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Final Argument

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Ontario Energy Board Act, 1998

PART I
GENERAL

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

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

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

3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

4. To facilitate the implementation of a smart grid in Ontario.

5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

Board objectives, gas

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers.

Sullivan and Driedger on the Construction of Statutes

Fourth Edition

by

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2930 would not prevail over a prior specific one. Thus, the only purpose the legislature could have had in including such a clause would be to overcome the normal interpretation rule and ensure that the later general article derogated from the earlier specific section.[84] The effect of this analysis was to impliedly repeal s. 585 in so far as it was inconsistent with art. 2930.

[84] *Ibid.*, at para. 42. This argument was drawn from P.-A Côté, *supra* note 80, at pp. 356-58.

CHAPTER 11

The Act as a Whole

INTRODUCTION

The governing principle. In *A.G. v. Prince Ernest Augustus of Hanover*, Viscount Simonds wrote:

> ... the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.[1]

In *Canada (Attorney General) v. Xuan*, Robertson J.A. wrote:

> ... a statutory word or expression can be fully grasped only in relation to the whole of which it is a constituent part.[2]

In *Greenshields v. The Queen*, Locke J. wrote:

> The broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.[3]

Each provision or part of a provision must be read both in its immediate context and in the context of the Act as a whole. When words are read in their immediate context, the reader forms an initial impression of their meaning. This meaning may be vague or precise, clear or ambiguous. Any impressions based on immediate context must be supplemented by considering the rest of the Act, including both other provisions of the Act and its various structural components.

Amendments. The Act as a whole includes any amendments that have come into force before the relevant facts arose. As explained by Houlden J.A. in *G.T. Campbell & Assoc. Ltd. v. Hugh Carson Co.*:

[1] [1957] A.C. 436, at 463 (H.L.). See also *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 43, where Iacobucci J. makes a similar point.

[2] [1994] 2 F.C. 348, at para. 13 (C.A.).

[3] [1958] S.C.R. 216, at 225. See also *Canadian Pacific Airlines Ltd. v. British Columbia* (1983), 46 B.C.L.R. 213, at 230 (C.A.); revd [1989] 1 S.C.R. 1133; *Hampson v. Dept. of Education and Science*, [1991] 1 A.C. 171, at 181 (H.L.).

PREAMBLES

General. The primary function of a preamble is to recite the circumstances and considerations that gave rise to the need for legislation or the "mischief" the legislation is designed to cure. However, the recitals constituting a preamble may mention not only the facts which the legislature thought were important but also principles or policies which it sought to implement or goals to which it aspired.[63]

The preamble appears at the beginning of the Act, between the long title and the enacting clause. Like titles and schedules, the preamble is considered and carried in committee and where appropriate may be amended or even added during the passage of a bill through the legislature.[64] It is therefore considered an integral part of the Act.

The preamble is an optional component of legislation. Although for a time preambles were out of fashion, particularly at the federal level, in recent years they appear to have enjoyed a revival. Along with purpose statements, they are often included in modern regulatory legislation, and with the current emphasis on purposive analysis, they are often relied on by courts.

Preambles reveal legislative purpose. Preambles are relied on most often to reveal legislative purpose.[65] While the courts are doubtless capable of figuring out the purpose of an enactment without having it explained to them in a legislative aside, reliance on the preamble gives their conclusions added force and legitimacy. Given the traditional importance of legislative intent in interpretation, an explanation of purpose that emanates from the legislature itself carries a desirable authority.

Legislative purpose is sometimes communicated directly, as where the preamble recites specific objectives that are sought or specific tasks to be accomplished. In *Western Minerals Ltd. v. Gaumont*,[66] for example, the Act to be

63 For a detailed analysis of the use of preambles in federal legislation, see K. Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill L. J. 129.

64 A. Fraser, W. Dawson, J. Holtby, eds., *Beauchesne's Rules and Forms of the House of Commons of Canada*, 6th ed. (1989), p. 209.

65 See, for example, *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 471, at para. 60; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 184-85; *R. v. Lucas*, [1998] 1 S.C.R. 439, para. 43; *Finlay v. Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080, at 1105-06; *Québec (Commission de Transport de la Communauté urbaine de Québec) v. Canada (National Battlefields Commn.)*, [1990] 2 S.C.R. 838, at 849-50; *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers, Loc. 2-69*, [1990] 1 S.C.R. 282, at 324; see also *Clarke v. Clarke* (1990), 73 D.L.R. (4th) 1, at 9-10 (S.C.C.); *Ontario Human Rights Commission v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, at 546; *Stewart v. Stewart* (1991), 7 O.R. (3d) 426, at 432-33 (Gen. Div.).

