IN THE MATTER OF: **An Application by The Manitoba Public Insurance Corporation to The Public Utilities Board of Manitoba for review and approval of its rate bases and premiums charged with respect to compulsory driver and vehicle insurance effective March 1, 2019.**

MOTION BRIEF
(MANITOBA PUBLIC INSURANCE)

(Motion to Compel Answers to Information Requests)

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INDEX

PART I LIST OF DOCUMENTS TO BE RELIED ON

1. The General Rate Application of The Manitoba Public Insurance Corporation, filed June 15, 2018

2. The Affidavit of Glenn Bunston, sworn August 20, 2018

PART II LIST OF AUTHORITIES

		TAB
1.	The Public Utilities Board Rules of Practice and Procedure	
2.	*Manitoba Hydro Electric Board v. John Inglis Co.*, 2001 MBQB 289	**A**
3.	*Dunsmuir v. New Brunswick*, 2008 SCC 9 (excerpts)	**B**

PART III STATEMENT OF FACTS

1) On June 15, 2018, The Manitoba Public Insurance Corporation ("MPI" or the "Corporation") filed its General Rate Application for the 2019 rate year (the "2019 GRA").

2) By Order No. 82/18, the Public Utilities Board of Manitoba (the "PUB") permitted the use of information requests ("IRs") by the parties thereto.

3) On July 11, 2018, MPI received 197 IRs, most containing a number of sub-parts, totalling 441 questions. Of those IRs, the Consumers' Association of Canada (Manitoba) Inc. ("CAC"), posed 226 questions through 96 IRs. On August 8, 2018, MPI provided responses to 224 of these 226 questions. The two unanswered questions were CAC (MPI) 1-84(f) and CAC (MPI) 1-85(g) (collectively referred to as the "Subject IRs").

4) The first of the Subject IRs (CAC (MPI) 1-84(f)) asks for the following:

> "f. More Detailed Analysis for Real Scenarios: Was the same "stepped" analysis that was performed using the Nominal Liability Benchmark (e.g. pages 1,749 to 1,753) also performed using the Real Liability Benchmark?
>
> i. If so, provide the analysis and commentary (at least for Basic and Pensions).
>
> ii. If not, could a similar analysis and commentary be provided, showing the effect of including RRBs ("minimally" constrained)? (at least for Basic and Pensions)"

5) The second of the Subject IRs (CAC (MPI) 1 085(g)) asks:

"g) Can Mercer show efficient frontiers, similar to the Capital Market Line shown above, except that risk is to be defined to take into account liabilities (surplus, not assets only), and the "risk-free" asset is the Minimum Risk Portfolio (Real Liability Benchmark, not Nominal Liability Benchmark, and not TBills)?

i. The analysis should show the effects of allowable leverage for fixed income assets only (e.g. bond overlays, including RRBs). Other constraints can be added in a "stepped approach", starting from the "minimally constrained" scenario, in the same way such "steps" were shown on pages 1,749 to 1,753 of the GRA to illustrate the effects of adding new asset classes.

ii. The steps should include, at a minimum, the imposition of various constraints that were actually imposed, directly or indirectly, or which would illustrate the return/risk tradeoffs arising from various "steps" taken (or decisions made) as listed below:

1) Set 0% maximum in RRBs

2) Restrict the weight to the "final MPI recommended" weight, rather than the global market cap, in three (3) individual steps for:

(1) Canadian Equity

(2) Emerging Markets Equity

(3) Other Equity

iii. The analysis should clearly show a portfolio ("Privates + ACWI") that consists of 0% fixed income, with a private/public split below:

1) Real estate, infrastructure, and private equity using MPI's recommended weights

2) Public equity in Canada, US, Emerging Markets, and other regions at their global market cap weights (e.g., All Country World Index Equities (ACWI))

iv. Mercer's "Observations" would facilitate the interpretation of results, as would Mercer's "Asset Mix Options" and "Expected Surplus Growth", similar to the observations and other reporting Mercer provided on pages 1,749 to 1,753 and 1,790 to 1,793 respectively of the GRA.

v. The scope of the above analysis could be limited to Basic and Pension."

6) On July 19, 2018, General Counsel for MPI wrote to counsel for the CAC seeking clarification that IR CAC (MPI) 1 85(g) sought production of a new report based on the Asset Liability Management ("ALM") study.

7) On July 26, 2018, legal counsel for the CAC responded that the CAC was seeking the commission of new studies.

8) On July 27, 2018, General Counsel for MPI replied that MPI was not prepared to conduct the assessments requested by the CAC in the Subject IRs without evidence suggesting that there was a real possibility that the inflation forecast underpinning the ALM Study was not correct.

9) On August 8, 2018, MPI answered the Subject IRs but did not produce new assessments as requested.

10) On August 8, 2018, the CAC brought a motion seeking to compel MPI to commission the assessments requested in the Subject IRs.

11) The ALM study, conducted by Mercer, included the participation of MPI's investment department, MPI's Investment Committee Working Group (which includes representatives of the Provincial Department of Finance), and the Investment Committee of the Board of Directors ("BoD"). The study was conducted during the fourth quarter of calendar 2017, with development of the implementation plan over the first and second calendar quarters of 2018. The 2019 GRA contains 305 pages of material generated by the study, as appendices to the Investments chapter, as well as narrative on the ALM study and implementation plan within the Investments chapter itself. A technical conference on the ALM study was also held at the PUB offices on March 14, 2018, where MPI presented the results of the ALM study to parties to the 2019 GRA.

PART IV ISSUES TO BE DETERMINED

Issue 1: Should the PUB issue an order compelling MPI to provide answers to IRs CAC (MPI) 1 084(f) and/or CAC (MPI) 1 085(g)?

i. IRs are not proper questions

ii. MPI's Decision-Making and Investment Strategy Reasonable

iii. IRs cannot be answered as information does not exist and cannot be obtained with reasonable effort

iv. Effort (and cost) of obtaining information required to answer IRs exceeds the anticipated value of that information

v. CAC can obtain the information sought without the assistance of MPI

Issue 2: Costs and Process Efficiency.

PART V POINTS TO BE ARGUED AND ARGUMENT

Introduction

1) The PUB states the following regarding the need for an ALM study in Order 162/16:

> "The Board finds that an ALM study should take place more frequently than has been the practice with the Corporation. The Board finds there is a need to update the ALM study, given that now the RSR target is based on total equity. The ALM study filed in the 2016 GRA used a constraint based on retained earnings that excluded AOCI, a significant component of total equity. The Board directs that MPI obtain an updated ALM study to be filed in the 2018 GRA, which study shall address each of the 18 recommendations made by Mr. Viola, which are set out in Appendix E of this Order."

2) MPI's Board of Directors ("BoD") and the Department of Finance are responsible for investing the Corporation's funds. While one could conduct an ALM study using a variety of reasonable assumptions, variables and risk tolerances or inputs, it is ultimately the responsibility and duty of the BoD and the Department of Finance to select the inputs and to determine whether and how to apply the ALM study. In determining rates, the role of the PUB is to examine policy issues affecting rates, whether the decisions related thereto are reasonable, and to determine whether the rates sought (resulting from those decisions) are just and reasonable. The PUB does not make investment decisions for the Corporation.

3) The CAC has presented no evidence to refute or call into question the accuracy of the inflation forecast assumption used by Mercer in the ALM Study. However, without

this evidence, the Order sought is not justifiable. Nonetheless, the CAC requests that Mercer create new scenarios (new evidence) based upon assumptions that MPI rejected in the development of the ALM study.

4) The broad consensus for inflation forecasting is in line with the inflation assumptions made by Mercer in the ALM Study. MPI knows of no credible alternative forecast. Actual inflation between now and December 2018 (2019 GRA Order), is unlikely to be instructive as inflation rarely escalates materially over a single quarter. MPI agrees that an inflation forecast predicting significantly elevated and/or prolonged inflation (should such a forecast exist), would no doubt lead to an optimal portfolio with inflation protection in the form of Real Return Bonds (RRBs). However, absent such a forecast, exploring these portfolio options becomes purely an academic exercise.

5) Finally, MPI plans to conduct an ALM study every three to four years, meaning it will revisit these forecasts and accompanying portfolios in the near future. Should actual inflation materialize above the forecast before the next ALM study, MPI's Investment Committee will respond appropriately.

6) MPI respectfully submits that, through this Motion, the CAC seeks, through improper questions no less, information:

a. that will have no impact upon the determination of the 2019 GRA or on the investment decisions of the BoD/Department of Finance; and

b. whose costs (funded through ratepayers' premiums) will exceed its benefits.

Issue 1: Should the PUB issue an order compelling MPI to provide answers to IRs CAC (MPI) 1 084(f) and/or CAC (MPI) 1 085(g)?

IRs are not proper questions

7) The Subject IRs are not proper questions because they:

a. are, in effect, a demand for new evidence; and

b. do not seek to provide a party with a satisfactory understanding of the matters to be considered.

8) While the Subject IRs technically contain questions, they are not the questions to which the CAC seeks answers. Instead, the *real* "questions" posed by the CAC call upon MPI to have its consultant (Mercer) create and produce new evidence.

9) For example, CAC (MPI) 1-84(f) contains two questions and a demand for production of a specific document, should it exist. The first question asks whether Mercer analyzed the effects of adding different asset classes on return/risk, using Real Liability Benchmark. The answer to that question is either "yes" or "no". If MPI answers the question in the affirmative, what follows at CAC (MPI) 1-84(f)(i) is a demand by the CAC for production of Mercer's analysis and commentary. However, if MPI answers the question in the negative, the CAC next asks MPI at CAC (MPI) 1-84(f)(ii) whether Mercer could perform that analysis (showing the effect of including RRBs) and provide commentary. This too is a simple "yes" or "no" question and, for the record, the complete answer to it is "yes", since Mercer could redo its analysis using the Real Liability Benchmark.

