EB-2017-0022/0223

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

AND IN THE MATTER OF Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Active Energy Inc. (ER-2012-0045).

ACTIVE ENERGY INC. (ACTIVE)

OPENING STATEMENT
AND BRIEF OF AUTHORITIES

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TAB A

Opening Statement

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ACTIVE ENERGY INC. (ACTIVE)

OPENING STATEMENT

The Issue and Active's Position

1. The Notices of Intention herein charge Active with breaching the *Energy Consumer Protection Act, 2010* (*ECPA*). The basis of these charges is the assertion that:

> *The determination as to whether or not the ECPA legislation applies to a retailer contract is based on a person's consumption at each location….*[1]

2. Active interprets the legislation differently. Active developed business practices based on its view that the applicability of *ECPA* legislation is determined by the aggregated consumption of a person's various accounts.

3. Statutory interpretation is at the heart of this dispute and will govern the result.

4. The OEB Enforcement Team (Enforcement Team) asserts that this Panel will have to decide whether the *ECPA "should be understood and applied narrowly so as to exclude certain persons from its protective ambit, or broadly in a way that maximizes the number of persons entitled to protection".*[2]

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[1] Notices of Intention, enumerated paragraphs 4.
[2] Enforcement Team Opening Statement, paragraph 4.

5. This is not correct. What this Panel will have to decide is what consumers the Ontario legislature intended be afforded the particularly extensive protections directed by the *ECPA*. The legislature, through the *ECPA*, has determined and directed which consumers the *ECPA* applies to. This Panel's job is to confirm the legislature's determination and then apply the legislature's direction.

6. The operative part of the law in this case is Part II of the *ECPA*, and the section which determines those consumers to whom Part II applies is section 3. Section 3 states (emphasis added):

> *This Part applies to gas marketing and retailing of electricity to consumers.*

7. The term *"consumer"* is expressly defined by section 2 of the *ECPA* (emphasis added):

> *"consumer" means,*
>
> *(a) in respect of the retailing of electricity, a person who uses, for the person's own consumption, electricity that the person did not generate and who annually uses less than the prescribed amount of electricity, and*
>
> *(b) in respect of gas marketing, a person who annually uses less than the prescribed amount of gas;*

8. A *"consumer"* who is entitled to the protections of the ECPA is thus defined based on two variables: (i) whether he, she or it is a "person" under the *ECPA*; and (ii) whether that *"person"* uses less than the prescribed amount of electricity or gas in a year.

9. The term *"person"* is also expressly defined by the *ECPA*, in section 1:

> *"person", or any expression referring to a person, means an individual, sole proprietorship, partnership, including a limited partnership, trust or body corporate, or an individual in his or her capacity as a trustee, executor administrator or other legal representative or such other class of persons as may be prescribed;*

10. The Enforcement Team advocates that, in respect of electricity, this Panel should read the definition of *"consumer"* with additional words [emphasized below] such that it would state:

> *"consumer" means,*
>
> *(a) in respect of the retailing of electricity, a person who uses, for the person's own consumption, electricity that the person did not generate and who annually uses less than the prescribed amount of electricity at a particular location.*

11. With respect, this Panel has no legal authority to do so. The legislative definition of *"consumer"* in the *ECPA* is crystal clear. No qualifying words or phrases are required to give it meaning, or to allow it to work harmoniously and logically with the *ECPA*. In the result, if this Panel adopts the Enforcement Team's interpretation it will be amending legislation, and that power belongs to the legislature alone.

12. Whether a *"consumer"* – a legal *"person"* consuming electricity which they did not generate – consumes that electricity through one meter at one location, multiple meters at one location, or multiple meters at different locations does not change the amount the *"person"* consumes or the level of sophistication presumed by the legislature as a result of that level of consumption.

13. Active's customer TRRCI (OEB Customer #77) consumes approximately 1.3 million kWh a year – more than 8 times the legislated low-volume threshold.[3] TRRCI's Chief Financial Officer signed an electricity supply agreement with Active which requires Active to supply electricity to 39 running apparel and equipment retail locations across the province.[4] Using the Enforcement Team's advocated test TRRCI would be an *ECPA* consumer.

14. Active's customer TTGL (OEB Customer #78) consumes more than 1 million kWh a year – more than 6.5 times the legislated low-volume threshold. TTGL's

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[3] Active Joint Witness Statement, Attachment 6, row 1.
[4] Agreed Statement of Facts, Tab 18, Contract 77.

President signed an electricity supply agreement with Active which requires Active to supply 20 shoe stores across the province.[5] Using the Enforcement Team's advocated test TTGL would be an *ECPA* consumer.[6]

15. Active's customer ASL (OEB Customer #10) consumes more than 13.7 million kWh a year – more than 90 times the legislated low-volume threshold.[7] ASL's Chief Financial Officer negotiated and signed an electricity supply agreement with Active which requires Active to supply 92 retail food stores which include 46 individual meters through which consumption exceeds 150,000 kWh per year, one of which meters records approximately 700,000 kWh per year.[8] Using the Enforcement Team's advocated test TRRCI would be an *ECPA* consumer.

16. Active's customer NMMC (OEB Customer #58) is a multi-location consumer financial services business which consumes more than 9.2 million kWh a year – more than 61 times the legislated low-volume threshold.[9] NMMC's VP-Controller signed an electricity supply agreement with Superior Energy Management (acquired from Superior by Active) which requires supply of electricity to 225 locations, including one location at which annual electricity consumption exceeds 358,000 kWh a year.[10] Using the Enforcement Team's advocated test TRRCI would be an *ECPA* consumer.

17. Active's customer DAL (OEB Customer #24) is an industrial anodizing business which consumes more than 4.164 million kWh a year – more than 26 times the legislated low-volume threshold.[11] DAL's President signed an electricity supply agreement with Superior Energy Management (acquired from Superior by Active) which requires supply of electricity to 7 locations, including one location consuming

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[5] Agreed Statement of Facts, Tab 18, Contract 78.
[6] Active Joint Witness Statement, Attachment 6, row 2.
[7] Active Joint Witness Statement, Attachment 4, row 1.
[8] Agreed Statement of Facts, Tab 18, contract 10.
[9] Active Joint Witness Statement, Attachment 4, row 2.
[10] Agreed Statement of Facts, Tab 18, contract 58.
[11] Active Joint Witness Statement, Attachment 4, row 3.

more than 4 million kWh of electricity a year.[12] Using the Enforcement Team's advocated test TRRCI would be an *ECPA* consumer.

18. The test advocated by the Enforcement Team is not implied or suggested in any way by the legislation. Quite the opposite; it is counterintuitive and would lead to absurd results. It should be rejected in favour of the plain and unambiguous test written into the legislation; the level of the person's consumption.

19. Each of the 101 *"persons"* who are the Active customers listed by the two Notices of Intent issued herein consume in excess of 150,000 kWh per year of electricity, and on application of the plain and unambiguous test written into the legislation are not *ECPA* customers.

20. Neither Active, nor the other Ontario energy suppliers[13] who have taken a similar approach to multi-location energy consumers whose consumption exceeds the legislated thresholds for ECPA application, are required to apply the ECPA to such consumers. The Board should so find, and dismiss this proceeding.

Scope of this Opening Statement

21. This Opening Statement outlines Active's position in this case. While Active responds to certain of the basic contentions advanced by the Enforcement Team in its Opening Statement, this is not Active's argument. The parties have agreed that their arguments will follow the oral hearing of this matter. Accordingly, silence on any of the Enforcement Team's Opening Statement assertions or positions should not be interpreted as acceptance of, or acquiescence to, those assertions or positions.

22. The parties have also agreed that the topic of "remedy", which would arise only should Active be found to have breached the *ECPA*, should be deferred to be

[12] Agreed Statement of Facts, Tab 18, contract 24.
[13] Active Further Joint Witness Statement, Attachment B.

addressed if and when required. Pursuant to this agreement, this Opening Statement does not address the topic of "remedy".

Legal Analysis: Statutory Interpretation

23. There is no ambiguity in the statutory definition of *"consumer"* for this Panel to resolve. Reading additional words into the clear and readily applied legislative definition of *"consumer"* as advocated by the Enforcement Team would be tantamount to amending the *ECPA*, which is a legislative and not a judicial function.

24. Our courts have cautioned against rewriting of legislation under the guise of interpreting it.[14]

25. While the Enforcement Team argues that the matter at hand is the correct interpretation of the term *"consumer"*[15], nowhere in their 21 page Opening Statement is there any mention of the companion definition of the term *"person"*, which is used 3 times in the *ECPA* definition of *"consumer"*. The term *"person"* is itself defined in *ECPA* section 1 as follows[16]:

> *"person", or any expression referring to a person, means an individual, sole proprietorship, partnership, including a limited partnership, trust or body corporate, or an individual in his or her capacity as a trustee, executor, administrator or other legal representative or such other class of persons as may be prescribed;*

26. The *ECPA* definition of *"person"* is also clear, and common. It essentially means a legally recognized individual.

27. On their own each of the definitions of *"consumer"* and *"person"* are clear. Read together, as they are expressly directed in the legislation to be, they are both clear

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[14] *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, at paragraph 27 ("*Wilson*").
[15] Opening Statement of the OEB Enforcement Team, paragraph 1.
[16] *ECPA* section 1.

and exhaustive. The definition of *"consumer"* as a *"person"* and the definition of *"person"* as a legal individual leave no gap for this Panel to fill and no ambiguity for this Panel to resolve.

28. Enforcement Staff urges this Panel to decide whether the Ontario energy consumer protection regime *"should be understood and applied narrowly so as to exclude certain persons from its protective ambit, or broadly in a way that maximizes the number of persons entitled to protection"*[17] [emphasis added].

29. This is not something that this Panel should, or can as a matter of law, do. This Panel's job is not to decide how Ontario energy consumer protection *should* be applied. That is a policy question, which our elected officials have expressly resolved. This Panel's job is to confirm how the legislature has resolved that question, and then to apply the *ECPA* accordingly.

30. The courts have characterized a statute as "the will of the legislature".[18] The task of an OEB panel that is called upon to interpret a statute is to determine the intention of the legislature when it drafted the statutory provisions at issue.[19]

31. Section 10 of the *Interpretation Act*[20] of Canada codifies this law and requires interpretation of statutes *"so that effect may be given to the enactment according to its true spirit, intent and meaning"*.

32. The Enforcement Team asserts[21] that, absent additional clarifying words, the definition of *"consumer"* in *ECPA* section 2 *"is equally capable of supporting either interpretation"*; i.e. what the Enforcement Team refers to as the "Aggregation Approach" or what the Enforcement Team refers to as the "Location Approach". The Enforcement Team's Opening Statement then sets out two alternative

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[17] Enforcement Team Opening Statement, paragraph 2.
[18] *Greater Essex Country District School Board v. I.B.E.W., Local 773 et al.*, 2007 CarswellOnt 256, at paragraph 54.
[19] *Schmidt v. Ontario (Ministry of Natural Resources),* 2008 ONCJ 442, at para. 7.
[20] R.S.C. 1985, c. I-21.
[21] Enforcement Team Opening Statement, paragraphs 26-27.

expanded formulations of section 2 – one reflecting each of its two defined approaches – and urges that, either way, additional wording is required to understand the scope of application of the *ECPA*. The suggested alternative formulations are [emphasis in Enforcement Team's Opening Statement]:

(a) *"... a person who uses, for the person's own consumption, at a single location, electricity that the person did not generate*; or

(b) *"... a person who uses, for the person's own consumption, aggregated across all locations, electricity that the person did not generate.*

33. Set out this way, it is plain to see that the additional wording suggested in formulation (b) does not change the pre-existing meaning of the definition (though perhaps it corroborates it). In contrast, the additional wording suggested in formulation (a) changes the meaning from what it would be had the words not been added. In other words, the addition of the phrase *"at a single location"* in formulation (a) modifies (i.e. narrows) the meaning of the pre-existing phrase, while the addition of the phrase *"aggregated across all locations"* in formulation (b) simply (and redundantly) reinforces the plain meaning of the pre-existing phrase without modification.

34. Word play aside, an unbiased reader of *ECPA* section 2 would have no trouble concluding that it means what it says; a person's consumption, full stop. The legislature's intention is crystal clear.

35. For this Panel to read words into the *ECPA* definition of *"consumer"* which are simply not there, and which are not required to resolve any ambiguity of meaning or application, is tantamount to asking this Panel to usurp the legislature's role of determining to whom *ECPA* competitive energy retailing protections are to be applied.[22] This Panel is, with great respect, not legally empowered to do so. The Supreme Court of Canada has specifically stated that it is not permissible to

[22] *Wilson, supra,* note 14, at paragraph 27.

disregard what the legislature has done and rewrite legislation *"to accord with [one's] own view of how the legislative purpose could be better promoted"*[23].

36. While the Enforcement Team relies on the "modern principle" of statutory interpretation[24], its characterization of that principle is incomplete and its proposed application of that principle is thus incorrect.

37. The Enforcement Team is correct that the court endorsed "modern principle" of statutory interpretation stipulates that legislative context and purpose are relevant considerations regardless of whether the language in issue is considered ambiguous. The Enforcement Team is, however, incorrect in its assertion that, where the language is clear, context trumps clarity (though in this instance, as outlined below, the statutory context is wholly in line with the clear statutory language of *ECPA* section 2).

38. The modern principle of statutory interpretation has been judicially endorsed in the following terms[25] [emphasis added]:

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

39. A more detailed explanation of this principle was set out by the Supreme Court of Canada in *R. v. McIntosh*[26], a case concerning the interpretation of the Criminal Code provision relating to the defence of self defence. The Court paraphrased from Dreidger's text where the author discusses the interplay in statutory interpretation of plain language, legislative context and legislative purpose [emphasis added]:

> *1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act*

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[23] *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25, paragraph 40.
[24] Enforcement Team Opening Statement, paragraphs 22-28.
[25] *Wilson, supra,* note 14, at paragraph 18.
[26] [1995] 1 SCR 686 ("*McIntosh*").

> *(the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).*
>
> *2. The words of the individual provision to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.*
>
> *3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.*
>
> *4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in pari materia, or the general law, then an unordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.*
>
> *5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected. [Emphasis added.]*[27]

40. Thus, while the modern law of statutory interpretation requires in all cases consideration of the purpose of the Act and legislative intention, it also requires that where clear and unambiguous language is used by the legislature, and the grammatical and ordinary sense of the legislative language is in harmony with the apparent intention, object and scheme of the legislation, *"that is the end"* of the interpretive exercise.

41. That is the case in this proceeding:

    (a) There is nothing in the terms *"consumer"* or *"person"* that is unclear or ambiguous.

    (b) There is no sense in which applying *ECPA* directed consumer protections to persons consuming a relatively low amount of electricity, but not to larger electricity consumers is discordant with the intention, object and scheme of the *ECPA*. The intention and object of the *ECPA* is to apply the extensive protections thereby directed to particularly vulnerable energy consumers (see paragraph 86, below). The design adopted for doing so is to deem those consuming below a statutorily determined threshold to be particularly

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[27] *Ibid.*, at paragraph 23.

vulnerable (and, by implication, those consuming a relatively large volume of energy to be relatively sophisticated).

42. The threshold for *ECPA* application has been clearly and unambiguously set with reference to *"consumer"*, which is specifically defined to mean *"person"*. Whether that person is buying large volumes of energy to consume at one location or at multiple locations, they are still buying large volumes of energy.

43. As Ruth Sullivan notes in *Sullivan on the Construction of Statutes*[28] [emphasis added]:

> *Statutory definitions may be exhaustive or non-exhaustive. Exhaustive definitions declare the complete meaning of the defined term and completely displace whatever meanings the defined term might otherwise bear in ordinary or technical usage. An exhaustive definition is normally introduced by the word "means"... Exhaustive definitions are used*
>
> - *to clarify a vague or ambiguous term*
> - *to narrow or enlarge the scope of a word or expression*
> - *to ensure that the scope of a word or expression is not narrowed or enlarged*
> - *to create an abbreviation or other concise form of reference for a lengthy expression.*

44. Both of the operative terms *"consumer"* and *"person"* are introduced by the word "means", and are thus exhaustive. There is simply no basis to modify the definition of the term *"consumer"*, as further expressly defined by the legislature through incorporation of the defined term *"person"*, by adding the constraining words *"at a particular location"* as urged by the Enforcement Team.

45. The limited extent to which words may be read into a statute was explained by the Supreme Court in *R. v. McIntosh*[29] [emphasis added]:

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[28] 5th ed., (Lexis Nexis Canada, 2008) at p. 62, as cited by the British Columbia Court of Appeal in *Maynes v British Columbia (Minister of the Environment)*, 2009 BCCA 499.
[29] *McIntosh, supra*, note 26, at paragraph 28.

> *... the contextual approach allows the courts to depart from the common grammatical meaning of words where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually. I would agree with Pierre-André Côté's observation in his book The Interpretation of Legislation in Canada (2nd ed. 1991), at p. 231, that:*
>
> > *Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say.*
>
> *The Crown is asking this court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function. The contextual approach provides no basis for the courts to engage in legislative amendment.*

46. These principles have been reiterated in several recent cases, including a recent Supreme Court of Canada decision in *Wilson v. British Columbia (Superintendent of Motor Vehicles)*[30] where the court was interpreting provisions in B.C.'s *Motor Vehicle Act* that establish the roadside driving prohibition scheme. In that decision the Court explains as follows:

> *The plain meaning of s. 215.41(3.1) supports the adjudicator's interpretation. It explicitly links the officer's belief to the result of the ASD analysis. The provision states that the peace officer must have reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol. The wording could not be clearer. The ASD analysis is the yardstick against which to measure the reasonableness of the officer's belief.*
>
> *Mr. Wilson submits that the officer's belief must be based not only on the ASD result, but also on confirmatory evidence showing that the driver's ability to drive is affected by alcohol. I would reject this interpretation. It is not supported by the text of the provision, and it requires the court to read in words that are simply not there. This Court has cautioned against judicial rewriting of legislation under the guise of interpreting it...*
>
> *(R. v. McIntosh, [1995] 1 S.C.R. 686 (S.C.C.), at p. 701; cited with approval in Bristol-Myers Squibb Co. v. Canada (Attorney General), 2005 SCC 26, [2005] 1 S.C.R. 533 (S.C.C.), at para. 174. See alsoR. v. Hinchey, [1996] 3 S.C.R. 1128 (S.C.C.), at paras. 8-9 and 36; Canada (Information Commissioner) v.*

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[30] 2015 SCC 47, at paragraphs 26-27. Adopted in *Northrop v. Windsor Energy Inc.*, 2017 NBCA 37, at paragraph 43.

Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 S.C.R. 306 (S.C.C.), at para. 40.)

Legal Analysis: Statutory Context

47. The Enforcement Team's Opening Statement searches at great length for other *ECPA* provisions that it states *"offer strong support"* for its advocated narrowing of the plain meaning of the *ECPA* definition of *"consumer"*.[31] All of this contextual analysis is only relevant, however, if the existing and plainly read section 2 wording does not fit or operate within the overall purpose and scheme of the *ECPA*. That is simply not the case.

48. In *Friesen v. Canada*[32], Justice Major, speaking for the Supreme Court of Canada, wrote as follows [emphasis added]:

> *The respondent is asking this Court to interpret the definition of inventory as though it read:*
>
> > *"inventory" [for a taxation year] means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for [the] taxation year;*
>
> *The principal problem with the respondent's interpretation is that the bracketed words do not appear in the definition in the Income Tax Act. The addition of these words to the definition effects a significant change to the sense of the definition. It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording. Reading extra words into a statutory definition is even less acceptable when the phrases which must be read in appear in several other definitions in the same statute. If Parliament had intended to require that property must be relevant to the computation of income in a particular year in order to be inventory in that year, it would have added the necessary phraseology to make that clear.*[33]

49. The Enforcement Team argues that because the term "aggregation" appears in other energy related legislation, it should be assumed that the legislature would

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[31] Enforcement Team Opening Statement, paragraph 29, and continuing through paragraph 13.
[32] 1995 CarswellNat 422 (SCC).
[33] *Ibid.*, at paragraphs 40-41.

have included the term "aggregation" in the definition of "*consumer*" in *ECPA* section 2 if the legislature had intended to permit aggregation of consumption across a person's multiple locations (and since it has not included the term "aggregation" in section 2, such a practice must not be permitted).[34] That is, the Enforcement Team seeks to employ the use of the term in one section of the act, and in certain other provisions in *"other related statutes and regulations"*, to demonstrate that its absence in another section is determinative.[35]

50. With respect, this approach is backwards. It is a counterfactual which demonstrates nothing. It turns the actual legal principle – as cited above – on its head, and then twists it out of recognition.

51. The legal principle relied upon by the Enforcement Team – the implied exclusion principle - may only be applied when *"an express reference is expected but absent"*.[36] Neither the *ECPA*, nor the related statutes and regulations referred to by the Enforcement Team creates any expectation that the concept of "aggregation" would be used to describe or define a "*consumer*". The Enforcement Team's argument in essence proceeds from the false premise that an energy supply activity not specifically permitted is prohibited. That is not the design of the *ECPA*. There is no such expectation of a general prohibition on competitive supply of energy in Ontario, and thus no exclusion may be implied by the absence of the inclusion of the term *"aggregation"*.

52. The more salient and sensible approach, to the extent that other Ontario energy statute references are relevant at all, is to examine how the concept of *"consumer"* has been addressed in related legislation. As detailed below;

    (a) for the specific purpose of *ECPA* regulation of contract cancellation fees, the legislature has defined a *"high volume consumer"* by reference to the property to which electricity is supplied;

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[34] Enforcement Team Opening Statement, paragraphs 34 through 40.
[35] Enforcement Team Opening Statement, paragraphs 37-40.
[36] *University Health Network v. Ontario (Minister of Finance),* [2001] O.J.No. 4485, at para 31 (ONCA)

(b) the legislature expressly distinguishes between the term *"consumer"* and a specific location or premises in Part III of the *ECPA* (in regulating suite metering); and

(c) the legislature also expressly distinguishes between the terms *"consumer"* and *"account"* in the contemporaneous *Ontario Clean Energy Benefit Act, 2010*.

53. In the *ECPA* Regulation[37], for the purposes of regulating energy contract cancellation fees at the higher end of the "low volume" (*ECPA* applicable) range, the legislature defined a "high volume consumer" by reference to the property to which electricity is supplied.

54. If *"consumer"* meant "location" as advocated by the Enforcement Team, then the reference to the property in this definition would not be necessary.

55. Further, had the legislature intended to similarly qualify the term *"consumer"* in Part II of the *ECPA* by reference to a specific property, it would be expected to have done so expressly in formulating sections 2 and 3 of the *ECPA*. Of course, it did not do so, and the implied exclusion rule thus indicates that such qualification was not intended and so is not appropriate.

56. In Part III of the *ECPA* in respect of the regulation of suite metering, statutory definitions specifically address the concept of a property or premises, and the regulatory requirements for, and limitations on, suite metering are then addressed with reference to these premises related definitions.

57. For example:

(a) a *"multi-unit complex"* is defined with reference to a building or related group of buildings, or such other properties or classes of properties as may be prescribed.

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[37] Ontario Regulation 389/10, section 23(4)(a).

(b) a *"unit"* is defined to mean *"a residential unit"* or a *"rental unit"* as these terms are defined in the *Residential Tenancies Act, 2006*, a condominium unit, or *"such other properties or classes of properties as may be prescribed"*.

58. The scope of suite metering regulation addressed in *ECPA* Part III is thus defined by the legislature with specific references to location or premises based definitions. Had the legislature similarly intended the scope of regulation of competitive energy supply in Part II of the same legislation to be determined by reference to location or premises based definitions, it would be expected to have done so expressly in formulating sections 2 and 3 of the *ECPA*. Of course, it did not do so, and the implied exclusion rule thus indicates that such qualification was not intended and so is not appropriate.

59. The Ontario *Clean Energy Benefit Act, 2010*, passed in 2010 (and recently repealed and replaced by the *Ontario Electricity Support Program* under the *Ontario Energy Board Act, 1998*) was intended to provide electricity cost relief in the form of the Clean Energy Benefit (CEB) to certain classes of customers. The CEB was provided to *"a consumer"* who had *"an eligible account"* [section 4(1)]. The legislation itself embedded a distinction between *"consumers"* and *"accounts"* and expressly contemplated application at the account level [emphasis added]:

- *"A consumer….is entitled to receive financial assistance in respect of the cost of a maximum of 3,000 kilowatt hours of electricity per eligible account per month…"* [section 4(1.1)1.]
- *"'consumer' means a person,*

  (a) to whom an invoice is issued in respect of an eligible account" [section 2(1)]
- *"'eligible account' means, in respect of a consumer, an account with an electricity vendor, or with a person prescribed by the regulations, for the provision of electricity in Ontario if,*

  (a) the consumer has a demand for electricity of 50 kilowatts or less,

  (b) the consumer annually uses not more than 250,000 kilowatt hours of electricity […], or

> *(e) the consumer or the account satisfies such conditions as may be prescribed by the regulations"* [section 2(1).]

60. The very scheme of the *CEBA* expressly distinguished between *"consumers"* and *"accounts"*. Further, the *CEBA* contemplated, and expressly provided for, a *"consumer"* having more than one *"eligible account"*. These legislative facts indicate that *"consumer"* has a specific legislative meaning in the Ontario energy context, and that this meaning is distinct from the concept of *"account"* and in fact may embrace more than one *"account"*.

61. The *Ontario Electricity Support Program*, which recently replaced the *CEBA*, continues the legislative distinction between a *"consumer"* and an *"account"*, and in fact expressly adds the distinct concept of location through the use of the term *"service address"* (as distinct from *"consumer"*[38]:

> *"account-holder" means a consumer who has an account with a distributor that falls within a residential-rate classification as specified in a rate order made by the Board under section 78 of the Act, and who lives at the service address to which the account relates for at least six months in a year*;

62. As the Enforcement Team's own Opening Statement points out[39]:

> *... consistent expression is an important convention of legislative drafting. As much as possible, drafters strive for uniform and consistent expression, so that once a pattern of words has been devised to express a particular purpose or meaning, it is presumed that the pattern is used for this purpose or meaning each time the occasion arises.*

63. The legal presumption of consistent expression holds that the legislature is presumed to use *"language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings"*.[40] This presumption applies not only within

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[38] Ontario Regulation 314/15, section 1(1).
[39] Enforcement Team Opening Statement, paragraph 35, citing Sullivan on Statutes (6th ed) at page 251.
[40] Ruth Sullivan, *supra,* note 28, at pp. 214-215.

statutes but also across statutes, particularly where they address the same subject matter.[41]

64. Had the drafters of the *ECPA*, and the same legislature that promulgated the *CEBA* contemporaneously with the *ECPA*, intended that the terms *"consumer"* or *"person"* as used in Part II of the *ECPA* to be qualified with reference to accounts or premises, the law (as well as common sense) presumes that they would have so expressly indicated, as they did in other contemporaneous energy related statutory references. They did not, and the law indicates that is Panel should not either.

Variable Approach by OEB Staff

65. That the OEB Compliance Staff's own interpretation of section 2 of the *ECPA* has been historically inconsistent undermines the Enforcement Team's current position on how the *ECPA* should be understood and applied.

66. The Enforcement Team asserts that[42]:

> *...the FAQ published by the Board in 2011 reflects the Location Approach and is totally inconsistent with the Aggregation Approach.*

67. Leaving aside the point that the Board's own interpretation cannot be a sound basis for validating the Board's own interpretation (a completely circular argument), in fact the FAQ does not reflect the Enforcement Team's "Location Approach". Rather it asserts a third approach, an "Account Approach" [emphasis added]:

> *Each account is considered to be a separate consumer for the purposes of determining whether the low-volume consumption threshold has been exceeded.*

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[41] *Ibid.*, at p. 215.
[42] Enforcement Team Opening Statement, paragraph 43.

68. Indeed, as demonstrated by the retailer/OEB Compliance Staff exchanges produced by the Enforcement Team and included as Attachment 4 to Birgit Armstrong's Further Witness Statement, it is the account level interpretation that OEB Staff has historically espoused, when asked.

69. This was true even at the time of the investigation which gave rise to the current enforcement proceeding, and apparently through the early phases of that investigation.

70. Active's customer CC, who initiated the OEB complaint the investigation of which is reflected in the materials provided as Attachments 1 through 4 to the ASF, has 3 separate electricity meters on one property, and consumes less than 150,000 kWh per year through each of the 3 meters, but more than this amount in aggregate across all 3 meters. In pursuing investigation of this customer's complaint from January through October, 2016, OEB Compliance Staff proceeded on the basis that it was individual meter/account consumption, rather than consumption at a single location, that determined application of the *ECPA*. Indeed, questions of Active along these lines persisted during the subject investigation through the end of 2016.

71. It was only in February of 2017, more than a year after the CC complaint was received and the OEB Compliance Staff investigation of Active's approach to customers whose aggregate consumption exceeds 150,000 kWh was commenced, that OEB Enforcement Staff started to ask about locations, rather than accounts.[43]

72. In none of the OEB Staff's responses to inquiries from suppliers from December 2010 through September 2015 did OEB Staff's responses ever indicate that location, rather than account, was the parameter by which *ECPA* applicability is to be determined.

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[43] Agreed Statement of Facts, Attachment 7.

Absurd Results of Enforcement Team's Approach

73. The legal presumption against absurdity holds that the legislature is presumed not to intend its legislation to have absurd consequences, including logical contradictions or internal incoherence. It means that courts may reject an interpretation that would lead to absurdity in favour of a plausible alternative that avoids the absurdity.[44]

74. Consideration of the arbitrariness that would result from the approach now advocated by the Enforcement Team commends rejection of that approach.

75. There is no disagreement that a competitive electricity supply customer with one meter at one location through which consumption equals 1 million kWh annually does not fall under the *ECPA*.

76. Consider the following customer (Customer A):

    (a) One location.

    (b) One meter through which annual consumption equals 1 million kWh.

    (c) A second meter, on the same property, through which annual consumption equals 10,000 kWh (just more than a typical residential electricity customer).

    (d) Each meter has a separate utility account (which is how the Ontario electricity distributors set up their accounts).

    OEB Enforcement Staff have historically taken the position that, in respect of the second meter, this customer must be treated as an *ECPA* customer. The Enforcement Team no longer takes that position, and appears to concede that this customer is, for all purposes, a non-*ECPA* customer.

77. If the same Customer A bought the property next door, and sought to add a third meter through which annual electricity consumption was 10,000 kWh, or even subdivided its property such that its existing second meter ended up on a separate,

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[44] Ruth Sullivan, *supra,* note 28,at p. 299.

but contiguous, property, under the Enforcement Team's formulation that customer would, for the purposes of the second property, be an *ECPA* customer. No change in the nature of the customer, its level of consumption (except perhaps that it increases) or its degree of sophistication (using more than 1 million kWh annually), but, according to the Enforcement Team, the customer is now, at least in some respects, "vulnerable" and requires *ECPA* protections. This proposition makes no sense.

78. Consider Customer B:

(a) One location.

(b) 3 meters through each of which the customer consumes 100,000 kWh annually.

(c) Each meter has a separate utility account (as is the practice in Ontario).

OEB Enforcement Staff have historically taken the position that this customer must be treated as an *ECPA* customer. That no longer appears to be the Enforcement Team's position, and using the Enforcement Team's currently proposed test this customer is apparently a non-*ECPA* customer.

79. The customer (CC) complaint which led to the investigation which ultimately resulted in this compliance proceeding is discussed by Messrs. Stedman and Waddick at paragraphs 24 through 28 of their Joint Witness Statement. CC's Active supply contract is included at Tab 4 of the ASF. CC has 3 electricity meters on one property, each meter has a separate utility account, and the consumption through each meter is below 150,000 kWh. The annual consumption through all of CC's meters in aggregate equals approximately 293,000 kWh.[45] While OEB Enforcement Staff pursued investigation of this complaint for a year under the *ECPA*, Active assumes that the OEB Enforcement Team ultimately agreed that this was a non-*ECPA* customer, by virtue of aggregation of its single property

[45] Agreed Statement of Facts, Tab 1, tenth page.

consumption, because CC is not included on the customer lists issued with the Notices of Intention.

80. Had CC owned two adjacent properties, and had one meter on one of those properties, without any changes to consumption at all, CC would be an *ECPA* customer under the Enforcement Team's currently proposed approach.

81. Active's customer ASL (OEB Customer #10) is referenced at paragraph 15, above. ASL consumes more than 13.7 million kWh a year – more than 90 times the legislated low-volume threshold.[46] ASL's Chief Financial Officer negotiated and signed an electricity supply agreement with Active which requires Active to supply 92 retail food stores which include 46 individual meters through which consumption exceeds 150,000 kWh per year, one of which meters records approximately 700,000 kWh per year.[47] Using the Enforcement Team's advocated test, 46 of TRRCI's locations would fall outside the ambit of the *ECPA*, while the other 50 would each require the application of *ECPA* protections (though exactly how this would work has never been made clear). That is:

(a) One customer, represented through one senior executive.

(b) 13.7 million kWh of competitive electricity supply annually, more than 90 times the legislated *ECPA* threshold.

(c) An absurd result of the required application of *ECPA* protections in respect half of its 92 locations (but not in respect of the other half).

82. There are many more scenarios that could be considered and which would lead to equally absurd results. This simple exercise makes clear that the interpretive approach advocated by the Enforcement Team is not only not required to bring the *ECPA* section 2 definition of *"consumer"* into harmony with the objective and design of the *ECPA*, in application it would result in complete discord. Such an approach would be both illogical and contrary to law.

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[46] Active Joint Witness Statement, Attachment 4, row 1.
[47] Agreed Statement of Facts, Tab 18, contract 10.

Impact of Adoption of a "Location Approach"

83. None of the 101 customers named in the Notices of Intent has complained to the OEB. None of these customers has indicated a need for protection by this Board.

84. Yet the Enforcement Team has pursued a compliance proceeding the outcome of which could, if the Enforcement Team's advocated approach is adopted, have significant negative implications for the continued availability of competitive retail supply options for large volume electricity (and natural gas) users.

85. Applying the Enforcement Team's advocated approach would result in a fundamental change to business to business competitive energy supply options in Ontario. The Enforcement Team's advocated approach would necessitate, for example;

    (a) verification calls which go on for hours with senior business executives;

    (b) different disclosure statements and price comparisons for different locations (in respect of gas) and the tying of each separate meter/account expressly to one of those disclosure statements;

    (c) extensive business contract cancellation rights which would fundamentally alter the risk profile of competitive energy supply;

    (d) caps on cancellation remedies which would fundamentally alter the ability of competitive large volume energy suppliers to manage their supply risks in a cost effective manner, in turn limiting the ability of suppliers to offer products of value to large energy consumers;

    (e) renewal process limitations and requirements which simply don't fit with the business operations of large volume energy consumers.

86. In the result, competitive energy supply product offerings would be significantly constrained.

87. In addition, if applied retrospectively, the Enforcement Team's position would cause significant financial hardship to Active and other Ontario competitive energy suppliers.

Conclusion

88. The Enforcement Team is urging this Panel to interpret section 2 of the *ECPA* – the definition of "consumer" to whom the extensive *ECPA* directed energy consumer protections must be applied – as broadly as possible.[48] The Enforcement Team is essentially urging this Panel to craft its own view of what the *ECPA* should be, and to stretch the legislature's chosen language beyond its reasonable limits in order to do so.

89. The Enforcement Team asserts[49] that its *"Location Approach strikes the proper balance and one which is consistent with the text, context and purpose of the Consumer Protection Regime"*. The Ontario legislature has already struck a balance, and has been crystal clear about what that balance is to be. To use the Enforcement Team's characterization, the legislature has identified what, in its view, is a *"workable proxy"* for sophisticated users of electricity[50]. The Enforcement Team asks that this Panel read in language that would replace that *"proxy"* with a new one.