66 [1953] 1 S.C.R. 345. See also *Finlay v. Canada (Minister of Finance)*, *supra* note 65, at 1123: "It is a spending statute. This is confirmed by reference to its preamble which ... identifies Parliament's specific aim in enacting this legislation — 'the Parliament of Canada ... is desirous of

construed contained a preamble stating that it was passed to clarify a specific point of law that had been cast in doubt by the judgment of the trial judge in the case. Section 3 of the Act provided that an owner of land "is and shall be deemed at all times to have been the owner of ... all sand and gravel on the surface of that land". The Supreme Court of Canada was asked to determine whether surface sand and gravel were conclusively or only provisionally presumed to belong to the owner of the land. Cartwright J. wrote:

> It is true that the word "declared" is not found in the statute, but there are many other *indicia* of the intention of the Legislature. In the preamble there is a recital of the judgment of the learned trial judge, of the doubts and uncertainties as to the ownership of sand and gravel in the Province resulting therefrom and of the desirability of resolving these doubts and uncertainties....
> ... I think it clear that the word "deemed" as used in this Statute means "conclusively presumed". To construe it as meaning "deemed, *prima facie*, until the contrary is shewn" would be to revive those doubts and uncertainties which it was the expressed intention of the Legislature to remove.[67]

Legislative purpose is often revealed indirectly, as where the court infers the purpose from the concerns set out in the preamble. The judgment of the Supreme Court of Canada in *Laurentide Motels Ltd. v. Beauport (Ville)*[68] offers an unusual example of this approach. The Court was concerned with s. 442 of Quebec's *City and Towns Act* which stated that municipalities "shall not be bound to warrant the quantity of water" supplied. The issue was whether this precluded an action in damages for loss sustained in a fire because of inadequate water supply. To resolve the issue the Court needed to know the purpose of the section. To determine the purpose, it wished to know what mischief the section was designed to cure. It sought this information in the preambles to a series of municipal by-laws dealing with water supply.[69] The Court inferred that the problems referred to in the preambles to this municipal legislation must have been in the mind of the provincial legislature when it addressed the issue of water supply in its own legislation.

Preambles as source of legislative values. Preambles are an important source of legislative values and assumptions. All legislation confers a degree of discretion on its official interpreters, whether explicitly through formal grants of decision-making power or implicitly through reliance on generally worded provisions. In exercising this discretion, or reviewing its exercise by others, interpreters must appeal to assumptions and values that have some claim to validity. Courts are used to looking to the common law for this purpose.

encouraging the further development and extension of assistance and welfare services programs throughout Canada by sharing more fully with the provinces in the cost thereof'."

67 *Ibid.*, at 368. See also at 353, 365.

68 (1989), 94 N.R. 1 (S.C.C.).

69 *Ibid.*, at 57.

The preamble offers another source, arguably one that is more authoritative. By spelling out the assumptions the legislature takes to be true, the policies and principles it wants to advance and the values to which it is committed, the preamble offers interpreters an authoritative form of guidance.

This use of the preamble is illustrated in the judgment of L'Heureux-Dubé J. in *New Brunswick (Minister of Health and Community Services) v. C. (G.C.)*[70] The issue in the case was how the Court should determine the best interest of the child under New Brunswick's *Family Services Act*. In developing an interpretation of this concept in line with the language and spirit of the Act, the judge relied in part on the preamble:

> Even if the Act did transfer to the Minister "all parental rights" ... it provides some means for the conservation of the relationship between the child and its natural parent or guardian when in the former's best interests. Indeed, the preamble of the Act declares that "children should only be removed from parental supervision either partly or entirely when all other measures are inappropriate".[71]

By directing the courts to decide applications in accordance with the best interests of the child, the legislature conferred broad discretion on judicial decision-makers. At the same time, by reciting a list of principles and policies in the preamble, it invited judges to exercise their discretion in accordance with those values it considered relevant.

Other uses. Since preambles are an integral part of an enactment, they are part of the context in which the words of the enactment must be read. As such, they may be relied on to help resolve ambiguity, determine scope or generally understand the meaning and effect of legislative language. In *Commission de la Santé & de la sécurité du travail (Que.) v. Bell Canada*,[72] the Supreme Court of Canada relied on the preamble to an international instrument to help determine the scope of the expression "working conditions" in Quebec's *Act Respecting Occupational Health and Safety*. Counsel for the province had argued that provisions designed to protect the health of workers were not part of workers' conditions of labour as that term is conventionally understood. In rejecting this argument, Beetz J. wrote:

> What is perhaps the best argument against the submission of counsel ... on this point comes from the very wording of the international documents which are the basis of contemporary legislation on occupational health and safety. The Preamble to the *Constitution of the International Labour Organisation* ... and Article 7 of the *International Covenant on Economic, Social and Cultural Rights* ... make it clear that the health of workers is part of their working conditions.[73]

[70] [1988] 1 S.C.R. 1073. See also *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446, at 468-69. See also *Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at 193 where the Chief Justice quoted Wilson J.A. (as she then was) speaking of the preamble to the *Ontario Human Rights Code*: "I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights."; *Ontario Human Rights Commission v. Simpsons Sears Ltd.*, *supra* note 65, at 546.