10) However, the question contained in CAC (MPI) 1-84(f)(ii) is not the question the CAC seeks to compel MPI to answer. What it really wants is an Order compelling MPI to commission Mercer to conduct further analyses and prepare a new report that does not currently exist.

11) The same applies in the case of the question posed in CAC (MPI) 1-85(g). On its face, the question is proper and, since Mercer could perform a new analysis showing efficient frontiers with risk defined to account for liabilities and with the risk-free asset being the Minimum-Risk Portfolio using the Real Liability Benchmark, MPI could completely answer the question with "yes". However, sub-parts "i" through "v" of CAC (MPI) 1-85(g) specify how the CAC expects Mercer to conduct this new analysis. Therefore, while the question technically asks whether Mercer *is able to* conduct a further review, the question is really a demand for new evidence.

12) Sections 14-16 of the PUB's Rules of Practice and Procedure (the "PUB Rules") provide the process of making and answering IRs. The purpose of IRs, as set out in Section 14 of the PUB Rules, is to provide a party with "...a satisfactory understanding of the matters to be considered". In other words, IRs are a means by which a party can get a better understanding of the material filed. Further, Section 16 uses the term "interrogatory" in place of IR, meaning these terms are interchangeable. An interrogatory is simply a question in written form and, in this context, is a substitute for oral examinations for discovery.

13) In addition, other avenues are available to the CAC to obtain the relief it seeks. For example, Rule 12(2) provides that the PUB may order a party to produce a document.

Rule 17(1)(b) goes further and provides that the PUB may direct a person to provide a report. The availability of this relief supports a limited scope of permissible questioning by interrogatories.

14) The PUB allowed the use of IRs in its Procedural Order No. 82/18. However, Page, 22, paragraph 4 of that Order makes it clear that all IRs must contain a question; and the rationale for the question asked. A demand that a party create and produce new evidence is not a question; it is a demand.

15) In the context of litigation, it is not proper (through an interrogatory) to demand that a third party create and produce new evidence. In *Manitoba Hydro Electric Board v. John Inglis Co.*, 2001 MBQB 289, MacInnes J. (then of the Court of Queen's Bench) considers the scope of an examination based on interrogatories. MacInnes J. finds that, in Manitoba, the scope on interrogatories is as broad as the scope for examinations for discovery. However, on the issue of whether parties could elicit expert opinions through interrogatories, MacInnes J. writes (at paragraph 28):

> "I conclude, therefore, that one may ask an examinee on discovery (i.e. whether by way of oral examination or interrogatories) to disclose and/or make inquiries of an expert already retained in respect of, findings, conclusions or opinions that the expert then has relating to a matter in issue in the action, and such examinee is obligated to respond whether by reason of having already informed himself or by way of undertaking. <u>However, it is not necessary for a party to go out and engage an expert so as to permit its representative to be able to answer questions put on examination for discovery, or to ask its expert to provide a new or fresh opinion not yet given in response to an examining party's question.</u> <u>Nor does the examinee have to ask his expert to comment or opine upon the theories or opinions advanced by examining counsel, such questions being cross-examination, not examination for discovery.</u>" [emphasis added]

16) Notwithstanding that, court proceedings are somewhat different than proceedings before the PUB, comparisons to the litigation context are appropriate as interrogatories serve the same purpose (i.e. pre-hearing discovery) and because other avenues already exist to compel the production of documents/reports.

17) In the case at hand, the CAC theorizes in its letter dated August 8, 2018 that the ALM Study prepared by Mercer and filed by MPI, as part of its GRA, is potentially inaccurate or flawed. The letter states at page 2 that the purpose of the Subject IRs is to "...test the decisions made regarding key assumptions on which the ALM Study is based". With respect, the theory posited by the CAC is exactly the type that the court in *Inglis* held was improper to explore through interrogatories. The information sought requires fresh opinions from Mercer (i.e. opinions not yet provided).

18) Further, the subject IRs do not elicit information from MPI for the purposes of obtaining "a satisfactory understanding of the matters to be considered". Based on the content of the Subject IRs, the CAC clearly understands the ALM Study. It also acknowledges that it has the capacity to obtain this information without the assistance of MPI. What is truly at issue is whether MPI should pay the cost of testing the CAC's theory that MPI did not select the right compositions of its investment portfolios. Obtaining this information on its own, MPI submits, requires the CAC to justify its usefulness to the PUB, in order to obtain reimbursement for the expense. However, proceeding in the fashion chosen by the CAC exposes it to no risk in the event that the reports are not useful, while limiting the ability of MPI to seek recovery of the costs.

19) By identifying its motion as one to compel answers to IRs, the CAC suggests that the only issue is whether its demand pertains to information that is relevant and material. While that is not the case (Section 16 of the PUB Rules provide two other grounds for refusal), MPI submits that where the IR seeks the creation of new evidence such as a report, the decision of whether to require its production should not solely rest on whether that new evidence would be relevant or material. In addition to relevancy and materiality, there must be consideration of the costs and anticipated benefits of creating the evidence. The fact that the test employed must be different further supports that a dispute of this nature cannot be resolved via a motion to compel answers to IRs.

20) As a result of the above, MPI respectfully submits that the CAC does not seek clarification of existing evidence but instead seeks the creation of new evidence. Demands of this nature are not questions, let alone proper ones, and a motion to compel answers to IRs is not the proper vehicle for redress in this case. On this basis alone, the PUB must dismiss this Motion.

MPI's Decision-Making and Investment Strategy Reasonable

21) In the alternative, should the PUB decide that a motion to compel answers to IRs is the proper vehicle for seeking production of new evidence, MPI respectfully submits that the PUB must still be satisfied that the benefits of producing this evidence do not outweigh the costs. Not all "costs" are financial. One of the costs of granting an Order of this nature is that it implies that decisions made by the BoD and Investment Committee were not reasonable.

22) The PUB has recently signaled its intention not to direct the business of the Corporation. In Order 82/18, the PUB denied intervener status to UBER because its intervention would be of limited assistance to the PUB in its determination of just and reasonable rates. At page 19 of its Order 82/18 (issued June 29, 2018) the PUB states:

> "While the Board has a broad jurisdiction to examine policy issues affecting rates, the Board does not view its role as regulator to include directing MPI's business practices." [emphasis added]

23) The PUB (in the above case) correctly concluded that its role was not to usurp that of MPI and its BoD, by second-guessing its business decisions. Therefore, MPI respectfully submits that, if the PUB is prepared to grant the Order sought, it must be satisfied that the decision to conduct the ALM Study in the manner chosen was unreasonable. There is no evidence before the PUB to suggest that this was the case.

24) MPI developed its investment strategy under the guidance of the recommendations of Mercer. Mercer is an independent consulting firm specializing in the provision of investment advice to corporate clients globally. The BoD (including the Investment Committee, comprised of three individuals with lengthy careers in the investment industry) carefully examined Mercer's recommendations.

25) In confirming the investment strategy now under scrutiny, the BoD had the benefit of the advice and recommendations of the Investment Committee Working Group, a group again comprised of individuals with a wealth of finance and investment experience, including Garry Steski, Assistant Deputy Minister of Manitoba Finance (Treasury Division) and his three directors. Mr. Steski was a witness for the PUB in the hearing of the 2018 General Rate Application and testified that, in addition to his ICWG input, he monitors the

investment fund and reports any concerns to the Minister of Finance. Mr. Steski also testified that he sees his role as 'watchdog' for the Minister of Finance because, although MPI is responsible for its investments, the Government of Manitoba owns the investment fund. As it concerns the composition of the Investment Committee (a committee of the MPI BoD), Mr. Steski testified as follows:

> "MR. STEVE SCARFONE: And would you agree with me, sir, that those three (3) members that we spoke of, of the investment committee, are very qualified individuals in their area of expertise?
>
> MR. GARRY STESKI: Very highly competent, yes.
>
> MR. STEVE SCARFONE: And so, sir, based on your earlier comments about the qualifications and – and the competency of the investment committee members, is it fair to say, sir, that you would have complete confidence in the investment committee's ability to properly and prudently manage and make decisions concerning MPIC's investment strategy.
>
> MR. GARRY STESKI: Absolutely."

26) In determining whether MPI's decision to conduct the ALM Study in the manner it did was unreasonable, MPI respectfully submits, that the approach used by the PUB should mirror that of a court of law when reviewing the decision of an expert tribunal. That is, the PUB should measure MPI's decisions on a standard of reasonableness.

27) *Correctness* is the other standard of review used by courts in the administrative law context. Correctness is of course is a more stringent standard and normally only applies in the case of questions of law. In this case, the decisions in question are not questions of law. Therefore, the correctness standard has no application in this case, by analogy or otherwise. Further, by virtue of its prospective nature, it is only possible to

determine whether a decision to employ one investment strategy over another is correct years later (when the results thereof are known).

28) In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, the Supreme Court of Canada holds there are two standards of review, namely, correctness and reasonableness. The Supreme Court defines the standard of *reasonableness* at paragraph 47, when it states:

> "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 inquiries 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." [emphasis added]

29) Central to the reasonableness standard is the notion of deference. The Supreme Court in *Dunsmuir* adopts the definition from Professor David Dyzenhaus (Professor of Law, University of Toronto) which relies on the concept of "deference as respect" whereby there is not submission, but a respectful attention to the reasons offered in support of a decision. At paragraph 49 of its decision, the Supreme Court states:

> "Deference in the context of the reasonableness standard therefore implies…due consideration to the determinations of decision makers. [A] policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes

have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime."

30) In the case at hand, the PUB must consider, in determining the reasonableness of the investment strategy chosen by MPI, whether the decisions it made fall outside the specialized area of expertise of the Investment Committee. If the answer is no, the PUB must give deference to the decision makers.

31) The investment strategy adopted by MPI, based on models run by Mercer in the ALM Study, does not include the purchase of RRBs issued by the Government of Canada. MPI based this decision largely on the reasonable assumption that inflation is not expected to significantly rise over the next few years. RRB yields are dependent on inflation (generating low yields during periods of low and stable inflation). Indeed, the Corporation acknowledges that RRB's would have formed part of the new investment strategy had the ALM Study forecasted rising inflation, but that was not the assumption.

