be payable to EfficiencyOne arising out or resulting from any
18 productivity losses, overhead or indirect costs or other costs and expenses of any kind
19 whatsoever.

20 4.3 NSPI shall make monthly payments on the first Business Day of each month in
21 accordance with Schedule "B" to EfficiencyOne on account of the Contract Price when
22 due, together with applicable HST. EfficiencyOne will submit an invoice to NSPI in
23 advance of the payment date referenced in Schedule "B".

24 4.4 Unless otherwise indicated all dollar amounts referred to in this Agreement are in lawful
25 money of Canada.

26 4.5 If applicable, payments shall be subject to harmonized sales tax (as defined in the
27 *Excise Tax Act* (Canada)) ("HST"). No additional taxes (foreign or domestic), customs,
28 duties or brokerage fees shall apply.

29 4.6 If applicable, NSPI will withhold from payments to EfficiencyOne any amounts required
30 to be withheld under applicable Laws and treaties in respect of services rendered in
31 Canada by a non-resident and may remit them to the relevant authority. Where
32 available, statutory withholding may be waived if EfficiencyOne delivers to NSPI a formal
33 waiver of the withholding requirement issued and signed by Canada Revenue Agency.
34 The Parties shall cooperate at all times to ensure that all proper withholdings are
35 deducted from payments and if any withholdings are overlooked then such withholdings
36 may be deducted from later payments.

37 **5. NOTIFICATION OF SIGNIFICANT CHANGES**

38 5.1 EfficiencyOne shall provide notice of Significant Changes to NSPI at the same time as
39 EfficiencyOne makes application to the UARB for the approval of the Significant
40 Changes. Subject to the terms of the Act and the general discretion of the UARB under

1 the Act, NSPI shall, have the right to make written submissions to the UARB on any
2 such Significant Changes to the EECA Plan.

3 **6. SAFETY**

4 6.1 EfficiencyOne shall at all times be responsible for safety and loss management in the
5 supply or performance of the EECA.

6 6.2 EfficiencyOne shall ensure that all employees, Subcontractors, agents and
7 representatives of EfficiencyOne comply with all federal, provincial and municipal health,
8 safety and environmental statutes, regulations, policies and guidelines and all health,
9 safety and environmental rules as prescribed by EfficiencyOne.

10 **7. PROTECTION OF PROPERTY**

11 7.1 EfficiencyOne shall take all commercially reasonable steps to protect the property of
12 NSPI's customers and other third parties from damage which may occur as the result of
13 the performance of the EECA.

14 7.2 Should EfficiencyOne damage the property of NSPI's customers or property of other
15 third parties while performing the EECA, EfficiencyOne shall make good such damage at
16 EfficiencyOne's expense and shall indemnify NSPI from and against all liabilities, claims,
17 damages, settlements, awards, costs, expenses and proceedings incurred by NSPI or its
18 servants, employees and/or agents in respect of such damage, except to the extent such
19 damage occurs as a result of the negligent acts of NSPI or those for which NSPI is
20 responsible at Law.

21 **8. ENVIRONMENT**

22 8.1 EfficiencyOne and its Subcontractors shall at all times comply with all Environmental
23 Laws that apply in any way to the supply or performance of the EECA. EfficiencyOne
24 and its Subcontractors shall not cause, permit or suffer the Release of a Hazardous
25 Substance in contravention of any Environmental Laws.

26 8.2 Notwithstanding any other provision in this Agreement (and in addition to any other right
27 to indemnity held by NSPI under the terms of the Agreement) EfficiencyOne shall
28 indemnify NSPI, NSPI's parent, their respective subsidiaries, affiliates and related
29 companies, and their respective officers, directors, employees, agents and shareholders,
30 and agrees to hold each of them harmless from and against any and all Indemnified
31 Costs resulting from any Release of any Hazardous Substance which is caused or
32 contributed to by EfficiencyOne or its Subcontractors or any breach of any
33 Environmental Law by EfficiencyOne or its Subcontractors.

34 **9. EFFICIENCYONE'S COVENANTS**

35 9.1 EfficiencyOne warrants, covenants and agrees with NSPI that:

36 (a) it has all requisite capacity and authority to execute, deliver and perform its
37 obligations under this Agreement;

38 (b) this Agreement has been duly and validly executed and delivered by
39 EfficiencyOne and constitutes a legal, valid and binding obligation of
40 EfficiencyOne enforceable against EfficiencyOne in accordance with its terms;

- 1 (c) to its knowledge, there is no matter, thing or event, including without limitation,
2 any litigation, proceeding, breach, default or financial circumstance that would
3 adversely affect EfficiencyOne's ability to perform its obligations under this
4 Agreement;
- 5 (d) it will furnish all labour, materials, products, tools, and other necessary
6 components necessary to perform and provide the EECA, unless otherwise
7 provided herein;
- 8 (e) it shall diligently perform or cause to be performed the EECA in a proper and
9 workmanlike manner;
- 10 (f) it has the skills, expertise and resources to carry out the EECA and to comply,
11 observe and perform the obligations to which it is subject in accordance with the
12 terms of this Agreement;
- 13 (g) prior to commencing any work hereunder, it shall obtain and maintain all permits,
14 licenses and notices that a prudent supplier acting in accordance with industry
15 standards would be required to obtain, maintain and provide in comparable
16 circumstances and shall comply with all applicable Laws, ordinances, rules,
17 regulations, codes and orders of any and all authorities having jurisdiction which
18 are or become in force during the Term in respect of the EECA;
- 19 (h) it will comply with applicable federal, provincial and municipal statutes,
20 regulations and bylaws pertaining to the EECA performed by or on behalf of
21 EfficiencyOne under this Agreement. EfficiencyOne shall be responsible for
22 ensuring similar compliance by any suppliers and Subcontractors;
- 23 (i) it is the Franchise Holder pursuant to the Act;
- 24 (j) it is not a non-resident of Canada for the purposes of the *Income Tax Act*;
- 25 (k) it will execute or cause to be made, done and executed all further acts, deeds,
26 assurances, agreements, instruments or other documents as may be reasonably
27 required to ensure fulfillment of the terms of this Agreement;
- 28 (l) the EECA shall be delivered and performed by individuals duly licensed and
29 authorized by Law, if applicable, to perform said undertakings;
- 30 (m) the EECA shall be delivered and performed solely by EfficiencyOne or its
31 Subcontractors and EfficiencyOne acknowledges that EfficiencyOne shall at all
32 times remain responsible for the proper completion of this Agreement; and
- 33 (n) upon becoming aware of a potential disruption having a material impact in the
34 supply of the EECA, EfficiencyOne shall provide notification to the UARB and
35 NSPI.

36 **10. SUBCONTRACTORS**

- 37 10.1 EfficiencyOne shall be permitted to subcontract the performance of any part of the EECA
38 without the prior written approval of NSPI.

1 10.2 Where EfficiencyOne subcontracts any part of the EECA, EfficiencyOne shall preserve
2 and protect the rights of the Parties under this Agreement with respect to the EECA to
3 be supplied or performed under subcontract, and shall be as fully responsible to NSPI
4 for the acts and omissions of Subcontractors and of persons directly or indirectly
5 employed by them, as if they were acts and omissions of persons directly employed by
6 EfficiencyOne.

7 10.3 Nothing contained in the Contract Documents shall create a contractual relationship
8 between a Subcontractor and NSPI.

9 **11. CONFIDENTIAL AND PERSONAL INFORMATION**

10 11.1 The Parties have executed or agree to execute the confidentiality agreement attached
11 hereto as Schedule "D" - Confidentiality ("**Confidentiality Agreement**").

12 11.2 EfficiencyOne shall be responsible for all physical and electronic security required to
13 ensure the security of the Personal Information which has been provided by NSPI to
14 EfficiencyOne.

15 11.3 EfficiencyOne shall indemnify and hold harmless NSPI for any liabilities, claims,
16 damages, settlements, awards, costs, expenses and proceedings incurred by NSPI or its
17 servants, employees and/or agents in consequence of EfficiencyOne's misuse of the
18 Personal Information or any disclosure, whether intentional, inadvertent, negligent or
19 otherwise of any of the Personal Information by EfficiencyOne contrary to the terms of
20 this Agreement or the Act, or in consequence of EfficiencyOne's contravention of CASL.

21 **12. PERFORMANCE REQUIREMENTS AND EVALUATIONS**

22 12.1 EfficiencyOne's performance under the terms of this Agreement shall be measured in
23 accordance with the performance requirements established by the UARB pursuant to
24 Section 79M of the Act as set out in Schedule "C" – Performance Requirements.

25 **13. FORCE MAJEURE**

26 13.1 Neither Party shall be in breach of its obligations under this Agreement where failure to
27 perform or delay in performance of any obligation is due, wholly or in part, to a Force
28 Majeure Event.

29 13.2 Each Party shall notify the other Party promptly of any Force Majeure Event and shall
30 take reasonable steps to minimize the impact of the failure or the delay and to resolve
31 the event or occurrence that has given rise to the Force Majeure Event in order to
32 resume performance. The time for performing an obligation as a result of Force Majeure
33 Event shall be extended for the period lost, subject to the condition that the Term of this
34 Agreement shall not be extended as a result of any Force Majeure Event.

35 13.3 Each Party suffering a Force Majeure Event shall take, or cause to be taken, such action
36 as may be necessary to void, or nullify, or otherwise to mitigate, in all material respects,
37 the effects of such Force Majeure Event. The Parties shall take all reasonable steps to
38 ensure normal performance under this Agreement, including the resumption of any
39 disrupted obligations.

40 13.4 For certainty, in no case shall the failure or omission of EfficiencyOne to carry out or
41 observe any of the terms, provisions, or conditions of this Agreement or any negligent

act or omission of EfficiencyOne, or others for whom EfficiencyOne is responsible constitute an event of Force Majeure or result in an extension of the time to perform the EECA.

14. INDEMNITY

14.1 EfficiencyOne shall assume all risk of loss, damage or injury, including death, to person or property, caused by its directors, officers, employees, Subcontractors, agents or representatives, and agrees not to make or bring any claim, action or demand against NSPI or its directors, officers, servants, agents, or employees in respect of such loss, damage or injury excepting such loss, damage or injury caused by the negligence or wilful misconduct of NSPI or NSPI's directors, officers, servants, agents or employees.

14.2 EfficiencyOne agrees to indemnify and save harmless NSPI, its directors, officers, servants, agents, or employees, and their heirs, executors, administrators, successors and assigns, or any of them, from and against any liabilities, losses, expenses (including legal costs on a solicitor-client basis), claims, demands, actions, and causes of action, whatsoever suffered by NSPI by reason of, or in any way arising out of or in connection with a breach of this Agreement by EfficiencyOne excepting only to the extent caused by the negligence or wilful misconduct of NSPI or NSPI's directors, officers, servants, agents or employees.

14.3 NSPI agrees to indemnify and save harmless EfficiencyOne, its directors, officers, servants, agents, or employees, and their heirs, executors, administrators, successors and assigns, or any of them, from and against any liabilities, losses, expenses (including legal costs on a solicitor-client basis), claims, demands, actions, and causes of action, whatsoever suffered by EfficiencyOne by reason of, or in any way arising out of or in connection with a breach of this Agreement by NSPI excepting only to the extent caused by the negligence or wilful misconduct of EfficiencyOne or EfficiencyOne's directors, officers, servants, agents or employees.

14.4 The provisions set forth in this Section shall apply and be effective with respect to any claim, cause of action, or legal theory whatsoever including without limitation, claims based upon breach of contract, failure to meet performance guarantees, tort (including negligence) and strict liability.

14.5 EfficiencyOne shall defend, indemnify and hold harmless NSPI from any claim, suit, cause of action, judgment, cost or expense (including legal fees) based on a claim by a third party that any intellectual property which is part of the EECA or supply or performance of EfficiencyOne's obligations under this Agreement infringes any patent, copyright, trade secret or other intellectual property right, provided the EfficiencyOne is promptly notified of such claim and is given complete authority for defense of same. EfficiencyOne shall pay all damages, costs and expenses resulting from such a claim, including legal fees and settlement costs, but shall not be responsible for any cost, expense or compromise incurred by NSPI without EfficiencyOne's prior consent.

15. LIMIT OF LIABILITY

15.1 Neither Party shall be liable to the other Party for any Consequential Losses with respect to the performance or non-performance under this Agreement or for any actions undertaken in connection with or related to this Agreement.