90. The Enforcement Team asserts that the legislative purpose of the *ECPA* strongly supports its advocated "Location Approach", and proceeds to characterize that purpose simply as "consumer protection" in reference to the title of the ECPA and an excerpt from Hansard from the third reading of the legislative bill the passage of which gave rise to the *ECPA*.[51]

91. The full text of the legislative debate on Part II of the *ECPA* spans dozens of pages of Hansard (which are attached to this Opening Statement) and includes specific references to the unique needs and concerns of the particular class of consumers which the *ECPA* was in fact intended to protect. This consumer class was

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[48] Enforcement Team Opening Statement generally, and, for example, paragraph 52.
[49] Enforcement Team Opening Statement, paragraph 59.
[50] Enforcement Team Opening Statement, paragraph 59.
[51] Enforcement Team Opening Statement, paragraphs 50 and 51.

described as *"everyday working people, ordinary Ontarians"*[52] in the legislative debates. The legislators considered this class to be vulnerable to pressure tactics and misleading advertising from energy retailers. Thus, the intended beneficiaries of *ECPA* protections were described by reference to; *"...seniors on fixed incomes and new Canadians, who perhaps do not have a strong command of the language"*,[53] *"consumers [who] don't have the information they need to decide at the door"*,[54] *"people who don't understand the language"*,[55] *"consumers and individuals who can't protect themselves"*,[56] *"constituents, friends or family members"*,[57] *"my mother-in-law"*,[58] *"people who find themselves in the position of being alone, who don't have the supports necessary to make what is probably the right decision"*.[59]

92. Not once in any of the extensive discussion is the business to business, larger volume customer category mentioned (though there is mention of the need to balance consumer protection with the interests of competitive supply businesses[60]). This is not surprising.

93. The 101 customers listed in connection with the Notices of Intention are sophisticated commercial actors, and unlike the residential customers or small businesses which the *ECPA* was intended to protect, they are knowledgeable about business processes and commercial agreements. They, and others like them served by other energy suppliers[61], were not sold energy at the door, but rather contracted for electricity supply after presentations, discussions, analysis,

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[52] Hansard, December 10, 2009, the Honourable Ted McMeekin (excerpt, p. 11).
[53] Hansard, December 10, 2009, Mr. Phil McNeely (excerpt, p. 16).
[54] Hansard, February 17, 2010, Mr. Dave Levac (excerpt, p. 40).
[55] Hansard, February 17, 2010, Mr. Rosario Marchese (excerpt, p. 53).
[56] Hansard, April 13, 2010, Mr. Dave Levac (excerpt, p. 64).
[57] Hansard, December 8, 2009, The Honourable Gerry Phillips (excerpt, p.3).
[58] Hansard, April 13, 2010, Mr. John Yakabuski (excerpt, p. 72).
[59] Hansard, February 16, 2010, Mr. Bill Mauro (excerpt, p. 30).
[60] Hansard, December 8, 2009, The Honourable Gerry Phillips (excerpt, p. 6); Hansard, April 13, 2010, The Honourable Brad Duguid (excerpt, p. 61).
[61] Active Further Joint Witness Statement, Attachment B.

negotiations, and in some instances, formal request for proposal processes.[62] They are not in need of extensive, paternalistic consumer protections.

94. This Panel's role is to interpret how the legislature intended the *ECPA* to be applied, not to refashion the statute to fit the Enforcement Team's view of how it would be better applied.

95. The legislature's intention for application of the *ECPA* is clear and unambiguous on its face, and is supported by a full consideration of the legislative debate leading up to its promulgation.

96. The express and completely logical design of the *ECPA* is to identify those consumers in need of extra protection based on how much energy they buy, not on how many locations they buy it for or how many meters that energy is delivered through.

97. To determine that the defined term *"person"* actually means *"location"*, as effectively urged by the Enforcement Team, would:

(a) Change the plain meaning not only of the term *"person"* but also of the term *"consumer"* which relies on it.

(b) Thereby alter the design and impact of the legislation.

(c) Produce absurd results, including capturing some (but only some) of the largest volume energy customers in the province, consuming hundreds of millions of kWh annually.

(d) Produce results contrary to the intention of the legislature as reflected in the applicable legislative debates by failing to balance the interests of competitive energy suppliers, in particular in respect of the provision of competitive energy supply options for larger volume energy consumers.

(e) Fundamentally undermine the business to business market for competitive energy supply in Ontario, to the detriment of those large volume energy consumers who engage in it.

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[62] Active Further Joint Witness Statement, paragraphs 6 through 11.

(f) Potentially destroy a number of Ontario energy supply businesses.

98. The Board should not, and cannot, penalize Active and other Ontario competitive energy suppliers for following the clear rules set by the legislature.

99. This proceeding must be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:

GOWLING WLG (CANADA) LLP, per:
Ian A. Mondrow
Counsel to Active Energy Inc.

TAB 1

Wilson v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 47

2015 SCC 47, 2015 CSC 47
Supreme Court of Canada

Wilson v. British Columbia (Superintendent of Motor Vehicles)

2015 CarswellBC 2940, 2015 CarswellBC 2941, 2015 SCC 47, 2015 CSC 47, [2015] 11 W.W.R. 429, [2015] 3 S.C.R. 300, [2015] B.C.W.L.D. 7199, [2015] B.C.W.L.D. 7255, [2015] A.C.S. No. 47, [2015] S.C.J. No. 47, 126 W.C.B. (2d) 567, 23 C.R. (7th) 44, 259 A.C.W.S. (3d) 684, 329 C.C.C. (3d) 527, 378 B.C.A.C. 58, 391 D.L.R. (4th) 43, 476 N.R. 60, 650 W.A.C. 58, 76 B.C.L.R. (5th) 1, 84 M.V.R. (6th) 1

Lee Michael Wilson, Appellant and Superintendent of Motor Vehicles and Attorney General of British Columbia, Respondents

McLachlin C.J.C., Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: May 19, 2015
Judgment: October 16, 2015
Docket: 35959

Proceedings: CD-ARG *Wilson v. British Columbia (Superintendent of Motor Vehicles)* (2014), 311 C.C.C. (3d) 369, 2014 BCCA 202, 66 M.V.R. (6th) 99, 60 B.C.L.R. (5th) 371, 2014 CarswellBC 1453, [2014] B.C.J. No. 1055, [2015] 4 W.W.R. 579, 610 W.A.C. 133, 356 B.C.A.C. 133, Harris J.A., Levine J.A., Saunders J.A. (B.C. C.A.); CD-RVG *Wilson v. British Columbia (Superintendent of Motor Vehicles)* (2013), 2013 CarswellBC 2696, 2013 BCSC 1638, S.D. Dley J., In Chambers (B.C. S.C.)

Counsel: Kyla Lee, Paul Doroshenko, for Appellant
Robert Mullett, Tyna Mason, for Respondents

Subject: Constitutional; Criminal; Public; Human Rights

Related Abridgment Classifications

Motor vehicles

X Offences and penalties
X.4 Suspension of licence
X.4.g Practice and procedure
X.4.g.v Judicial review
X.4.g.v.E Evidence capable of supporting decision

Statutes

II Interpretation
II.3 Rules of interpretation
II.3.a Object and purpose

Headnote

Statutes --- Interpretation — Rules of interpretation — Object and purpose

Appellant W was stopped at police road check and was asked to provide breath sample using approved screening device ("ASD") — W blew "Warn" — Police officer found that W had odour of liquor on breath; W admitted to drinking four beers earlier — Officer issued immediate notice of three-day driving prohibition pursuant to s. 215.41(3.1) of Motor Vehicle Act — Delegate of superintendent upheld three-day driving prohibition issued to W by police officer at roadside check — W applied for judicial review — Chambers judge found that s. 215.41(3.1) of Act required more than just "Warn" before driving prohibition could be issued and needed to be corroborated by other evidence that supported officer's reasonable belief that ability to drive was affected by alcohol — Chambers judge quashed prohibition — Superintendent appealed — It was appellate court's finding that statutory language did not distinguish consequences between "Warn" and "Fail" so that officer required additional evidence beyond result of analysis to support reasonable belief that driver's ability to drive was affected by alcohol where there was "Warn" but not "Fail" — Appellate court held that adjudicator's decision furthered purpose of statutory regime and that adjudicator's interpretation of s. 215.41(3.1) of Act was reasonable — Prohibition was confirmed by appellate court — W appealed — Appeal dismissed — Section 215.41(3.1) of Act states that peace officer must have reasonable grounds to believe, as result of analysis, that driver's ability to drive is affected by alcohol — It explicitly links officer's belief to result of ASD analysis — Roadside driving prohibitions serve pressing public safety purpose — Allowing police to rely on ASD test results is critical to fulfillment of these objectives — Automatic roadside driving prohibition ("ARP") scheme establishes common standard for removing drivers from road who pose elevated risk to others — It also serves to deter drunk driving — Adjudicator's interpretation was consistent with legislative objectives of ARP scheme.

Motor vehicles --- Offences and penalties — Suspension of licence — Practice and procedure — Judicial review — Evidence capable of supporting decision

Appellant W was stopped at police road check and was asked to provide breath sample using approved screening device ("ASD") — W blew "Warn" — Police officer found that W had odour of liquor on breath; W admitted to drinking four beers earlier — Officer issued immediate notice of three-day driving prohibition pursuant to s. 215.41(3.1) of Motor Vehicle Act — Delegate of superintendent upheld three-day driving prohibition issued to W by police officer at roadside check — W applied for judicial review — Chambers judge found that s. 215.41(3.1) of Act required more than just "Warn" before driving prohibition could be issued and needed to be corroborated by other evidence that supported officer's reasonable belief that ability to drive was affected by alcohol — Chambers judge quashed prohibition — Superintendent appealed — Appellate court held that was not plausible that officer could only issue notice if he or she had additional grounds to reasonably believe that impaired driver's ability to drive was affected by alcohol — It was appellate court's finding that statutory language did not distinguish consequences between "Warn" and "Fail" so that officer required additional evidence beyond result of analysis to support reasonable belief that driver's ability to drive was affected by alcohol where there was "Warn" but not "Fail" — More than "Warn" or "Fail" was not required for officer to conclude that driver's ability to drive was affected — Appellate court held that adjudicator's decision furthered purpose of statutory regime and that adjudicator's interpretation of s. 215.41(3.1) of Act was reasonable — Prohibition was confirmed by appellate court — W appealed — Appeal dismissed — Roadside driving prohibitions serve pressing public safety purpose — Allowing police to rely on ASD test results was critical to fulfillment of these objectives — Scientific evidence shows that at 50-milligram percentage, which is level needed to register "Warn", driving skills are significantly impaired and likelihood of being involved in collision is markedly elevated — Evidence also shows that it is extremely difficult to identify drivers who have been drinking by observation alone — Automatic roadside driving prohibition ("ARP") scheme establishes common standard for removing drivers from road who pose elevated risk to others and also serves to deter drunk driving — Adjudicator's interpretation was consistent with legislative objectives of ARP scheme.

Lois --- Interprétation — Règles d'interprétation — Objet et but

Appelant W a été arrêté par la police à un poste de contrôle routier et a été invité à fournir des échantillons de son haleine dans un appareil de détection approuvé (« ADA ») — Analyse des échantillons de W a donné le résultat « Avertissement » — Agent de la paix a remarqué que l'haleine de W dégageait une odeur d'alcool et ce dernier a admis avoir consommé quatre bières plus tôt — Agent de la paix a immédiatement signifié à W un avis qui lui interdisait de conduire pendant une période de trois jours, en application de l'art. 215.41(3.1) de la Motor Vehicle Act (« MVA ») — Délégué du surintendant a confirmé l'avis d'interdiction de conduire pendant trois jours signifié à W par l'agent de la paix lors du contrôle routier — W a présenté une demande de contrôle judiciaire — Juge siégeant en chambre a conclu que, selon l'art. 215.41(3.1) de la MVA,

l'interdiction de conduire ne peut être émise que sur la base d'un résultat indiquant « Avertissement », lequel doit être corroboré par d'autres éléments de preuve étayant les motifs raisonnables de l'agent de croire que la capacité de conduire était affaiblie par l'alcool — Juge siégeant en chambre a annulé l'interdiction — Surintendant a interjeté appel — Cour d'appel a conclu que le libellé de la MVA n'établissait aucune conséquence distincte que le résultat soit « Avertissement » ou « Échec » de sorte que l'agent devait obtenir d'autres éléments de preuve que le résultat de l'analyse pour étayer des motifs raisonnables de croire que la capacité de conduire était affaiblie par l'alcool lorsque le résultat obtenu indiquait « Avertissement » plutôt qu'« Échec » — Cour d'appel a estimé que la décision de l'arbitre servait l'objectif du régime statutaire et que l'interprétation donnée par l'arbitre à l'art. 215.41(3.1) de la MVA était raisonnable — Interdiction a été confirmée par la Cour d'appel — W a formé un pourvoi — Pourvoi rejeté — Article 215.41(3.1) de la MVA prévoit que l'agent de la paix doit avoir, en raison de l'analyse, des motifs raisonnables de croire que le conducteur a les facultés affaiblies par l'alcool — Cette disposition établit explicitement un lien entre la croyance de l'agent et le résultat de l'analyse effectuée au moyen de l'ADA — Interdictions de conduire signifiées lors de contrôles routiers servent un objectif de sécurité publique urgent — Permettre aux policiers de se fonder sur les résultats d'une analyse effectuée au moyen d'un ADA est essentiel à la réalisation de ces objectifs — Régime d'interdiction automatique de conduire (« RIAC ») établit une norme commune permettant d'écarter de la circulation les conducteurs qui constituent un risque élevé pour autrui — Il vise aussi à décourager la conduite avec facultés affaiblies — Interprétation de l'arbitre était compatible avec les objectifs législatifs du RIAC.

Véhicules à moteur --- Infractions et sanctions — Suspension de permis — Procédure — Contrôle judiciaire — Preuve permettant d'étayer la décision

Appelant W a été arrêté par la police à un poste de contrôle routier et a été invité à fournir des échantillons de son haleine dans un appareil de détection approuvé (« ADA ») — Analyse des échantillons de W a donné le résultat « Avertissement » — Agent de la paix a remarqué que l'haleine de W dégageait une odeur d'alcool et ce dernier a admis avoir consommé quatre bières plus tôt — Agent de la paix a immédiatement signifié à W un avis qui lui interdisait de conduire pendant une période de trois jours, en application de l'art. 215.41(3.1) de la Motor Vehicle Act (« MVA ») — Délégué du surintendant a confirmé l'avis d'interdiction de conduire pendant trois jours signifié à W par l'agent de la paix lors du contrôle routier — W a présenté une demande de contrôle judiciaire — Juge siégeant en chambre a conclu que, selon l'art. 215.41(3.1) de la MVA, l'interdiction de conduire ne peut être émise que sur la base d'un résultat indiquant « Avertissement », lequel doit être corroboré par d'autres éléments de preuve étayant les motifs raisonnables de l'agent de croire que la capacité de conduire était affaiblie par l'alcool — Juge siégeant en chambre a annulé l'interdiction — Surintendant a interjeté appel — Cour d'appel a estimé qu'il n'était pas plausible que l'agent ne pouvait émettre un avis que s'il avait des motifs additionnels de croire raisonnablement que la capacité de conduire d'un individu avec les facultés affaiblies était sous l'effet de l'alcool — Cour d'appel a conclu que le libellé de la MVA n'établissait aucune conséquence distincte que le résultat soit « Avertissement » ou « Échec » de sorte que l'agent devait obtenir d'autres éléments de preuve que le résultat de l'analyse pour étayer des motifs raisonnables de croire que la capacité de conduire était affaiblie par l'alcool lorsque le résultat obtenu indiquait « Avertissement » plutôt qu'« Échec » — Il n'était pas nécessaire de chercher des éléments additionnels après avoir obtenu un résultat indiquant « Avertissement » ou « Échec » pour conclure que la capacité du conducteur de conduire était affaiblie — Cour d'appel a estimé que la décision de l'arbitre servait l'objectif du régime statutaire et que l'interprétation donnée par l'arbitre à l'art. 215.41(3.1) de la MVA était raisonnable — Interdiction a été confirmée par la Cour d'appel — W a formé un pourvoi — Pourvoi rejeté — Interdictions de conduire signifiées lors de contrôles routiers servent un objectif de sécurité publique urgent — Permettre aux policiers de se fonder sur les résultats d'une analyse effectuée au moyen d'un ADA est essentiel à la réalisation de ces objectifs — Preuve scientifique indique qu'une alcoolémie de 50 mg par 100 ml de sang — le niveau requis pour obtenir l'indication « Avertissement » — compromet sérieusement la capacité de conduire d'une personne et accroît de façon marquée son risque de faire un accident — Preuve montre également qu'il est extrêmement difficile de reconnaître les conducteurs qui ont bu par simple observation visuelle — Régime d'interdiction automatique de conduire (« RIAC ») établit une norme commune permettant d'écarter de la circulation les conducteurs qui constituent un risque élevé pour autrui et vise à décourager la conduite avec facultés affaiblies — Interprétation de l'arbitre était compatible avec les objectifs législatifs du RIAC.

In order to address the problem of impaired driving, British Columbia instituted a regime in the Motor Vehicle Act ("MVA"), known as the automatic roadside driving prohibition scheme (the "ARP regime" or "ARP scheme"). Although the ARP regime is a provincial scheme, it is triggered by a roadside demand for a breath sample under s. 254 of the Criminal Code.

Under s. 215.41(3.1) of the MVA, when a driver registers a “Warn” or “Fail” on the approved screening device (”ASD”), a peace officer must issue an immediate driving prohibition if the officer has reasonable grounds to believe, as a result of the analysis, that the driver’s ability to drive is affected by alcohol. A driving prohibition must also be issued to individuals who fail or refuse to comply with a demand for a breath sample without a reasonable excuse. At the officer’s discretion, drivers who are served with a three- or seven-day driving prohibition may also have their vehicle impounded for the duration of their driving prohibition.