[71] *Ibid.*, at 1080.

[72] [1988] 1 S.C.R. 749.

Weight of preamble. The leading authority on the use of preambles in interpretation is the judgment of the House of Lords in *Attorney General v. Prince Ernest Augustus of Hanover*.[74] This case establishes that preambles may always be looked at as part of the context, but only minimal weight should be attached to them. In the words of Lord Norman:

> When there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions. The preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts. There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the preamble. Again, the preamble cannot be of much or any assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail.[75]

Lord Norman's words are useful in pointing out a number of truths. The weight of the preamble is affected by its clarity and specificity. If the preamble itself is ambiguous and requires clarification, it may not be very helpful to the court.[76] Also, preambles must be measured against other indicators of legislative purpose or meaning, which may point in the same or a different direction. If there is a contradiction between the preamble and a substantive provision, the latter normally prevails.[77]

Lord Norman's words are misleading, however, if they suggest that preambles as a rule carry little weight and are rarely a decisive factor. This does not reflect Canadian practice, which is to attach as much weight to the preamble as seems appropriate in the circumstances. In keeping with the modern emphasis on purposive analysis, heavy reliance on the preamble is often judged appropri-

[73] *Ibid.*, at 806.

[74] [1957] A.C. 436 (H.L.).

[75] *Ibid.*, at 467.

[76] For a case in which the Court undertakes to resolve ambiguity in the preamble of legislation, see *Finlay v. Canada (Minister of Finance)*, *supra* note 65, at 1105-06.

[77] A striking example of such a contradiction was considered in *National Farmers Union v. Potato Marketing Council (Prince Edward Island)* (1989), 56 D.L.R. (4th) 753, at 757-58 (P.E.I.S.C.). See also *M. v. H.*, [1999] 2 S.C.R. 3, at para. 83-85; *Re McVey*, [1992] 3 S.C.R. 475, at 525, *per* La Forest J.: "... it would seem odd if general words in a preamble were to be given more weight than the specific provisions that deal with the matter."

ate. An example is found in the Supreme Court of Canada's judgment in *Rawluk v. Rawluk*.[78] The question was whether by enacting the *Family Law Act, 1986*, the Ontario legislature had precluded spouses in a marriage breakdown from claiming a common law constructive trust. Speaking for the majority, Cory J. wrote:

> At the outset, the Act's preamble recognizes not only the need for the "orderly and equitable settlement of the affairs of the spouses", but also "the equal position of spouses as individuals within marriage" and the fact that marriage is a "form of partnership". These fundamental objectives are furthered by the use of the constructive trust remedy in appropriate circumstances. It provides a measure of individualized justice and fairness which is essential for the protection of marriage as a partnership of equals. Thus the preamble itself is sufficient to warrant the retention and application of this remedy.[79]

Because resort to the remedial constructive trust would tend to promote the legislatively approved conception of marriage, its retention was considered justified.

Sometimes the weight of a preamble is affected by provisions in the Act which expressly or implicitly invoke it. Under s. 56 of the *Official Languages Act*, for example, the Commissioner of Official Languages has jurisdiction to determine whether a federal institution has complied with "the spirit and intent" of the Act. In *St.-Onge v. Canada (Commissariat aux langues officielles)*,[80] in reviewing a decision of the Commissioner under s. 56, the Federal Court of Appeal relied heavily on the preamble to the Act to give meaning to the words "spirit and intent".

PURPOSE STATEMENTS

Definition of purpose statement. A purpose statement is a provision set out in the body of legislation that declares the principles or policies the legislation is meant to implement or the objectives it is meant to achieve. Usually purpose statements are found at the beginning of an Act or the portion of the Act to which they relate. Some are explicit and begin with the words "The purposes of this Act are ..." or "It is hereby declared that ...". Others simply recite the principles or policies that the legislature wishes to declare without introductory fanfare. Purpose statements are a relatively recent innovation in Canadian statutes and are not mentioned in either the federal or provincial Interpretation Acts.

Like preambles, purpose statements reveal the purpose of legislation and they are also an important source of legislative values. Unlike preambles, they come after the enacting clause of the statute and are part of what is enacted into law. This makes them binding in the sense that they cannot be contradicted by courts;

78 (1990), 103 N.R. 321, at 339-40 (S.C.C.).
79 *Ibid.*, at 339-40.
80 [1992] 3 F.C. 287.

they carry the authority and the weight of duly enacted law. In the absence of specific legislative direction, however, it is still up to courts to determine what use should be made of the purposes or values set out in these statements.

Function of purpose statement. Purpose statements play an important role in modern regulatory legislation.[81] Such legislation establishes a general framework within which powers are conferred to achieve particular goals or to give effect to particular policies.[82] Purpose statements expressly set out these policies and goals.