32) It was reasonable for MPI to rely upon the recommendations of Mercer, including its recommendations on the modeling the ALM Study should use. It was also reasonable for MPI not to have Mercer perform the ALM Study using the scenarios proposed by the CAC. In fact, MPI considered but ultimately chose not to run alternate scenarios at the time it was preparing the ALM study with Mercer. The Investment Committee and the BoD each have specialized knowledge regarding investment strategies and the PUB must give deference to their decisions.

33) With respect to the CAC, the issue in this case is not the ALM study itself, but whether it is was unreasonable for MPI to conduct the ALM in the manner suggested by

the CAC. MPI respectfully submits there is no evidence to refute the inflation assumptions underpinning the investment strategy it adopted.

34) Even if Mercer were to re-run portions of the ALM study as proposed by the CAC, any significant and lasting increase to the current inflation rate would not be known for at least another year or two. As a result, the results could not form part of the Order the PUB is expected to issue December 3, 2018.

35) In sum, unless the PUB finds that the decisions made by MPI concerning conduct of the ALM Study were unreasonable, it must not interfere with those decisions. Ordering the production of new studies (as sought by the CAC) would do just that. The available evidence supports that MPI's decisions were reasonable. There is no evidence to the contrary. Therefore, should the PUB find that a motion to compel production of new evidence is appropriate on a motion to compel answers to interrogatories, MPI respectfully submits that the CAC has failed to establish that the decisions not to produce this evidence in the first instance was unreasonable. For that reason as well, this motion must fail.

IRs cannot be answered as information does not exist and cannot be obtained with reasonable effort

36) In the further alternative, Section 16(b) of the PUB Rules suggests that a party may refuse to provide a full and adequate response an interrogatory "...where the information necessary to provide an answer is not available or cannot be provided with reasonable effort".

37) The actual questions contained in the subject IRs are demands for further analysis, which does not currently exist. Mercer estimates that re-running the modelling of efficient frontiers, as requested in the Subject IRs will take over 40 hours to complete, at a cost of approximately $46, 000. MPI has already paid more than $30,000 for Mercer to respond to Round 1 IRs.

38) The additional effort to complete the new modelling cumulatively represents about one-quarter the cost of the initial study. Given the value of the proposed further analysis, MPI submits that it cannot provide this information with reasonable effort.

Effort (and cost) of obtaining information required to answer IRs exceeds the anticipated value of that information

39) In the further alternative and, as indicated previously above, MPI submits that the central issue here is whether the costs of obtaining the information required exceeds its expected benefits. At page two (2) of its motion, the CAC characterizes MPI's reason for refusal to produce the requested analysis as being on the basis of cost, not relevance. MPI submits that the costs to the regulatory process are an important consideration, and should be weighed against the potential benefits derived from those costs.

40) In considering this balance, it must be remembered that costs does not necessarily mean *financial costs*, although that it an important consideration. As discussed above, MPI believes there is a substantial cost to granting an order of this nature that is not monetary in nature.

41) MPI respectfully submits that the analysis requested will have little, if any benefit, and will not assist the PUB in the determination of the 2019 GRA. The CAC's motion

asserts that the ALM study could be "vulnerable given the simplifying assumption about the nature of the liabilities (nominal vs. real)". However, the term "simplifying assumption" mischaracterizes how MPI made the decision to rely on the nominal liability benchmark, and suggests that MPI assumed its way to the desired result.

42) In fact, the decision to proceed using a nominal liability benchmark was made having accurately modelled the liabilities, with real and nominal benchmarks, based on Mercer's inflation assumption that is a reasonable best estimate. The affidavit of Mr. Bunston explains that a real liability benchmark was modelled, producing an efficient frontier, and several possible portfolios. These modelled portfolios did contain RRBs, and allocations to other inflation sensitive assets. However, of these portfolios, only one provided the necessary level of interest rate hedging (a Hedge Ratio of 100%), and this particular portfolio had an expected 10 year return of 1.9%, just over **one third less** than the return of 3.12% for the portfolio ultimately selected. Further the risk the portfolio, as measured by the Anticipated Surplus Volatility was 3.0%, **more than double** that of the portfolio ultimately selected, at 1.32%.

43) The analysis requested by the CAC will not add meaningful evidence to the record unless there exists some reasonable basis to challenge Mercer's inflation forecast.

44) Mercer's inflation forecast is 2%, with a standard deviation of 2.6%. Inflation forecasts from six independent forecasters were provided in the GRA Application, at Part VI Investments INV.14.2.1, Figure INV-44, which is reproduced below for convenience:

Figure INV- 44: Canadian CPI Forecast

Line No.	Quarterly	Scotia	CIBC	RBC	TD	BMO NB	Global	Average
1	2018 Q1	1.9%	1.8%	1.9%	1.3%	3.6%	1.6%	2.0%
2	Q2	2.0%	2.0%	2.2%	1.8%	1.3%	1.9%	1.9%
3	Q3	2.2%	2.4%	2.3%	2.0%	1.8%	2.4%	2.2%
4	Q4	2.2%	2.4%	2.0%	2.0%	2.2%	2.1%	2.2%
5	2019 Q1	2.3%	2.3%	1.7%	2.0%	2.5%	1.9%	2.1%
6	Q2	2.3%	2.2%	2.0%	2.1%	1.9%	1.9%	2.1%
7	Q3	2.3%		2.1%	2.0%	2.0%	2.0%	2.1%
8	Q4	2.3%		2.0%	2.1%	2.1%	2.1%	2.1%
9								
9	Annual							
10	2018	2.2%	2.2%	2.1%	2.2%	2.2%	2.0%	2.2%
11	2019	2.3%	2.1%	1.8%	2.1%	2.1%	2.0%	2.1%
12	2020				2.0%		2.0%	2.0%
13	2021				2.0%		2.0%	2.0%
14	2022				2.0%		2.0%	2.0%

15 Scotiabank, "Global Economics", March 6 , 2018
16 CIBC, "Economic Insights", February 15, 2018
17 RBC, "Economic Forecast Detail", March 2018
18 TD Economics, "Quarterly Economic Forecast", December 14, 2017
19 BMO, "Canadian Economic Outlook", March 9, 2018
20 Global Insight, March 2018
21 Global Insight, March 2017

45) While these inflation forecasts vary between forecasters, none diverges materially from 2.0%, and average 2.1% in 2019.

46) Further, Mercer's inflation forecast is consistent with the mid-point of the Bank of Canada's inflation target band. The inflation target band is described by the following excerpt from the Bank of Canada's website:

> **Inflation-control target**
>
> The inflation-control target was adopted by the Bank and the Government of Canada in 1991 and has been renewed several times since then, most recently in October 2016 for the five years to the end of 2021. The target aims to keep total CPI inflation at the 2 per cent midpoint of a target range of 1 to 3 per cent over the medium term. The Bank raises or lowers its policy interest rate, as appropriate, in order to achieve the target typically within a horizon of six to eight quarters—the

time that it usually takes for policy actions to work their way through the economy and have their full effect on inflation.1

47) MPI believes that the Bank of Canada's inflation target is credible, and notes that the independent inflation forecasts appear to concur based on the tight variation in the forecasts about the midpoint of the range.

48) Evidence regarding inflation targeting was placed on the record of the 2015 GRA, where the CAC's expert witness Dr. Simpson expressed some degree of confidence in the Bank of Canada's inflation targeting:

"And also again, to repeat this point about monetary policy, I think monetary policy much like it is improved to avoid the collapses associated with the Great Depression, and we've seen some evidence of that in the treatment of the recession in '08/'09, it's also improved to avoid the mistakes associated with the great stagflation. That is to say, it has adopted inflation targeting procedures which causes the Bank of Canada to lean against the wind of inflation once it gets near the top of that band of 3 percent. And that was not the case earlier, and I think monetary policy has learned from that period, because that was a worldwide phenomenon and a worldwide lesson, that if it's a choice between high inflation and low inflation, you're not going to get very much out of that in terms of improved economic performance, and so you're better off to adopt a low inflation strategy." [emphasis added]2

49) Dr. Simpson also opined that the inflation outlook for Canada at that time, was well within Bank of Canada's target range when he stated:

"Similarly, the interest rate decline scenario relies entirely for its adverse outcomes on the era surrounding the Great Stagflation of the late 1970s and early 1980s when inflation and unemployment were both high and authorities were able to reduce interest rates to stimulate the economy once inflationary concerns abated. No such

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1 https://www.bankofcanada.ca/rates/indicators/key-variables/inflation-control-target/

2 MPI GRA 2015-16, 11-05-2014, Tx: 1642-1643

inflationary concerns exist today, since inflation remains low and well within the Bank of Canada's target range and unemployment and excess capacity in the economy remain the focus." [emphasis added] [3]

50) Counsel for CAC also cross-examined an MPI witness on the presence of structural breaks in the historical inflation data, coincident with the change in approach to monetary policy. This suggests that the Bank of Canada's inflation targeting policy is both effective and predictable:

> "MR. BYRON WILLIAMS: You've risen incredibly in my estimation, sir. We can agree that since 1991 the Government of Canada and the -- the Bank of Canada have had an expressed policy objective of keeping inflation low, stable, and predictable?
>
> MR. LUKE JOHNSTON: Agreed.
>
> MR. BYRON WILLIAMS: And the current inflation target as measured by the total consumer price index remains at the midpoint of the control range of 1 to 3 percent?
>
> MR. LUKE JOHNSTON: That's my understanding.
>
> MR. BYRON WILLIAMS: And it's also fair -- it's also your understanding that the Bank of Canada carries out monetary policy through changes in its target overnight range of interest, agreed?
>
> MR. LUKE JOHNSTON: Yes.
>
> MR. BYRON WILLIAMS: And turning, if -- if we might, to page 57 of the D-C-A-T report, DCAT. Scrolling down to the bottom, if you would, Diana. And actually, is this -- just one (1) second, please. (BRIEF PAUSE)
>
> MR. BYRON WILLIAMS: Page 56. I apologize. At the bottom of page 56, the table under, "Inflation risk." Mr. Johnston, in preparing your DCAT and assessing inflation risk, you reviewed the all items Consumer Price Index for two (2) distinct

[3] Determining the Manitoba Public Insurance Rate Stabilization Reserve
Dr. Wayne Simpson with the advice and assistance of Ms Andrea Sherry and Mr. Peter Dyck October 1, 2014, p.15

historical periods, one (1) being from 1914 to 1991 and the second being from 1992 to 2013, agreed?