During a police road check, the appellant W was stopped. The officer conducting the road check noticed an odour of alcohol on W’s breath. Upon being questioned, W admitted to having consumed four beers hours earlier. W then provided samples of his breath into two ASDs, both of which registered a “Warn” reading. Consequently, the officer served W with a notice, prohibiting him from driving for a period of three days, under s. 215.41(3.1) of the MVA.

W applied to the Superintendent of Motor Vehicles for a review, seeking to have the notice revoked. He argued that the officer lacked reasonable grounds to believe that his ability to drive was affected by alcohol. According to W, the ASD result alone could not provide the officer with the reasonable grounds required by s. 215.41(3.1) of the MVA: the officer was also required to point to other confirmatory evidence indicating that W’s ability to drive was affected by alcohol.

W’s application was dismissed. W then applied to the British Columbia Supreme Court for judicial review. The chambers judge noted that s. 215.41(3.1)(b) of the MVA requires a peace officer to believe, as a result of the analysis, that the driver’s ability to drive is affected by alcohol. In his view, if it was the legislature’s intent that a notice be issued solely on the basis of an ASD reading, it would not have included this requirement. He therefore held that on a plain reading of the legislation, additional confirmatory evidence was required before a notice could be issued and that the adjudicator’s interpretation of s. 215.41(3.1) of the MVA was unreasonable.

The Superintendent appealed to the British Columbia Court of Appeal, which unanimously held that the adjudicator’s interpretation was reasonable. The notice was therefore reinstated.

W appealed the result.

Held: The appeal was dismissed.

Per Moldaver J. (McLachlin C.J.C., Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ. concurring): Section 215.41(3.1) of the MVA states that the peace officer must have reasonable grounds to believe, as a result of the analysis, that the driver’s ability to drive is affected by alcohol. It explicitly links the officer’s belief to the result of the ASD analysis. The wording could not be clearer. The ASD analysis is the yardstick against which to measure the reasonableness of the officer’s belief. The inclusion of the phrase “as a result of the analysis” precludes an officer from issuing a notice in situations in which the officer has reason to doubt that the ASD device functioned properly or has reason to doubt that the sample was taken properly. The officer must have an honest belief in the accuracy of the ASD result. Only then will he or she have reasonable grounds to believe “as a result of the analysis” that the individual’s ability to drive is affected by alcohol.

The grounds of review focussed primarily on the manner in which the ASD test was administered and the reliability of the results. Nothing suggests that the Superintendent may revoke a notice if a peace officer does not point to other confirmatory evidence. This indicates that the legislature did not intend to require other confirmatory evidence as a precondition to issuing a notice, and in turn, supports the reasonableness of the adjudicator’s interpretation.

A genuine ambiguity exists only when there are two or more plausible readings, each equally in accordance with the intentions of the statute. Section 215.41(3.1) of the MVA does not meet that test. When read in light of its text, context, and legislative objective, it admits of only one reasonable interpretation — the one arrived at by the adjudicator.

The MVA and the Criminal Code are two independent statutes, with two distinct purposes. They were enacted by two different levels of government, neither of which is subordinate to the other. The fact that the MVA relies on a Criminal Code demand for a breath sample does not render it subsidiary legislation.

It has long been recognized that regulatory legislation, such as the MVA, differs from criminal legislation in the way it balances individual liberties against the protection of the public. Under regulatory legislation, the public good often takes on greater weight. Roadside driving prohibitions are a tool to promote public safety. As such, the legislation necessarily places greater weight on this goal. Unlike the criminal law regime, persons who register a “Warn” or “Fail” under the regulatory regime do not end up with a criminal record, nor are they exposed to the more onerous sanctions under the criminal law, including the risk of incarceration. Regulatory legislation does not share the same purpose as the criminal law, and it would be a mistake to interpret it as though it did.

The adjudicator’s decision was consistent with the legislative objective. Roadside driving prohibitions serve a pressing public safety purpose. Allowing the police to rely on ASD test results is critical to the fulfillment of these objectives. Scientific evidence shows that at a 50-milligram percentage, which is the level needed to register a “Warn”, driving skills are significantly impaired and the likelihood of being involved in a collision is markedly elevated. Evidence also shows that it is extremely difficult to identify drivers who have been drinking by observation alone. The ARP scheme establishes a common standard for removing drivers from the road who pose an elevated risk to others. It also serves to deter drunk driving. The adjudicator’s interpretation was consistent with the legislative objectives of the ARP scheme.

Pour résoudre le problème de la conduite avec facultés affaiblies, la Colombie-Britannique a mis en place un régime créé par la Motor Vehicle Act (« MVA ») et connu sous le nom de régime d’interdiction automatique de conduire (« RIAC »). Bien que le RIAC soit un régime provincial, son application est déclenchée lorsque le prélèvement d’un échantillon d’haleine est ordonné en vertu de l’art. 254 du Code criminel. En vertu de l’art. 215.41(3.1) de la MVA, lorsque le conducteur obtient le résultat [TRADUCTION] « Avertissement » ou « Échec » sur un appareil de détection approuvé (« ADA »), l’agent de la paix est tenu de lui signifier une interdiction immédiate de conduire s’il a, en raison de l’analyse, des motifs raisonnables de croire que le conducteur a les facultés affaiblies par l’alcool. Une telle interdiction doit également être signifiée au conducteur qui, sans excuse raisonnable, n’obtempère pas ou refuse d’obtempérer à un ordre de fournir un échantillon d’haleine. Les conducteurs ayant reçu signification d’une interdiction de conduire de 3 ou 7 jours peuvent également, à la discrétion de l’agent de la paix, voir leur véhicule mis en fourrière pour la durée de cette interdiction.

L’appelant W a été arrêté par la police à un poste de contrôle routier. L’agent de la paix ayant effectué le contrôle a remarqué que l’haleine de W dégageait une odeur d’alcool. Lorsqu’il a été interrogé, ce dernier a admis avoir consommé quatre bières quelques heures auparavant. Il a ensuite fourni des échantillons de son haleine dans deux ADA différents, lesquels ont donné le résultat « Avertissement ». L’agent de la paix a donc signifié à W un avis qui lui interdisait de conduire pendant une période de trois jours, en application de l’art. 215.41(3.1) de la MVA.

W a présenté une demande de réexamen au Superintendent of Motor Vehicles (« Surintendant ») en vue d’obtenir la révocation de l’avis. Il a fait valoir que l’agent n’avait pas de motifs raisonnables de croire que sa capacité de conduire était affaiblie par l’alcool. Selon W, le résultat de l’ADA ne pouvait, à lui seul, fournir à l’agent les motifs raisonnables exigés par l’art. 215.41(3.1) de la MVA : l’agent devait également mentionner d’autres éléments de preuve confirmant que sa capacité de conduire était affaiblie par l’alcool.

La demande de W a été rejetée. W a présenté une demande de contrôle judiciaire à la Cour suprême de la Colombie-Britannique. Le juge siégeant en chambre a fait remarquer que l'art. 215.41(3.1)b) de la MVA exige de l'agent de la paix qu'il croie, en raison de l'analyse, que le conducteur a les facultés affaiblies par l'alcool. À son avis, si le législateur avait voulu que l'avis soit signifié sur la seule foi du résultat indiqué sur l'ADA, il n'aurait pas prévu cette exigence. Il a donc conclu que, suivant le sens ordinaire de la loi, il faut des éléments de preuve corroborants additionnels avant qu'un avis puisse être signifié, et que l'interprétation donnée par l'arbitre à l'art. 215.41(3.1) était déraisonnable.

Le Surintendant a interjeté appel à la Cour d'appel de la Colombie-Britannique, laquelle a conclu, dans un jugement unanime, que l'interprétation de l'arbitre était raisonnable. L'avis a donc été rétabli.

W a formé un pourvoi à l'encontre de cette décision.

Arrêt: Le pourvoi a été rejeté.

Moldaver, J. (McLachlin, J.C.C., Cromwell, Karakatsanis, Wagner, Gascon, Côté, JJ., souscrivant à son opinion) : L'article 215.41(3.1) de la MVA prévoit que l'agent de la paix doit avoir, en raison de l'analyse, des motifs raisonnables de croire que le conducteur a les facultés affaiblies par l'alcool. Cette disposition établit explicitement un lien entre la croyance de l'agent et le résultat de l'analyse effectuée au moyen de l'ADA. Le libellé ne saurait être plus clair. L'analyse effectuée au moyen de l'ADA sert de jalon pour mesurer le caractère raisonnable de la croyance de l'agent. L'inclusion des mots « en raison de l'analyse » empêche l'agent de signifier un avis lorsque l'agent a des motifs de douter du bon fonctionnement de l'ADA ou a des raisons de douter que l'échantillon ait été prélevé correctement. L'agent doit croire sincèrement à l'exactitude du résultat indiqué sur l'ADA. Ce n'est qu'alors qu'il pourra avoir, en « raison de l'analyse », des motifs raisonnables de croire que le conducteur a les facultés affaiblies par l'alcool.

Les motifs de réexamen s'attachaient principalement à la manière dont l'analyse a été effectuée ainsi qu'à la fiabilité des résultats. Rien n'indiquait que le Surintendant pouvait révoquer un avis si l'agent de la paix ne mentionnait pas d'autres éléments de preuve corroborants. Cela montre que le législateur n'avait pas l'intention d'exiger d'autres éléments de preuve corroborants comme condition préalable à la signification d'un avis et que l'interprétation de l'arbitre était donc raisonnable.

Il n'y a ambiguïté véritable que lorsqu'il existe deux ou plusieurs interprétations plausibles, qui s'harmonisent chacune également avec l'intention du législateur. L'article 215.41(3.1) de la MVA ne répond pas à ce critère. Lorsque cette disposition est interprétée à la lumière de son libellé, du contexte et de l'intention du législateur, on ne peut plutôt lui donner qu'une seule interprétation raisonnable — celle à laquelle en est venu l'arbitre.

La MVA et le Code criminel sont deux lois indépendantes ayant deux objets distincts. Ils ont été édictés par deux ordres de gouvernement différents, aucun des deux n'étant subordonné à l'autre. Le fait que la MVA renvoie à un ordre de fournir un échantillon d'haleine donné en application de ce dernier ne permet pas d'assimiler cette loi à une mesure législative accessoire.

Il est reconnu depuis longtemps qu'une loi de nature réglementaire comme la MVA se distingue d'une loi de nature criminelle dans la manière dont elle met en balance les libertés individuelles et la protection du public. Dans une loi de nature réglementaire, on accorde souvent plus de poids à l'intérêt public. Les interdictions de conduire dans le cadre de contrôles routiers visent à favoriser la sécurité publique. La loi accorde donc nécessairement plus de poids à cet objectif. Contrairement à ce qui se produit en cas d'application du régime de droit criminel, les personnes qui obtiennent un « Avertissement » ou un « Échec » suivant le régime réglementaire ne se retrouvent pas avec un casier judiciaire; elles ne sont pas non plus passibles

des sanctions plus sévères prévues par le premier de ces régimes, dont l'incarcération. Une loi de nature réglementaire ne vise pas le même objectif qu'une loi de nature criminelle et ce serait une erreur de l'interpréter comme si c'était le cas.

La décision de l'arbitre était compatible avec l'objectif législatif. Les interdictions de conduire signifiées lors de contrôles routiers servent un objectif de sécurité publique urgent. Permettre aux policiers de se fonder sur les résultats d'une analyse effectuée au moyen d'un ADA est essentiel à la réalisation de ces objectifs. La preuve scientifique indique qu'une alcoolémie de 50 mg par 100 ml de sang — le niveau requis pour obtenir l'indication « Avertissement » — compromet sérieusement la capacité de conduire d'une personne et accroît de façon marquée son risque de faire un accident. La preuve montre également qu'il est extrêmement difficile de reconnaître les conducteurs qui ont bu par simple observation visuelle. Le RIAC établit une norme commune permettant d'écarter de la circulation les conducteurs qui constituent un risque élevé pour autrui. Il vise aussi à décourager la conduite avec facultés affaiblies. L'interprétation de l'arbitre était compatible avec les objectifs législatifs du RIAC.

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s. 43.09 — referred to

Words and phrases considered:

ambiguity

It is settled law that a genuine ambiguity only exists when there are "two or more plausible readings, each equally in accordance with the intentions of the statute": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)* [1999] 1 S.C.R. 743 (S.C.C.), at para. 14; *Bell ExpressVu Ltd. Partnership v. Rex*, [[2002] 2 S.C.R. 559 (S.C.C.)] at paras. 29-30.

approved screening device

Approved screening devices ("ASDs") are used to collect roadside [breath] samples.

blow a "warn"

[B]low a "Warn" — when the [approved screening device ("ASD")] registers a blood alcohol concentration of 50 milligrams of alcohol in 100 millilitres of blood . . . or higher. . . . [B]low a "Fail" — when the ASD registers a blood alcohol concentration of 80 milligrams of alcohol in 100 millilitres of blood . . . or higher.

Termes et locutions cités:

ambiguïté

Il est bien établi en droit qu'il n'y a ambiguïté véritable que lorsqu'il existe « deux ou plusieurs interprétations plausibles, qui s'harmonisent chacune également avec l'intention du législateur » : *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743, par. 14; [*Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559], par. 29-30.

appareil de détection approuvé

L'échantillon [d'haleine] est prélevé au moyen d'un appareil de détection approuvé (« ADA »)

conducteurs qui obtiennent le résultat « Avertissement »

Les conducteurs (...) obtiennent le résultat « Avertissement » (....) lorsque l'[appareil de détection approuvé (ADA)] mesure 50 milligrammes d'alcool par 100 millilitres de sang ou plus (....) [et l]es conducteurs (...) obtiennent le résultat « Échec » (...) lorsque l'ADA mesure 80 milligrammes d'alcool par 100 millilitres de sang ou plus.

APPEAL from judgment reported at *Wilson v. British Columbia (Superintendent of Motor Vehicles)* (2014), 2014 BCCA 202, 2014 CarswellBC 1453, [2014] B.C.J. No. 1055, 311 C.C.C. (3d) 369, 60 B.C.L.R. (5th) 371, 610 W.A.C. 133, 356 B.C.A.C. 133, 66 M.V.R. (6th) 99, [2015] 4 W.W.R. 579 (B.C. C.A.), reinstating notice of driving prohibition issued under s. 215.41(3.1) of *Motor Vehicle Act*.

POURVOI formé à l'encontre d'un jugement publié à *Wilson v. British Columbia (Superintendent of Motor Vehicles)* (2014), 2014 BCCA 202, 2014 CarswellBC 1453, [2014] B.C.J. No. 1055, 311 C.C.C. (3d) 369, 60 B.C.L.R. (5th) 371, 610 W.A.C. 133, 356 B.C.A.C. 133, 66 M.V.R. (6th) 99, [2015] 4 W.W.R. 579 (B.C. C.A.), ayant rétabli un avis d'interdiction de conduire signifié en vertu de l'art. 215.41(3.1) de la *Motor Vehicle Act*.

Comment

The Supreme Court in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, reported above at p. 1, and *Wilson* here confirms the constitutionality of the B.C. impaired driving prohibition scheme. It is constitutional in the division of powers sense for provinces to have tough prohibition schemes overlapping with Federal *Criminal Code* offences to try to prevent drunk drivers' killing and injuring on our highways. The *Charter*'s section 11 protections do not apply, as the scheme does not involve the charge of an offence and are merely regulatory or administrative in nature. Submitting someone to an ASD test does engage section 8 *Charter* protections. The problem identified in *Goodwin* was an inadequate review mechanism of this unreliable test that was not saved under section 1 of the *Charter* because the B.C. legislature had in 2012 already enacted a fairer form of review. Many will welcome the move to strengthen our laws against drunk driving. Other provinces may now well follow suit in enacting such tough driving prohibition, impounding, and penalty schemes.

Some anomalies and inconsistences in the Supreme Court judgments deserve comment. Although the Court recognized that section 8 was engaged, the Court is very likely content to accept the system now that a better administrative review process is in place. In *Wilson* the Court declares that there was no ambiguity in a provision based on a statutory requirement of reasonable grounds for the officer to believe in the ASD result. It was not right to rely on *Charter* values to create ambiguity and the Court had repeatedly warned against reading in words in the guise of interpretation.

What was really at stake in section 8 was the *Charter* standard for the seizure. The Court has here apparently settled for an ASD test where there is no requirement for even individualised reasonable suspicion. So the ASD test, which is too unreliable to use as a standard for a criminal sanction, can be used at random for a severe so-called "administrative" driving prohibition.

The statement that the Supreme Court is against reading in criteria in the name of interpretation is at odds with numerous decisions over the years, especially since the *Charter* came into force in 1982. For example, in *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 16 C.R. (6th) 203, in rejecting claims of vagueness and overbreadth, the majority of the Supreme Court read in numerous requirements to what constitutes reasonable force by parents against children under section 43 of the *Criminal Code*. This included inserting age limits requiring that children disciplined to be over two but under thirteen. The Court in *Wilson* read in two requirements into the officer's reasonable belief standard where the officer had reason to doubt whether the machine was functioning properly or whether the samples had been properly taken.

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***Moldaver J.* (McLachlin C.J.C. and Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ. concurring):**

I. Overview

1 Impaired driving is a matter of grave public concern in Canada. Over the years, various *Criminal Code* offences have been enacted to deal with this problem. The provinces have also enacted regulatory legislation in an attempt to curb the number of impaired drivers on the road. Despite these measures, the problem of drunk driving persists, resulting as it often does in lives lost and lives shattered.