In some cases purpose statements point in a single direction and guide interpreters toward a particular outcome. In *LeBlanc v. LeBlanc*,[83] for example, the Supreme Court of Canada considered s. 2 of New Brunswick's *Marital Property Act*. La Forest J. wrote:

> Section 2 is an interpretative provision in the nature of a preamble announcing the general framework and philosophy of the legislation.... The provisions of ss. 3 and 7, *inter alia*, work this framework out in detail....
>
> In common with similar provisions in other jurisdictions, s. 2 establishes the general principle that each spouse is entitled to an equal share of marital property.... The principle must be respected. In applying that principle, courts are not permitted to engage in measurements of the relative contributions of spouses to a marriage....[84]

This passage shows how the declarations set out in a purpose statement may inform judicial understanding of the Act as a whole and guide interpretation in a particular direction.

Not all purpose statements establish a unified and coherent philosophy. Sometimes a purpose statement sets out a number of competing principles or policies which interpreters are to weigh and balance in applying the legislation to particular cases. This approach is illustrated in the judgment of the Supreme Court of Canada in *R. v. T. (V.)*[85] The issue was whether the *Young Offenders Act* conferred a discretion on youth court judges to dismiss charges on the ground that the conduct complained of was trivial and charges should never have been laid. In support of this interpretation the respondent relied on a paragraph in the purpose statement which declared that "where it is not inconsistent with the protection of society, taking no measures [of any sort against the accused] ... should be considered." Speaking for the Court, L'Heureux-Dubé J. wrote:

81 As Gonthier J. wrote in *Westbank First Nation v. B.C. Hydro and Power Authority*, [1999] 3 S.C.R. 134, at para. 26: "A regulatory scheme will have a defined regulatory purpose. A purpose statement contained in the legislation may provide assistance to the court in this regard."
82 For discussion of the distinctive features of modern program legislation, see *supra*, Chapter 8, at pp. 201-02.
83 [1988] 1 S.C.R. 217.
84 *Ibid.*, at 221-22.
85 [1992] 1 S.C.R. 749.

> I am unable to accede to the submission of the appellant that s. 3(1) is merely a "preamble" and does not carry the same force one would normally attribute to substantive provisions, especially since Parliament has chosen to include the section in the body of the Act. Yet, I am equally unable to attribute to that section the clarity necessary to accept the respondent's interpretation. Section 3(1)(*d*) admittedly advocates the taking of no measures in certain circumstances. However, this subsection must be read in conjunction with the rest of s. 3 which states, *inter alia*, that "young persons who commit offences should nonetheless bear responsibility for their contraventions" (3(1)(*a*)), and that "society must ... be afforded the necessary protection from illegal behaviour" (3(1)(*b*)). These statements, on their face, would both militate against the action advocated by the Court of Appeal just as much as s. 3(1)(*d*) is said to militate in favour of it.[86]

L'Heureux-Dubé J. went on to note that the disparate character of the principles recited in s. 3 of the *Young Offenders Act* reflects the complex and multi-dimensional character of the problems addressed by the Act. She quoted the following text with approval:

> While the [s. 3] declaration as a whole defines the parameters for juvenile justice in Canada, each principle is not necessarily relevant to every situation. The weight to be attached to a particular principle will be determined in large measure by the nature of the decision being made and the specific provisions of the YOA that govern the situation.[87]

L'Heureux-Dubé J. concluded that because the declaration set out competing principles, as opposed to a single clear philosophy, it did not constitute persuasive evidence of Parliament's intention to change a long-standing common law rule.

Purpose statements define limits of discretion. Another important function of purpose statements is to define the limits of discretion conferred by legislation. This function is evident when purpose statements are contained in provisions that confer discretion on administrative boards and tribunals. Such provisions may confer powers to be exercised generally "for the purposes of this Act" or for particular purposes mentioned in the text of the provision.

This function of purpose statements was discussed by L'Heureux-Dubé J. in *Canadian Assn. of Industrial, Mechanical & Allied Workers, Local 14 v. Paccar of Canada Ltd.*[88] The issue in the case was whether the Labour Relations Board of British Columbia had exceeded its jurisdiction under the provincial *Labour Code*. Section 27(1) of the Code contained a purpose statement which instructed the board to exercise its powers and duties "so as to develop effective industrial relations" having regard to a number of specific purposes and objects set out in

86 *Ibid.*, at 765.
87 Bala and Kirvan, *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (1991), pp. 80-81, quoted in *R. v. T. (V.)*, *supra* note 85, at 766.
88 (1989), 62 D.L.R. (4th) 437 (S.C.C.).

the section. L'Heureux-Dubé J. found that because the Board had ignored the goals of its mandate as set out in its purpose clause, it had reached a patently unreasonable solution and so exceeded its jurisdiction. She wrote:

> General purpose clauses such as s. 27(1) of the *Labour Code* not only aim to provide guidance to the administrative agency; they also identify the limits of the discretion it enjoys in the exercise of its statutory powers....
>
> Purposes and objects clauses find their historical roots in the common law. In *Padfield v. Minister of Agriculture, Fisheries and Food*,[89] Lord Reid explained why the fundamental objects of the enabling legislation restrict the delegation of discretionary powers:
>
> > ... Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court....[90]

L'Heureux-Dubé J. went on to review Canadian cases establishing the same point, namely, the purpose for which discretion is conferred defines the limits of the discretion. She concluded:

> ... [G]eneral purposes and objects clauses such as s. 27(1) of the *Labour Code* are not enacted in a juridical vacuum. Such clauses codify the common law duty to exercise delegated powers in strict accordance with the fundamental dictates of the enabling statute. In this historical context, s. 27(1) amounts to more than a simple guide to the board; it constitutes a statutory direction to carefully consider the goal of developing effective industrial relations having regard to certain specific purposes and objects.[91]

Because the purpose clause considered in the *Paccar* case was specific and explicitly addressed to the board, its role in limiting discretion was evident. However, the reasoning relied on by L'Heureux-Dubé J. applies to all purpose statements and justifies a purposive approach to all statutory discretion.

Weight of purpose statements. In *R. v. T. (V.)* the Supreme Court of Canada suggested that it was prepared to take purpose statements seriously. It rejected the suggestion that a purpose statement is merely a preamble that does not carry the same force as a substantive provision.[92] However, the weight given to a purpose statement depends on a number of considerations: how specific and coherent the declared principles or policies are, what directives are given by the legislature respecting their use, whether there are other indicators of legislative purpose and so on. Because purpose statements are merely descriptive of the legislature's goals, they are likely to carry less weight than a substantive provision.

89 [1968] A.C. 997, at 1030 (H.L.).
90 *Supra* note 88, at 465-66.
91 *Ibid.*, at 467.
92 See *R. v. T. (V.)*, *supra* note 85, at 765.

A striking illustration of this last point is found in *National Farmers Union v. Potato Marketing Council (Prince Edward Island)*.[93] In 1988, the legislature of Prince Edward Island enacted the *Judicial Review Act*. The court was asked to determine whether it was still possible after the coming into force of the Act to apply for an order in the nature of *certiorari*. Section 2 of the Act provided:

> 2. The purpose of this Act is to substitute an application for judicial review for the following existing proceedings:
>
> (*a*) proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari;

The only other section to mention *certiorari* was s. 10 which provided:

> 10. A reference in any other enactment to a writ or order in the nature of certiorari, prohibition or mandamus is deemed *also* to refer to an application for judicial review.

After setting out the purpose statement in s. 2, McQuaid J. wrote:

> That, of course, is not substantive legislation; it is merely expressive of the intention of Parliament when it enacted the legislation. It is the substantive legislation itself which is determinative whether Parliament did, in fact, accomplish its purpose or whether the reach of Parliament exceeded its grasp.[94]

McQuaid J. then examined s. 10 and found that "whether by design or misadvertence," by using the word "also" in s. 10, the legislature had perpetuated rather than abolished *certiorari*.[95] Although the stated purpose of the legislature was clear, so too was the substantive provision, and in the view of McQuaid J. any conflict between the two must be resolved in favour of the latter:

> The stated purpose of a statute is the signpost by means of which the legislature indicates the road which it proposes to follow to reach its indicated destination. The words which the legislature actually uses are the road which it does in fact follow. Whether, indeed, that road, and those words, do lead to that New Jerusalem envisioned by the legislature will depend upon the propriety and aptness of those words.[96]

McQuaid J. expressed the view that in a conflict between a purpose statement and a substantive prescription, the latter must always win. It is arguable, however, that faced with a contradiction between a clear and specific purpose statement on the one hand and a substantive provision on the other, it would be open to a court to find that the substantive provision contained a drafting error which could appropriately be corrected by bringing it in line with the stated purpose.[97]

93 (1989), 56 D.L.R. (4th) 753 (P.E.I.S.C.).
94 *Ibid.*, at 756.
95 *Ibid.*, at 757.
96 *Ibid.*, at 756-57.
97 For discussion of the courts' jurisdiction to correct drafting errors, see *supra*, Chapter 6, at pp. 131-34.

HEADINGS

General. In Parliamentary procedure headings are not considered an integral part of a bill as it goes through the legislative process. This peculiarity is reflected in the majority of Canadian Interpretation Acts, which state that headings do not form part of the enactment in which they are found. In the other Interpretation Acts, headings are not mentioned.[98] This treatment is unsatisfactory. To any person reading legislation, headings appear to be as much a part of the enactment as any other component. There is no apparent reason why they should be assigned an inferior status.