1 15.2 EfficiencyOne's total liability to NSPI with respect to the performance or non-
2 performance under this Agreement or for any actions undertaken in connection with or
3 related to this Agreement shall be limited to the greater of the sum of two million dollars
4 (\$2,000,000) or the proceeds of the applicable insurance policies taken out by
5 EfficiencyOne under this Agreement ("**EfficiencyOne Limit of Liability**") provided that
6 the EfficiencyOne Limit of Liability shall not apply to:

7 (a) indemnification of NSPI by EfficiencyOne under the terms of this Agreement for
8 any third party claims (including but not limited to EfficiencyOne's obligations
9 pursuant to Sections 7.2, 8.2, 11.3, 14.5 and 18.1);

10 (b) any wilful misconduct or fraud of EfficiencyOne or its employees, agents or
11 representatives; and

12 (c) any obligation on the part of EfficiencyOne to refund in whole or in part the
13 Contract Price pursuant to this Agreement or the Act.

14 15.3 NSPI's total liability to EfficiencyOne with respect to the performance or non-
15 performance under this Agreement or for any actions undertaken in connection with or
16 related to this Agreement shall be limited to the sum of two million dollars (\$2,000,000)
17 ("**NSPI Limit of Liability**") provided that the NSPI Limit of Liability shall not apply to:

18 (a) any wilful misconduct or fraud of NSPI or its employees, agents or
19 representatives; and

20 (b) NSPI's liability for payment of the Contract Price pursuant to the Agreement or
21 the Act.

22 **16. INSURANCE**

23 16.1 EfficiencyOne shall obtain, maintain and pay for, during the entire Term of this
24 Agreement, the following minimum insurance coverage as follows, such insurance as it
25 relates to this Agreement shall be in a form and from an insurer acceptable to NSPI:

26 (a) General liability insurance shall be in the name of EfficiencyOne and shall name
27 NSPI as an additional insured and shall have limits of not less than five million
28 dollars (\$5,000,000) inclusive per occurrence for bodily injury, death, and
29 damage to property including loss of use thereof. Such insurance shall be
30 primary and non-contributing with, and not in excess of, any other insurance
31 available to NSPI. This policy shall also contain cross liability and severability of
32 interest and blanket contractual liability.

33 (b) Environmental impairment insurance with limits of not less than five million
34 dollars (\$5,000,000);

35 (c) Automobile liability insurance in respect of licensed vehicles shall have limits of
36 not less than two million dollars (\$2,000,000) inclusive per occurrence for bodily
37 injury, death, and damage to property. For automobiles not owned or operated
38 by or on behalf of EfficiencyOne the insurance shall be in the form of a standard
39 non-owned automobile policy and shall include standard contractual liability
40 endorsement. For automobiles owned or operated by or on behalf of
41 EfficiencyOne the insurance shall be in the form of a standard owner's form
42 automobile policy and shall provide third party liability and accident benefits

1 insurance covering licensed vehicles owned or operated by or on behalf of
2 EfficiencyOne.

3 (d) Property Insurance covering all loss of or damage to EfficiencyOne's property
4 and equipment of EfficiencyOne or for which EfficiencyOne is legally liable or
5 responsible used in performance of the EECA for the full replacement value,
6 which insurance shall not allow subrogation claims by the insurer against NSPI.

7 (e) To the extent that the EECA includes the provision of professional services,
8 professional liability errors and omissions insurance covering all claims arising
9 out of errors and omissions of EfficiencyOne in the performance of professional
10 services as part of the EECA with a limit of two million dollars (\$2,000,000). In
11 the event other claims erode EfficiencyOne's professional errors and omissions
12 insurance below two million dollars (\$2,000,000), in the annual aggregate,
13 EfficiencyOne agrees to reinstate the limit.

14 (f) Workers' compensation to the full extent required in Nova Scotia and wherever
15 EfficiencyOne's personnel contracts of employment are made or are expressed
16 to be made.

17 16.2 If EfficiencyOne fails to effect or keep in force any of the foregoing insurances, NSPI
18 may, without prejudice to any other right or remedy, effect such insurance and pay the
19 premiums due and recover the same as a deduction from any other monies due to
20 EfficiencyOne under this Agreement.

21 16.3 EfficiencyOne shall be responsible to pay deductible amounts and for determining the
22 deductible amount in respect of each policy. EfficiencyOne shall not violate, nor
23 knowingly permit to be violated, any conditions of the policies maintained according to
24 the provisions of this Section, and it shall be EfficiencyOne's duty and responsibility to
25 impose upon each Subcontractor the same responsibilities and obligations imposed
26 upon EfficiencyOne under such provisions.

27 16.4 EfficiencyOne agrees to provide proof of insurance to NSPI on an annual basis. Such
28 proof shall be in the form of a certificate of insurance signed by EfficiencyOne's
29 insurance broker.

30 17. INTELLECTUAL PROPERTY

31 17.1 NSPI acknowledges that all branding, trade and business marks of EfficiencyOne used
32 in the course of provision of EECA pursuant to this Agreement, (the "**EfficiencyOne
33 Brands**") are, and shall remain, the sole and exclusive property of EfficiencyOne and
34 shall not be used by NSPI without EfficiencyOne's express consent. Upon termination of
35 this Agreement, NSPI shall immediately upon instruction from EfficiencyOne return or
36 destroy, as instructed by EfficiencyOne, the EfficiencyOne Brands.

37 17.2 Any trademarks, brands, logos or other branding or trade or business marks used in
38 NSPI's business ("**NSPI Brands**") shall remain the sole and exclusive property of NSPI
39 and shall not be used by EfficiencyOne for any purpose except in connection and as
40 necessary for the provision of the EECA. Upon termination of this Agreement,
41 EfficiencyOne shall immediately upon instruction from NSPI return or destroy, as
42 instructed by NSPI, the NSPI Brands.

1 **18. LIENS AND CLAIMS**

2 18.1 EfficiencyOne shall indemnify and hold harmless NSPI, NSPI's parent and their
3 subsidiaries and affiliates (collectively the "**Lien Indemnitees**" or singularly "**Lien**
4 **Indemnitee**") and defend each of them from and against any and all losses and costs
5 arising out of any and all claims for payment, liens, attachment or any other process,
6 filed against any property of the Lien Indemnitees by or in respect of a Subcontractor of
7 any tier or any other party providing work, materials in respect of the EECA or any part
8 thereof (referred to in this Section as "**Liens or Claims**"), including solicitor and client
9 fees and expenses incurred by NSPI in discharging any such Liens or Claims or similar
10 encumbrances.

11 18.2 EfficiencyOne shall discharge promptly any Liens or Claims. If EfficiencyOne does not
12 promptly satisfactorily discharge such Liens or Claims, NSPI at its sole option may (i)
13 require EfficiencyOne to pay, within five (5) Business Days after request by NSPI, or (ii)
14 subject to any requirements of the *Builders' Lien Act* of Nova Scotia, offset against any
15 holdback or other amounts due or to become due to EfficiencyOne, all costs and
16 expenses incurred by NSPI or other Lien Indemnitee in causing the release of, paying or
17 settling such Liens or Claims. EfficiencyOne shall have the right to contest any such
18 Liens or Claims, provided it first provides to NSPI a bond or other assurance of payment
19 reasonably satisfactory to NSPI in the amount of such Liens or Claims and in form and
20 substance reasonably satisfactory to NSPI. In no circumstance whatsoever shall NSPI
21 be liable for a greater amount than the amount payable by NSPI to EfficiencyOne.

22 **19. DISPUTE RESOLUTION**

23 19.1 In the event of a dispute in connection with this Agreement, a senior representative of
24 EfficiencyOne and a senior representative of NSPI shall promptly meet to discuss and
25 resolve the dispute and the Parties shall have thirty (30) days to resolve the dispute (or
26 ten (10) days if either Party notifies the other Party that the matter requires urgent
27 resolution).

28 19.2 Unless the parties agree otherwise, in the event resolution cannot be achieved in
29 accordance with Section 19.1 of this Agreement, then such dispute or difference shall be
30 referred to the UARB in accordance with Section 79P of the Act.

31 19.3 Notwithstanding any dispute, EfficiencyOne shall diligently carry out the EECA, and shall
32 not suspend, impair, interfere with, restrict or discourage the prompt completion of any
33 portion of the EECA, unless specifically authorized to do so by the UARB. .

34 **20. DEFAULT AND TERMINATION**

35 20.1 This Agreement may be terminated immediately by either Party, in whole or in part, upon
36 the happening of one or more of the following events:

37 (a) EfficiencyOne's Franchise is terminated and the Agreement has not been
38 assigned by the Minister; or

39 (b) The UARB approves the termination of the Agreement.

40 In the event of a termination pursuant to this Section 20.1, neither Party shall be entitled
41 to any compensation or damages for any Consequential Losses as a result of such
42 termination. Immediately upon receipt of such termination notice, EfficiencyOne will

1 discontinue all EECA under this Agreement and will only finish such portions of the
2 EECA as may be necessary to preserve and protect the EECA already in progress.
3 Such termination does not relieve either Party from any of their respective obligations
4 under this Agreement for EECA provided up to the date of termination. Any claim for
5 payment by EfficiencyOne must be asserted within thirty (30) days from the date of such
6 termination.

7 20.2 Notwithstanding any other provision in this Agreement, in the event this Agreement is
8 terminated in accordance with Section 20.1(a), EfficiencyOne shall:

9 (a) Immediately return all monies paid on account of the Contract Price which
10 amounts have not been legitimately incurred or subject to contractual
11 commitments for expenditure which cannot otherwise be mitigated to NSPI; and

12 (b) Provide to NSPI all reasonable required termination assistance to allow the
13 EECA provided under this Agreement to continue and to facilitate the orderly
14 transition of the EECA to NSPI or any third party as directed by NSPI, provided
15 that EfficiencyOne shall be entitled to commercially reasonable payment for such
16 transition services on a time and material basis.

17 20.3 The Parties acknowledge that this Agreement is subject to the general supervision of the
18 UARB.

19 20.4 A Party shall be determined to be in default of its obligations under this Agreement if
20 (each a "**Event of Default**");

21 (a) it is in breach of any material term or condition of this Agreement, which breach
22 is not cured by the Party within thirty (30) days after written notice from the other
23 Party;

24 (b) it assigns this Agreement other than as permitted by the Act and/or the UARB;

25 (c) any representation or warranty made by either Party shall prove to be untrue
26 when made in any material respect;

27 (d) there is a sale, transfer or relinquishment, voluntary or involuntary, by operation
28 of law or otherwise, of legal control of the business of either Party except for a
29 transfer to a related corporation or a transfer resulting from a merger, acquisition,
30 amalgamation or reorganization, or, in the case of EfficiencyOne, a change in the
31 Membership of the corporation;

32 (e) Either Party sells, transfers or assigns all or substantially all of its assets;

33 (f) a petition in bankruptcy is filed with respect to either Party; or

34 (g) any proceeding is commenced under any bankruptcy or insolvency legislation or
35 under any other federal, state or provincial law relating to insolvency or
36 bankruptcy, the adjudication of either Party as a bankrupt, the appointment by
37 any competent court having jurisdiction of a temporary or permanent receiver,
38 trustee or other officer having similar powers over either Party its business or
39 assets, or the making of any assignment by either Party for the benefit of its
40 creditors.

20.5 If a breach notified pursuant to Sections 20.4(a) cannot be corrected within the period required therein, the defaulting Party shall not be in breach or violation if it:

(a) commences and diligently and continuously carries out the correction of the breach or violation within the specified time;

(b) provides to the non-defaulting Party, and the UARB an acceptable plan for such correction; and

(c) corrects the breach or violation in accordance with such plan.

20.6 Upon the occurrence of an Event of Default, the non-defaulting Party may apply to the UARB to terminate this Agreement in whole or in part.

21. NOTIFICATIONS

21.1 All notices to be given to either Party under this Agreement shall be written and addressed to the NSPI and to EfficiencyOne as follows:

To NSPI:

Nova Scotia Power Incorporated
1223 Lower Water Street
PO Box 910
Halifax, NS B3J 3S8
Attention: Corporate Secretary
Facsimile: (902) 428-6171

To EfficiencyOne:

EfficiencyOne
230 Brownlow Avenue
Suite 300
Dartmouth, NS B3B 0G5
Attention: CEO
Facsimile: (902) 470-3599

21.2 All notices may be sent by facsimile, a nationally recognized overnight courier service, first class mail or hand delivered. Notice shall be given when received by the addressee on a Business Day. In the absence of proof of the actual receipt date, the following presumptions will apply:

(a) Notices sent by facsimile shall be presumed to have been received upon the sending Party's receipt of its facsimile machine's confirmation of successful transmission. If the day on which such facsimile is received is not a Business Day or is after five p.m. (local time for the recipient) on a Business Day, then such facsimile shall be deemed to have been received on the next following Business Day.

1 (b) Notice by overnight courier shall be presumed to have been received on the next
2 Business Day after it was sent.

3 (c) Notice by first class mail shall be presumed delivered five (5) Business Days
4 after mailing.

5 21.3 Either Party may modify its address for notices by advance written notice to the other
6 Party.