MR. LUKE JOHNSTON: Agreed.

MR. BYRON WILLIAMS: The significance of the second period, being the 1992 to 2013 period, is that coincides with the Bank of Canada inflation targeting area, correct?

MR. LUKE JOHNSTON: Correct.

MR. BYRON WILLIAMS: And the purpose of your analysis was to examine whether or not within the data you could associate a structural break in the data associated with the Bank of Canada inflation targeting era, agreed?

MR. LUKE JOHNSTON: Agreed.

MR. BYRON WILLIAMS: And if we look at the data, sir, for the period between 1915 and 1991, we can see that the average for that time period was interest [sic inflation] rates as measured by the all Canada – all items Consumer Price Index of about 3.6 percent. Is that correct?

MR. LUKE JOHNSTON: Correct.

MR. BYRON WILLIAMS: And we can also see a substantial standard deviation of 5.4 percent?

MR. LUKE JOHNSTON: Yes.

MR. BYRON WILLIAMS: And by standard deviation simplistically, would that suggest variance around the -- around the mean or average, sir?

MR. LUKE JOHNSTON: Yes, going back to your bell curve, as you can see here, it's probably not possible that the standard deviation's going to be negative 5.4 percent of that mean. But as a general statement, it's -- it's the variability around the -- the mean terms of 0.7 percent or standard deviation?

MR. LUKE JOHNSTON: Yes.

MR. BYRON WILLIAMS: And based on this analysis for the purposes of the DCAT modelling of interest rate risk, you chose to base your assessment of inflation risk focusing on data from the recent period, 1992 to present. Is that correct?

20 MR. LUKE JOHNSTON: Correct." [emphasis added]4

51) The evidence on the record of the current and past GRAs coalesces around certain key points. First, the Bank of Canada targets inflation, to the 2% midpoint of a range. Second, the Bank of Canada's inflation targeting policy is credible, as evidenced by both the historical data and the presence of a structural break in the data, and the forecasts of private forecasters who predict inflation to be at or near the inflation control target.

52) Given the foregoing, MPI respectfully submits that the reasonableness of Mercer's inflation forecast is the single determinative issue to the relevance of the additional modelling requested by the CAC. For the CAC to establish that the requested analysis is relevant and material, and therefore beneficial to the process to a degree that outweighs the cost, it must establish that there is some credible deficiency in Mercer's inflation forecast. To date, the CAC has not taken issue with the inflation forecast, nor has it articulated any specific concerns with Mercer's inflation forecast, nor provided any alternative forecast.

53) In this context, the CAC's requested analysis would extend the current analysis down a path whose destination is already known with enough certainty that the analysis was abandoned at an early stage of the ALM study. That destination is a portfolio laden with RRBs, earning less return with higher risk than the selected portfolio to protect against rising inflation that experts say will not occur.

---

[4] October 22, 2014 – 2015-16 Insurance year TX 1471:1474

54) As indicated, MPI has obtained an estimate from Mercer that the financial costs of re-running the portions of the ALM study will cost MPI (and its ratepayers) approximately $46,000. These costs (and the intangible costs noted above) far exceed the anticipated and highly questionable benefits of producing the requested evidence. As a result, MPI respectfully submits that this motion must also fail on this basis.

CAC can obtain the information sought without the assistance of MPI

55) The email correspond from CAC's counsel dated July 26, 2018 states the following:

> "We note that CAC Manitoba and its consultants could do the analysis, using the first method of single period optimization to get efficient frontiers, for less than $10,000 by downloading an Excel optimization model from the web and using Mercer's capital market assumptions as inputs to the model. However, there are two difficulties with this option that would likely make it more efficient for MPI/Mercer's to conduct the analysis..."

56) The CAC concedes that it has access to the tools and expertise required to perform the analysis requested but states that it is reluctant to use them. MPI respectfully submits that the PUB must also consider this as a factor in determining whether to grant the relief sought. Should the PUB refuse this motion, the CAC could still obtain this information. It would of course need to decide whether the benefits of doing so outweigh the costs, the same analysis already performed by MPI (with costs having tipped the scale) and the same analysis, which MPI submits the PUB must perform now.

Issue 2: Costs and Process Efficiency

57) The PUB awards costs in consideration of the criteria set out in Sections 43-44 of the PUB Rules. The PUB Rules do not permit MPI to make a claim for costs but instead set the criteria for awarding costs *to an intervenor*.

58) Page 19 of Order 82/18 of the PUB indicates that the PUB will provide intervenors with preliminary approval of their budgets with final approval to be granted once the hearing is complete.

59) The alternative scenarios proposed by the CAC (notwithstanding a reasonable alternative already in place) are also cost prohibitive and appear to be in conflict with the PUB having indicated to MPI in a letter dated April 11, 2018 (and again in PUB Interim Procedural Order No. 61/18) that it wished to streamline the 2019 GRA by improving the focus and efficiency of the application and hearing process.

60) In the event that the PUB dismisses this motion, MPI respectfully submits that the CAC should not be awarded any costs in relation thereto.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF AUGUST, 2018.

MANITOBA PUBLIC INSURANCE

Per: _____

STEVE SCARFONE/
ANTHONY LAFONTAINE GUERRA
Legal Counsel

TAB "A"

2001 MBQB 289, 2001 CarswellMan 529, 109 A.C.W.S. (3d) 572, 159 Man. R. (2d) 136

2001 MBQB 289
Manitoba Court of Queen's Bench

Manitoba Hydro Electric Board v. John Inglis Co.

2001 CarswellMan 529, 2001 MBQB 289, 109 A.C.W.S. (3d) 572, 159 Man. R. (2d) 136

The Manitoba Hydro Electric Board (Plaintiff) and John Inglis Co. Limited, Inglis Limited/Inglis Limitee, English Electric Company of Canada, Limited, GEC Alsthom International Canada Inc., GEC Alsthom Reseau de Vente Inc./GEC Ashom Sales Network Inc. and English Electric Company Limited (Defendants) and Acres International Limited and Racey, MacCallum and Associates Limited (Third Parties)

MacInnes J.

Judgment: November 2, 2001
Docket: Winnipeg Centre CI 93-01-70004

Counsel: *Rod E. Stephenson Q.C.*, *L. William Bowles*, for Plaintiff
Robert P. Sokalski, *J.A. Baigrie*, *H. Cholakis*, for Defendants, Inglis Co. Limited, Inglis Limited/Inglis Limitee
Kevin T. Williams, *Kyle Dear*, for Defendant, English Electric Company Limited
Kelly Dixon, for Third Party, Acres International Limited

Subject: Civil Practice and Procedure; Corporate and Commercial; Contracts
Headnote
Corporations --- Practice and procedure in actions involving corporations — Discovery — Interrogatories
Defendant corporation produced representative for examination — Plaintiff first served interrogatories in order to focus and shorten oral examination — Defendant refused to answer many questions — Plaintiff brought motion for order to answer questions — Motion granted — Interrogatories under Manitoba Rules are no different than oral examination for discovery — In either case, party has obligation to correct any answers later discovered to be incorrect or incomplete — Person being examined as representative of corporation has duty to make reasonable efforts to inform himself — Queen's Bench Rules, Man. Reg. 553/88, R. 31.02, 31.03(2), 31.04(2), 31.09.
Practice --- Discovery — Examination for discovery by interrogatories — Range of discovery by interrogatories — What may be asked
Plaintiff served interrogatories on defendants — Defendants refused to answer many of questions — Plaintiff brought motion for order to answer questions — Motion granted — Interrogatories under Manitoba Rules are no different than oral examination for discovery — Plaintiff was entitled to disclosure of findings, opinions, and conclusions of any experts engaged by defendants — Rule applied to even provisional opinions — Defendants had obligation to correct any answers later discovered to be incorrect or incomplete — Queen's Bench Rules, Man. Reg. 553/88, R. 31.02, 31.04(2), 31.06.

MOTION by plaintiff for order that defendants provide answers and further and better answers to interrogatories.

***MacInnes J.*:**

1 Plaintiff moves for an order that the defendants John Inglis Co. Limited ("Inglis") and English Electric Company Limited ("English Electric") provide answers and/or further and better answers to interrogatories served by the plaintiff upon each of Inglis and English Electric.

2 This litigation relates to the design, manufacture and installation of certain turbine generator units at the plaintiff's generating station in Grand Rapids, Manitoba. The work was done pursuant to a contract between the plaintiff and

Inglis executed January 28, 1963. Inglis in turn arranged for the involvement of English Electric in the project. The turbines were put into service in October 1965 and the completion certificate under the contract was issued by the plaintiff July 1, 1967. On March 10, 1992, an explosion occurred which seriously damaged the outer head cover on one of the turbines (unit 1), thereby allowing water and oil to escape into the powerhouse of the generating station. The plaintiff alleges that its loss, suffered by reason of this occurrence, including loss of profits, totals approximately $30 million.

3 The litigation in question was commenced in 1993. For reasons I need not go into, the litigation has not proceeded swiftly. Indeed, it is only now at the examination for discovery stage with much time and work contemplated to complete discovery. While the issues in the litigation are not particularly difficult, the extensive passage of time since performance of the work has made the discovery process difficult from the standpoint of both production of records and documents, and the availability of knowledgeable or informed witnesses.