2 This appeal concerns one of the mechanisms British Columbia has instituted to address the problem: a regime in the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 ("*MVA*"), known as the automatic roadside driving prohibition scheme (the "ARP regime" or "ARP scheme"). The ARP regime at issue in this appeal is the successor to the regime at issue in the companion case of *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 (S.C.C.). Although the ARP regime

is a provincial scheme, it is triggered by a roadside demand for a breath sample under s. 254 of the *Criminal Code*, R.S.C. 1985, c. C-46. Approved screening devices ("ASDs") are used to collect roadside samples. Under s. 215.41(3.1) of the *MVA*, when a driver registers a "Warn" or "Fail" on the ASD, a peace officer must issue an immediate driving prohibition if the officer "has reasonable grounds to believe, *as a result of the analysis*, that the driver's ability to drive is affected by alcohol".

3 The interpretation of that provision is central to this appeal. The question that arises is this: In assessing whether a peace officer has the requisite grounds to believe that a driver's ability to drive is affected by alcohol, can the officer rely solely on the ASD result?

4 Mr. Wilson says no. He submits that to meet the "reasonable belief" standard, the ASD result must be backed by other evidence indicating that the driver's ability to drive is affected by alcohol. This could include evidence of erratic driving, or other indicators commonly associated with impairment, such as slurred speech, glassy and bloodshot eyes, unsteady gait, and so on.

5 The Superintendent of Motor Vehicles rejected this argument and upheld a notice of driving prohibition ("Notice") served on Mr. Wilson. In his view, the ASD test result was sufficient, on its own, to provide a peace officer with the grounds needed to issue a Notice. On judicial review, the British Columbia Supreme Court set aside the Notice. On appeal from that decision, the British Columbia Court of Appeal reinstated it.

6 Before this Court, Mr. Wilson contends that s. 215.41(3.1) is ambiguous, and that the adjudicator, a delegate of the Superintendent of Motor Vehicles, erred in failing to consider *Canadian Charter of Rights and Freedoms* values to resolve the ambiguity. According to Mr. Wilson, this rendered his decision unreasonable. With respect, I disagree. The provision is not ambiguous, and the adjudicator's interpretation was the only reasonable one. Accordingly, I would dismiss the appeal.

II. Facts

A. British Columbia's Automatic Roadside Prohibition Regime

7 Since the 1960s, British Columbia has sought to address the problem of impaired driving through regulatory legislation enabling peace officers to issue roadside driving prohibitions: see the *Motor-vehicle Act Amendment Act*, 1966, S.B.C. 1966, c. 30, s. 34. In 2010, the province expanded the powers of peace officers to issue such driving prohibitions: *Motor Vehicle Amendment Act, 2010*, S.B.C. 2010, c. 14, s. 19. The constitutionality of the 2010 regime is at issue in the companion case of *Goodwin* . The present appeal concerns an amended version of the 2010 regime: *Motor Vehicle Amendment Act, 2012*, S.B.C. 2012, c. 26. It raises no constitutional challenge.

8 The amended ARP scheme is dependent upon, and is only triggered by, a roadside demand for a breath sample made under s. 254 of the *Criminal Code*. Under the ARP scheme, when a driver registers a "Warn" or "Fail" on the ASD, the peace officer must issue a Notice, provided he or she has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol. A driving prohibition must also be issued to individuals who fail or refuse to comply with a demand for a breath sample without reasonable excuse.

9 Drivers who blow a "Warn" — when the ASD registers a blood alcohol concentration of 50 milligrams of alcohol in 100 millilitres of blood ("50 mg%") or higher — receive a Notice prohibiting them from driving for 3, 7, or 30 days, depending on their driving history: *MVA*, s. 215.43(1). There is a corresponding fine of $200, $300, or $400, respectively: *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 43.09. Drivers who blow a "Fail" — when the ASD registers a blood alcohol concentration of 80 milligrams of alcohol in 100 millilitres of blood ("80 mg%") or higher — and drivers who refuse or fail to provide a breath sample receive a Notice prohibiting them from driving for 90 days and a $500 fine: *MVA*, s. 215.43(2.1); *Motor Vehicle Act Regulations*, s. 43.09. Drivers who receive either a 30- or 90-day driving prohibition are subject to a mandatory 30-day vehicle impoundment: *MVA*, ss. 215.46(2) and 253(7). At the peace officer's discretion, drivers who are served with a 3- or 7-day driving prohibition may also have their vehicle impounded for the duration of their driving prohibition: *MVA*, ss. 215.46(1) and 253(6). Drivers may also be subjected to a variety of other consequences, including enrollment in a remedial program and the imposition of an ignition interlock device: *MVA*, ss. 215.45 and 25.1(1). Drivers are required to bear the costs of these programs, and must pay a fee to have their licence reinstated and their vehicle released if it has been impounded.

10 An individual who has been issued a Notice may apply to the Superintendent of Motor Vehicles for review. However, the review is limited and the Superintendent may only revoke a Notice under certain grounds prescribed in s. 215.5 of the *MVA*. For an individual who has blown a "Warn" or "Fail", the factors the Superintendent is to consider are:

- Whether the person was a "driver" within the statutory meaning;
- Whether the person was advised of his or her right to a second ASD analysis and provided with a second analysis (if requested);
- Whether the second analysis, if requested, was performed with a different ASD machine;
- Whether the Notice was served on the basis of the lower of the two analysis results;
- Whether the ASD registered a "Warn" as a result of the driver's blood alcohol concentration being at least 50 mg% or the ASD registered a "Fail" as a result of the driver's blood alcohol concentration being at least 80 mg%;
- Whether the result of the analysis was reliable; and
- In the case of a 7-day prohibition, whether it was the driver's second prohibition, and in the case of a 30-day prohibition, whether it was the driver's third or subsequent prohibition.

B. Mr. Wilson's Driving Prohibition and Application for Review

11 On September 19, 2012, at 10:40 p.m., Mr. Wilson was stopped at a police road check near Coombs, British Columbia. The peace officer conducting the road check noticed an odour of alcohol on Mr. Wilson's breath. Upon being questioned, Mr. Wilson admitted to having consumed four beers hours earlier. Mr. Wilson then provided samples of his breath into two different ASDs — the first at 10:41 p.m. and the second at 10:46 p.m. Both devices registered a "Warn" reading. Consequently, the peace officer served Mr. Wilson with a Notice, prohibiting him from driving for a period of three days, under s. 215.41(3.1) of the *MVA*.

12 Mr. Wilson applied to the Superintendent of Motor Vehicles for a review, seeking to have the Notice revoked. He argued that the officer lacked reasonable grounds to believe that his ability to drive was affected by alcohol. According to Mr. Wilson, the ASD result alone could not provide the officer with the reasonable grounds required by s. 215.41(3.1) of the *MVA*: the officer was also required to point to other confirmatory evidence indicating that his ability to drive was affected by alcohol. The relevant provision of the *MVA* reads:

> **215.41** . . .
>
> (3.1) If, at any time or place on a highway or industrial road,
>
> (a) a peace officer makes a demand to a driver under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, and
>
> (b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,
>
> the peace officer, or another peace officer, must,
>
> (c) if the driver holds a valid licence or permit issued under this Act, or a document issued in another jurisdiction

> that allows the driver to operate a motor vehicle, take possession of the driver's licence, permit or document if the driver has it in his or her possession, and
>
> (d) subject to section 215.42, serve on the driver a notice of driving prohibition.

13 Adjudicator Hughes rejected Mr. Wilson's argument and held that the "Warn" result, standing alone, provided the officer with the grounds he needed to issue a Notice. He therefore confirmed Mr. Wilson's driving prohibition.

III. Judicial History

A. British Columbia Supreme Court (Dley J.), 2013 BCSC 1638 (B.C. S.C.)

14 Mr. Wilson applied to the British Columbia Supreme Court for judicial review. The reviewing judge noted that s. 215.41(3.1)(b) of the *MVA* requires a peace officer to *believe*, as a result of the analysis, that the driver's ability to drive is affected by alcohol (para. 20). In his view, if it was the legislature's intent that a Notice be issued solely on the basis of an ASD reading, it would not have included this requirement. He therefore held that on a plain reading of the legislation, additional confirmatory evidence was required before a Notice could be issued. It followed that the adjudicator's interpretation of s. 215.41(3.1) was unreasonable. As there was no confirmatory evidence indicating that Mr. Wilson's ability to drive was affected by alcohol, the reviewing judge set aside the Notice.

B. British Columbia Court of Appeal (Saunders, Levine and Harris JJ.A.), 2014 BCCA 202, 60 B.C.L.R. (5th) 371 (B.C. C.A.)

15 The Superintendent appealed to the British Columbia Court of Appeal. Writing for a unanimous court, Harris J.A. considered the text, context, and purpose of the *MVA*, and concluded that the adjudicator's interpretation was reasonable. In his view, it better fulfilled the legislative purpose than did Mr. Wilson's interpretation (para. 33). He therefore reinstated the Notice.

IV. Issue

16 The only issue on appeal is whether the adjudicator's interpretation of s. 215.41(3.1) of the *MVA* was reasonable. That is a matter of statutory interpretation. Mr. Wilson does not challenge the constitutionality of the provision.

V. Analysis

17 An administrative decision maker's interpretation of his or her home statute is presumptively owed deference: *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), at para. 21; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 34; *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 54. The parties acknowledge, correctly in my view, that reasonableness is the applicable standard of review.

18 When assessing the reasonableness of an administrative decision maker's interpretation, Driedger's modern rule of statutory interpretation provides helpful guidance:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

19 These principles must be kept in mind when analyzing the reasonableness of the adjudicator's interpretation. For convenience, I repeat the relevant portion of s. 215.41(3.1):

> (3.1) If, at any time or place on a highway or industrial road,
>
> > (a) a peace officer makes a demand to a driver under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, and
> >
> > (b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,

20 Mr. Wilson has the burden of demonstrating that the adjudicator's interpretation was unreasonable: *McLean*, at para. 41. While he advances various arguments in an attempt to meet this burden, in the end, his case rests on the premise that s. 215.41(3.1) of the *MVA* is ambiguous and that *Charter* values must be applied to resolve the ambiguity: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 28. And because the adjudicator did not take *Charter* values into account, his decision must, for that reason, be set aside as unreasonable.

21 Before considering the merits of Mr. Wilson's argument, I feel obliged to point out, in fairness to the adjudicator, that he was not asked to consider *Charter* values as an interpretive tool; nor, indeed, was the reviewing judge. The ambiguity claim was made for the first time in the Court of Appeal — and then, only in passing. This may explain why the Court of Appeal did not explicitly address it in its reasons, although I believe it did so implicitly.

22 It is settled law that a genuine ambiguity only exists when there are "two or more plausible readings, each equally in accordance with the intentions of the statute": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at para. 14; *Bell ExpressVu*, at paras. 29-30. In stating that the adjudicator's interpretation better fulfilled the legislative purpose than did Mr. Wilson's interpretation, this could be taken to mean that the Court of Appeal did not consider the provision to be ambiguous (para. 33).

23 Be that as it may, Mr. Wilson maintains that s. 215.41(3.1) is ambiguous and that *Charter* values must be applied to discern the legislature's true intent. In support of his position, he emphasizes that the *Criminal Code* roadside screening regime passes constitutional muster because it contains various safeguards designed to protect the ss. 8 and 10(*b*) *Charter* rights of drivers — safeguards that do not exist under the ARP regime. In particular, he points to the following features of the *Criminal Code* regime:

- A driver may challenge whether the police had the "reasonable suspicion" necessary to make a demand;
- The test must be conducted forthwith; and
- The ASD results cannot be used as evidence in a criminal trial to prove either impairment or the driver's blood alcohol level.

24 Mr. Wilson submits that because the ARP scheme is triggered by a roadside demand for a breath sample under the *Criminal Code*, it must be interpreted in a way that is consistent with the *Code*'s protections. To that end, he contends that the "reasonable grounds to believe" requirement must be given a robust interpretation — it cannot be satisfied by the ASD result alone. Other confirmatory evidence is required. Mr. Wilson insists that unless his interpretation is adopted, the ARP scheme will be out of sync with *Charter* values because it does not approximate the protections associated with ASD testing under the *Criminal Code*.

25 With respect, Mr. Wilson's argument must fail. It suffers from a fatal flaw — s. 215.41(3.1) is not ambiguous. As I

observed earlier, at para. 22, a genuine ambiguity exists only when there are two or more plausible readings, each equally in accordance with the intentions of the statute. Section 215.41(3.1) does not meet that test. Indeed, in my view, it does not even given rise to two plausible readings, let alone two such readings that are equally in accordance with the intentions of the statute. Rather, as I will explain, when read in light of its text, context, and legislative objective, it admits of only one reasonable interpretation — the one arrived at by the adjudicator. *Charter* values may not be used "to create ambiguity when none exists": *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612 (S.C.C.), at para. 1. Consequently, they have no role to play as an interpretive tool in this case: *Charlebois c. Saint John (Ville)*, 2005 SCC 74, [2005] 3 S.C.R. 563 (S.C.C.), at paras. 23-24; *Bell ExpressVu*, at para. 62. That being so, in the circumstances, I need not decide whether Mr. Wilson's argument would necessarily have succeeded had I found s. 215.41(3.1) to be ambiguous.

A. Text

26 The plain meaning of s. 215.41(3.1) supports the adjudicator's interpretation. It explicitly links the officer's belief to the result of the ASD analysis. The provision states that the peace officer must have reasonable grounds to believe, *as a result of the analysis*, that the driver's ability to drive is affected by alcohol. The wording could not be clearer. The ASD analysis is the yardstick against which to measure the reasonableness of the officer's belief.

27 Mr. Wilson submits that the officer's belief must be based not only on the ASD result, but also on confirmatory evidence showing that the driver's ability to drive is affected by alcohol. I would reject this interpretation. It is not supported by the text of the provision, and it requires the court to read in words that are simply not there. This Court has cautioned against judicial rewriting of legislation under the guise of interpreting it:

> ... the contextual approach allows the courts to depart from the common grammatical meaning of *words* where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually. ... The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function. [First emphasis in original; second emphasis added.]
>
> (*R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.), at p. 701; cited with approval in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 (S.C.C.), at para. 174. See also*R. v. Hinchey*, [1996] 3 S.C.R. 1128 (S.C.C.), at paras. 8-9 and 36; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 (S.C.C.), at para. 40.)

28 Mr. Wilson further submits that the adjudicator's interpretation gives no meaning to s. 215.41(3.1)(b). He points out that the provision uses mandatory language requiring peace officers to issue a Notice when there are reasonable grounds to believe an individual's ability to drive is affected by alcohol. He argues that if a "Warn" or a "Fail" result constitutes reasonable grounds on its own, para. (b) is superfluous: the legislature could have simply stated that the officer must issue a Notice on the basis of a "Warn" or "Fail" result. For that reason, he contends that the wording of the statute must require something more than merely the ASD result.

29 In my view, both the Court of Appeal and the Crown respondent provide a convincing answer to this argument. As they point out, there can be situations in which a driver blows a "Warn" or "Fail", but the officer has reason to doubt the accuracy of the result. Two examples come to mind:

- The officer has reason to doubt that the ASD device functioned properly.
- The officer has reason to doubt that the sample was taken properly (i.e., in accordance with the procedures for obtaining reliable readings from ASD devices).

The inclusion of the phrase "as a result of the analysis" precludes an officer from issuing a Notice in such situations. The officer must have an honest belief in the accuracy of the ASD result. Only then will he or she have reasonable grounds to

believe "as a result of the analysis" that the individual's ability to drive is affected by alcohol. This interpretation gives meaning to the words used in the statute; it does not read in wording that introduces a new dimension to the provision, as Mr. Wilson would have it.

B. Context

30 The context of the statutory scheme also indicates that the adjudicator's interpretation is reasonable. His interpretation is consistent with the grounds on which the Superintendent may review a peace officer's decision to issue a Notice: *MVA*, s. 215.5(1). The grounds for review are limited. As described in para. 10, they include whether the driver was advised of his or her right to a second analysis, whether the second analysis was performed on a different machine, whether the ASD accurately registered a "Warn" or "Fail", and whether the ASD result was reliable. In short, the grounds of review focus primarily on the manner in which the ASD test was administered and the reliability of the results. Nothing suggests that the Superintendent may revoke a Notice if a peace officer does not point to other confirmatory evidence. This indicates that the legislature did not intend to require other confirmatory evidence as a precondition to issuing a Notice, and in turn, supports the reasonableness of the adjudicator's interpretation.

31 Mr. Wilson makes one final argument about context. He asserts that because the ARP scheme is triggered by a *Criminal Code* demand for a breath sample, it is subsidiary legislation and therefore must incorporate the protections that are present under the *Code*. He insists that by departing from these protections, the adjudicator's interpretation ignores the link between the two statutes.

32 This argument can be disposed of summarily. The *MVA* and the *Code* are two independent statutes, with two distinct purposes. They were enacted by two different levels of government, neither of which is subordinate to the other: *Reference re Securities Act (Canada)*, 2011 SCC 66, [2011] 3 S.C.R. 837 (S.C.C.), at para. 71. Under the *MVA*, the demand for a breath sample triggers a regulatory regime that is wholly independent of the *Criminal Code*. The fact that the *MVA* relies on a *Criminal Code* demand for a breath sample does not render it subsidiary legislation.

33 In addition, it has long been recognized that regulatory legislation, such as the *MVA*, differs from criminal legislation in the way it balances individual liberties against the protection of the public. Under regulatory legislation, the public good often takes on greater weight. In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 (S.C.C.), at p. 219, this Court held that

> [r]egulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

34 These comments are particularly apt in the case of regulatory legislation involving roadside driving prohibitions: *R. v. Gordon*, 2002 BCCA 224, 100 B.C.L.R. (3d) 35 (B.C. C.A.), at paras. 26-27. Roadside driving prohibitions are a tool to promote public safety. As such, the legislation necessarily places greater weight on this goal. Unlike the criminal law regime, persons who register a "Warn" or "Fail" under the regulatory regime do not end up with a criminal record, nor are they exposed to the more onerous sanctions under the criminal law, including the risk of incarceration. In short, regulatory legislation does not share the same purpose as the criminal law, and it would be a mistake to interpret it as though it did. I therefore reject Mr. Wilson's contention that the ARP scheme must incorporate the same protections as those provided under the *Criminal Code* regime.