7 **22. AUDIT AND INSPECTION**

8 22.1 EfficiencyOne shall, during the Term and for a period of thirty-six (36) months thereafter,
9 keep accurate records of all EECA supplied to NSPI, as necessary to determine that the
10 EECA was provided in accordance with the terms and conditions of this Agreement.

11 22.2 NSPI shall have the right to apply to the UARB to request access to any of the records
12 referred to in 22.1.

13 22.3 NSPI shall have the right to apply to the UARB to inspect or observe the EECA at all
14 times, whether using its own forces or those of a designated third party. EfficiencyOne
15 shall facilitate such inspections and provide sufficient, safe and proper facilities at all
16 times for inspection of the EECA.

17 **23. ASSIGNMENT**

18 23.1 Neither Party shall assign all or any portion of this Agreement without the prior written
19 approval of the UARB and/or the Minister as the situation requires.

20 **24. SHARING OF DATA AND INFORMATION**

21 24.1 EfficiencyOne shall work co-operatively with NSPI to provide NSPI with information and
22 data from time to time in order to assist NSPI with planning and load forecasting as may
23 be reasonably required by NSPI. For greater certainty, such information and data shall
24 be consistent with the past practices of the Parties.

25 24.2 In the event of a dispute regarding any request for information by NSPI, NSPI shall have
26 the right to apply to the UARB to request access to the information and data referred to
27 in 24.1.

28 **25. COORDINATION MEETINGS AND REPORTS**

29 25.1 During the Term of this Agreement, EfficiencyOne shall prepare and deliver to the UARB
30 and NSPI a quarterly report (the "**Quarterly Report**") in a form acceptable to the UARB.

31 25.2 EfficiencyOne shall prepare and deliver to the UARB and NSPI an annual report (the
32 "**Report**") in a form acceptable to the UARB. For greater certainty, the Report shall
33 summarize and provide details as to the EECA and milestones achieved in the prior
34 year, contain a discussion and analysis of major discrepancies relative to the EECA
35 Plan's intent and forecasts, EfficiencyOne's financial statement for the previous year with
36 respect to the EECA, evaluation reports and a summary of planned versus actual
37 savings and costs for each metric.

1 25.3 The Parties agree that ongoing coordination and regular communication between NSPI
2 and EfficiencyOne is important in order to ensure effective planning. To that end, the
3 Parties shall meet quarterly or as otherwise agreed upon to discuss the provision of the
4 EECA.

5 **26. GENERAL**

6 26.1 This Agreement shall only be renewed in accordance with the provisions of the Act.

7 26.2 This Agreement shall extend to, be binding upon and enure to the benefit of the
8 respective successors and permitted assigns of the Parties hereto.

9 26.3 EfficiencyOne will be an independent contractor. EfficiencyOne shall not act as an agent
10 for NSPI, bind NSPI to any obligation with a third party, nor hold itself out as having
11 authority to bind or obligate NSPI. None of the persons engaged by EfficiencyOne or
12 any of its Subcontractors in the performance of the EECA will be considered employees
13 of NSPI.

14 26.4 This Agreement shall be deemed to have been made in and shall be governed by,
15 construed and interpreted in accordance with the laws of the Province of Nova Scotia
16 and the laws of Canada, as applicable therein. Where the provisions of this Agreement
17 or the Act permit or require a matter to be referred to or proceeded with before a court,
18 or in any other case where the Parties bring a matter in respect of this Agreement before
19 a court, the Parties irrevocably attorn to the jurisdiction of the Supreme Court of Nova
20 Scotia.

21 26.5 No consent or waiver, express or implied, by any Party to this Agreement of any breach
22 or default by any other Party in the performance of its obligations under this Agreement
23 or of any of the terms, covenants or conditions of this Agreement shall be deemed or
24 construed to be a consent or waiver of any subsequent or continuing breach or default in
25 such Party's performance.

26 26.6 Time shall be of the essence for purposes of this Agreement.

27 26.7 This Agreement, upon approval by the UARB, shall represent the entire Agreement
28 between the Parties with respect to the subject matter hereto and shall not be modified,
29 varied or amended except by an instrument in writing signed by the Parties and
30 approved by the UARB or as ordered or directed, by the UARB at any time.

31 26.8 Should any provision of the Agreement be declared by a judicial or other competent
32 authority to be unenforceable, the remaining provisions of the Agreement shall remain in
33 full force and effect.

34 26.9 The Parties acknowledge that this Agreement and all related documents shall be in
35 English.

36 26.10 This Agreement may be executed by the Parties in counterparts, each of which when so
37 executed and delivered shall be deemed to be an original and when taken together shall
38 be deemed to be one and the same instrument. The electronic delivery, including,
39 without limitation, by email or facsimile transmission, of any signed original of this
40 Agreement shall be the same as the delivery of an original.

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Supply Agreement

1 IN WITNESS THEREOF, the Parties have duly executed this Agreement, in duplicate, as of the
2 date set forth above.

Witness

Witness

Witness

Witness

NOVA SCOTIA POWER INCORPORATED

Per:

Name:

Title:

Karen Hutt
President & CEO

Per:

Name:

Title:

David Landrigan
VP, Commercial

EFFICIENCYONE

Per:

Name:

Title:

Per:

Name:

Title:

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Supply Agreement

1 IN WITNESS THEREOF, the Parties have duly executed this Agreement, in duplicate, as of the
2 date set forth above.

NOVA SCOTIA POWER INCORPORATED

Per: _____

Name: _____

Title: _____

Per: _____

Name: _____

Title: _____

EFFICIENCYONE

Per: _____

Name: Stephen MacDonald

Title: Chief Executive Officer

Per: _____

Name: _____

Title: _____

Witness

Witness

Holly Brown.

Witness

Witness

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SCHEDULE A**ELECTRICITY EFFICIENCY AND CONSERVATION ACTIVITIES****Schedule A****Electricity Efficiency and Conservation Activities**

The figure below identifies the scope of savings associated with carrying out EECAs over the Term.

	Incremental** Annual Net Energy Savings at Generator(GWh)	Incremental** Annual Net Peak Demand Savings at Generator (MW)
Performance Targets *	127.2	20.2

The Performance Targets will be achieved in accordance with the EECA Plan as set out in Schedule E.

* For certainty, in accordance with the performance requirements set out in Schedule "C" attached hereto, EfficiencyOne shall be deemed to be in substantial compliance with the approved Performance Targets if 90 percent (90%) or greater achievement is reached on both Performance Targets. If less than 90 percent (90%) of either Performance Target is achieved, a regulatory process will be triggered.

**Incremental refers to new (or additional) annual savings

SCHEDULE B

COMPENSATION

Schedule B (Page 1 of 2)

Compensation

I. Net Contract Price

The figure below identifies the net Contract Price to be paid by NSPI allocated for each year of the Term.

				2019
UARB Approved	34,050,000.00			\$34,050,000.00
Net Contract Price to be Paid by NSPI				\$34,050,000.00

The Parties acknowledge that any surplus realized by EfficiencyOne in delivering the Performance Targets at the end of the Term shall be reported to the UARB and, subject to any other direction that may be provided by the Board, credited¹ toward monthly payments required to be made by NSPI for EECA for 2021.

¹ Together with all accumulated interest earned by EfficiencyOne on such surplus.

Schedule B (Page 2 of 2)**Compensation****II. Payments**

In accordance with Section 4.3 of the Agreement, the monthly payments to be made by NSPI to EfficiencyOne over the Term shall be as set out below. The monthly payment amounts referred to following are exclusive of required HST. HST shall be remitted to EfficiencyOne in addition to these monthly amounts.

On the First Business Day of:	2019
January	\$2,902,994
February	\$2,643,668
March	\$2,835,843
April	\$3,012,732
May	\$2,546,339
June	\$2,365,872
July	\$2,428,360
August	\$2,448,936
September	\$3,105,656
October	\$4,053,223
November	\$2,867,637
December	\$2,838,740
Total	\$34,050,000

SCHEDULE C

Performance Requirements

I. UARB-APPROVED PERFORMANCE TARGETS, THRESHOLDS, AND INDICATORS

a) Performance Targets and Thresholds:

- i. EfficiencyOne is deemed to be in substantial compliance with the UARB-approved Plan Performance Targets if 90 percent or greater achievement is reached on the two Performance Targets as listed below. If less than 90 percent (90%) of either Performance Target is achieved, a regulatory process will be triggered.

b) Performance Targets consist of:

- i. Incremental annual net energy savings at generator
- ii. Incremental annual net peak demand savings at generator.

c) Performance Indicators (for UARB reporting) consist of:

- i. Incremental annual net energy savings at generator
- ii. Incremental annual net peak demand savings at generator.
- iii. Lifetime net energy savings at generator (reported by program and rate class)
- iv. Total ratepayer benefits
- v. Total spending (reported by program and rate class)
- vi. Customer satisfaction
- vii. An analysis of the impact on rates through the implementation of the 2019 programs will be included as part of EfficiencyOne's historical-looking rate and bill impact analysis, filed by October 31, 2020
- viii. Reporting on low income program participation, expenditures, and savings through a variety of methods, including estimation based on geographic census information.

1 SCHEDULE D

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3 CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT4
5 THIS CONFIDENTIALITY AGREEMENT made effective this 1st day of January, 20196
7 Between:8
9 EfficiencyOne, hereinafter "EfficiencyOne"

10 Party of the First Part

11
12 And13
14 Nova Scotia Power Incorporated, hereinafter "NSPI"

15 Party of the Second Part

16
17 Whereas the Parties have entered into a Supply Agreement for Electricity Efficiency and
18 Conservation Activities made effective as of January 1, 2019 ("Supply Agreement")
19 whereby Efficiency One is to provide EECA (as that term is defined in the Supply
20 Agreement) to NSPI;21 And whereas in accordance with the Supply Agreement, and the Electricity Efficiency
22 and Conservation Act (Nova Scotia) and the Public Utilities Act (Nova Scotia) (together
23 hereinafter referred to as the "Legislation"), and as may be directed by the Nova Scotia
24 Utility and Review Board, and as may be further agreed between the Parties, the
25 Parties will be receiving, reviewing, and analyzing Confidential Information from each
26 other;27 And whereas the Parties wish to clarify the manner in which any Confidential
28 Information disclosed by one Party ("Disclosing Party") to the other is to be treated by
29 the recipient of the Confidential Information ("Recipient");30 In consideration of the agreements of the Parties set forth below, and other good and
31 valuable consideration, the receipt and sufficiency of which are hereby acknowledged,
32 the Parties agree as follows:

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2 **Confidential Information**

3 1. The Parties agree that for the purpose of this Agreement "Confidential
4 Information" means all information, regardless of the form in which it is
5 communicated or maintained and prepared by the Disclosing Party, and is
6 disclosed directly or indirectly to the Recipient, pursuant to the Supply
7 Agreement, the Legislation, as directed by the Nova Scotia Utility and Review
8 Board or as otherwise agreed between the Parties. Confidential Information
9 includes, but is not limited to the following: all reports analyses, notes,
10 memoranda, correspondence, spreadsheets, drawings, survey plans, maps,
11 contracts, commercial arrangements, intellectual property, trade secrets,
12 corporate strategies, business plans or other information that is based on,
13 contain or reflect any Confidential Information, material, whether printed or
14 electronic, which has been designated by the Disclosing Party as confidential
15 information, including proprietary information and other commercially sensitive
16 information. This includes but is not limited to information which has been or
17 may be filed with the Nova Scotia Utility and Review Board ("the Board") in
18 confidence in answer to Information Requests and any further material that may
19 be filed with the Board in confidence whether in response to future Information
20 Requests or otherwise, and whether printed or electronic. Confidential
21 Information shall also include any explanation or other information provided by
22 either Party to the Recipient concerning the foregoing and which has been
23 identified by the Party providing the information as confidential at the time it is
24 initially provided, whether printed or electronic. Confidential Information may also
25 include any password or other information necessary to access electronic copies
26 of Confidential Information.

27 **Permitted Scope of Use**

28 2. The Recipient may use the Confidential Information solely for the purposes of
29 providing or receiving EECA, as the case may be, in accordance with the
30 Legislation and the Supply Agreement and for no other reason or purpose.

31 **No Obligation to Disclose**

32 3. This Agreement does not obligate either Party to disclose any Confidential
33 Information to the other.

34 **Protection of Confidential Information**

35 4. The Recipient shall hold the Confidential Information in strict confidence and
36 shall strictly protect the Confidential Information from all harm, loss, theft,
37 reproduction and unauthorized access, employing at least the same degree of
38 care that the Recipient employs to protect its own confidential information of a
39 similar nature, but in any event, not less than reasonable care. The Recipient
40 shall ensure that such Confidential Information is not disclosed, published,

released, transferred or otherwise made available in any form to, for the use or benefit of, any person except as provided in this Agreement.

Acknowledgements

5. The Recipient acknowledges that the Confidential Information is confidential and a trade secret and is owned by the Disclosing Party and is highly valuable and material to the interests, business and affairs of the Disclosing Party and that any unauthorized disclosure thereof by the Recipient would be detrimental to the Disclosing Party.