4 Inglis has examined for discovery a representative of the plaintiff. The examination has lasted 3 1/2 weeks and is not yet complete. Extensive undertakings are outstanding in respect of the questions asked so far. The plaintiff now wishes to examine Inglis for discovery. Inglis has chosen to produce a Mr. Davies as its representative for discovery, believing him to be the most knowledgeable person they are able to produce. Mr. Davies is now 74, retired and a resident of Salt Spring Island, British Columbia. While he is prepared to serve as Inglis' representative, he does not wish to travel to Winnipeg for examination and, accordingly, two weeks have been scheduled to examine him in Vancouver. This will necessitate the attendance of counsel and the shipment of volumes of documents from Winnipeg to Vancouver for purposes of the examination.

5 Plaintiff's counsel asserts that because of the foregoing, he felt it reasonable to serve interrogatories in advance of oral examination in an attempt to identify and receive evidence on some of the major issues between the parties so as hopefully to permit the oral examination to be more focused, brief and efficient.

6 The plaintiff asserts the existence of a relationship between Inglis and English Electric and the exchange between them of knowledge and information relative to the project. Accordingly, plaintiff's counsel considered it reasonable to serve interrogatories on English Electric as well.

7 As a result, interrogatories were served by the plaintiff upon both Inglis and English Electric. The interrogatories consist of 238 questions and are identical for each of Inglis and English Electric in the sense that the same questions are to be answered by each of them separately.

8 Inglis answered many of the questions asked, but objected to a large number and refused to answer them. No answers have yet been obtained from English Electric, but its counsel has provided an indication as to those questions which English Electric will answer as compared with those questions to which it objects.

9 Plaintiff then made the motion now before me seeking answers to those questions objected to by both Inglis and English Electric and seeking further and better answers to some of the questions which have been answered by Inglis.

10 At the hearing of the motion, many of the questions were resolved both as to the validity of objections made and as to whether further or better answers were required. Two issues, however, were left for resolution, namely:

(1) Whether there is an obligation upon an individual designated by a corporation to answer interrogatories, to inform himself in order to provide such answers; and

(2) Whether questions on interrogatories can elicit opinions of expert witnesses for the party being examined.

11 I reserved judgment on both issues and the following are my reasons for decision.

12 The focal point for the argument advanced by Inglis' counsel on these two issues is that interrogatories are different than examination for discovery. They argued that the interrogatories were served under Manitoba Queen's Bench Rule 35, that it is therefore the governing rule, and that there is no obligation under that rule for a person answering

interrogatories to be required to inform himself, including in respect of the findings or opinions of experts. Inglis' counsel referred me to authorities as to the purpose and limits of interrogatories, including as to the obligation to inform oneself and as to the question whether one needs to ascertain and then relate by way of answer to interrogatories the findings or opinions of an expert.

13 I do not agree with or accept the submission of Inglis' counsel on either issue, or of English Electric's counsel which was confined to the second issue only. In my view, the reference point for deciding the issues in question are the Manitoba Queen's Bench Rules. While many of the authorities referred to me by counsel were interesting in providing an historical background to the nature, purpose and scope of interrogatories, none of the cases referred to me are binding upon this court, nor, in my view, are they consistent with the Manitoba Queen's Bench Rules as I interpret them.

14 The present Queen's Bench Rules came into force March 1, 1989 and were the first major revision of the Queen's Bench Rules in Manitoba since 1939. They are the product of extensive study by a committee of bench and bar and, while not identical to, were closely modeled upon the Ontario Rules of Civil Procedure which came into existence January 1, 1985. I conclude, therefore, that whatever may have been the law in Manitoba before March 1, 1989, after that date the new (now current) Queen's Bench Rules apply.

15 In deciding this motion, the following in my view are the rules relevant for consideration. Under Rule 31 entitled Examination for Discovery, the following sub-rules appear:

> 31.02 An examination for discovery may take the form of an oral examination or interrogatories or both.
>
> . . .
>
> 31.03(2) Where a corporation may be examined for discovery, the examining party may examine any person who is or has been an officer, director or employee on behalf of the corporation . . .
>
> . . .
>
> 31.04(2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or interrogatories under rule 35.01 . . .
>
> . . .
>
> 31.06(1) A person examined for discovery shall answer, to the best of the person's knowledge, information and belief, any proper question relating to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,
>
> (a) the information sought is evidence;
>
> . . .
>
> 31.06(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,
>
> > (a) the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
> >
> > (b) the party being examined undertakes not to call the expert as a witness at the trial.

16 In addition, I note that Rule 34 is entitled "Procedure On Oral Examinations" and Rule 35 "Procedure On Interrogatories". The rules also provide for a general ongoing undertaking that answers given, which subsequently are

discovered either to be incorrect or incomplete, will be made correct or complete when so discovered (31.09), and for the production of expert reports (53).

17 I interpret Queen's Bench Rule 31.02 to mean just what is says, namely, that an examination for discovery may take the form of an oral examination or interrogatories or both. That is, interrogatories are not some separate kind of animal. Interrogatories are simply a form of examination for discovery. Rule 31 covers in a substantive way the essentials of examination for discovery, which includes both oral examination and interrogatories. Rules 34 and 35, on the other hand, provide for the process to be followed in embarking upon and completing either an oral examination or interrogatories, both or either as a method by which examination for discovery may be held.

18 I am fortified in my interpretation of Rule 31.02 by reference to Rule 31.04 (and in particular as it applies here, Rule 31.04(2)), which clearly in my view contemplates two different modes of examination for discovery, namely, serving a notice of examination (which pertains to oral examination) or interrogatories. In short, I conclude that Queen's Bench Rule 31 deals with substance of examination for discovery, whether oral examination or interrogatories, and Rule 35 is simply a rule of process pertaining to one of the forms by which examination for discovery may be conducted.

19 Having concluded then that interrogatories are simply a form of examination for discovery, I likewise conclude that whether by way of interrogatories or by way of oral examination, the obligation of a party being examined by way of interrogatories to inform himself and to answer questions as to the findings, opinions and conclusions of an expert, is the same. If it were otherwise, you would have the anomaly of examination by interrogatories being considerably restricted as to both scope and effectiveness compared to oral examinations, contrary to the prevailing mood and intent of broadening the scope of discovery and disclosure so as to avoid surprises at trial, and to enable litigants at an earlier time to more reliably assess their positions in the hope and expectation that this may result in earlier and therefore less costly resolution of disputes. What is the logical or principled reason for a former employee offered as a corporate representative being required to inform himself by inquiry of company records and other past employees or as regards the findings, opinion and conclusions of an expert, if either can reasonably be done, for purposes of oral examination but not for purposes of interrogatories?

20 As regards the obligation to inform oneself, I note the comments of Master Peppiatt in *Air Canada v. McDonnell Douglas Corp.* (1995), 22 O.R. (3d) 140 (Ont. Master), at 152 where he wrote:

> It is the obligation of any person who is to be examined for discovery to prepare himself or herself to answer questions which may reasonably be expected to be asked. This is particularly so where, as here, the person is being examined on behalf of a large corporation in respect of the matter which engaged the attention of a considerable number of people. It is a well-established principle that the person to be examined must make reasonable inquiries of fellow servants of the corporation.

At p. 153 of the reported decision, Master Peppiatt refers to *Gravlev v. Venturetek International Ltd.* (1979), 15 C.P.C. 18 (Ont. H.C.), and to the comments of Steele J. who wrote at pp. 23 - 25:

> The fact that the persons are no longer employees or servants of the Company is not, in my opinion, grounds for refusing to attempt to obtain the information.
>
> . . .
>
> Merely because a person becomes a former employee does not excuse the plaintiff from attempting to obtain information from him. The test really is that the plaintiff is bound to obtain the information from such former agents or servants unless he can show that it would be unreasonable to require him to do so. The test is not whether such employee is still within the control of the plaintiff but whether it is unreasonable to require him to inform himself. It may be that if the plaintiff cannot obtain information from a former employee no longer under his control he will be excused from answering the question, but that is a secondary matter and not the primary matter.

. . .

In the present case, all of the persons from whom information may be obtained are still available and there is no evidence to indicate that they will not supply the information to the plaintiff.

. . .

The test is that the party being examined must inform himself unless it would be unreasonable to require him so to do. I am of the opinion that it is not unreasonable to require the plaintiff to do so in the present case. Obviously, if the persons from whom he must obtain the information are not available or refuse to give him information, the matter would have to be considered further, but he should be required to attempt to obtain the information in the first instance.

21 Having concluded that interrogatories are simply a form of examination for discovery and not, as Inglis' counsel argued, something distinct from examination for discovery, it follows that the obligation to inform oneself in respect of interrogatories is the same as in respect of oral examination, as succinctly described in *Air Canada* (supra).

22 I appreciate in the circumstances of this case that it may be extremely difficult, costly and ultimately impossible for the representatives of Inglis and English Electric to be able to obtain information of the kind one would consider satisfactory in most lawsuits. However, reasonable effort must first be made. Thereafter the parties may further litigate the extent of the effort required given the practicabilities of the case. For the present, however, there is no evidence before me as to the difficulty or expense which might be incurred in the examinee representative informing himself.

23 As regards the second issue, that is the extent if at all to which an examining party can examine in respect of expert opinions, it is my view that Rule 31.06(3) clearly provides that an examining party may obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined, provided of course that they relate to a matter in issue in the action. There is under Rule 31.06(3) an exclusion to that general proposition, but the circumstances of this case to my knowledge do not give rise to that exclusion. As well, the old objection that the question(s) sought evidence rather than fact no longer applies in light of Rule 31.06(1)(a). Furthermore, Rule 31.06(3) is clearly distinct from the intent and requirements of Rule 53, which relates to the service of an expert's report prior to trial.