The judicial response to headings is varied. Some courts, in deference to the applicable *Interpretation Act*, refuse to rely on headings as a tool of interpretation.[99] Others resort to a heading only if the language of the provision is ambiguous. The following passage from the judgment of Kellock J. in *Canada (A.G.) v. Jackson* is often quoted:

> Where the language of a section is ambiguous, the title and the headings of the statute in which it is found may be resorted to to restrain or extend its meaning as best suits the intention of the statute, but neither the title nor the headings may be used to control the meaning of enacting words in themselves clear and unambiguous.[100]

The view favoured in recent judgments from the Supreme Court of Canada is that for purposes of interpretation headings should be considered part of the legislation and should be read and relied on like any other contextual feature. In *Law Society of Upper Canada v. Skapinker (Joel)*,[101] speaking of headings in the Charter, Estey J. wrote:

> The Charter, from its first introduction into the constitutional process, included many headings including the heading now in question.... It is clear that these headings were systematically and deliberately included as an integral part of the Charter for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the Charter.[102]

98 See R.S.A. 2000, c. I-8, s. 12; R.S.B.C. 1996, c. 238, ss. 9, 11; R.S.M. 1987, c. I-80, ss. 3(3), 10-11; R.S.N.B. 1973, c. I-13, s. 15 [am. 1982, c. 33, s. 4], s. 16 [am. 1982, c. 33, s. 4, 1992, c. 13, s. 1]; R.S.N.L. 1990, c. I-19, ss. 14-15; R.S.N.S. 1989, c. 235, ss. 11-12; R.S.O. 1990, c. I.11, ss. 8-9; R.S.P.E.I. 1988, c. I-8, ss. 10-11; R.S.Q. 1977, c. I-16, ss. 17, 40; S.S. 1993, c. I-11.1, ss. 11-12; R.S.N.W.T. 1988, c. I-8, ss. 11-12; R.S.Y. 1986, c. 93, ss. 8-9.
99 See, for example, *Re Peters and District of Chilliwack* (1987), 43 D.L.R. (4th) 523, at 527 (B.C.C.A.); *Langseth Estate v. Gardiner* (1990), 68 Man. R. (2d) 289, at 292 (C.A.); *Ontario Catholic Teachers Assn. v. Ontario*, [1992] O.J. No. 2287, at 11 (Ont. Gen. Div.).
100 [1946] 2 D.L.R. 481, at 486-87 (S.C.C.).
101 (1984), 9 D.L.R. (4th) 161 (S.C.C.).
102 *Ibid.*, at 176.

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Ontario Energy Board | Commission de l'Énergie de l'Ontario

EB-2005-0551

NATURAL GAS ELECTRICITY INTERFACE REVIEW

DECISION WITH REASONS

November 7, 2006

4. COMPETITION AND THE PUBLIC INTEREST

Although the Board has determined that the storage market in Ontario is subject to workable competition, the Board must also determine whether the level of competition is or will be "sufficient to protect the public interest". This is a key element of section 29. There has been considerable debate in this proceeding regarding the meaning of "public interest" in section 29. The public interest is multi-faceted and dynamic, but it is important to clearly identify how the Board will assess whether the public interest will be protected by competition if the Board refrains from regulating storage rates.

Board Findings

The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.

Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between $50 million and $174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the

potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. The scope of appropriate considerations is broader and includes factors related to market signals, incentives and efficiency. These are discussed further below.

Some parties, including the Board Hearing Team and APPrO, argued that the Board's legislative objectives provide the best set of public interest considerations to apply in this case. Others took a similar approach, although expressed somewhat differently. For example:

- VECC submitted that the test is whether the market created by forbearance "will operate in a fashion that ensures that market discipline will be at least as effective as regulation in effecting fair and reasonable conditions in the customer relationship."
- Energy Probe argued that the Board should be guided by three public interest considerations: encouraging economically efficient pricing of gas storage services; protecting consumers of monopoly transmission and distribution services; and promoting the development of cost-effective storage opportunities in Ontario.

The Board finds that these broader approaches set out above represent a balanced and comprehensive approach to assessing the public interest. It is appropriate to consider the Board's legislative objectives in this case, because they are a clear expression of the factors the Board is to take into account. The Board's objectives which are most directly relevant in this case are as follows:

- to facilitate competition in the sale of gas to users;
- to protect the interests of consumers with respect to prices and the reliability and quality of gas service.

- to facilitate rational development and safe operation of gas storage

The Board notes that these may well be conflicting objectives. Put differently, there are public interest trade-offs. This is particularly relevant in light of another argument raised by the parties. Enbridge and MHP Canada argued that the forbearance contemplated in section 29, as a matter of statutory interpretation, is mandatory because of the use of the word "shall" in the statute. They argued that once the Board makes a factual finding that there is sufficient competition to protect the public interest, the *OEB Act* requires that the Board then refrain from setting prices through a cost of service regime.

The Board does not agree with Enbridge and MHP Canada's conclusion. Section 29 says that the Board shall make a determination to refrain "in whole or part" which the Board believes allows considerable flexibility in this regard. In addition, the Board concludes that it is required by the statute to address the public interest trade-offs, for example, between price impacts and the development of storage and the Ontario market generally.