35 In sum, the adjudicator's interpretation of s. 215.41(3.1) is consistent with the statutory context, and Mr. Wilson's is not.

C. The Legislative Objective

36 The adjudicator's decision is also consistent with the legislative objective. Roadside driving prohibitions serve a pressing public safety purpose. As Cory J. said in *R. v. Bernshaw* (1994), [1995] 1 S.C.R. 254 (S.C.C.), at para. 16:

> Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.

37 Roadside driving prohibitions are an important tool for confronting and reducing the devastating effects of impaired driving. Courts have repeatedly held that driving prohibitions serve the twin purposes of increasing highway safety and deterring impaired driving: *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79, 307 C.C.C. (3d) 77 (B.C. C.A.), at para. 104; *Gordon*, at paras. 25-27; *Buhlers v. British Columbia (Superintendent of Motor Vehicles)*, 1999 BCCA 114, 170 D.L.R. (4th) 344 (B.C. C.A.), at paras. 28-29.

38 The ARP regime in question is no exception. When its predecessor was introduced in 2010, Minister de Jong confirmed that the objective of the scheme was to improve highway safety and to deter impaired driving:

> Bill 14 [the *Motor Vehicle Amendment Act, 2010*] fulfils a throne speech commitment to introduce significant changes to reduce impaired driving and dangerous driving and improve public safety on our highways.
>
> The amendments will address impaired driving by focusing on intervention and deterrence....
>
> Of late we are sadly seeing an escalation in incidents of impaired driving and all of the resulting tragedy that flows from that. The amendments ... will give police more tools at the roadside to remove impaired and dangerous drivers from the road as a means of reducing the body count on B.C.'s highways.
>
> [Emphasis added.]
>
> (British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, No. 1, 2nd Sess., 39th Parl. (April 27, 2010, at p. 4871)

39 When the amended regime came into force in 2012, Minister Bond emphasized that the legislature had not wavered from these goals:

> In September 2010, with the support of this House, we introduced new sanctions for impaired driving. We set a goal to reduce impaired driving fatalities by 35 percent by the end of 2013 ....
>
> After just one year we saw a 40 percent drop in alcohol-related deaths on British Columbia's highways, and 45 people are alive today because this House was bold in the attempt to change the way we tackle drinking and driving....
>
> ... Our goal is to protect this important law that has shown great success in deterring drinking and driving and in saving lives in our province.
>
> [Emphasis added.]
>
> (British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 36, No. 7, 4th Sess., 39th Parl. (May 3, 2012), at pp. 11492-93)

40 Allowing the police to rely on ASD test results is critical to the fulfilment of these objectives. ASD testing provides an immediate, efficient tool for assessing whether an individual's ability to drive is affected by alcohol. As the Court of Appeal noted, at para. 33, scientific evidence shows that at 50 mg% — the level needed to register a "Warn" — driving skills are

significantly impaired and the likelihood of being involved in a collision is markedly elevated. Evidence also shows that it is extremely difficult to identify drivers who have been drinking by observation alone: *Sivia* , at para. 100. These are the concerns that the ARP scheme is designed to address. It establishes a common standard for removing drivers from the road who pose an elevated risk to others. It also serves to deter drunk driving.

41 In sum, the adjudicator's interpretation is consistent with the legislative objectives of the ARP scheme, and Mr. Wilson's is not.

D. Conclusion on the Interpretation of Section 215.41(3.1)

42 The adjudicator's interpretation is consistent with the text, context, and legislative objectives of the ARP scheme. Mr. Wilson's interpretation is not. The provision is unambiguous. The adjudicator's interpretation is the only plausible one.

VI. Disposition

43 For these reasons, I would dismiss the appeal.

Appeal dismissed.
Pourvoi rejeté.

TAB 2

Greater Essex County District School Board
v. I.B.E.W. Local 773 et al., 2007 Carswell Ont 256 (Ont Div Ct)

2007 CarswellOnt 256
Ontario Superior Court of Justice (Divisional Court)

Greater Essex County District School Board v. I.B.E.W., Local 773

2007 CarswellOnt 256, [2007] O.L.R.B. Rep. 255, [2007] O.J. No. 185, 154 A.C.W.S. (3d) 1099, 2007 C.L.L.C. 220-011, 221 O.A.C. 22, 83 O.R. (3d) 601

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD (Applicant) and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6, THE INTERNATIONAL UNION OF PAINTERS AND ALLED TRADES, LOCAL 1494, LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 625 and the ONTARIO LABOUR RELATIONS (Respondents)

Carnwath J., Sachs J., and Spence J.

Heard: August 15, 2006
Judgment: January 22, 2007
Docket: 126/06

Counsel: Leonard P. Kavanaugh, Q.C. for Applicant
Stephen B.D. Wahl for Respondent Unions
Leonard Marvy for Respondent, Ontario Labour Relations Board

Subject: Labour; Public

Related Abridgment Classifications

Administrative law

IV Standard of review
  IV.3 Reasonableness
    IV.3.b Patently unreasonable

Labour and employment law

I Labour law
  I.1 Labour relations boards
    I.1.e Judicial review
      I.1.e.ii Availability of review
        I.1.e.ii.B Standard of review

Labour and employment law

I Labour law

I.5 Bargaining rights
I.5.e Successor rights
I.5.e.ii Successor employer
I.5.e.ii.C Common control or direction

Labour and employment law

I Labour law
I.5 Bargaining rights
I.5.e Successor rights
I.5.e.iii Jurisdiction of board

Headnote

Labour and employment law --- Labour law — Labour relations boards — Judicial review — Availability of review — Standard of review

Two school boards, W Board and E Board, merged to form applicant, district school board — Respondent unions applied to have applicant declared successor employer to or, alternately, single employer with W Board — Labour Relations Board (Board) dismissed successor employer application but granted application for single employer declaration — Applicant applied for judicial review — Standard of review was patent unreasonableness — All four contextual factors pointed to according high degree of deference to Board's decision — Existence of very strong privative clause attracted significant deference — Factor of expertise weighed in favour of deference — Significant discretion given to Board by legislature in s. 1(4) of Labour Relations Act reinforced need for deference — Questions at issue were questions of law concerning interplay between two labour relations statutes which Labour Relations Boards, unlike courts, dealt with frequently — Both questions concerned matters that were directly within Board's mandate.

Labour and employment law --- Labour law — Bargaining rights — Successor rights — Jurisdiction of board

Two school boards, W Board and E Board, merged to form applicant, district school board — Respondent unions applied to have applicant declared successor employer to or, alternately, single employer with W Board under Labour Relations Act ("Act") — Public Sector Labour Relations Transition Act ("P.S.L.R.T.A.") specifies that successor employer provision of Labour Relations Act, s. 69, does not apply with respect to assumption by district school board of jurisdiction of two or more old boards — Section 39 of P.S.L.R.T.A. provides that, in event of conflict between P.S.L.R.T.A. or its Regulations and any other Act, the P.S.L.R.T.A. or its Regulation prevails — Labour Relations Board ("Board") dismissed successor employer application but granted application for single employer declaration — Applicant applied for judicial review, alleging that Board lacked jurisdiction to exercise discretion to make single employer declaration — Application dismissed — Board's decision that Regulations and s. 39 of P.S.L.R.T.A did not preclude Board from exercising its discretion under s. 1(4) of Act was not patently unreasonable — Board made distinction between s. 69 and s. 1(4) of Act — Under Act, Board has jurisdiction to rule on bargaining rights pursuant to s. 1(4) if there are two or more entities that carry on related activities under common control or direction — Unlike s. 69, s. 1(4) is not referred to in P.S.L.R.T.A.

Labour and employment law --- Labour law — Bargaining rights — Successor rights — Successor employer — Common control or direction

Two school boards, W Board and E Board, merged to form applicant, district school board — Respondent unions applied to have applicant declared successor employer to or, alternately, single employer with W Board — Labour Relations Board ("Board") dismissed successor employer application but granted application for single employer declaration — Applicant applied for judicial review — Application dismissed — Board found that all statutory preconditions to exercise of Board's discretion to make single employer declaration had been met — Board's conclusion gave very expansive meaning to control or direction but, given evidence, it was not patently unreasonable — Review of Board's reasoning did not demonstrate that

Board ignored its own jurisprudence, or that its conclusion was patently unreasonable.

Two school boards, W Board and E Board, merged into a single district school board, the applicant, as of January 1, 1998. The respondent unions were certified as bargaining agents for construction trades working in W Board. Pursuant to s. 163(2) of the Labour Relations Act (the Act), the relevant provincial collective agreement regarding those trades became binding on W Board.

In 1997, the provincial Legislature passed the Public Sector Labour Relations Transition Act (P.S.L.R.T.A.), which specifies in s. 13 that the successor employer provision of the Act, s. 69, does not apply with respect to the assumption by a district school board of the jurisdiction of two or more old boards. Section 39(1) of the P.S.L.R.T.A. stipulates that, in the event of a conflict or inconsistency between the P.S.L.R.T.A. and its Regulations and any other Act, the P.S.L.R.T.A. or its Regulation prevails.

In 2004, the respondents applied to have the applicant declared a single employer with the former W Board under s. 1(4) of the Act or alternatively, sought a declaration that the applicant was a successor to the former W Board. The Labour Relations Board dismissed the respondents' application to have the applicant declared the successor to the W Board under the Act on the basis of s. 13 of the Act. However, the Board granted the respondents' application under s. 1(4) and declared that the W Board and the applicant were a single employer for the purposes of the Act.

The Board determined that it had jurisdiction to exercise its discretion under s. 1(4) of the Act and refuse to limit the geographic scope of the respondents' provincial agreements. As a result, the applicant was bound by the provincial collective agreements. Therefore, the geographic scope of those agreements was not limited to the geographic jurisdiction of the former W Board, but applied province wide. The applicant applied for judicial review.

Held: The application was dismissed.

Per Sachs J. (Spence J. concurring): All four contextual factors of the pragmatic and functional approach pointed to according a high degree of deference to the Board's decisions. Therefore, the appropriate standard of review was that of patent unreasonableness. The Board's decisions were not patently unreasonable.

The Board's decision that the Regulations and s. 39 of the P.S.L.R.T.A did not preclude the Board from exercising its discretion under s. 1(4) of the Act was not patently unreasonable. The Board made a distinction between s. 69 and s. 1(4) of the Act. Section 13 of the P.S.L.R.T.A. specifically states that s. 69 of the Act does not apply when a district school board assumes the jurisdiction of two or more boards. Under the P.S.L.R.T.A. the Legislature set up a separate scheme for determining successor rights, and in doing so, made it clear that the scheme set out in s. 69 did not apply. However, under the Act, the Board also has jurisdiction to rule on bargaining rights pursuant to s. 1(4) if there are two or more entities that carry on related activities under common control or direction. Unlike s. 69, s. 1(4) is not referred to in the P.S.L.R.T.A. While ss. 69 and 1(4) might often apply to same fact situations, the respective scope of the provisions were not identical. The Board's decision that the Legislature had not removed the powers of the Board under s. 1(4) by virtue of the P.S.L.R.T.A. and Regulation could not be said to defeat the purposes of the P.S.L.R.T.A. The applicant failed to demonstrate that the necessary threshold of patent unreasonableness had been met. The Board's approach to the problem and their restrictive interpretation of the effect of the regulations might not be the correct one, but it was not clearly irrational or almost absurd.

The Board found that all of the statutory preconditions to the exercise of the Board's discretion to make a single employer declaration had been met. The Board's conclusion gave a very expansive meaning to control or direction but, given the

evidence, it was not patently unreasonable. A review of the Board's reasoning did not demonstrate that the Board ignored its own jurisprudence, or that its conclusion was patently unreasonable.

Per Carnwath J. (dissenting in part): The application should be allowed. It was agreed that the standard of review was patent unreasonableness; however, the Board's decision was patently unreasonable. There were several points which the Board chose to ignore or failed to adequately explain away. Their cumulative effect compelled the conclusion that the decision was patently unreasonable.

The effect of the Board's decision was to deny, not facilitate, collective bargaining in the geographical area of the former E Board. Their right to bargain collectively was foreclosed by the Board's decision. The Board's decision ignored the obvious intention of the P.S.L.R.T.A. and Regulations. The Board's interpretation of s. 1(4) of the Act conflicted and was inconsistent with s. 39(1) of the P.S.L.R.T.A. The construction placed on s. 39 by the Board was so narrow as to render it meaningless. The preconditions of s. 1(4) could not be met. The decision to apply s. 1(4) was wrong in law.

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Construction Work, O. Reg. 457/97

Generally — referred to

APPLICATION by school board for judicial review of decision of Labour Relations Board regarding single employer declaration.

***Sachs J.*:**

Overview

1 This is an application to review and set aside several decisions of the Labour Relations Board (the "Board") that were made as a result of applications brought by the Respondent Unions under s.1(4) of the *Labour Relations Act* (the "Act")[1] to declare that the Applicant (Greater Essex County District School Board) and the former Board of Education for the City of Windsor (the "Windsor Board") should be treated as a "single employer" for the purposes of the Act. The effect of the decision is that the provincial collective agreement of the Windsor Board binds the Applicant outside the geographic jurisdiction of the City of Windsor.

2 The first issue raised on the application for judicial review is the standard of review applicable to a decision of the Board that involves the interpretation of a statute or regulation. The Applicant employer submits that the appropriate standard is correctness. The Respondent Unions say that the standard is patent unreasonableness. However, the Applicant also argues that, applying either standard, the decisions under review cannot stand.

3 For the reasons that follow, I find that the appropriate standard of review this Court should apply to the Board's decision is patent unreasonableness. Applying that standard, I would dismiss the application.

Factual Background

The Situation Prior to January 1, 1998

4 Before January 1, 1998, there were two public school boards in the Greater Windsor/Essex County area: the Windsor Board (which looked after the City of Windsor) and the Essex County Board (which looked after the County of Essex, except for the City of Windsor). Both Boards were created pursuant to the authority of the *Education Act*[2].

5 Each of the Respondent Unions was certified under the construction industry provisions of the Act to be the bargaining agents, in their respective trades, of the employees of the Windsor Board who performed construction work in those trades. Additionally, pursuant to Section 163(2) of the Act, the relevant provincial collective agreement became binding upon the Windsor Board. Under the Act, a provincial collective agreement is a collective agreement whose geographic jurisdiction is the Province of Ontario.

6 Prior to January 1, 1998, none of the Respondent Unions held bargaining rights with respect to the employees of the Essex Board.

Changes Effected as of January 1, 1998

7 In 1997, the Ontario Legislature enacted the *Fewer School Boards Act*[3] and the *Education Quality Improvement Act*[4]. As a consequence of these statutes, as of January 1, 1998, the Applicant (The Greater Essex County District School Board) was created and both the Windsor Board and the Essex County Board were "*merged with and continued as*" the Applicant.

8 During the same year, the Ontario Legislature also passed the *Public Sector Labour Relations Transition Act* (P.S.L.R.T.A.)[5]. The P.S.L.R.T.A. is legislation that was enacted, among other things,

> *to facilitate the effective and rationalized bargaining unit structures in restructured broader public sector organizations"* and *"to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees following restructuring in the broader public sector and in other specified circumstances.*[6]

9 Pursuant to Section 7 of the P.S.L.R.T.A., it applied "*upon the assumption by a district school board of the jurisdiction of two or more old boards*". Thus, the P.S.L.R.T.A. applied to the Applicant and its relationship with the Respondent Unions.

10 The following are the provisions of the P.S.L.R.T.A. that are relevant to this application. Section 7(2) of the P.S.L.R.T.A. specifies that:

for the purposes of this Act, the old boards are the predecessor employers and the district school board is the successor employer.

11 Section 13 of the P.S.L.R.T.A. states that Section 69 (the successor employer provision of the Act) "*does not apply with respect to an occurrence described in Sections 3 to 10*". Pursuant to Section 7, one of these occurrences is "*the assumption by a district school board of the jurisdiction of two or more old boards*".

12 With respect to bargaining units and their bargaining rights, Section 14 of the P.S.L.R.T.A. provides as follows:

Bargaining Units

14(1) On the changeover date[7] each bargaining agent that had bargaining rights in respect of a bargaining unit of a predecessor employer immediately before the changeover date has bargaining rights in respect of a like bargaining unit of the successor employer, but the description of the bargaining unit shall be such as to include only,

(a) employees who immediately before the changeover date were employees of the predecessor employer in the bargaining unit for which the bargaining agent has bargaining rights, and

(b) employees who are hired to replace employees described in clause (a).

With respect to the application of collective agreements and the status of successor employers in relation to those agreements, the P.S.L.R.T.A. contains the following provisions:

Collective Agreement

15(1) *The collective agreement, if any, that applies with respect to employees of a predecessor employer immediately before the changeover date continues to apply with respect to those employees who are employed by the successor employer on or after the changeover date and with respect to employees hired by the successor employer to replace such employees.*

. . . . .

Status of successor employer

(3) *The successor employer is bound by the collective agreement if he, she or it had been a party to it. The successor employer shall be deemed to be the employer under the collective agreement.*

13 The P.S.L.R.T.A. delegates authority to the Lieutenant Governor in Council to make certain regulations. Specifically, respecting the construction industry, the P.S.L.R.T.A. provides as follows:

Regulations

40(1) The Lieutenant Governor in Council may make regulations,

. . . . .

(b) governing how this Act applies with respect to employees of a predecessor employer who perform construction work and who, immediately before the changeover date, are in a bargaining unit with respect to which a construction union has bargaining rights;

. . . . .

(3) A regulation under clause (b) may,

(a) vary the application of this Act;

(b) prescribe provisions to operate in place of any part of this Act;

(c) prescribe provisions to operate in addition to this Act.