24 In *Cheaney v. Peel Memorial Hospital* (1990), 44 C.P.C. (2d) 158 (Ont. Master), Master Clark at p. 162 wrote the following which in my view is applicable here:

> . . . rule 31.06(3) deals with the disclosure of "findings, opinions and conclusions", which, according to the plain meaning of the Rule, and subject to the exemptions set out therein, must be disclosed on discovery if they exist, regardless of whether they have been transmitted orally or in writing, and whether or not counsel chooses to categorize such as preliminary or final.

25 In argument, there was an expression of concern as to the fact that the expert's opinion, by reason of the stage of the litigation, may be preliminary and subject to change. But, the rules provide for and contemplate just such a situation. Rule 31.09 requires that evidence given which subsequently is discovered to have been incorrect or incomplete when given, will be made correct or complete when so discovered.

26 At p. 163 of *Cheaney* (supra) Master Clark wrote:

> It is not unheard of for "findings, opinions and conclusions" of an expert to change between the time of the original instructions from counsel and the date of the final report. . . . But a finding, or an opinion or a conclusion, is still that, even though it is reached at an early time in the process, and especially if it has been expressed to counsel. On discovery, counsel may only say he or she has no "findings, opinions or conclusions" to disclose if in fact, none have by that time been expressed to counsel by the expert. Counsel may not safely or properly avoid disclosure by

describing the consultations as "discussions only", or as being "preliminary" or "informal" in nature. Once arrived at, a finding or an opinion or a conclusion exists, notwithstanding that it may change.

The test is this: if the finding is expressed in a sufficiently coherent manner that it can be used by counsel, then it is a "finding" that ought to be disclosed. The same applies to "opinions" and "conclusions". They may change, and change dramatically, but they still must be disclosed whenever they are formed. And it is the duty of counsel, as an officer of the court, to disclose those coherent "findings, opinions and conclusions" as they are disclosed to counsel. It is not proper practice to so construct the relationship of expert to counsel that no "findings, opinions, or conclusions" are expressed to counsel until the final written report is produced before trial.

The operation of rule 31.06(3) does not depend on the subjective judgment of counsel as to whether or not "findings, opinions or conclusions" are final or preliminary, or written or oral. Rather, the operation of the rule depends on the objective judgment of counsel as to whether his or her expert has expressed a coherent "finding, opinion or conclusion" that ought, in all fairness, to be disclosed.

If rule 31.06(3) required that "findings, opinions and conclusions" be in writing and be final before being disclosed, it would allow counsel to avoid all disclosure until forced by rule 53.03(1) to serve a report just before trial.

27 I note that the comments of Master Clark in *Cheaney* pertain to the Ontario Rules of Practice. However, the rules to which he refers are identical to Manitoba Rules 31.06(3), 31.09 and 53.03(1) respectively.

28 I conclude, therefore, that one may ask an examinee on discovery (i.e. whether by way of oral examination or interrogatories) to disclose and/or to make inquiries of an expert already retained in respect of, findings, conclusions or opinions that that expert then has relating to a matter in issue in the action, and such examinee is obligated to respond whether by reason of having already informed himself or by way of undertaking. However, it is not necessary for a party to go out and engage an expert so as to permit its representative to be able to answer questions put on examination for discovery, or to ask its expert to provide a new or fresh opinion not yet given in response to an examining party's question. Nor does the examinee have to ask his expert to comment or opine upon the theories or opinions advanced by examining counsel, such questions being cross-examination, not examination for discovery.

29 In light of the matters resolved at the hearing of the motion and of my decision expressed in these reasons, plaintiff has been substantially successful in its motion and is entitled to costs. If counsel are unable to agree as to costs, they may be spoken to.

Motion granted.

End of Document

TAB "B"

2008 SCC 9, 2008 CSC 9
Supreme Court of Canada

Dunsmuir v. New Brunswick

2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 2008 CSC 9, [2008] 1 S.C.R. 190, [2008] A.C.S. No. 9, [2008] S.C.J. No. 9, 164 A.C.W.S. (3d) 727, 170 L.A.C. (4th) 1, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 329 N.B.R. (2d) 1, 372 N.R. 1, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 844 A.P.R. 1, 95 L.C.R. 65, J.E. 2008-547, D.T.E. 2008T-223

David Dunsmuir (Appellant) v. Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management (Respondent)

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

Heard: May 15, 2007
Judgment: March 7, 2008*
Docket: 31459

Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, (sub nom. *Dunsmuir v. R.*) 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.)**Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2005), 2005 NBQB 270, 2005 CarswellNB 444, 293 N.B.R. (2d) 5, 762 A.P.R. 5, 43 C.C.E.L. (3d) 205 (N.B. Q.B.)**

Counsel: J. Gordon Petrie, Q.C., Clarence L. Bennett for Appellant
C. Clyde Spinney, Q.C., Keith P. Mullin for Respondent

Subject: Labour; Employment; Public

Headnote

Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Procedure on dismissal — Procedural fairness

Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act ("PSLRA"), alleging that dismissal was actually for cause and he was not given opportunity to correct his performance prior to dismissal — After interpreting sections of PSLRA and Civil Service Act ("CSA"), adjudicator determined he had jurisdiction to inquire into reasons for employee's dismissal — Adjudicator held that employee was denied procedural fairness and reinstated him — Province applied successfully for judicial review — Application judge held that adjudicator was incorrect in finding that he had jurisdiction to inquire into true reasons for dismissal, and that adjudicator erred in ruling that employee had been denied procedural fairness — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed — Adjudicator's decision was correctly struck down on judicial review — Adjudicator erred in his application of duty of fairness by imposing procedural fairness requirements on Province over and above its contractual obligations and ordering reinstatement — Employee was contractual employee of Province as well as public office holder — Section 20 of CSA provided that, as civil servant, employee could only be dismissed in accordance with ordinary rules of contract — It was unnecessary to consider public law duty of procedural fairness — Employee was protected by contract and was able to obtain contractual remedies related to dismissal.

Labour and employment law --- Employment law — Termination and dismissal — Practice and procedure — Judicial review of adjudicative decisions

Labour and employment law --- Public service employees — Termination of employment — Practice and procedure

Jurisdiction of adjudicator to inquire into reasons underlying dismissal where no cause is alleged — Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act ("PSLRA"), alleging that dismissal was actually for cause, and he was not given opportunity to correct his performance prior to dismissal — After interpreting sections of PSLRA and Civil Service Act, adjudicator determined he had jurisdiction to inquire into reasons for employee's dismissal — Adjudicator held that employee was denied procedural fairness and reinstated him, but provisionally assessed notice period to be eight months — Province applied successfully for judicial review — Application judge held that adjudicator lacked jurisdiction to inquire into true reasons for dismissal, and that adjudicator erred in ruling that employee had been denied procedural fairness — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed — Adjudicator's decision regarding his jurisdiction was not reasonable — Adjudicator adopted fatally flawed reasoning process that was inconsistent with employment contract by giving PSLRA interpretation that allowed him to inquire into reasons for dismissal when employer had right not to provide such reasons — Combined effect of PSLRA sections could not, on any reasonable interpretation, remove employer's right under contract law to discharge employee with reasonable notice or pay in lieu.

Labour and employment law --- Public service employees — Appeal and judicial review — Standard of review

Decision of adjudicator — Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act ("PSLRA"), alleging that dismissal was actually for cause and he was not given opportunity to correct his performance prior to dismissal — After interpreting section of PSLRA and Civil Service Act ("CSA"), adjudicator determined he had jurisdiction to inquire into reasons for employee's dismissal — Adjudicator held that employee was denied procedural fairness and reinstated him — Province applied successfully for judicial review — Application judge held that adjudicator was incorrect in concluding that he had jurisdiction to inquire into true reasons for dismissal, and that adjudicator erred in ruling that employee had been denied procedural fairness — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed — Appropriate standard of review of adjudicator's interpretation of PSLRA and s. 20 of CSA was reasonableness — Question was whether PSLRA sections permitted adjudicator to inquire into employer's reasons for dismissing employee with notice or pay in lieu, which was question of law — Inclusion of full privative clause in PSLRA gave rise to strong indication that reasonableness standard of review should apply — Nature of question was not of central importance to legal system and outside specialized expertise of adjudicator, which also suggested reasonableness standard of review.

Administrative law --- Standard of review — General principles

Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act, alleging that dismissal was actually for cause and he was not given opportunity to correct his performance prior to dismissal — Adjudicator held that employee was denied procedural fairness and reinstated him — Province applied successfully for judicial review — Application judge held that adjudicator's decision on merits failed to meet reasonableness standard of review — Application judge held that adjudicator's jurisdiction in circumstances was limited to assessing reasonableness of notice period — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed — It was necessary to reconsider both number and definitions of various standards of review, and analytical process employed to determine which standard applies in a given situation — Analytical problems that arose in trying to apply different standards of review undercut any conceptual usefulness created by inherently greater flexibility of having multiple standards of review — Two variants of reasonableness review, reasonableness simpliciter and patent unreasonableness, should be collapsed into single form of "reasonableness" review — Result was system of judicial review comprising two standards: correctness and reasonableness.

Labour and employment law --- Public service employees — Termination of employment — Dismissal — Common law right to dismiss at pleasure

Distinction between office holder and contractual employee — Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act, alleging that dismissal was actually for cause and he was not given opportunity to correct his performance prior to dismissal — Adjudicator held that employee was denied procedural fairness and reinstated him, but provisionally assessed notice period to be eight months — Province applied successfully for judicial review — Application judge held that adjudicator's decision failed to meet reasonableness standard of review — Application judge held that adjudicator's jurisdiction in circumstances was limited to assessing reasonableness of notice period — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed — Distinction between office holder and contractual employee for purposes of public law duty of fairness was problematic and should be done away with — Distinction was difficult to apply in practice and did not correspond with justifications for imposing public law procedural fairness requirements — Where relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as office holder — Public authority which dismisses employee pursuant to contract of employment should not be subject to any additional public law duty of fairness — Where public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law.