Permitted Disclosures

6. The Recipient shall be permitted to disclose relevant aspects of the Confidential Information to its employees and professional advisors to the extent that such disclosure is reasonably necessary for the performance of its duties and obligations; provided, however, that prior to such disclosure the Recipient shall inform such persons and parties of the confidential nature of the Confidential Information and each such person or party signs the undertaking attached to this Confidentiality Agreement. The Recipient shall inform the Disclosing Party of the name of each person to whom it has disclosed the Confidential Information in accordance with this provision and shall provide to the Disclosing Party the signed undertaking. The Recipient shall be fully responsible for ensuring that any such persons to whom it discloses the Confidential Information complies with the confidentiality obligations contained in this Agreement and shall be liable for any breach of this Agreement by such persons.

7. The non-disclosure obligations in this Agreement shall not restrict any disclosure by the Recipient pursuant to any applicable law or an order of any court of competent jurisdiction or regulatory body with regulatory responsibilities over the Recipient, provided that the Recipient shall provide the Disclosing Party with prompt prior written notice of its obligation to disclose so that the Disclosing Party may seek a protective order or other appropriate remedy concerning the disclosure of its Confidential Information and/or waive compliance with the confidentiality provisions of this Agreement. In addition, the Recipient shall take reasonable steps, to the extent permitted by law, to remove from the Confidential Information that is required to be disclosed, any information that is commercially sensitive to the Disclosing Party. In the event of an order for disclosure by a court of competent jurisdiction or regulatory body with regulatory responsibilities over the Recipient, the Recipient shall first notify the Disclosing Party of such order and allow the Disclosing Party not less than ten (10) days to remove any such information that is commercially sensitive.

Term

8. The term of this Agreement shall commence on the effective date of the Supply Agreement unless superceded by another form of writing, and notwithstanding the return of any Confidential Information or any other event, shall continue in full

force and effect for a period of FIVE (5) years from the effective date of this Agreement.

Equitable Remedy

9. The Recipient acknowledges that any unauthorized use of the Confidential Information or any breach of its obligations under this Agreement will result in irreparable harm to the Disclosing Party which cannot be adequately compensated for by damages. Neither the Recipient, nor any term in this Agreement, shall interfere with, delay, or prevent the Disclosing Party from seeking an interim and interlocutory equitable remedy to enforce any provision of this Agreement. The Recipient agrees not to oppose an application for equitable relief by the Disclosing Party in such circumstances. Any such relief or remedy shall not be exclusive, but shall be in addition to all other available legal or equitable remedies. The Recipient agrees that the provisions of this Section are fair and reasonable in the commercial circumstances of this Agreement. This Article shall survive the termination of this Agreement.

Return of Information

10. On the earlier of either thirty (30) days following the termination of the Supply Agreement or at the written request of the Disclosing Party (and unless superceded by another form of writing), the Recipient shall return or destroy (at the Disclosing Party's direction) and delete from all electronic devices all Confidential Information provided to it, including all copies (and all notes and documents prepared by the Recipient that may incorporate same) and still in the Recipient's possession (and otherwise under its control or in the possession of other persons to whom it has been provided as permitted hereunder) and, if requested by the Disclosing Party, shall provide written confirmation to the Disclosing Party to that effect. Notwithstanding the forgoing, the Recipient shall be entitled to retain the Confidential Information in one legal file copy that may be retained solely for the determination of its legal obligations under this Agreement.

Residual Information

11. The Recipient or its designate or any other person having access to the Confidential Information pursuant to this Agreement shall not, during and after the termination of this Agreement, use in its business any Residual Information. "Residual Information" means the ideas, know-how and techniques that would be retained in the unaided memory of an ordinary person skilled in the art, not intent on appropriating the proprietary information of the disclosing party, as a result of such person's access to, use, review, evaluation, or testing of the Confidential Information of the disclosing party for the purposes described herein. An employee's memory is unaided if the employee has not intentionally memorized the Confidential Information for the purpose of retaining and subsequently using or disclosing it.

Limited Rights

12. The Recipient agrees that no rights are granted to Recipient other than the limited rights to use the Confidential Information on the terms of this Agreement. For certainty, no license is granted under this Agreement (directly or indirectly) under any patent, discovery, copyright, or other intellectual or industrial property right now or in the future.

Indemnity

13. The Recipient shall indemnify and hold the Disclosing Party harmless from any and all loss, liability, cost or expense (including, without limitation, solicitor's costs on a solicitor and client basis and all other costs of defence) caused in whole or in part by the Recipient's breach of any provision of this Agreement. This Article shall survive the termination of this Agreement.

Governing Law

14. This Agreement is governed and shall be construed in accordance with the laws of the Province of Nova Scotia.

General Provisions

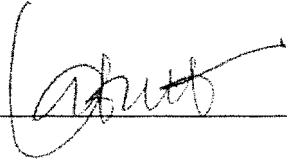
15. This Agreement is binding on the Parties, their administrators, successors, executors and assigns.

Executed and delivered this 6th day of April, 2018.

EfficiencyOne

Nova Scotia Power Incorporated

By: _____

By:  _____

Name:

Name:

Title:

Title:

Karen Hutt
President & CEO

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Limited Rights

12. The Recipient agrees that no rights are granted to Recipient other than the limited rights to use the Confidential Information on the terms of this Agreement. For certainty, no license is granted under this Agreement (directly or indirectly) under any patent, discovery, copyright, or other intellectual or industrial property right now or in the future.

Indemnity

13. The Recipient shall indemnify and hold the Disclosing Party harmless from any and all loss, liability, cost or expense (including, without limitation, solicitor's costs on a solicitor and client basis and all other costs of defence) caused in whole or in part by the Recipient's breach of any provision of this Agreement. This Article shall survive the termination of this Agreement.

Governing Law

14. This Agreement is governed and shall be construed in accordance with the laws of the Province of Nova Scotia.

General Provisions

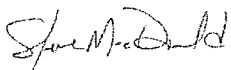
15. This Agreement is binding on the Parties, their administrators, successors, executors and assigns.

Executed and delivered this 6th day of April, 2018.

EfficiencyOne

Nova Scotia Power Incorporated

By:



By: _____

Name:

Name: Stephen MacDonald

Title:

Title: Chief Executive Officer

1 SCHEDULE "A" to CONFIDENTIALITY AGREEMENT

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3 UNDERTAKING4
5 I _____, HAVE READ AND
6 AGREE TO ABIDE AND AM BOUND BY THE TERMS AND CONDITIONS SET
7 OUT IN THE CONFIDENTIALITY AGREEMENT DATED THE ____ DAY OF
8 _____ BETWEEN EFFICIENCYONE AND NOVA SCOTIA
9 POWER INCORPORATED.10
11 Dated the ____ day of _____ 201__.12
13 _____
14 Witness

Name:

15 Recipient Designate

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SCHEDULE E

EECA PLAN

[Subject to approval by the UARB]

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Tab 11

ORDER NO. 87082

IN THE MATTER OF POTOMAC EDISON
 COMPANY D/B/A ALLEGHENY POWER'S
 ENERGY EFFICIENCY, CONSERVATION AND
 DEMAND RESPONSE PROGRAMS PURSUANT TO
 THE EMPOWER MARYLAND ENERGY
 EFFICIENCY ACT OF 2008

BEFORE THE
 PUBLIC SERVICE COMMISSION
 OF MARYLAND

CASE NO. 9153

IN THE MATTER OF BALTIMORE GAS AND
 ELECTRIC COMPANY'S ENERGY EFFICIENCY,
 CONSERVATION AND DEMAND RESPONSE
 PROGRAMS PURSUANT TO THE EMPOWER
 MARYLAND ENERGY EFFICIENCY ACT OF 2008

CASE NO. 9154

IN THE MATTER OF POTOMAC ELECTRIC
 POWER COMPANY'S ENERGY EFFICIENCY,
 CONSERVATION AND DEMAND RESPONSE
 PROGRAMS PURSUANT TO THE EMPOWER
 MARYLAND ENERGY EFFICIENCY ACT OF 2008

CASE NO. 9155

IN THE MATTER OF DELMARVA POWER &
 LIGHT COMPANY'S ENERGY EFFICIENCY,
 CONSERVATION AND DEMAND RESPONSE
 PROGRAMS PURSUANT TO THE EMPOWER
 MARYLAND ENERGY EFFICIENCY ACT OF 2008

CASE NO. 9156

IN THE MATTER OF SOUTHERN MARYLAND
 ELECTRIC COOPERATIVE, INC.'S ENERGY
 EFFICIENCY, CONSERVATION AND DEMAND
 RESPONSE PROGRAMS PURSUANT TO THE
 EMPOWER MARYLAND ENERGY EFFICIENCY
 ACT OF 2008

CASE NO. 9157

IN THE MATTER OF WASHINGTON GAS LIGHT
 COMPANY'S ENERGY EFFICIENCY,
 CONSERVATION AND DEMAND RESPONSE
 PROGRAMS PURSUANT TO THE EMPOWER
 MARYLAND ENERGY EFFICIENCY ACT OF 2008

CASE NO. 9362

Issue Date: July 16, 2015

On February 12 and 13, 2015, the Public Service Commission of Maryland (“Commission”) held a legislative-style hearing in the above-captioned cases to consider the topics of post-2015 energy efficiency goal allocations and future cost-effectiveness screening methodologies. The Commission received and reviewed comments filed by The Potomac Edison Company (“PE”);¹ Baltimore Gas and Electric Company (“BGE”);² Potomac Electric Power Company (“Pepco”) and Delmarva Power & Light Company (“Delmarva”);³ Southern Maryland Electric Cooperative, Inc. (“SMECO”);⁴ and Washington Gas Light Company (“WGL”)⁵ (collectively, the “Utilities”). In accordance with the EmPOWER Maryland Energy Efficiency Act of 2008 (“EmPOWER”),⁶ the Commission also reviewed the comments filed by its Technical Staff (“Staff”);⁷ the Office of People’s Counsel (“OPC”);⁸ the Maryland Energy Administration (“MEA”);⁹ the Coalition of Maryland Energy Efficiency Advocates (the “Coalition”);¹⁰ and the Maryland Chapter of Efficiency First (“Efficiency First”).¹¹

¹ ML#163520: *The Potomac Edison Company Comments on Post-2015 Goal Allocation and Future Cost Effectiveness Assessment Methodologies* (“PE Comments”) (Jan. 30, 2015).

² ML#163598: *Comments of Baltimore Gas and Electric Company* (“BGE Comments”) (Jan. 30, 2015).

³ ML#163542: *Delmarva Power & Light Company and Potomac Electric Power Company’s Comments in response to Order No. 86785* (“PHI Comments”) (Jan. 30, 2015).

⁴ ML#163500: *Southern Maryland Electric Cooperative, Inc. Comments on Goals and Cost Effectiveness Calculation* (“SMECO Comments”) (Jan. 29, 2015).

⁵ ML#163607: *Comments of Washington Gas* (“WGL Comments”) (Jan. 30, 2015).

⁶ Public Utilities Article (“PUA”) § 7-211.

⁷ ML#163612: *Comments Regarding the Post-2015 Goal Allocation and Future Cost-Effectiveness Screening Methodologies for EmPOWER Maryland* (“Staff Comments”) (Jan. 30, 2015).

⁸ ML#163617: *Office of People’s Counsel Comments on EmPOWER Maryland* (“OPC Comments”) (Jan. 30, 2015).

⁹ ML#157744: *EmPOWER 2015 – 2017 Cost Effectiveness Framework* (“MEA Framework Comments”) (Aug. 19, 2014); ML#163513: *Maryland Energy Administration Comments regarding post-2015 goal allocation methodologies and future cost-effectiveness screening methodologies* (“MEA Comments”) (Jan. 30, 2015).

¹⁰ ML#163616: *Comments of the Maryland Energy Efficiency Advocates* (“Coalition Comments”) (Jan. 30, 2015).

¹¹ ML#163376: *Comments on Cost Effectiveness and Goal Allocation* (“Efficiency First Comments”) (Jan. 28, 2015).

In this Order we outline a framework for prospective cost-effectiveness screening and establish a methodology for determining post-2015 electric energy efficiency goals. We also provide a timeline and parameters for the development of robust natural gas energy efficiency goals and goals specific to the residential limited-income sector.

I. Future Cost-Effectiveness Screening

We have a statutory duty to require each gas and electric company to establish any program or service that the Commission deems appropriate and cost effective to encourage and promote the efficient use and conservation of energy.¹² We maintain an active role throughout program implementation, as the Commission is charged with monitoring and analyzing program impacts and outcomes using four statutory factors, including whether the program is cost effective.¹³ As part of our ongoing review, should a program not yield “the best possible results,” we may in turn direct the utility to remedy these findings.¹⁴

To date, our cost-effectiveness standard has focused on ensuring a real return on the ratepayers’ investment. Based on evaluation, measurement, and verification (“EM&V”) best practices, in 2009 we adopted an independent, third-party evaluator model to review the EmPOWER Maryland portfolio results.¹⁵ Among other things, this process evaluates free-ridership, deemed savings calculations, spillover, cost-

¹² PUA § 7-211(f).