We will now review each objective and discuss some of the public interest factors which the Board considers relevant to the assessment of whether the level of storage competition is sufficient to protect the public interest if the Board refrains from rate regulation and contract approval.

4.1 TO FACILITATE COMPETITION IN THE SALE OF GAS TO USERS

The Board has worked over time to ensure that Ontario consumers reap the benefits of commodity competition. The Board must continue to pursue this objective and can do so by facilitating the evolution of a robust market in Ontario. The development of the Dawn Hub has brought substantial benefits to consumers in Ontario and to other market participants.

The Board concludes that it is in the public interest to maintain and enhance the depth and liquidity of the market at the Dawn Hub as a means of facilitating competition. One way to do this is to encourage the development of innovative services and to ensure access to those services. Choice is the bedrock of competition. The evolution of the transactional services market is an example where innovative and flexible services have evolved within a market-based pricing structure.

Enbridge argued that forbearance will foster innovation by facilitating the provision of storage services in the competitive market. The Board agrees that regulating storage rates does place constraints on the development of flexible and innovative services; forbearance, within a framework of non-discriminatory access, can remove these constraints.

In the current industry structure, the gas utilities both acquire storage for their own customers and operate storage for their own needs and for other customers. The utilities also operate integrated storage and transportation systems. The Board considers later in this decision whether forbearance requires that there be greater separation between these operations or whether other procedures should be developed to ensure non-discriminatory access to storage and transportation.

4.2 TO PROTECT THE INTERESTS OF CONSUMERS WITH RESPECT TO PRICES AND THE RELIABILITY AND QUALITY OF GAS SERVICE

The interests of consumers were a primary focus for many intervenors. The submissions addressed issues related to the direct and indirect impacts of forbearance and competition. Interestingly, no ex-franchise customer opposed paying market-based rates; nor was there any evidence of a price impact on this market segment in the event of forbearance. This is consistent with the Board's finding that these customers have alternatives and that competition will provide adequate protection for these customers.

With respect to in-franchise customers, two rate impacts were discussed: the direct impact on storage rates and the indirect impact on the sharing of the storage premium. With respect to the direct impact, the utilities proposed to freeze the allocation of in-franchise storage and to acquire incremental storage at market-based prices. This would have the effect of increasing in-franchise storage rates (under current market conditions), albeit only marginally given the relatively slow growth of in-franchise storage demand. The utilities were of the view that this afforded in-franchise customers a significant level of protection. The other direct storage rate impact arises from the proposal that Enbridge be treated as an ex-franchise customer in respect of its contracts with Union. This would have the effect of raising Enbridge's storage rates.

However, attention of the parties was primarily focussed on the indirect impact arising from the premium which exists between the price of market-based storage and the underlying costs. Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities' proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejected these proposals and, as a result, opposed forbearance.

IGUA/AMPCO argued that there should be no forbearance if there will be any adverse impact on ratepayers. Similarly, they argued that the level of return under forbearance should be no greater than the regulated return; otherwise the level of competition is not sufficient, because the regulated return is a proxy for a competitive result. The Consumers Council argued that there should be no forbearance if a material increase in price is not offset by the prospect of decreasing prices.

Union argued that on IGUA/AMPCO's and the Consumers Council approach, the Board would never forbear, no matter how competitive the market. It argued that the financial impact is not a factor as to whether forbearance is warranted. Union argued that the

Board should consider that new storage development would attract additional volumes to Ontario, increasing market liquidity and enhancing security of supply for Ontario consumers.

The Board agrees that the distribution of the premium is a significant consideration. In many ways, it has been the underlying focus of the NGEIR Proceeding. However, the impact of removing the premium from rates is the result of removing a sharing of economic rents; it is not the result of competition bringing about a price increase. So while it is an important consideration which the Board must address (see Chapter 7), it is not a sufficient reason, in and of itself, to continue regulating storage prices.

Apart from the premium issue, the direct expected storage rate impacts under a forbearance scenario are modest for Union's in-franchise customers, under the utility proposal of fixing the in-franchise storage allocation. The impact for Enbridge customers is more pronounced given its lower level of storage assets. The Board must consider whether the allocation to Union's in-franchise customers should be fixed and whether Enbridge (and possibly other ex-franchise customers) should be entitled to cost-based storage from Union.

A key consideration with respect to this issue is the question of which consumers the Board is responsible for protecting. Some parties, such as Kitchener, have argued that our duty is to end-use consumers in Ontario – either to them directly or to them indirectly through their local distributor. These parties advocate cost-based storage pricing for Ontario end-users and market-based pricing for those outside Ontario.

While the Board concurs that a key objective (and therefore a key public interest consideration) is the protection of consumers in Ontario, the Board concludes that this approach of separate treatment depending upon location is problematic. This is discussed further later in Chapter 5.