Droit du travail et de l'emploi --- Droit de l'emploi — Cessation et licenciement — Cessation de l'emploi par l'employeur — Procédure au moment du licenciement — Équité procédurale

Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Après avoir interprété des dispositions de la LRTSP et de la Loi sur la Fonction publique (« LFP »), l'arbitre a conclu qu'il avait compétence pour s'enquérir des raisons de la cessation d'emploi de l'employé — Arbitre a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré — Ministère a déposé une demande de contrôle judiciaire avec succès — Juge de révision a conclu que l'arbitre avait erré en concluant qu'il avait compétence pour s'enquérir des raisons véritables du congédiement et en statuant que l'employé n'avait pas eu droit à l'équité procédurale — Employé a interjeté appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Cour de révision a annulé à bon droit la décision de l'arbitre — Arbitre a erré dans son application de l'obligation d'équité en imposant au ministère des exigeances d'équité procédurale allant au-delà des obligations contractuelles de ce dernier et en ordonnant la réintégration de l'employé — Employé était à la fois titulaire d'une charge publique et employé contractuel du ministère — Article 20 de la LFP prévoyait qu'à titre de fonctionnaire, il ne pouvait être congédié que suivant les règles contractuelles ordinaires — Il n'était pas nécessaire de tenir compte de quelque obligation d'équité procédurale que ce soit en droit public — Employé était protégé par un contrat et a pu obtenir des mesures de réparation de nature contractuelle en liaison avec son congédiement.

Droit du travail et de l'emploi --- Droit de l'emploi — Cessation et licenciement — Procédure — Révision judiciaire d'une sentence arbitrale

Droit du travail et de l'emploi --- Fonctionnaires — Cessation d'emploi — Procédure

Compétence d'un arbitre pour s'enquérir des raisons d'un congédiement sans cause alléguée — Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Après avoir interprété des dispositions de la LRTSP et de la Loi sur la Fonction publique (« LFP »), l'arbitre a conclu qu'il avait compétence pour s'enquérir des raisons de la cessation d'emploi de l'employé — Arbitre a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré, mais a subsidiairement évalué la période de préavis à huit mois — Ministère a déposé une demande de contrôle judiciaire avec succès — Juge de révision a conclu que l'arbitre n'avait pas compétence pour s'enquérir des raisons véritables du congédiement et avait erré en statuant que l'employé n'avait pas eu droit à l'équité procédurale — Employé a interjeté appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Décision de

l'arbitre concernant sa compétence n'était pas raisonnable — En concluant que la LRTSP lui permettait de rechercher les motifs du congédiement, alors que l'employeur avait le droit de ne pas les préciser, l'arbitre a tenu un raisonnement foncièrement incompatible avec le contrat d'emploi et, de ce fait, entaché d'un vice fatal — Application concomitante des dispositions de la LRTSP ne saurait raisonnablement supprimer le droit contractuel de l'employeur de congédier un employé avec préavis raisonnable ou indemnité en tenant lieu.

Droit du travail et de l'emploi --- Fonctionnaires — Appel et contrôle judiciaire — Norme de contrôle

Sentence arbitrale — Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Après avoir interprété des dispositions de la LRTSP et de la Loi sur la Fonction publique (« LFP »), l'arbitre a conclu qu'il avait compétence pour s'enquérir des raisons de la cessation d'emploi de l'employé — Arbitre a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré — Ministère a déposé une demande de contrôle judiciaire avec succès — Juge de révision a conclu que l'arbitre avait erré en concluant qu'il avait compétence pour s'enquérir des raisons véritables du congédiement et en statuant que l'employé n'avait pas eu droit à l'équité procédurale — Employé a interjeté appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Interprétation de la LRTSP et de l'art. 20 de la LFP par l'arbitre devait être révisée selon la norme de la décision raisonnable — Question de savoir si les dispositions de la LRTSP autorisaient l'arbitre à s'enquérir des motifs du congédiement de l'employé avec préavis ou indemnité en tenant lieu était une question de droit — Présence d'une clause privative dans la LRTSP militait clairement en faveur d'un contrôle selon la norme de la décision raisonnable — De par sa nature, la question ne revêtait pas une importance capitale pour le système juridique et n'était pas étrangère au domaine d'expertise de l'arbitre, ce qui favorisait encore le critère de la décision raisonnable.

Droit administratif --- Norme de contrôle — Principes généraux

Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Arbitre a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré — Ministère a déposé une demande de contrôle judiciaire avec succès — Juge de révision a conclu que la sentence arbitrale, quant au fond de l'affaire, ne satisfaisait pas à la norme de la décision raisonnable — Juge de révision a conclu que, dans les circonstances, le rôle de l'arbitre se limitait à l'examen de la durée du préavis — Employé a interjeté appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Il était nécessaire de repenser tant le nombre que la teneur des normes de contrôle, ainsi que la démarche analytique qui présidait à la détermination de la norme applicable — Difficultés analytiques soulevées par l'application des différentes normes réduisaient à néant toute utilité conceptuelle découlant de la plus grande souplesse propre à l'existence de normes de contrôle multiples — Il y avait lieu de fondre en une seule les deux normes de « raisonnabilité », à savoir la norme de la décision raisonnable simpliciter et la norme de la décision manifestement déraisonnable — Il en résultait un mécanisme de contrôle judiciaire emportant l'application de deux normes : celle de la décision correcte et celle de la décision raisonnable.

Droit du travail et de l'emploi --- Fonctionnaires — Cessation d'emploi — Congédiement — Droit issu de la Common Law permettant de congédier à volonté

Distinction entre l'employé titulaire d'une fonction et l'employé contractuel — Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Arbitre a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré, mais a subsidiairement évalué la période de préavis à huit mois — Ministère a déposé une demande de contrôle

judiciaire avec succès — Juge de révision a conclu que la sentence arbitrale ne satisfaisait pas à la norme de la décision raisonnable — Juge de révision a conclu que, dans les circonstances, le rôle de l'arbitre se limitait à l'examen de la durée du préavis — Employé a interjeté appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Établissement d'une distinction entre l'employé titulaire d'une fonction et l'employé contractuel pour les besoins de l'obligation d'équité posait problème en droit public et devrait être abandonné — Distinction était difficile à établir dans les faits et était sans corrélation avec la raison d'être de l'imposition de l'obligation d'équité procédurale — Lorsque la nature de la relation d'emploi est contractuelle, elle doit être considérée comme toute autre relation d'emploi assujettie au droit privé, même lorsque l'employé est titulaire d'une charge — Organisme public qui renvoie un employé en application d'un contrat d'emploi ne devrait pas être assujetti en outre à une obligation d'équité reconnue en droit public — Fonctionnaire qu'un contrat protège contre le congédiement injuste devait exercer un recours en droit privé.

The employee was employed as a court clerk and legal officer by the provincial Department of Justice (Province). Performance issues arose and the employee was reprimanded. While preparing for the employee's performance review, the Province concluded that the employee was not right for the job. The Province cancelled the meeting and purported to dismiss the employee without cause on reasonable notice pursuant to s. 20 of the Civil Service Act (CSA).

The employee unsuccessfully grieved under the Public Service Labour Relations Act (PSLRA), claiming that he was dismissed without procedural fairness as the Province gave no reasons for its dissatisfaction with his performance, and he had no opportunity to respond to the concerns. The grievance was referred to adjudication. A preliminary issue arose as to whether the adjudicator was authorized to assess the reasons underlying the decision to dismiss, as cause was not alleged. The adjudicator held that the employee was entitled to adjudication as to whether the dismissal with notice was in fact for cause, and found he had jurisdiction to consider the merits. The adjudicator found that the dismissal was not disciplinary.

The adjudicator noted that the employee's employment was "hybrid in character" as he was a legal officer under the CSA and an office holder at pleasure as court clerk. The adjudicator held that the employee was entitled to procedural fairness, and declared the termination void ab initio. The adjudicator ordered reinstatement, but provisionally assessed the notice period at eight months. The Province applied for judicial review.

The application judge held that a correctness standard of review applied to the preliminary issue. The application judge ruled that the adjudicator had overlooked the effects of s. 20 of the CSA and had misinterpreted certain procedural sections of the PSLRA, giving them a substantive interpretation. The application judge held that the adjudicator lacked jurisdiction to inquire into the reasons for dismissal, and quashed his preliminary ruling.

The application judge held that the adjudicator's reasons for his decision on the merits did not meet a reasonableness simpliciter standard of review, so that the reinstatement award could not stand. It was held that the employee received procedural fairness due to the grievance hearing. The reinstatement order was quashed, but the provisional award of eight months' notice was upheld. The employee appealed.

The Court of Appeal held that the application judge had erred in adopting a correctness standard of review of the adjudicator's preliminary decision. The Court of Appeal found that a reasonableness standard of review applied to the adjudicator's decisions, and held that the decisions were unreasonable. The appeal was dismissed. The employee appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Bastarache, LeBel JJ. (McLachlin C.J.C., Fish, Abella JJ. concurring): It was necessary to reconsider the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. The analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. The two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness.

The appropriate standard of review of the adjudicator's interpretation of the PSLRA and s. 20 of the CSA was reasonableness. The question of whether the PSLRA sections permitted the adjudicator to inquire into the employer's reasons for dismissal of the employee with notice was a question of law. The legislative regime and purpose, and the inclusion of a full privative clause in the PSLRA, favoured a standard of reasonableness. The nature of the question

was not of central importance to the legal system and outside the specialized expertise of the adjudicator, which also suggested a reasonableness standard.

The preliminary decision was unreasonable. By giving the PSLRA an interpretation that allowed him to inquire into the reasons for discharge when the Province had the right not to provide, or even have, such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and fatally flawed. The adjudicator's decision treated the employee as a unionized employee when he was not. The combined effect of the PSLRA sections could not, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu.

The adjudicator's decision was correctly struck down on judicial review. The employee was a contractual employee of the Province in addition to being a public office holder. Section 20 of the CSA provides that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In the circumstances, it was unnecessary to consider any public law duty of fairness. The Province was fully within its rights to dismiss the employee without a hearing with pay in lieu of notice. The employee was able to obtain contractual remedies for his dismissal.