¹³ PUA § 7-211(i)(1). The other three statutory factors include the impact on rates of each ratepayer class; the impact on jobs; and the impact on the environment. *Id.*

¹⁴ PUA § 7-211(i)(2)-(3).

¹⁵ Order No. 82869 (Aug. 31, 2009).

effectiveness, and other factors pertinent to a thorough and ongoing review of viable and cost-effective energy efficiency and demand response programs.

While the results of this thorough EM&V analysis frequently result in recommendations for future programmatic modifications, it is by definition a *retrospective* evaluation.¹⁶ Today we provide direction regarding the scope and balancing of factors for purposes of *prospective* cost-effectiveness screening in order to provide transparency and foster innovation in the growing energy efficiency industry of Maryland.

A. Cost-Effectiveness Tests

Since the inception of the EmPOWER Maryland programs we have focused primarily on the Total Resource Cost (“TRC”) test as the key predictor of cost effectiveness.¹⁷ There are, however, four additional tests utilized to varying degrees to screen customer-facing energy efficiency programs: the Societal Cost test (“SCT”); the Ratepayer Impact Measure (“RIM”) test; the Participant Cost test (“Participant”); and the Program Administrator Cost test (“PACT”). In the Northeast and Mid-Atlantic regions, the TRC, the SCT, and the PACT are the tests used most often; the TRC is the most widely used cost-effectiveness test nationwide.¹⁸

The Utilities, Staff, MEA, OPC, and other stakeholders advocated for a range of cost-effectiveness tests and combinations moving forward, although the parties’ positions

¹⁶ The verified savings resulting from this retrospective evaluation have been used to track progress toward the 2015 EmPOWER Maryland goals. Furthermore, it is standard practice for all EmPOWER Maryland program implementers to apply the calculated realization rates to reported savings on a prospective basis. This Order does not alter these long-standing practices, and to the extent that any party seeks to modify them, the proposal would require a Commission determination prior to enactment.

¹⁷ Staff Comments at 20.

¹⁸ Northeast Energy Efficiency Partnerships, *Cost-Effectiveness Screening Principles and Guidelines* (Nov. 2014) at 56, *available at*: http://www.neep.org/sites/default/files/resources/Forum_C-E_Screening_Guidelines_Final_No_2014.pdf.

generally focus on whether the TRC or the SCT should take precedence on a prospective basis.¹⁹ Across the parties, the recommended choice of test ultimately depended on the Commission’s decision regarding whether to account for non-energy benefits (“NEBs”). As asserted by the Coalition, “the test will be skewed against energy efficiency resources” if participant costs are included, but not the full complement of benefits that accrue to participants, such as limited-income arrearage relief and other NEBs.²⁰ OPC, Efficiency First, Delmarva, and Pepco also advocated for the inclusion of known and quantifiable NEBs in any primary cost-effectiveness assessment tool, with the PHI companies referring to the expanded test as the “TRC Hybrid.”²¹

In reaching a determination regarding future cost-effectiveness screening methodologies, we note the prominence of the TRC as a cost-effectiveness screening tool nationwide, as well as its reputation as one of the most balanced and fair tests in terms of examining the inclusivity of costs and benefits.²² For these reasons, coupled with our frequent reliance on comparisons to utility energy efficiency programs operated in other jurisdictions, we are reluctant to alter the inputs of the TRC to such a degree as to render comparisons to TRC results from other jurisdictions meaningless. As stated by BGE, the TRC “should maintain its integrity as a key cost-effectiveness screening measure considered in implementing energy efficiency programs.”²³

However, we are not persuaded that the TRC should remain as the *only* screening tool on a prospective basis; on the contrary, we concur with parties such as PE that note,

¹⁹ The exception to this generalization is the position of PE; the company argued that the RIM and the TRC should be treated as equally valid primary assessment tests. PE Comments at 13.

²⁰ Coalition Comments at 4.

²¹ PHI Comments at 4; OPC Comments at 5-6; Efficiency First Comments at 5.

²² Staff Comments at 19.

²³ BGE Comments at 2.

“[t]he TRC test alone fails to consider the cost-effectiveness of investments from a non-participating ratepayer point of view.”²⁴ Indeed, the Coalition contends that failing to account for “benefits that accrue to participants and non-participants alike, such as reduced air pollution and the corresponding reductions in adverse health effects” mischaracterizes the true cost-effectiveness of energy efficiency investments.²⁵ A failure on our part to consider a broader societal impact stemming from the implementation of energy efficiency programs would ignore the codified intent of the General Assembly “to provide affordable, reliable, and clean energy for consumers of Maryland.”²⁶ This directive is not limited to only those consumers who participate in an energy efficiency program, just as the benefits of energy efficiency investments do not accrue only to direct program participants. We concur with MEA that the directive of the General Assembly to the Commission requires a societal viewpoint as the primary orienting framework,²⁷ and thus we direct the use of both the TRC *and* the SCT as assessment tools for purposes of conducting preliminary cost-effectiveness screening.²⁸

We recognize that the use of two tests for assessment purposes could lead to some ambiguities in situations that generate positive results under one test only, just as we recognize that the use of two tests will likely expand the realm of potential cost-effective program offerings. We find, however, that the first situation is easily resolved and that

²⁴ PE Comments at 13. While PE asserts that the perceived shortcomings of the TRC can be overcome by coupling it with the RIM test, we find that the impact on rates for each ratepayer class is more properly accounted for as part of our “appropriate screen” described later in this section.

²⁵ Coalition Comments at 4.

²⁶ PUA § 7-211(b).

²⁷ MEA Comments at 9. As stated by MEA, the societal-based directive is reinforced multiple times in the statute because saving energy is good for society – including ratepayers, the economy, the electricity grid, the environment, and the utilities. *Id.*

²⁸ Even parties such as BGE and SMECO, who primarily advocated for retention of a “clean TRC”, noted that the Commission should consider the SCT. See BGE Comments at 2-3; SMECO Comments at 2.

the second situation is in fact desirable. In the first instance, we note that during the EmPOWER Maryland Planning Work Group process the parties concluded that it would be feasible to screen programs from all five perspectives;²⁹ thus, restricting our directive to only two tests is feasible. Furthermore, since we concur with MEA that the societal viewpoint is the primary orienting framework intended by the General Assembly, a positive result from the SCT shall be recognized as a cost-effective outcome. The TRC, while also considered a primary assessment test, will function as a guidepost and comparative tool to other jurisdictions, as well as our own past programmatic performance.

We are cognizant of the concern raised by at least one utility that reliance on a societal viewpoint will expand the definition of cost effectiveness in a way that will greatly impact consumer rates;³⁰ however, we strongly disagree. By definition, a cost-effective program must yield benefits in excess of its costs.³¹ Moreover, we are not bound to approve *any* cost-effective program or service that is proposed to us; rather, the authorizing statute grants the Commission discretion in determining what we consider to be “appropriate” in light of certain statutory factors.³² *In addition to* considering whether the program is cost effective, we must also consider the program’s impact on rates of each ratepayer class, its impact on jobs, and its impact on the environment.³³ If we find a program to be appropriate after fully considering these four factors, only then will we

²⁹ MEA Framework Comments at 6.

³⁰ PE Comments at 13.

³¹ MEA Comments at 10.

³² PUA § 7-211(f).

³³ PUA § 7-211(i)(1)(i) – (iv).

authorize its implementation.³⁴ Therefore, we find that conflating a program’s impact on consumer rates with whether the program is cost effective is unwarranted given the statutory discretion afforded to the Commission through inclusion of the “appropriate” screen.³⁵ For the circumstances in which a cost-effective program is projected to yield inappropriate impacts on consumer rates, the Commission retains its discretion to deny the implementation request irrespective of the cost-effectiveness screening results.

B. Cost-Effectiveness Screening Levels

In Order No. 84569, we directed the examination of cost effectiveness to occur at the sub-portfolio level, *i.e.*, collectively for residential programs and collectively for commercial and industrial (“C&I”) programs.³⁶ In its August 2014 filing, MEA on behalf of the EmPOWER Maryland Planning Work Group recommended that we continue with sub-portfolio testing.³⁷ However, BGE distinguished its position from the Work Group by noting its preference that cost-effectiveness testing occur at both the sub-portfolio level and at the program level.³⁸ BGE expressed concern regarding sub-portfolio testing, noting that the results may obscure projections related to individual programs that have not yet demonstrated the potential for future successful outcomes or market transformation.³⁹

We have expressed repeatedly our intent to encourage additional innovation in EmPOWER program offerings,⁴⁰ and we acknowledge our earlier finding that such

³⁴ PUA § 7-211(f)(1).

³⁵ Whether a program is “appropriate” is subjective, while a program can be defined mathematically as “cost effective.” MEA Comments at 9.

³⁶ Order No. 84569 (Dec. 22, 2011) at 16.

³⁷ MEA Framework Comments at 7.

³⁸ *Id.* at 19.

³⁹ *Id.*

⁴⁰ *See, e.g.* Order No. 86785 (Dec. 23, 2014) at 5; Order No. 86995 (May 21, 2015) at 13.

innovation may not always satisfy cost-effectiveness standards on a program-by-program basis.⁴¹ Therefore, we accept the recommendation by the Work Group to continue cost-effectiveness screening at a sub-portfolio level, subject to two important clarifications. *First*, we note that prospective cost-effectiveness screening is different than retrospective cost-effectiveness evaluation; and *second*, we note that limited-income programs comprise a sub-portfolio to be considered separately during cost-effectiveness screening from the residential and C&I sub-portfolios.

As described previously, we rely heavily on a suite of EM&V best practices that yields, among other things, retrospective cost-effectiveness determinations for individual programs. These retrospective cost-effectiveness results are critical for our evaluation of recommended program modifications and for purposes of fulfilling our statutory directive to seek “the best possible results” from program implementation.⁴² However, this retrospective program-by-program evaluation serves a different purpose than the prospective cost-effectiveness screening discussed here, which we find is structured appropriately to occur at the sub-portfolio level so as to encourage the development of innovative program offerings. This decision to conduct cost-effectiveness screening at the sub-portfolio level does not remove our overarching discretion to modify or discontinue an individual program at any time should it fail during implementation to demonstrate the potential for future successful outcomes or market transformation.

With respect to limited-income programs, which constitute a separate and distinct sub-portfolio of programs, we concur with the Coalition that unique treatment in cost-

⁴¹ Order No. 84569 at 16.

⁴² PUA § 7-211(i)(3).

effectiveness screening is appropriate.⁴³ Improving the energy efficiency of limited-income households is a critical area of focus under the EmPOWER umbrella, and simply waiving the requirement that the limited-income programs undergo cost-effectiveness screening may do our ratepayers a disservice by failing to maximize the benefits of the energy efficiency investment. However, requiring that the limited-income sub-portfolio “pass” cost-effectiveness screening may do our ratepayers a similar disservice by too greatly limiting these critical program offerings. Therefore, we accept the recommendation of the Coalition that, while cost-effectiveness screening of the limited-income sub-portfolio shall be required in the same manner as with respect to the other EmPOWER sub-portfolios, the results of the limited-income sub-portfolio screening shall serve as a point of comparison to other jurisdictions and past programmatic performance rather than as the basis for precluding certain limited-income program offerings.⁴⁴

C. Cost-Effectiveness Assumptions

Cost-effectiveness testing is carried out by a mathematical algorithm. The EmPOWER Maryland Planning Work Group is requesting Commission direction regarding certain assumptions and inputs to the algorithm. We find that the values derived from the Avoided Cost Study performed by Exeter Associates on behalf of MEA and the Power Plant Research Project (“PPRP”) for avoided energy costs were appropriately adopted by the EmPOWER Maryland Planning Work Group and reflected in the Utilities’ 2015 – 2017 program cycle proposals.⁴⁵ Although the cost-effectiveness framework indicated a high level of consensus among parties on this point, a similar level

⁴³ Coalition Comments at 7.

⁴⁴ *Id.* at 7-10.