The Board concludes that long-term consumer protection in terms of price, reliability and quality of service is best achieved through thriving competition for the competitive elements of the storage market and effective regulation of the non-competitive elements of the market. The Board is of the view that refraining from rate regulation and contract approval in the ex-franchise market has the potential to foster more competition in the storage market, to the benefit of all customers, provided there are clear rules and non-discriminatory access by all market participants. In a competitive market, customers have choices, resources are distributed efficiently, and there are incentives to innovate and respond to customer needs.

4.3 TO FACILITATE RATIONAL DEVELOPMENT AND SAFE OPERATION OF GAS STORAGE

Discussion in this area focussed on the impact of forbearance on the development of new storage in Ontario, through the utilities directly, through their affiliates, or through independent storage developers. The estimates of new storage potential ranged from 50 Bcf to around 120 Bcf.

The Board has as an explicit objective to facilitate the rational development of gas storage. The Board therefore must look for means by which to achieve this objective. A number of authorities have identified the need to develop additional storage. For example, FERC has acknowledged that additional storage development will mitigate commodity price volatility and improve winter peak availability. The utilities and their affiliates took the position that this should be a key consideration for the Board and argued that new storage development will not take place in Ontario under the current regulatory regime. In their view, forbearance from setting rates and approving contracts would encourage storage development and the development of storage services. Nexen agreed with the utilities that forbearance will allow needed new services to develop.

Energy Probe also agreed and argued that there has been limited recent storage development despite the appearance of significant opportunities and that this can be contrasted with the level of development elsewhere. In Energy Probe's view, Ontario storage development has been artificially constrained due to unfavourable regulatory conditions. Energy Probe argued that forbearance will drive enhancements to meet the needs of gas-fired generators and that the public interest will benefit from having storage developers manage the risks and rewards of development.

Others, primarily consumer groups, took the view that new storage, to the extent that it is needed, can be stimulated by allowing market-based rates for new storage developers only. The position of these groups, including the London Property Management Association (LPMA), the Wholesale Gas Service Purchasers Group (WGSPG), VECC, and Consumers Council, can be summarized as follows:

- The existing facilities are more than sufficient to meet Ontario's needs.
- The utilities could further develop existing facilities under the current regulatory framework if additional capacity is needed. There is evidence that they have done so in the past.
- Forbearing from setting storage rates and transferring the rents to the shareholders will not provide an incentive to non-utility developers, and continued regulation of the utilities will not provide a disincentive to third-party storage development. The way to stimulate new storage development by third parties is by forbearing or regulating at market rates, which is consistent with FERC Order 678.
- There is no evidence that forbearing from regulating the utilities will cause them to increase capacity. The Enbridge evidence is that even with forbearance it might not invest in storage enhancements.

The evidence suggests that there is no need for significant new storage within Ontario to serve the traditional requirements of Ontario consumers. However, there is a

demonstrated desire for more specialized services to meet the load characteristics of power generators. The Board also agrees that further development of storage in Ontario would be of benefit to Ontario consumers in terms of reduced price volatility, enhanced security of supply and an overall enhanced competitive market at Dawn. There is also evidence that new services, once they are generally available, can enhance the service offerings of other parties, such as marketers, thereby increasing the liquidity of the market.

The Board concludes that it is appropriate to facilitate the development of storage to offer these services without undue risk for ratepayers. The issue is how this objective is best achieved. At a minimum, for third-party storage development, whether independent or affiliated, the Board agrees that it should refrain from setting storage rates and approving storage contracts. There was no significant opposition to this approach.

The more contentious issue concerns the utilities and whether forbearance on price setting is necessary to stimulate their investment in storage. The utilities claimed they would only develop storage under a forbearance scenario but would not commit to doing so. On the other hand, the evidence shows the utilities have been willing to invest in the past under regulation, and indeed, the Board has the authority to order the utilities to provide storage services. The Board concludes that while there is no guarantee that the utilities will develop storage under forbearance, it is apparent they will not develop it under a regulatory framework unless ordered to do so. The Board does not believe that the best way to stimulate development of storage assets and services is to order utilities to develop these resources. The Board's preferred approach is to use market mechanisms where possible, and under forbearance, the Board concludes, the utilities will have an incentive to develop assets and services.

A related question is whether it continues to be appropriate for storage to be developed as part of the regulated utility business or whether it should in the future be developed

separately. The Board accepts the evidence of Enbridge Inc. that storage development is more akin to exploration and development and is riskier than other distribution activities. Some parties disagreed that enhancements to existing storage facilities were as risky as new storage development. However, the Board is convinced by the evidence that storage investments are generally riskier than other regulated activities, such as distribution or transmission expansions, given the difficulty, for example, in accurately predicting the achievable operating parameters related to storage projects. This evidence was not significantly challenged. The Board therefore agrees with Energy Probe's view, namely that the risks associated with new storage development are best borne by storage developers. This approach is consistent with a rational development of storage in the Board's view. Under forbearance, the utility shareholders would be expected to bear the risk of any storage development for the competitive market.