Binnie, J. (concurring): The appeal should be dismissed. The employee's employment relationship with the Province was governed by contract. The Province chose to exercise its right to dismiss the employee without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the CSA and of the PSLRA sections. The employee was not unionized, and his employment was terminated in accordance with contract law. Public law principles of fairness were not applicable.

The need for a re-examination of the Canadian approach to judicial review of administrative decision is widely recognized, but the majority's reasons did not deal with the system as a whole: they focused on administrative tribunals. In that context they reduced the applicable standards from three to two, but retained the pragmatic and functional analysis, although it is now to be called the standard of review analysis. A broader reappraisal is called for. The present "pragmatic and functional" approach is more complicated than is required by the subject matter.

Deschamps, J. (concurring): The appeal should be dismissed. The majority's decision on the issue of natural justice was agreed with.

Since the common law, not the adjudicator's enabling statute, was the starting point of the analysis, and since the adjudicator did not have specific expertise in interpreting the common law, the reviewing court did not have to defer to his decision on the basis of his expertise. The standard of review was correctness.

In the case at bar, the adjudicator's role was limited to evaluating the length of notice. The adjudicator erred in his interpretation and application of the PSLRA sections, and overlooked common law rules. The adjudicator did not even consider the common law rules. Even if deference had been owed to the adjudicator, his interpretation could not have stood.

Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère »). Le rendement de l'employé a été remis en question et l'employé a été réprimandé. En préparant l'évaluation de rendement de l'employé, le ministère s'est rendu compte qu'il n'était pas fait pour le travail. Le ministère a annulé la rencontre et a pris la décision de mettre fin à l'emploi de l'employé sans motif moyennant un préavis raisonnable, conformément à l'art. 20 de la Loi sur la Fonction publique (« LFP »).

L'employé a vainement déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'il avait été congédié au mépris de l'équité procédurale en raison du fait que le ministère ne lui avait pas précisé ses motifs d'insatisfaction relativement à son rendement et qu'il n'avait pas eu la chance de répondre aux reproches. Le grief a fait l'objet d'un arbitrage. S'est alors posé la question préjudicielle de savoir si l'arbitre était autorisé à déterminer les raisons de la décision du ministère de mettre fin à l'emploi, puisque les motifs de congédiement n'avaient pas été révélés. L'arbitre a statué que l'employé avait droit à une décision arbitrale quant à savoir si son congédiement avec préavis constituait en fait un congédiement pour motif et a conclu qu'il avait compétence pour rendre pareille décision. L'arbitre a conclu que le congédiement n'était pas de nature disciplinaire.

L'arbitre a relevé la « nature hybride » de l'emploi de l'employé qui était à la fois conseiller juridique soumis à la LFP et greffier nommé à titre amovible. L'arbitre a conclu que l'employé avait droit à l'équité procédurale et a déclaré nulle ab initio la cessation d'emploi. L'arbitre a ordonné la réintégration de l'employé dans ses fonctions et a jugé que ce dernier, subsidiairement, aurait droit à un préavis de huit mois. Le ministère a demandé un contrôle judiciaire.

Le juge de révision a estimé que la norme de la décision correcte s'appliquait à la question préjudicielle. Le juge de révision a statué que l'arbitre n'avait pas tenu compte de la portée de l'art. 20 de la LFP et avait considéré à tort certains articles de la LRTSP comme des dispositions substantielles plutôt que procédurales. Le juge de révision a conclu que l'arbitre n'avait pas compétence pour s'enquérir des motifs de la cessation d'emploi et a annulé sa décision sur la question préjudicielle. Le juge de révision a conclu que les motifs de l'arbitre en ce qui a trait à la sentence arbitrale sur le fond ne satisfaisaient pas la norme de la décision raisonnable simpliciter et, qu'en conséquence, l'ordonnance de réintégration devait être annulée. Il a également conclu que l'employé avait bénéficié de l'équité procédurale du fait de l'audition de son grief par l'arbitre. L'ordonnance de réintégration a été annulée mais la décision subsidiaire portant à huit mois le préavis requis a été confirmée. L'employé a interjeté appel.

La Cour d'appel a statué que le juge de révision avait erré en appliquant la norme de la décision correcte à la décision de l'arbitre sur la question préjudicielle. La Cour d'appel était d'avis que la norme de la décision raisonnable s'appliquait aux décisions de l'arbitre et a conclu que ces décisions n'étaient pas raisonnables. L'appel a été rejeté. L'employé a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Bastarache, LeBel, JJ. (McLachlin, J.C.C., Fish, Abella, JJ., souscrivant à leur opinion): Il était nécessaire de repenser tant le nombre que la teneur des normes de contrôle, ainsi que la démarche analytique qui présidait à la détermination de la norme applicable. Les difficultés analytiques soulevées par l'application des différentes normes réduisaient à néant toute utilité conceptuelle découlant de la plus grande souplesse propre à l'existence de normes de contrôle multiples. Il y avait lieu de fondre en une seule les deux normes de raisonnabilité. Il en résultait un mécanisme de contrôle judiciaire emportant l'application de deux normes : celle de la décision correcte et celle de la décision raisonnable.

L'interprétation de la LRTSP et de l'art. 20 de la LFP par l'arbitre devait être révisée selon la norme de la décision raisonnable. La question de savoir si les dispositions de la LRTSP autorisaient l'arbitre à s'enquérir des motifs du congédiement de l'employé avec préavis était une question de droit. Le régime et l'objectif législatif, ainsi que la présence d'une clause privative dans la LRTSP, militaient en faveur d'un contrôle selon la norme de la décision raisonnable. De par sa nature, la question ne revêtait pas une importance capitale pour le système juridique et n'était pas étrangère au domaine d'expertise de l'arbitre, ce qui favorisait encore le critère de la décision raisonnable.

La décision relative à la question préjudicielle n'était pas raisonnable. En concluant que la LRTSP lui permettait de rechercher les motifs du congédiement, alors que l'employeur avait le droit de ne pas les préciser, et même, de ne pas en avoir, l'arbitre a tenu un raisonnement foncièrement incompatible avec le contrat d'emploi et, de ce fait, entaché d'un vice fatal. Dans sa décision, l'arbitre a considéré l'employé comme un employé syndiqué alors qu'il n'en était pas un. L'application concomitante des dispositions de la LRTSP ne saurait donc raisonnablement supprimer le droit contractuel de l'employeur de congédier un employé avec préavis raisonnable ou indemnité en tenant lieu.

La cour de révision a annulé à bon droit la décision de l'arbitre. L'employé était à la fois titulaire d'une charge publique et employé contractuel du ministère. L'article 20 de la LFP prévoit qu'à titre de fonctionnaire, il ne pouvait être congédié que suivant les règles contractuelles ordinaires. Dans les circonstances, il n'était pas nécessaire de tenir compte de quelque obligation d'équité procédurale en droit public que ce soit. Le ministère pouvait parfaitement congédier l'employé en lui versant une indemnité tenant lieu de préavis, sans lui offrir la possibilité d'être entendu. L'employé a pu obtenir des mesures de réparation de nature contractuelle en liaison avec son congédiement.

Binnie, J. (souscrivant à l'opinion de la majorité) : Le pourvoi devrait être rejeté. Le lien d'emploi entre l'employé et la ministère était régi par un contrat. Le ministère a choisi d'exercer son droit de mettre fin à l'emploi de l'employé sans invoquer de motif. L'arbitre a interprété l'art. 20 de la LFP ainsi que les dispositions de la LRTSP d'une manière déraisonnable. L'employé était un employé non syndiqué, et le ministère a mis fin à son emploi conformément au droit contractuel. Les principes du droit public relatifs à l'équité procédurale ne s'appliquaient pas dans les circonstances.

La nécessité d'un réexamen du contrôle judiciaire des décisions administratives au Canada est largement reconnue, mais les motifs des juges majoritaires ne s'attaquaient pas au mécanisme dans son ensemble : leurs motifs visaient les tribunaux administratifs. Dans ce contexte, ils ramenaient le nombre de normes de contrôle applicables de trois à deux, mais conservaient l'analyse pragmatique et fonctionnelle, rebaptisée « analyse relative à la norme de contrôle ». Une réévaluation plus vaste s'imposait. L'actuelle analyse « pragmatique et fonctionnelle » est plus compliquée qu'elle ne le devrait.

Deschamps, J. (Charron, Rothstein, JJ., souscrivant à l'opinion de la majorité): Le pourvoi devrait être rejeté. La décision de la majorité concernant le respect de la justice naturelle était bien fondée.
La décision ne commandait pas la retenue, car c'était la Common Law, et non la loi habilitante, qui était le point de départ de l'analyse et l'arbitre ne possédait en ce domaine aucune expertise particulière. La norme de contrôle applicable était celle de la décision correcte.
En l'espèce, le rôle de l'arbitre se limitait à l'examen de la durée du préavis. Il a eu tort dans son interprétation et son application dispositions de la LRTSP et a ignoré les règles de la Common Law. L'arbitre n'a même pas envisagé les règles de la common law. Même si l'arbitre avait eu droit à la déférence, son interprétation n'aurait pu être retenue.

APPEAL by employee from judgment reported at *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, (sub nom. *Dunsmuir v. R.*) 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.), dismissing employee's appeal from decision allowing employer's application for judicial review.

POURVOI formé par un employé à l'encontre d'un jugement publié à*New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, (sub nom. *Dunsmuir v. R.*) 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.), ayant rejeté l'appel interjeté par l'employé à l'encontre d'une décision ayant accueilli la demande de contrôle judiciaire de l'employeur.

Bastarache, LeBel JJ.:

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

A. Facts

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness. ...

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23 (S.C.C.), at paras. 40-41, *per* LeBel J.

C. Two Standards of Review

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonableness and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

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.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, [*infra*], at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.