14 Pursuant to this authority the Lieutenant Governor in Council passed Ontario Regulation 457/97 (the Regulation). The relevant portion of the Regulation reads as follows:

1. (1) If a predecessor employer was a municipality or a school board and a construction union had bargaining rights with respect to a bargaining unit of that employer that contained or would have contained employees who performed construction work, the following apply:

1. The description of the bargaining unit of the successor employer referred to in subsection 14(1) of the Act shall not include, or be changed under section 22 of the Act to include, employees who perform construction work outside the geographic jurisdiction of the predecessor employer unless the successor employer agrees.

2. Despite Sections 15 and 24 of the Act, a collective agreement that bound the predecessor employer immediately before the changeover date does not bind the successor employer with respect to construction work performed outside the geographic jurisdiction of the predecessor employer unless the successor employer agrees.

15 Thus, pursuant to paragraph 2 of Section 1(1) of the Regulation, the Applicant would be bound by the collective agreement of the Windsor Board only with respect to those employees within the jurisdiction of the City of Windsor but not outside it.

16 The P.S.L.R.T.A. also contains a provision specifying what is to happen in the event of a conflict between it and any other statute. That provision reads as follows:

39(1*) In the event of a conflict or inconsistency between this Act or a regulation made under this Act and any other Act, this Act or the regulation prevails.*

The Situation After the Passage of the P.S.L.R.T.A.

17 After the passage of the P.S.L.R.T.A., the Applicant negotiated a new collective agreement with the five Respondent Unions. It was a single collective agreement between the Applicant and a council composed of representatives from the five Respondent Unions. Pursuant to that agreement, the Applicant agreed that members of the Respondents Unions would do all labour work on the current and new properties within the geographic jurisdiction of the former Windsor Board, except for certain specified preventative maintenance work. The Applicant also agreed that any work that was contracted out in the geographic jurisdiction of the former Windsor Board required that the bidder be bound to the relevant collective agreement, depending on the nature of the work.

18 After January 1, 1998, the Applicant employed members of some, but not all, of the Respondent Unions to perform work for it, but only in schools within the geographic jurisdiction of the former Windsor Board. It did not hire any employees to perform work in the geographic jurisdiction of the former Essex County Board.

19 The Applicant also contracted out work. If the work that was contracted out was performed in schools located in the geographic jurisdiction of the former Windsor Board, there was a requirement that the bidder be bound to the relevant collective agreement. The contracts that were contracted out for schools located in the geographic jurisdiction of the former Essex County Board did not have that requirement. Work went to the lowest capable bidder. The Board had evidence as to what work was contracted out in the geographic jurisdiction of the former Essex County Board. They had no evidence before them as to whether or not the successful bidder(s) was or were bound to any collective agreement(s).[8]

20 In late 2004, the Applicant contracted out work at two schools located in the geographic jurisdiction of the former Essex County Board that involved work that two of the Respondent Unions alleged was construction work in the construction industry. As a consequence, the two Unions filed grievances that were referred to the Board in December of 2004.

The Unions' Applications Before the Board

21 In August and December of 2004, several construction trade unions initiated applications before the Board. In each application, the Union sought to have the Applicant declared to be one employer with the former Windsor Board pursuant to Section 1(4) of the Act or, alternatively, they sought a declaration that the Applicant was a successor to the former Windsor Board for the purposes of Section 69 of the Act.

22 Under Section 1(4) of the Act, the Board may declare that two or more entities should be treated as a single employer where, "*in its opinion*", they carry on related or associated business activities — whether or not simultaneously — under common control or direction. Under Section 69 of the Act, successor rights are triggered when a "*business*" or even part of a business is sold or transferred in any way.

23 In the proceedings before the Board, the Applicant raised a preliminary objection to the Respondent Unions' applications. They argued that these applications were precluded by the P.S.L.R.T.A. and the Regulation and therefore the Board should not hear either application. On January 18, 2005, the Board decided that the Respondent Unions' applications should be referred for a full hearing.

24 On January 4, 2006, after a full hearing and argument, the Board issued a decision whereby it dismissed the Respondent Unions' application to have the Applicant declared the successor to the Windsor Board under Section 69 of the Act. It did so having regard to Section 13 of the P.S.L.R.T.A., which provides that Section 69 of the Act does not apply to the restructuring of school boards. However, the Board granted the Respondent Unions' application under Section 1(4) of the Act and declared that the Windsor Board and the Applicant were one employer for the purposes of the Act. Further, they made the declaration effective as of January 1, 1998.

25 As a result of this decision the Applicant was bound by the provincial collective agreements as of January 1, 1998. Therefore, the geographic scope of those agreements was not limited to the geographic jurisdiction of the former Windsor Board, but applied province wide.

26 The Applicant then applied to the Board asking it to reconsider its decision. On January 26, 2006, the Board declined to reconsider its decision of January 4, 2006.

27 While the application for judicial review is with respect to all three of the Board's decisions, it is the decision of January 4, 2006 that resulted in the granting of the relief that affected the relationship between the Applicant and the Respondent Unions.

The Applicable Standard of Review

The Test — Overview

28 The standard of review to be applied to an administrative tribunal's decision — correctness, unreasonableness, or patent unreasonableness — is determined using a "*pragmatic and functional*" approach that considers a variety of factors. These factors include the presence or absence of a privative clause or statutory right of appeal, the expertise of the tribunal relative to that of a reviewing court on the issue in question, the purpose of the legislation and the provision in particular, and

the nature of the question — law, fact, mixed law and fact. It is not possible to reduce the weight to be given to each of the various factors comprising a "*pragmatic and functional analysis*" to a single legal rule.[9]

The Presence or Absence of Privative Clause or Statutory Right of Appeal

29 In making its decision, the Board was interpreting the provisions of two labour relation statutes, the P.S.L.R.T.A. and the Act. Pursuant to Section 37(1) of the P.S.L.R.T.A. the privative clauses set out at Sections 114 and 116 of the Act "*apply, with necessary modification, with respect to anything the Board does under this Act*".

30 Sections 114 and 116 of the Act provide as follows:

> 114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.
>
> (2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.
>
> (3) Where the Board has authorized the chair or a vice-chair to make an inquiry under clause 111 (2) (j), his or her findings and conclusions on facts are final and conclusive for all purposes, but nevertheless he or she may, if he or she considers it advisable to do so, reconsider his or her findings and conclusions on facts and vary or revoke any such finding or conclusion.
>
> . . . . .
>
> 116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

31 Thus, pursuant to Section 114 of the Act, the Board has exclusive jurisdiction to determine all questions of fact or law that come before it and its decisions are "*final and conclusive for all purposes*". In *Dr. Q.*, McLachlin C.J.C. stated:

> The stronger the privative clause, the more deference is generally due.[10]

Section 116 is comparable to the privative clause considered by the Ontario Court of Appeal in *O.P.S.E.U. v. Seneca College of Applied Arts & Technology*, a clause that the Court found to be a "*very strong privative clause*" that "*attracts significant deference*"[11]. Thus, a consideration of the first factor weighs in favour of deference.

Expertise

32 This factor requires the reviewing court to consider the expertise of the administrative body under review in comparison to that of the court doing the reviewing. The courts have repeatedly affirmed the expertise of labour tribunals and, in particular, labour relations boards, on questions of interpretation of labour relations legislation. Because tribunals such as the Board work with and make determinations under the legislation on a regular basis, they have been found to have developed special expertise that is adapted to the specific context of labour relations and that is not shared by the courts.[12]

33 The Supreme Court of Canada has described labour relations boards as an administrative body of "*high calibre*". Their competence has been characterized as follows:

> The Labour Board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to

> exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada and its labour relations sense from accumulated experience in that area[13]

34 The Ontario Court of Appeal recently confirmed the deference to be accorded to administrative tribunals when they are interpreting statutes that are linked to their mandate and that they encounter frequently. As articulated by Laskin J.A. in *O.P.S.E.U. v. Seneca College*:

> *If the statute is linked to a board of arbitration's mandate, and frequently encountered by it, then its interpretation and application of the statute warrants deference from a reviewing court.*[14]

Again, a consideration of the second factor weighs in favour of deference.

The Purpose of the Legislation and the Provisions in Question

35 The purposes of the Act as a whole are expressed in Section 2 of the Act. They include facilitating collective bargaining, recognizing the importance of workplace parties adapting to change, promoting flexibility, productivity and employee involvement in the workplace, encouraging cooperative participation of employers and trade unions in resolving workplace issues and promoting expeditious resolution of workplace disputes.

36 The purpose of the P.S.L.R.T.A. includes facilitating the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations, facilitating collective bargaining between employers and trade unions following restructuring and fostering prompt resolution of workplace disputes arising from restructuring.

37 Thus, one of the purposes of both the Act and the P.S.L.R.T.A. is to promote the prompt resolution of disputes between employers and unions, including the prompt resolution of disputes arising from restructuring. To this end, the Legislature placed the resolution of those disputes in the hands of a specialized tribunal, the Board. The integrity of that process can only be maintained if the courts give significant deference to the decisions of the Board.

38 The purpose of Section 1(4) of the Act is to protect the bargaining rights of a trade union from being undermined by a change in the structure of an employer. The section, by its terms, provides the Board with a wide range of discretion at three points. First, the Board must decide whether "*in the opinion of the Board*" associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction. Second, if the Board makes such a finding, the Board is given discretion as to whether or not to treat the entities concerned as one employer for the purposes of the Act. Third, the Board is given discretion to grant whatever relief it "*may deem appropriate*".

39 The significant discretion given to the Board by the Legislature in Section 1(4) reinforces the need for deference. It signals the Legislature's decision that it is the Board who has the expertise to do the balancing required in making a decision under Section 1(4).

The Nature of the Question

40 In coming to its determination, the Board was required to address two preliminary questions:

1. Whether the provisions of the P.S.L.R.T.A. precluded it from exercising its authority under Section 69 of the Act.

2. Whether the provisions of the P.S.L.R.T.A. precluded it from exercising its authority under Section 1(4) of the Act.

These questions were both questions of law.

41 Once the Board answered the second question in the affirmative, it was then required to make a determination involving questions of mixed fact and law as to whether, and how, to exercise its discretion under Section 1(4) of the Act.

42 The Applicant argued that when it came to the questions of law alone, the expertise of the Court was as great as that of the Board, particularly since the questions involved the interpretation of a statute other than the Act.

43 The questions of law concern the interplay between two labour relations statutes. Both are statutes that the Board, unlike the courts, deal with frequently. Both concern matters that are directly within the Board's mandate and expertise. In these situations, the courts have held that considerable deference should be paid to the tribunal's decision.

44 This principle was recently canvassed and reinforced by the Ontario Court of Appeal in *London Machinery Inc. v. CAW-Canada, Local 27*,[15]. In that case the Court was reviewing the decision of an arbitrator in which he was required to interpret both the collective agreement between the parties and certain provisions of the *Employment Standards Act* and its regulation. In finding that patent unreasonableness was the proper standard of review Cronk J.A. stated:

> [37] The arbitrator's decision in this case concerned the interpretation of the collective agreement between the parties and various provisions of the Act and the Regulation. The legislation in issue lies at the core of the work of labour arbitrators in the employment law sector. It is both centrally related to their expertise and intimately connected to their mandate. Moreover, the interpretive issues in play here have important implications in the labour relations and employment law domains. They arise in the context of a powerful, although not full, privative clause under the L.R.A. and employment standards legislation that itself invites strong deference to the arbitral process. These factors militate in favour of a high degree of deference to the arbitrator's award.

These comments are equally applicable to the case at bar.

Conclusion re Standard of Review

45 All four contextual factors point to this court according a high degree of deference to the Board's decisions. Therefore, the appropriate standard of review to apply is that of patent unreasonableness.

What Constitutes Patent Unreasonableness?

46 What constitutes a patently unreasonable decision was considered by the Supreme Court of Canada in *Canada (Attorney General) v. P.S.A.C.*[16] as follows:

> It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "not having the faculty of reason, irrational, not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

47 In *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*[17], La Forest J. (Dickson C.J.C. concurring) laid out the strict test of review at p. 453:

> Where, as here, an administrative tribunal is protected by a privative clause, this court has indicated that it will only review the decision of the Board if that board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function...
>
> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently

unreasonable, be found by the court to be clearly irrational.

48 In the Supreme Court of Canada decision in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*,[18] the Court said that:

...A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd....

49 In the decision in *London Machinery*,[19] Cronk JA. gave, as one of three reasons for the finding of patent unreasonableness, the following:

[77] Third, the arbitrator's analysis offends well-established principles of statutory interpretation. Those principles require that, to the extent possible, statutory provisions be interpreted harmoniously so as to avoid absurd results, including those that would defeat the purpose of the statutory scheme in issue. Moreover, an interpretation of a statutory scheme that renders part of a statute pointless, redundant or incapable of application is to be avoided. See Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths Canada Ltd., 2002) at pp. 243-57 and Rizzo at para. 27.

50 Laskin, JA. concurring, said as follows[20]:

[121] Thus, I conclude that the arbitrator's reasoning and the dismissal of McCleary's grievance are patently unreasonable, because they defeat the purpose of the election in s. 67 and render that election meaningless. Put differently, the arbitrator's decision is patently unreasonable because at its core, it fails to recognize that termination under the [Employment Standards Act] and termination under the collective agreement are quite distinct. An employee may be entitled to statutory termination pay at 35 weeks while still enjoying rights, including recall rights, under the collective agreement. Section 67 legislates their co-existence. The arbitrator's decision obliterates it.

51 In the *Seneca College* decision,[21] Laskin JA. said as follows:

[70] The Supreme Court of Canada has used a variety of adjectives and adverbs to describe a patently unreasonable decision. Many of these are summarized in *Toronto (City) Board of Education v. O.S.S.T.F.*, District 15, supra, at paras. 41-46. See also *Canada (Attorney General) v. Public Service* alliance of Canada, [1993] 1 S.C.R. 941, [1993] S.C.J. No. 35, at pp. 963-64 S.C.R. The phrases "clearly irrational" or "evidently not in accordance with reason" best describe this highly deferential standard of review. A reviewing court should not interfere with a tribunal's decision unless that decision is "clearly irrational".

Were the Board's Decisions Patently Unreasonable?

The Position of the Applicant

52 The Applicant's submission is that the Board's decisions were patently unreasonable for the following reasons:

1. The Board's decision that, in spite of the P.S.L.R.T.A., it did have authority to exercise its discretion under Section 1(4) of the Act, and refuse to limit the geographic scope of the Unions' provincial agreements to the City of Windsor, was patently unreasonable in that it ran contrary to what the Applicant asserts is the clear and sole purpose of the Regulation. As put by the Applicant in their factum:

> It is beyond dispute that the Legislature which passed the P.S.L.R.T.A. and the Regulation (the same Ministry as the Ministry which is responsible for the Act, namely the Ministry of Labour) was aware of the province-wide scope of the bargaining rights held by the Respondent Unions with respect to the predecessor employer (the "Windsor Board"). It is submitted that it is precisely that situation and the bargaining rights which the Regulation is designed to limit geographically. Otherwise the Regulation is absolutely meaningless.

Furthermore, the Applicant argues that if there is a conflict between Section 1(4) of the Act and the Regulation, Section 39 of the P.S.L.R.T.A. is clear — it is the Regulation that governs.

2. The Applicant submits that the Board's decision to exercise its discretion under Section 1(4) of the Act is patently unreasonable because:

a) a school board is not a "*business*" or other entity within the meaning of Section 1(4);

b) there were not "*two or more entities*" as required by Section 1(4) since, upon the creation of the Applicant, the Windsor Board ceased to exist;

c) the Applicant and the Windsor Board were not under common control and direction since when the Windsor Board did exist it was governed by an elected Board of Trustees that was different from the elected Board of Trustees that governs the Applicant; and

d) the Board's decision to grant relief under Section 1(4) ran contrary to its own established jurisprudence regarding the exercise of its discretion under Section 1(4) of the Act. According to the Applicant,

> The OLRB has consistently declined to grant relief (having exercised its jurisdiction on this basis) in the absence of a significant labour relations purpose for doing so. (eg. erosion of bargaining rights) and, further, has consistently refused to grant relief where a declaration would expand bargaining rights.

3. Finally, the Applicant submits that the Board's decision to declare the Applicant and the Windsor Board to be one employer for all purposes of the Act effective as of January 1, 1998 is patently unreasonable given that the various applications that gave rise to that declaration were not filed with the Board until August and December of 2004.

The Board's Decisions

1. The Decision that the Regulation and Section 39 of the P.S.L.R.T.A. did not Preclude the Board from Exercising its Discretion under Section 1(4) of the Act

53 The Board's reasoning on this issue is contained in both its decision of January 18, 2005 and its decision of January 4, 2006. That reasoning can be summarized as follows.

54 First, the Board dealt with the Unions' submission that to the extent the Regulation directly affected the Act, it was beyond the competence of the Lieutenant Governor in Council. As summarized by the Board, the essence of this submission was "*The will of the Legislature is expressed in statutes and is supreme. It cannot be undermined or contradicted by executive regulation*".[22] The Board accepted that "*as an abstract principle, this seems fairly straightforward*".[23] However, it did not go on to deal with this argument as it found that the Regulation did not purport to directly affect anything in the Act. The Board found that the provisions of the Regulation could be reconciled with the continuation of the Board's ability to exercise its jurisdiction under Section 1(4) of the Act.

55 In this regard, the Board made a distinction between Section 69 and Section 1(4) of the Act. In Section 13 of the

P.S.L.R.T.A. the Legislature specifically states that Section 69 of the Act does not apply when a district school board assumes the jurisdiction of two or more old boards.