⁴⁵ MEA Framework Comments at 9-10.

of agreement could not be reached with respect to the demand-reduction induced price effect (“DRIPE”) calculation, the selection of an appropriate discount rate, and the inclusion of NEBs.⁴⁶

1. DRIPE

The question before us is how to appropriately account for the value and length of Energy and Capacity DRIPE in the cost-effectiveness screening process. With respect to the DRIPE calculations, the Work Group developed a greater level of consensus surrounding the valuation of Energy DRIPE than compared to Capacity DRIPE.⁴⁷ OPC did, however, note several perceived shortcomings with respect to the methodology developed by Exeter to calculate Energy DRIPE; subject to the caveat that MEA address the identified issues moving forward, OPC recommended approval of the Exeter Energy DRIPE methodology.⁴⁸

Staff, OPC, and PE expressed varying degrees of concern with the expected value and length of the Capacity DRIPE proposed by the Exeter Avoided Cost Study.⁴⁹ Exeter concluded based on the last three reports from Synapse on the New England ISO avoided energy supply costs that prices could be influenced in the market for up to ten years.⁵⁰ However, Staff noted that a previous iteration of the Synapse report relied on by Exeter to support its ten-year assumption reflected only a four-year Capacity DRIPE benefit for calendar year 2009.⁵¹ Staff observed that Itron calculated the 2013 cost-effectiveness values using a Capacity DRIPE benefit of only four years, and recommended that this

⁴⁶ Staff Comments at 22-23.

⁴⁷ MEA Framework Comments at 2.

⁴⁸ OPC Comments at 6, Chernick-14.

⁴⁹ Staff Comments at 22.

⁵⁰ Staff Comments at 22-23.

⁵¹ *Id.*

same methodology be adopted here.⁵² OPC took issue with the specific methodology used by Exeter to calculate Capacity DRIPE altogether, instead recommending the adoption of a different methodology advanced by Synapse/Resource Insight.⁵³ While acknowledging that Capacity DRIPE may have a non-zero value in some auctions, PE asserted that Capacity (and Energy) DRIPE are too uncertain and subjective to be included in the base case cost-effectiveness analysis.⁵⁴

Throughout the proceeding we questioned the degree to which the DRIPE variables drive the cost-effectiveness screening results. As informed by our proceedings, we know that DRIPE has a lesser impact on energy efficiency program screening than on the consideration of demand response programs, and that it could potentially impact a portfolio's measure mix.⁵⁵ As such, OPC expressed concern that "inappropriate estimates of avoided costs will tend to misdirect incentive funds."⁵⁶ However, given that we retain our discretion to modify energy efficiency and demand response programs on an ongoing basis (including the appropriate incentive levels, funding, and measure mix), and given that we have a plethora of other tools to assist in these programmatic evaluations (such as forecasted versus realized participants, measures, budget, and savings), we decline to deviate from the DRIPE methodologies recommended here by Exeter and endorsed by many of the parties.⁵⁷ Furthermore, we concur with Staff that other variables unrelated to EmPOWER Maryland may influence market fluctuations in a

⁵² *Id.*

⁵³ OPC Comments at 6.

⁵⁴ PE Comments at 14-15.

⁵⁵ Tr. 211-212 (Sunderhauf).

⁵⁶ OPC Comments at Attachment 1-7.

⁵⁷ See PHI Comments at 5; MEA Framework Comments at 2; MEA Framework Comments (SMECO) at 46.

shorter timeframe, and thus a four-year Capacity DRIPE is appropriate for the remainder of the 2015 – 2017 program cycle.

As with all cost-effectiveness screening assumptions discussed in this section, we anticipate that the underlying technical analysis will be updated and refreshed in conjunction with subsequent three-year program cycles.⁵⁸ Our decision here to assume a four-year DRIPE and to retain the Exeter methodology for calculating Energy and Capacity DRIPE is applicable to the remainder of the 2015 – 2017 program cycle. The DRIPE methodology may be revisited in conjunction with subsequent program cycle planning following completion of additional analyses as recommended by Staff.⁵⁹

2. Non-Energy Benefits

Experts argue that the exclusion of non-energy benefits (“NEBs”) from the cost-benefit tests “may be the most significant problem with energy efficiency program screening methods in the United States today.”⁶⁰ Initially, none of the five established cost-effectiveness tests explicitly recognized the inclusion of NEBs; however, a recent study found that by 2011, 12 states indicated the inclusion of NEBs in their cost-benefit tests.⁶¹ As the literature on NEBs has evolved, more states are moving toward the inclusion of “readily measured” NEBs in their regulatory cost-benefit tests, while other

⁵⁸ See Tr. at 65 – 68 (Lucas/Commissioner Speakes-Backman), discussing the need to revalue and revise assumptions every three years so as not to “be caught up in huge seismic change that is baked in for many years to come.”

⁵⁹ Staff Comments at 23. So that the Commission may further evaluate the impact of DRIPE in the cost-effectiveness screening process, any future additional analyses conducted for purposes of revising the DRIPE methodology should include sensitivities that reflect results with and without energy and capacity DRIPE inputs.

⁶⁰ Woolf, T., W. Steinhurst, E. Malone, and K. Takahashi, *Energy Efficiency Cost-Effectiveness Screening*, Synapse Energy Economics, Inc., for the Regulatory Assistance Project, Inc. (2012) at 5-6.

⁶¹ Kushler, M., S. Nowak, and P. Witte, *A National Survey of State Policies and Practices for the Evaluation of Ratepayer-Funded Energy Efficiency Programs*, American Council for an Energy-Efficient Economy (2011).

states have opted for simple adders to reflect contributions from a subset of NEB categories.⁶²

As articulated by the Coalition in this proceeding, cost-effectiveness testing must be symmetrical in how it considers both costs and benefits, and thus an inclusion of all participant costs in a test requires the inclusion of all participant benefits – including NEBs.⁶³ We concur with this assessment, and note that our examination of additional benefits beyond energy savings is directly contemplated by the guiding statute. In order to determine whether a proposed program or service encourages and promotes the efficient use and conservation of energy, the Commission is explicitly directed by statute to consider non-energy categorical impacts on jobs and on the environment,⁶⁴ and more broadly to rely on energy efficiency as a resource to assist with the provision of affordable, reliable, and clean energy to Maryland ratepayers.⁶⁵

In determining how to appropriately account for NEBs in our screening process, we are guided by the positions of parties such as MEA, OPC, the Coalition, Efficiency First, Delmarva, and Pepco; these parties assert generally that NEBs should be included and that cost-effectiveness screening methodologies should reflect the viewpoint of the beneficiary of the energy efficiency programs.⁶⁶ There are three classes of NEBs

⁶² ML#164304: Skumatz, Lisa A. *Non-Energy Benefits / Non-Energy Impacts (NEBs/NEIs) and their Role & Values in Cost-Effectiveness Tests: State of Maryland*, NRDC (March 31, 2014), at 1.

⁶³ Coalition Comments at 4.

⁶⁴ See PUA § 7-211(i)(1)(ii)-(iv), which directs the Commission to consider the impact on rates, jobs, and the environment.

⁶⁵ PUA § 7-211(b)(2).

⁶⁶ MEA Comments at 14-15; OPC Comments at 6; Efficiency First Comments at 5-6; Coalition Comments at 4-5; and PHI Comments at 5.

depending on the selected “beneficiary” viewpoint,⁶⁷ and thus the inclusion of the NEBs we order today mirrors our selection of primary cost-effectiveness screening methodologies. Because the TRC test includes all participant costs, we concur that quantified NEBs accruing to program participants must be included in the TRC. In addition to quantified Participant NEBs, quantified Societal NEBs that represent indirect program effects and accrue to society at large also must be reflected in the SCT.⁶⁸ In keeping with our decision herein to apply unique treatment to the limited-income sub-portfolio in cost-effectiveness screening, we also direct the inclusion of certain Utility NEBs in the TRC test and the SCT as applied to the suite of limited-income programs.⁶⁹

Given that work is ongoing in this important area of research, we find that it is appropriate at this time to adopt the business-as-usual value equivalents of the Itron quantified NEBs for the categories of air emissions, comfort, C&I O&M, and reduced customer arrearages.⁷⁰ We find that the inclusion of these specific NEBs in the TRC test and the SCT as described above will enhance the parity of cost-effectiveness screening and assist us in completing the necessary statutory inquiries. Should the parties develop additional quantifications of Participant, Utility, or Societal NEBs moving forward, or

⁶⁷ See *Addressing Non-Energy Benefits in the Cost-Effectiveness Framework*, CPUC Energy Division Staff (2011), at 1, *available at*: <http://www.cpuc.ca.gov/NR/rdonlyres/BA1A54CF-AA89-4B80-BD90-0A4D32D11238/0/AddressingNEBsFinal.pdf>.

⁶⁸ Examples of “Participant NEBs” include reduced building operating costs, increased value, comfort, health, and safety. Examples of “Societal NEBs” include job creation, tax receipts growth, labor productivity, housing, value, neighborhood stability, and reduced emissions. *Id.*

⁶⁹ Examples of “Utility NEBs” include bill payment improvements and benefits from reduced customer arrearages.

⁷⁰ See ML#164454: *Development and Application of Select Non-Energy Benefits for the EmPOWER Maryland Energy Efficiency Programs*, Itron (Feb. 24, 2015). Itron quantified NEBs in the State using a business-as-usual value equivalent of: \$0.002/kWh saved (air emissions); \$34/year for each insulation or duct sealing installation (comfort: HPwES program); \$27/year for each insulation or duct sealing installation (comfort: limited-income participants); and 2% of kWh savings for the life of the measure (reduced customer arrearages: limited-income program). *Id.* at 6-2. The business-as-usual value equivalent for C&I O&M NEBs varies by utility program. *Id.* at 4-11 – 4-12.

should the parties seek to revise the valuation of the NEBs directed by our Order today, the parties may present such analysis in conjunction with planning for future program cycles.

3. Discount Rate

A significant input to the cost-effectiveness screening process is the discount rate assumption. Given that each cost-effectiveness test reflects a specific stakeholder perspective in comparing the net present value of the annual costs and benefits over the life of an energy efficiency measure, the choice of discount rate depends on which test is being employed.⁷¹ Typically, the discount rates assumed in the RIM test, the PACT, and the TRC test all correspond to the utility's weighted average cost of capital ("WACC"), while the Participant test utilizes the discount rate of an individual or business (such as the consumer lending rate).⁷² The SCT generally assumes a social discount rate that reflects the benefit to society of the energy efficiency investment over the long term.⁷³

Currently, the EmPOWER Maryland programs utilize the individual utility's WACC as the assumed discount rate for the TRC⁷⁴ consistent with the best practices outlined by the U.S. Environmental Protection Agency ("EPA").⁷⁵ Several parties requested a departure from this assumption, however, with the Coalition advocating for the use of a lower discount rate that takes into account the low-risk nature of energy efficiency investments for utilities.⁷⁶ MEA and Efficiency First similarly advocated for

⁷¹ *Understanding Cost-Effectiveness of Energy Efficiency Programs: Best Practices, Technical Methods, and Emerging Issues for Policy-Makers*, U.S. Environmental Protection Agency (Nov. 2008), at 4-7.

⁷² *Id.* at 4-8.

⁷³ *Id.*

⁷⁴ Staff Comments at 21.

⁷⁵ *Understanding Cost-Effectiveness of Energy Efficiency Programs: Best Practices, Technical Methods, and Emerging Issues for Policy-Makers*, U.S. Environmental Protection Agency (Nov. 2008), at 4-8.

⁷⁶ Coalition Comments at 6.

use of a lower discount rate, in particular the societal discount rate set at a nominal rate of 4.7%.⁷⁷ Staff in turn recommended using the average of the EmPOWER Utilities' WACC for all cost-effectiveness tests (except for the SCT), stating that "the average WACC equals out the various risks to the utility and participants."⁷⁸

We concur with MEA that the assumed discount rate "must represent the balance between short-term and long-term savings from the viewpoint of the *beneficiary* of the [energy efficiency and demand response] programs."⁷⁹ Further, as stated by MEA, "[w]hen [energy efficiency] programs are appropriately viewed from a societal perspective, the only choice for discount rate is a societal rate."⁸⁰ Therefore, because we endorse the societal perspective through the SCT, we adopt the 4.7% nominal discount rate recommended by MEA for use with the SCT.⁸¹ However, we decline to adopt the societal discount rate as the assumed input for *all* cost-effectiveness screening methodologies utilized in the EmPOWER process given our earlier stated preference to retain the integrity of the TRC test for comparison purposes. Instead, we find that the individual WACC of the Utilities should continue as the assumed discount rate for purposes of the TRC assessment, while a nominal 4.7% discount rate shall be assumed for purposes of the SCT assessment on a prospective basis. Given that our decision today renders the TRC test and the SCT as equally valid assessment tools for purposes of conducting prospective cost-effectiveness screening, we see no reason to depart from nationwide best practices regarding the discount rates assumed by the individual tests.

⁷⁷ MEA Comments at 18-19; Efficiency First Comments at 4-5.

⁷⁸ Staff Comments at 22.

⁷⁹ MEA Comments at 14.

⁸⁰ *Id.* at 15.

⁸¹ Societal discount rates typically range from 0% to 3% in *real* terms; thus, a 4.7% *nominal* rate was endorsed by MEA. *Id.*

II. Post-2015 Goal Allocation Methodologies

In 2008, faced with dramatic rate increases due to the removal of price caps established at the time of deregulation, as well as PJM projections of rolling blackouts in the State by 2011 due to generation shortages and reliability problems, the Maryland General Assembly passed legislation to meet specific energy efficiency, conservation, and demand response targets by the end of 2015, culminating in the EmPOWER Maryland Energy Efficiency Act of 2008.⁸² While the EmPOWER Maryland Act was officially adopted in 2008, the value of energy efficiency as a least-cost resource is hardly a new concept. For more than two decades – and before the enactment of the EmPOWER legislation – the Commission has been tasked with the statutory duty to “require each gas company and electric company to establish any program or service that the Commission deems appropriate and cost effective to encourage and promote the efficient use and conservation of energy.”⁸³ The Commission’s statutory directive stems from the declaration by the Maryland General Assembly that energy efficiency is among the least expensive ways to meet the growing electricity demands of the State⁸⁴ – a finding repeatedly affirmed by nationwide studies, such as a 2014 study conducted by the American Council for an Energy-Efficiency Economy (“ACEEE”).⁸⁵

⁸² PUA § 7-211.

⁸³ In 1991, the General Assembly enacted an energy conservation measure, then codified in Article 78, §28(g) of the Maryland Annotated Code, and later re-codified as PUA § 7-211.

⁸⁴ PUA § 7-211(b)(1).

⁸⁵ This study concluded that electric utility energy efficiency programs, at an average cost of 2.8 cents per kilowatt hour (“kWh”), provide resource options ranging from one half to one third the cost of alternative options such as building new power plants. Also, compared to a natural gas commodity price of 49 cents per therm in 2013, natural gas energy efficiency programs prevailed as a least-cost option at an average cost of 35 cents per therm. See Maggie Molina, *The Best Value for America’s Energy Dollar: A National Review of the Cost of Utility Energy Efficiency Programs*, ACEEE Report Number U1402 (March 2014), at iii.

As we reach the end of the prescribed 2015 energy efficiency and demand reduction goals, we find that enormous potential still exists throughout the State for continued cost-effective investment in energy efficiency as a least-cost resource. Moreover, curtailing energy efficiency and demand management programs would result in increased load on the PJM system, thereby heightening reliability risks including exposure to localized brownouts due to unanticipated summer and winter peak demand. The elimination of energy efficiency and demand management programs would likely also result in the need for more costly generation and transmission projects to fulfill the demand currently met in part by EmPOWER Maryland programs. For ratepayers across the State, it continues to be less costly to invest in energy efficiency than it is to pay for electricity. Across all Utilities, the lifecycle cost per kWh for the energy efficiency programs is \$0.026 per kWh – significantly lower than the current cost of Standard Offer Service, which ranges from \$0.062 to \$0.093 per kWh.⁸⁶

Until such time that energy efficiency is no longer a least-cost resource, or until such time that the costs of investing in energy efficiency outweigh the projected benefits, we see value in establishing energy savings goals for the Utilities on a prospective basis.⁸⁷ In this Order we establish electric energy efficiency goals and describe a framework for goal formulation that can be replicated for the other sectors. While the

⁸⁶ *The EmPOWER Maryland Energy Efficiency Act Standard Report of 2015*, MD PSC (April 2015), at 4. The cost of SOS differs between utility service territories and changes by season. Customers can access the current cost of supply service for their utility and compare residential retail electricity supplier offers by visiting the Commission's shop-and-compare web portal, *available at*: <http://167.102.231.189/electricchoice/shop-and-compare/>.

⁸⁷ We note, however, that the establishment of any goals does not waive or otherwise impact the Commission's discretion with respect to determining whether a program is cost effective and appropriate. As discussed in Section I: Future Cost-Effectiveness Methodologies, the Commission may decline to implement cost-effective energy efficiency programs if the impact on rates of a certain ratepayer class is found to be inappropriate. See PUA § 7-211(f) and (i).

record is not yet developed to the degree necessary to support the establishment of robust natural gas energy efficiency goals, or goals specific to the residential limited-income sector, we provide a timeline and guidance herein as to their future development.

A. Post-2015 Energy Efficiency and Conservation Goals

1. Electric Energy Efficiency Goals

The EmPOWER Maryland Planning Work Group utilized a common set of questions to consider the structure and nature of post-2015 energy savings goals.⁸⁸ A high level of consensus was achieved regarding several structural elements, including that goals should be established at the gross wholesale level, on a utility-wide basis, and in conjunction with the established three-year program cycle format.⁸⁹ The parties also decried generally the expression of post-2015 goals using a per capita methodology, and instead advocated for a bottom-up methodology capable of reflecting the normalization of variables such as weather.⁹⁰

A similar consensus was not achieved, however, with respect to the expression or specificity of post-2015 electric savings targets. OPC and the Coalition proffered similar proposals, both recommending that post-2015 energy savings goals should be expressed as a percentage of retail sales and both recommending that the Commission establish a trajectory so that the Utilities achieve 2% annual incremental gross energy savings.⁹¹ While other parties declined to offer specific proposals pending completion of the MEA-led potential study, the Coalition countered that significant evidence exists that “the

⁸⁸ OPC Comments at 4.

⁸⁹ Staff Comments at 12-14; OPC Comments at 4-5; MEA Comments at 22-24; Coalition Comments at 18; PHI Comments at 2-3; BGE Comments at 1; SMECO Comments at 1; PE Comments at 9-10.

⁹⁰ See, e.g. Staff Comments at 12-14.

⁹¹ OPC Comments at 4-8; Coalition Comments at 18-22.

EmPOWER programs have not come close to saturating markets with energy efficiency,” and that “Maryland is not even close to meeting the savings achievements of the Nation’s leading states.”⁹² We agree with the Coalition and find that the continued lack of completion of the potential study can no longer be a barrier to establishing targets for EmPOWER. A potential study – the results of which are highly dependent on the selected input assumptions – is only one of several tools that can be used in this endeavor. Thus, while the parties may continue to pursue the outstanding potential study, we will look to its forthcoming results as only an informative guidepost in future discussions.

Instead, we move forward today by establishing a definitive and flexible framework for post-2015 electric goals. *First*, we accept the parties’ consensus recommendation that goals should be established utility-wide⁹³ and at the gross wholesale level. *Second*, we concur also with the parties’ consensus recommendation that a per capita goal-setting method is inappropriate moving forward,⁹⁴ and we will instead rely on a retail sales baseline that accounts for weather-normalization.⁹⁵ *Third*, we find that a continued reliance on a three-year program and planning cycle strikes an appropriate balance between accountability and flexibility. Thus, while today we establish annual incremental targets, the Utilities will ultimately be assessed against a three-year average percentage goal. *Fourth*, we accept the recommendation by OPC and the Coalition to establish a trajectory so that the Utilities ultimately achieve annual incremental gross

⁹² Coalition Comments at 18.

⁹³ While we decline to establish separate residential and C&I goals, we note that the Utilities’ performance will continue to be evaluated using the approved forecasts, which do include sector-specific breakdowns.

⁹⁴ As noted by MEA, “a top down goal introduces uncertainty” and “[i]t is important for the utilities to have measureable goals based on factors they can influence.” MEA Comments at 18.

⁹⁵ The majority of states utilize an annual energy savings goal relative to retail electricity sales. Staff Comments at 8.

energy savings of 2% of their weather-normalized gross retail sales baseline.⁹⁶ In establishing this trajectory we adopt a modest ramp-up rate of 0.20% per year starting with the approved 2016 plans,⁹⁷ and escalating until such time that the utility achieves the 2% annual target. So that we may assess whether the goals established herein require the Utilities to enhance their 2017 program offerings, the Utilities are directed to file no later than September 1, 2015 a table depicting forecasted gross electric savings for the 2015 – 2017 program cycle as a percentage of the individual utility’s 2013 weather-normalized gross retail sales.

Because the establishment of this new goal structure occurs midstream in the 2015 – 2017 program cycle, we recognize that from a practical perspective the full deployment of this new goal structure will occur as part of the 2018 – 2020 program cycle. Consistent with the existing statutory directive, the Utilities are directed to submit plans to the Commission no later than September 1, 2017 for this subsequent program cycle. At such time, annual incremental savings targets shall be calculated as a percentage of the individual utility’s 2016 weather-normalized gross retail sales baseline. While annual incremental targets will be tracked and measured, achievement of the goal will be decided on the basis of a three-year average.

Also raised for our consideration as part of the prospective goal allocation methodology discussion were two additional topics pertaining to goal-setting and measurement. The parties sought guidance and clarification on these issues given the

⁹⁶ An illustration of the new goal structure is depicted in Appendix 1.

⁹⁷ The “ramp-up rate” refers to the rate or pace of improvement. In a recent U.S. EPA survey of existing state energy efficiency programs, the Agency identified ten states with clear energy efficiency schedules and calculated the average rate of improvement for each, finding the average rate of improvement of incremental annual savings rate to be 0.21% per year. See *Technical Support Document: GHG Abatement Measures*, U.S. Environmental Protection Agency Office of Air and Radiation (June 10, 2014), at 5-34 – 5-35.

perception that their resolution would impact the magnitude of post-2015 electric goals. Specifically, parties questioned whether it is appropriate to continue using annualized first-year energy savings to derive and measure post-2015 goals. We concur with the recommendation of OPC, Delmarva, Pepco, and PE that it is appropriate to continue with this practice. Specifically, we agree with OPC's perspective that the consistency and simplicity of deriving goals from incremental annual savings is preferable, and that routine monitoring of the Utilities' portfolios will ensure that the measure mix does not become overly dependent upon short-lived measures.⁹⁸

Parties also questioned whether it is appropriate to continue permitting the attribution of energy savings from non-EmPOWER funded measures (*e.g.* high-efficiency transformer projects, dynamic pricing programs, etc...) toward goal progress. We concur with PE that "the State should count and take credit for savings...regardless of the cost recovery mechanism."⁹⁹ Neither MEA nor Staff objected to the continuation of this practice, subject to the reflection of the non-EmPOWER funded measure potential in the goal-setting process.¹⁰⁰ However, at this time we decline to make a specific adjustment to the annual incremental electric energy savings goals established herein to specifically reflect the potential of non-EmPOWER funded measures, although we will permit the Utilities to continue reporting such savings under the EmPOWER umbrella. In recognition of the concern raised by Staff and MEA, we direct Staff to analyze separately each utility's progress towards its 2016 and 2017 goal using savings

⁹⁸ OPC Comments at 4. We also note that Staff's concern regarding the need to reflect the expiration of measure savings over time is not applicable given that we have opted to establish annual incremental savings targets (rather than a cumulative savings goal). Staff Comments at 17.

⁹⁹ PE Comments at 10.

¹⁰⁰ MEA Comments at 24.

attributable to EmPOWER funded versus non-EmPOWER funded measures so that we may consider whether to adjust subsequent program cycle goals accordingly.

2. Natural Gas Energy Efficiency Goals

Although the current 2015 EmPOWER Maryland goals measure progress on the basis of *electricity* energy savings and demand reductions, the guiding statute states that, “[s]ubject to review and approval by the Commission, each *gas company* and electric company shall develop and implement programs and services to encourage and promote the efficient use and conservation of energy by consumers, gas companies, and electric companies.”¹⁰¹ (emphasis added). As the EmPOWER programs have ramped-up, some stakeholders have encouraged the formulation of separate natural gas usage reduction goals.¹⁰² Other stakeholders have focused on the possibility of cost-effective electric savings resulting from the conversion of electric usage to direct usage of natural gas.¹⁰³ In December 2014, we directed the formation of the Natural Gas – Electric Efficiency Coordination Work Group to address in part this identified fuel conversion potential, and more broadly to develop program coordination strategies that reflect the overlap of electric and natural gas service territories and corresponding energy efficiency programs.¹⁰⁴

While the Coalition and OPC both recommended the formulation of post-2015 natural gas energy savings goals as part of our February 2015 proceeding,¹⁰⁵ Staff and MEA cautioned that the topic required further consideration in light of the ongoing

¹⁰¹ PUA § 7-211(d).

¹⁰² ML#148544: MEA Request Proposal for EmPOWER Planning (“MEA Proposal”) (July 16, 2013) at Attachment 2: 2-3.

¹⁰³ See Order No. 86366 (May 28, 2015) at 23.

¹⁰⁴ Order No. 86785 (Dec. 23, 2014) at 28.

¹⁰⁵ Coalition Comments at 22; OPC Comments at 8.

discussions by the Natural Gas – Electric Efficiency Coordination Work Group.¹⁰⁶ On April 15, 2015, we received an update on the Work Group’s progress toward completing the tasks assigned to it by our December 23, 2014 order.¹⁰⁷ The Work Group’s report indicated several recommended next steps, most prominently requesting a Commission decision as to whether natural gas utilities will be required to offer energy efficiency programs moving forward.¹⁰⁸

We find, however, that such a determination is unnecessary given that the statute speaks directly to this point, stating in part that “each gas company ... shall develop and implement programs and services to encourage and promote the efficient use and conservation of energy.”¹⁰⁹ As observed by WGL, “the three largest natural gas distribution companies [WGL, BGE, and Columbia Gas] all have approved energy efficiency programs.”¹¹⁰ Therefore, the question before us is not whether natural gas utilities must develop and implement energy efficiency programs in the first instance, but rather whether a goal for the reduction of natural gas usage is necessary to drive further progress, innovation, and accountability. We find that development of a natural gas usage reduction goal is consistent with codified State public policy goals, and is also imperative to support an overall strategy of efficient energy usage rather than simply a shifting of demand between two fuel sources.

¹⁰⁶ Staff Comments at 16; MEA Comments at 25.

¹⁰⁷ ML#167111: *Workgroup Summary Report* (April 15, 2015) at Attachment E.

¹⁰⁸ *Id.* at 16.

¹⁰⁹ PUA § 7-211(d). Furthermore, “gas company” is defined by PUA § 1-101(k).

¹¹⁰ WGL Comments at 2.

While we conclude that the formulation of a natural gas usage reduction goal for all gas companies¹¹¹ in the State is appropriate, we are not at this time prepared to establish specific targets due to the ongoing discussions occurring at the Natural Gas – Electric Efficiency Coordination Work Group. However, by this Order we establish a timeline for development of these goals and prescribe certain minimum parameters that must be observed during this process. *First*, Staff is directed to engage all affected natural gas companies in the State as part of this process. *Second*, we direct the Work Group to structure the natural gas usage reduction goals in the same manner prescribed herein for the electric energy savings goals, meaning that goals should be established: in conjunction with three-year program cycles; at the gross wholesale level; and utility-wide (rather than sector-specific). *Third*, the natural gas usage reduction goal should be formulated as a percentage of retail sales using a consistent sales baseline. While the parties may rely on external tools such as a potential study to derive this percentage, we concur with the Coalition that the completion of such a study “should not be a barrier to establishing targets for EmPOWER.”¹¹² Instead, the parties are encouraged to look to other sources, such as achieved reductions by existing EmPOWER natural gas measures, and natural gas usage reduction goals adopted by leading states in our region.¹¹³ Staff, on behalf of the Natural Gas – Electric Efficiency Coordination Work Group, is directed to file proposed natural gas usage reduction goals for year 2017 and the subsequent program cycle no later than February 1, 2016.

¹¹¹ “Gas company” is defined by PUA § 1-101(k).

¹¹² Coalition Comments at 22.

¹¹³ As noted by the Coalition in its comments, ACEEE reported in its *2014 State Energy Efficiency Scorecard* that the ten leading states in gas energy efficiency achieved between 0.73% and 1.47% of savings as a percentage of retail sales. Coalition Comments at 22.

3. Limited-Income Energy Efficiency Goals

Improving the energy efficiency of limited-income households remains a critical area of focus for the State. In recent orders we have established a framework of accountability to increase the reach of the EmPOWER limited-income programs to as many eligible participants as possible using the allocated funding.¹¹⁴ To further encourage services to this critical sector, the Coalition advocated that we establish a minimum investment target for the EmPOWER Maryland limited-income programs moving forward.¹¹⁵

While the Coalition (and all other parties) agreed that there should be no residential or C&I sector-specific goals established for the Utilities, the Coalition did recommend that we establish a separate limited-income program energy savings goal that the Maryland Department of Housing and Community Development (“DHCD”), rather than the Utilities, would be responsible for attaining.¹¹⁶ We concur that the program implementer is the appropriate entity with whom responsibility for goal attainment should lie, and we also find that the establishment of a separate limited-income goal is appropriate given our decision to apply unique treatment to this sub-portfolio with respect to the cost-effectiveness screening process.

However, despite our interest in setting a post-2015 energy savings goal for our limited-income programs, the record is underdeveloped on this point, and importantly, does not contain input from the current limited-income program implementer. We therefore direct the Limited-Income Work Group to consider this issue and develop a

¹¹⁴ See, e.g. Order No. 86785 (Dec. 23, 2014) at 21.

¹¹⁵ Coalition Comments at 17.

¹¹⁶ *Id.*

recommended post-2015 goal for the EmPOWER limited-income programs no later than February 1, 2016, subject to the following parameters. At a minimum, the Limited-Income Work Group should consider: the total number of customers in each service territory eligible to qualify for benefits under the Electric Universal Service Program; the historical production rate of EmPOWER-funded limited-income weatherization programs; associated bill impacts, assuming an investment per household amount equivalent to the soft cap established in Order No. 86785; and the overlap of electric and natural gas utility service territories. Until such time that we adopt a post-2015 goal specific to the limited-income programs, we will continue to evaluate program performance in light of DHCD's approved 2015 – 2017 program cycle proposal.

4. Multifamily Energy Efficiency Goals

We continue to acknowledge the importance of extending EmPOWER programs to all market segments, although we note that no party recommended the establishment of a separate post-2015 energy efficiency goal specific to the multifamily sector. We note that the absence of such a recommendation aligns with the more general consensus of the parties to establish a single utility-wide goal (rather than a separate goal for the residential and C&I sectors), and is appropriate given that the funding for multifamily initiatives is drawn from both the residential and C&I surcharges at present. To-date, the multifamily sector has been primarily addressed in the EmPOWER context through the Multifamily Energy Efficiency and Housing Affordability (“MEEHA”) program implemented by DHCD. However, several of the Utilities developed in recent years

programs within their residential and C&I sub-portfolios that specifically target multifamily dwellings and master-metered units.¹¹⁷

While we decline to establish a post-2015 goal specific to the multifamily sector (just as we decline to establish a post-2015 goal specific to the residential and C&I sectors), we concur with the recommendation by Staff and others that sector progress should continue to be tracked to ensure the equitable distribution of utility resources.¹¹⁸ To the extent that Staff requires the Utilities and DHCD to supplement forecasts or analyses with respect to the 2015 – 2017 program cycle in order to assess the appropriate distribution of resources to the multifamily and master-metered sector, the Utilities and DHCD are directed to do so.

B. Post-2015 Demand Reduction Goals

Since 2009, the Utilities have collectively achieved 1,743 MW of demand reduction through implementation of EmPOWER Maryland programs, serving to mitigate capacity market prices and to offset critical winter and summer peak loads. While we continue to stress the importance of such demand reduction measures, we concur with Staff's observation that several recent and ongoing developments (such as the litigation surrounding FERC Order 745 and the PJM Capacity Performance Proposal) are complicating the formulation of post-2015 demand savings targets.¹¹⁹ Additionally, the Utilities have reported an increasing level of market saturation with respect to their direct load control programs in recent years, and are also grappling with customer

¹¹⁷ BGE and Pepco administer a residential multifamily new construction program, while BGE, Delmarva, Pepco, and SMECO each began implementing a C&I master-metered multifamily program in the 2015 – 2017 program cycle.

¹¹⁸ Staff Comments at 14.

¹¹⁹ *Id.* at 14-15.

engagement issues and the interface of these traditional demand response programs with emerging initiatives such as dynamic pricing.¹²⁰

In light of these observations, we find that the prospect of establishing post-2015 specific and robust demand reduction goals is not yet ripe for our consideration. We will, however, continue to evaluate the Utilities' achieved demand savings in light of the approved 2015 – 2017 program cycle proposals.¹²¹ This approach provides that the Utilities will maintain demand reduction capability and continue to work towards achieving their 2016 and 2017 approved targets during this period of market transformation. The EmPOWER Maryland Planning Work Group is encouraged to continuing monitoring the developments in this arena so that a demand reduction goal could be established in conjunction with the subsequent program cycle, as appropriate.

IT IS THEREFORE, this 16th day of July, in the year Two Thousand Fifteen, by the Maryland Public Service Commission,

ORDERED: (1) That the Societal Cost Test and the Total Resource Cost Test shall be used as the assessment tools for cost-effectiveness screening on a prospective basis;

(2) That cost-effectiveness screening should occur at the sub-portfolio level subject to the guidance provided herein;

(3) That, for the 2015 – 2017 program cycle, the Energy and Capacity DRIPE methodologies proposed as part of the Exeter Avoided Cost Study shall be reflected in

¹²⁰ *Id.*

¹²¹ See Order No. 86785 (Dec. 23, 2014).

the cost-effectiveness screening tools, subject to the modified assumption of a four-year Capacity DRIPE;

(4) That the Utilities' individual weighted average cost of capital shall be the assumed discount rate for purposes of the Total Resource Cost test;

(5) That a 4.7% nominal discount rate shall be assumed for purposes of the Societal Cost Test;

(6) That the Itron quantified business-as-usual valuation of non-energy comfort benefits and non-energy commercial and industrial operations and maintenance benefits shall be included in both the Total Resource Cost test and the Societal Cost Test;

(7) That the Itron quantified business-as-usual valuation of non-energy avoided air emissions benefits shall be included in the Societal Cost Test;

(8) That the Itron quantified non-energy 2% increase in benefits associated with reduced customer arrearages shall be included in the Total Resource Cost test and the Societal Cost Test with respect to the limited-income sub-portfolio;

(9) That BGE, Delmarva, Pepco, PE, and SMECO are directed to file no later than September 1, 2015 a table depicting Commission-approved forecasted gross electric savings for the 2015 – 2017 program cycle as a percentage of their respective 2013 weather-normalized gross retail sales;

(10) That post-2015 electric energy efficiency goals are established: utility-wide; at the gross wholesale level; calculated as a percentage of the individual utility's weather-normalized gross retail sales baseline; and on a trajectory to achieve an annual incremental gross energy savings of 2.0% per year using a ramp-up rate of 0.20% per year;

(11) That Staff, on behalf of the Natural Gas – Electric Efficiency Coordination Work Group, is directed to file no later than February 1, 2016 proposed natural gas usage reduction goals for year 2017 and the subsequent program cycle consistent with the guidance provided herein; and

(12) That Staff, on behalf of the Limited-Income Work Group, is directed to develop and submit a post-2015 energy savings goal for the EmPOWER Maryland limited-income programs no later than February 1, 2016.

/s/ W. Kevin Hughes

/s/ Harold D. Williams

/s/ Lawrence Brenner

/s/ Anne E. Hoskins
Commissioners¹²²

¹²² Commissioner Jeannette M. Mills did not participate in this decision.

Appendix 1: Post-2015 Electric Energy Efficiency Goal Structure Illustration

Hypothetical: Utility A, Utility B, and Utility C each received Commission approval for their 2015 – 2017 program cycle proposals. Translating the gross savings forecasted by the 2015 – 2017 approved plans into a percentage of their individual 2013 weather-normalized gross retail sales yields the following results depicted in Table 1.

*Table 1: Forecasted Gross Savings from the Approved 2015 – 2017 Program Cycle Plans
As a Percentage of 2013 Weather-Normalized Gross Retail Sales*

	2015	2016	2017
Utility A	1.50%	1.50%	1.50%
Utility B	1.20%	1.25%	1.10%
Utility B	1.30%	1.35%	1.55%

Following issuance of the Commission’s Order, both Utility A and Utility B need to supplement their approved calendar year 2017 plans to reflect a ramp-up rate of 0.20%. The approved plan for Utility C, however, already reflects a 0.20% ramp-up rate between calendar year 2016 and 2017, and thus Utility C does not need to take any additional action during this program cycle.

*Table 2: Revised 2015 – 2017 Program Cycle Goals
Annual Incremental Gross Savings as a Percentage of
2013 Weather-Normalized Gross Retail Sales*

	2015	2016	2017
Utility A	1.50%	1.50%	1.70%
Utility B	1.20%	1.25%	1.45%
Utility C	1.30%	1.35%	1.55%

No later than September 1, 2017, all three utilities must file new electric energy efficiency plans for the 2018 – 2020 program cycle. The gross savings projected by the utilities’ proposals must be translated into a percentage of the individual utility’s 2016 weather-normalized gross retail sales baseline. Utility A, Utility B, and Utility C must propose plans that continue to ramp-up targeted annual incremental gross savings until reaching the targeted 2.0% annual incremental savings goal as a percentage of the specified retail sales baseline. While each utility’s progress will be measured against the annual targets, achievement of the goal will be measured using an average of the utility’s three-year program cycle annual targets.

*Table 3: 2018 – 2020 Program Cycle Electric Goals
Annual Incremental Gross Savings as a Percentage of
2016 Weather-Normalized Gross Retail Sales*

	2018	2019	2020	2018 - 2020 Goal
Utility A	1.90%	2.00%	2.00%	1.97%
Utility B	1.65%	1.85%	2.00%	1.83%
Utility C	1.75%	1.95%	2.00%	1.90%