56 As already indicated, Section 69 is the provision of the Act that deals with "*successor employer*" applications and what happens to the bargaining rights of a union when the employer with whom they have a collective agreement is sold or disposed of in any way. Section 69 reads as follows:

> 69. (1) In this section,
>
> "business" includes a part or parts thereof; ("entereprise")
>
> "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")
>
> (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.
>
> (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 16 or 59, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 16 or 59, as the case requires.
>
> (4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,
>
> > (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
> >
> > (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold, the Board may, upon the application of any person, trade union or council of trade unions concerned,
> >
> > (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
> >
> > (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.
>
> (5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within 60 days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within 60 days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

(6) Despite subsections (2) and (3), where a business was sold to person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

(a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);

(b) determine whether the employees concerned constitute one or more appropriate bargaining units;

(c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in the unit or units; and

(d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

(7) Where a trade union or council of trade unions is declared to be the bargaining agent under subsection (6) and it is not already bound by a collective agreement with the successor employer with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and the notice has the same effect as a notice under section 14.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

(9) Where an application is made under this section, an employer is not required, despite the fact that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

(10) For the purposes of section 7, 63, 65, 67 and 132, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 10.

(11) Where one or more municipalities as defined in the Municipal Affairs Act are erected into another municipality, or two or more such municipalities are amalgamated, united or otherwise joined together, or all or part of one such municipality is annexed, attached or added to another such municipality, the employees of the municipalities concerned shall be deemed to have been intermingled, and,

(a) the Board may exercise the like powers as it may exercise under subsections (6) and (8) with respect to the sale of a business under this section;

(b) the new or enlarged municipality has the like rights and obligations as a person to whom a business is sold under this section and who intermingles the employees of two of the person’s businesses; and

(c) any trade union or council of trade unions concerned has the like rights and obligations as it would have in the case of the intermingling of employees in two or more businesses under this section.

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the

> respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

57 Under the P.S.L.R.T.A. the Legislature set up a separate scheme for determining successor rights and, in doing so, made it clear that the scheme set out in Section 69 of the Act did not apply. As put by the Board at para. 16 of its decision of January 18, 2005:

> Thus, for the purposes of the P.S.L.R.T.A., the Greater Essex Board is a "successor" to the Windsor Board. Pursuant to Section 14, the Union continues to represent the "like bargaining unit", and the provincial collective agreement continues to apply. To the extent that the Unions rely on the P.S.L.R.T.A. as the source of their bargaining relationship with the Greater Essex Board, that relationship is circumscribed by the limitations contained in the P.S.L.R.T.A. and regulations thereunder, in this case geographic.

58 However, under the Act, the Board also has jurisdiction to rule on bargaining rights pursuant to Section 1(4) of the Act if there are two or more entities that carry on related activities whether or not simultaneously, under common control or direction. Section 1(4) provides:

> 1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

59 Unlike Section 69, Section 1(4) of the Act is not referred to in the P.S.L.R.T.A.. As pointed out by the Board, while Sections 69 and 1(4) of the Act may often apply to the same fact situations, the respective scope of the provisions is not identical. In making this point, the Board cites its decision in *B.F.C.S.D., Local 304 v. Harley Transport Ltd.*,[24] where it said as follows:

> *13. ... with the amendment of section 1(4) in 1975, it became possible that both section 63* [the predecessor of section 69] *and section 1(4) could be applicable to the same fact situation. The variety of transactions and business arrangements which have been found to be a "sale" within the meaning of section 63 could also entail a sufficient retention of ongoing control over the business activities to bring into play section 1(4). We note in passing that even prior to section 1(4) being amended to apply to serial or sequential control or ownership, the Board had found section 63 and section 1(4) to be simultaneously applicable to the same fact situation. It is fair to say that both sections can only have simultaneous application if all or part of a "business" is involved. Where a partial change has occurred in the ownership or control of an operation, the Board has generally applied section 63 where there is proof that a "severable, coherent and independent" operation or part of a going concern has been transferred or that a "discrete, cohesive portion of the economic organization or activities" which comprise the totality of the business has been severed or transferred. Where the partial change does not satisfy the requirements of section 63, section 1(4) may still apply if there is sufficient retention of control over the core functions of an operation.* (cites omitted)

60 Thus, under the Act, the focus of Section 1(4) as opposed to Section 69, is on "*the retention of control over the core functions of an operation*". As noted by the Board, there are situations where Section 69 would not apply and Section 1(4) would.

61 The question before the Board was whether by virtue of the P.S.L.R.T.A. and particularly the Regulation, the Legislature had removed or replaced the powers of the Board under Section 1(4) of the Act. In coming to the conclusion that they had not, the Board found:

1. That neither the P.S.L.R.T.A. nor the Regulation make any reference to Section 1(4).

2. That while section 39 of the Act contemplates that the Lieutenant Governor in Council has the power to pass regulations that "*override the will of the Legislature*" as expressed in another statute, sections 40(1)(c) and 40(3) of the P.S.L.R.T.A., the sections that actually govern the regulation-making power under the P.S.L.R.T.A., limit

> the effect of such regulations to the operation of the P.S.L.R.T.A.. That is, nothing in the regulations promulgated under the authority of section 40 can apply to vary or contradict another statute. Section 40 simply does not give the Lieutenant Governor in Council the power to promulgate such a regulation.[25]

62 The Board's decision of January 18, 2005 also deals with this point as follows:

> *... the Regulation in this case does not purport to affect directly anything in the L.R.A.*[the Labour Relations Act]. *It is promulgated under a section of the P.S.L.R.T.A., Section 40, by which the Legislature delegated authority to the Lieutenant Governor in Council to make regulations about "how this Act applies with respect to employees of a predecessor employer who performed construction work". It does that. On its face, it says nothing about the L.R.A.. Despite Section 39(1) and its "regulations", the Regulation is promulgated under Section 40(1) and 40(3), all of which refer only to this "Act" (i.e. the P.S.L.R.T.A.)*[26].

63 The Board did comment on the question of why the Legislature chose not to refer to Section 1(4) of the Act in the P.S.L.R.T.A.. It did so as follows:

> It is indeed odd that the P.S.L.R.T.A. carefully excludes the effect of Section 69 of the Act, but makes no reference to subsection 1(4). The reasons for that are purely matters of speculation on my part. However, when deciding whether or not to exercise a discretion under subsection 1(4) of the Labour Relations Act, 1995, the Board must do so with respect to factors which are relevant to the aims and objectives of the Labour Relations Act, 1995, rather than to some other statute which by its very terms does not apply to or vary subsection 1(4) of the Act. It would be entirely inappropriate for me to speculate about why there is no reference to subsection 1(4) in the P.S.L.R.T.A.. Perhaps the draftsperson overlooked that issue. Perhaps the draftsperson was perfectly aware of the Board's jurisprudence with respect to subsection 1(4) (indeed, that is a proper assumption to make in interpreting a statute): see Sullivan and Dreiger on The Construction of Statues (4thed.) Sullivan, (Butterworths Toronto: 2002) at pp 154-5 and 2747-3174 Québec *Inc. v. Québec* [1996] 3 S.C.R. 919. To speculate on, and to give weight to, my guess as to certain policy directives under the P.S.L.R.T.A. not contained in the statute would be an improper exercise of a discretion, which is confined exclusively to the operation of the Labour Relations Act, 1995. Policy initiatives on the part of the Legislature are expressed in statute, and it is not appropriate for the Board to substitute its belief about what the Legislature might have intended had it addressed the issue before it (assuming, of course, that it did not do so).[27]

64 The Applicant contends that there is conflict or inconsistency between section 40 of the P.S.L.R.T.A. as qualified by the Regulation and section 1(4) of the Act, such that section 39(1) of the P.S.L.R.T.A. applies with the result that the declaration made by the Board pursuant to section 1(4) of the Act should be quashed.

65 The basis for the position taken by the Applicant is as follows.

66 In paragraph 53 of its decision dated January 4, 2006, the Board granted a declaration that the Windsor Board and the Applicant are one employer for all purposes of the Act. Accordingly, under the Act, by reason of section 1(4) and the decision of the Board dated January 4, 2006, the Applicant is bound by the province-wide collective agreements of the Windsor Board, but without the geographic restriction that is effective under the P.S.L.R.T.A..

67 Since the P.S.L.R.T.A. on the one hand, applies so as to bind the Applicant to the collective agreements only on a geographically restricted basis and the Act, on the other hand, applies so as to bind the Applicant to the collective agreements without that geographic restriction, there is a *prima facie* "conflict or inconsistency" between the P.S.L.R.T.A. and the Act in this regard, within the meaning of section 39 of the P.S.L.R.T.A.. In simple terms, the P.S.L.R.T.A. expressly *permits* the Applicant to do what the declaration under section 1(4) of the Act *prevents* the Applicant from doing. Unless there are proper

reasons to the contrary, the result under section 39 would be that the manner in which the P.S.L.R.T.A. applies must prevail over the different and conflicting manner in which the Act applies.

68 It was submitted for the Respondent Unions that there is no "contradiction" between the P.S.L.R.T.A. and the Act because all that the P.S.L.R.T.A. does is to put in place a regime for "successor rights" in substitution for section 69 of the Act, while the Board's decision of January 4, 2006 was made under the "related employer" provision in section 1(4) of the Act. However, the result of the P.S.L.R.T.A. and the Regulation, on the one hand, and the application of section 1(4) of the Act, on the other hand, is the conflict or inconsistency identified above.

69 The Board said in paragraph 46 of its decision of January 4, 2006 that it was not obvious that there is conflict between the Regulation and the provision in sections 162 and 163 of the Act relating to provincial collective agreements. Whether this statement is to be taken as denying the existence of the conflict asserted by the Applicant is not clear. The decision of the Board does not otherwise directly deal with whether the alleged conflict is a real conflict for purposes of section 39(1) of the P.S.L.R.T.A..

70 However, it is evident that the Board considered section 1(4) of the Act and the relevant P.S.L.R.T.A. provisions which replace section 69 of the Act, to be dealing with two different matters, as discussed above in these reasons: "continuity of control", in the case of section 1(4) of the Act and "sale" of a "business" in the case of the P.S.L.R.T.A..

71 Taking this difference into account, it could be argued that while the *results* that flow from the application of section 1(4) and those flowing from the P.S.L.R.T.A. are different and apparently incompatible, that does not constitute a "conflict or inconsistency" for purposes of section 39(1) of the P.S.L.R.T.A. because the different results flow from provisions directed to different circumstances and not from provisions which are in conflict with each other in respect of their terms. Put simply, there may be a conflict in *results*, but there is no conflict in *terms*, and therefore section 39(1) has no application. This distinction might be contended to be incorrect, but no basis is evident for regarding it as patently unreasonable.

72 In coming to the decision it did, the Board sought to find an interpretation that avoided a conflict between the Regulation and s.1(4) of the Act. In doing so, it strictly and narrowly construed the effect of the Regulation and of s.39(1) of the P.S.L.R.T.A..

73 Section 39(1) of the P.S.L.R.T.A. and others like it where the Legislature delegates to the Executive the discretionary power to overrule by regulation the provisions of an enabling statute or another statute have been dubbed "*Henry VIII clauses*", allegedly named "*in disrespectful commemoration of that monarch's tendency to absolution* (sic)".[28]

74 Henry VIII clauses have been the subject of controversy and comment, both in Canada and in England. The comments by A. Campbell J. in *Ontario Public School Board's Assn. v. Ontario (Attorney General)*[29] represent a forceful articulation of the constitutional concern they raise. In that case, Campbell J. dealt with a provision of the *Fewer School Boards Act*[30], passed at the same time as the P.S.L.R.T.A., whose wording mirrors that of s.39(1). In doing so, he first observed that:

> This is the opposite of the usual rule, that if there is any conflict between the statute and the regulation which relies for its authority on the statute, the statute enacted by the Legislative Assembly prevails over the regulation made by the government. The usual rule is that legislative power is vested in the democratically elected Legislature to make laws after full public debate. This provision reverses that rule.[31]

Campbell J. then went on to articulate the following concern:

> This power is constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its legal authority.[32]

75 According to Campbell J., this power was never used by the Ontario legislature until the early 1990's. Until that time, it had been considered by the government "*and successive generations of Crown law officers to be repugnant to our basic traditions of public accountability.*"[33]

76 In the words of Campbell J., "*however offensive*" this power may be "*to our traditional sense of legality and public*

accountability"[34], the constitutional capacity of legislative bodies to confer the power has been upheld by the Supreme Court of Canada in *Grey, Re* (Grey).[35] In *Re Gray*, the Supreme Court of Canada was dealing with the constitutional validity of a section of the "*War Measures Act, 1914*" that provided that Cabinet would have the power to do what was necessary or advisable by regulation or order, "*for the security, defence, peace order and welfare of Canada*" by reason of the "*existence of real or apprehended war...*". With two judges dissenting on the basis that such a "*wholesale surrender of the will of the people to any autocratic power is exactly what we are fighting against*"[36], the majority of the Court upheld the constitutional validity of this broad delegation of authority by the Legislative branch of government to the executive.

77 In *Re Gray*, Mr. Grey had, pursuant to the *Military Service Act*, 1917, been granted exemption from military service. In April of 1918, the Governor-in-Council passed a regulation canceling Mr. Grey's exemption. The Regulation was passed pursuant to the broad powers granted to Cabinet under the *War Measures Act*, 1914. The regulations were put before Parliament for approval.

78 The majority of the Court in *Re Gray* considered and dismissed the submission that the power to make regulations cannot

> constitutionally be granted to such an extent as to enable the express provisions of a statute to be amended or repealed; that under the constitution parliament alone is to make laws, the Governor-in-Council to execute them, and the court to interpret them; that it follows that no one of these fundamental branches of government can constitutionally either delegate or accept the function of any other branch.[37]

79 A review of the reasoning in *Re Gray* makes it clear that the fact that the country was at war was at the forefront of the Court's mind when it considered the question before them. In the words of Justice Anglin:

> Again, it is contended that should section 6 of the War Measures Act be construed as urged by counsel for the Crown, the powers conferred by it are so wide that they involve serious danger to our parliamentary institutions. With such a matter of policy we are not concerned. The exercise of legislative functions such as those here in question by the Governor-in-Council rather than by parliament is no doubt something to be avoided as far as possible. But we are all living in extraordinary times which necessitate the taking of extraordinary measures.[38]

80 As Justice Campbell noted:

> It is one thing to confer this extraordinary power if it is actually needed for some urgent and immediate action to protect an explicitly identified public interest. It is quite another thing to hand it out with the daily rations of government power, unlimited as to any explicit legal purpose for which it may be exercised.[39]

81 *Re Gray* was recently discussed by the Ontario Court of Appeal in *R. v. P. (J.)*[40]. In that case the Court was not dealing with a Henry VIII clause. Rather, the question was whether the executive could, by regulation, limit or provide an exemption for the crime of possession of marijuana set out in s.4 of the *Controlled Drugs and Substances Act* ("C.D.S.A."). In holding that they could, the Court of Appeal noted that s.55(1) of the C.D.S.A. specifically provides that the Governor-in-Council could make regulations "*governing, controlling, limiting, authorizing ... possession or obtaining of or other dealing in any controlled substance*". In dealing with the question before them the Court relied on *Re Gray* in support of the principle that while Parliament cannot

> abdicate its functions, it can, within reasonable limits, delegate its powers to the executive. Such powers must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.[41]

In *R. v. P. (J.)* , the enabling legislation clearly delegated the impugned power to the executive.

82 In *Brantford (City) Public Utilities Commission v. Brantford (City)*[42] Kent J. dealt with a Henry VIII situation and upheld a regulation that conflicted with a statutory provision. Specifically, the *Public Utilities Act* permitted a municipality to create or dissolve a Public Utilities Commission. The provincial government then amended the *Municipal Act* and in that Act provided that "*despite any Act*" the Minister of Municipal Affairs could make regulations, including a regulation providing that a municipality did not have the power to dissolve a local board specified in the regulation. The Minister then passed a regulation specifying that a municipality did not have the power to dissolve certain local boards, one of which was a Public

Utility Commission established under the *Public Utilities Act* or any other Act which is responsible for the distribution and supply of electric power or energy. Pursuant to the *Public Utilities Act*, the City of Brantford's municipal council approved a resolution that the City would dissolve the existing Public Utilities Commission to create an appointed Hydro-Electric Commission pursuant to the *Power Corporation Act*. The Public Utilities Commission moved for an injunction and a declaration that the City did not have the jurisdiction to dissolve them, given the provisions of the *Municipal Act* and the regulations made thereunder. Kent J. granted the relief sought, finding *that* the regulation and its enabling legislation "*were created with the intention of effectively repealing the prior existing statute*". In that case the enabling legislation specifically addressed the fact that the Minister could make regulations prohibiting a municipality from dissolving a local board.

83 Unlike in *R. v. P. (J.)* and *Brantford*, there is no clear delegation in the enabling legislation at issue in this case the (P.S.L.R.T.A.), that the Minister may make regulations removing the power of the Board to grant a sole employer declaration pursuant to the provisions of s.1(4) of the Act. The question then becomes whether the Board was patently unreasonable when it failed to interpret s.39(1) broadly enough to imply such a delegation.

84 In *R. v. Secretary of State for Social Security*[43] Lord Keith of Kinkel, who wrote the reasons that the other members of the House of Lords agreed with, endorsed a previous judicial pronouncement that "a *power to modify the provisions of a statute should be narrowly and strictly construed*".[44]

85 In *Thoburn v. Sunderland City Council*[45] the High Court of Justice, Queen's Bench Division, Divisional Court considered the use of a Henry VIII clause in the *European Communities Act*, 1972, a law that was passed in Britain to give effect domestically to the policies of the European Union. Lord Justice Laws, who wrote the opinion that the other judges concurred with, found that Parliament could delegate the power to amend primary legislation. However, he also acknowledged and did not disagree with the jurisprudence concerning the narrow construction to be given to such clauses. In doing so, he referred to the decision in *Orange Personal Communications Ltd. v. Secretary of State for Trade and Industry*[46] where Sullivan J. stated at p. 177:

> Parliament does not lightly take the exceptional course of delegating to the executive the power to amend primary legislation. When it does so the enabling power should be scrutinized, should not receive anything but a narrow and strict construction and any doubts about its scope should be resolved by a restrictive approach.

86 In *Friends of the Oldman River Society v. Canada (Minister of Transport)*[47] LaForest J. reviewed the principles of law applicable to the interpretation of an apparent conflict between a statute and subordinate legislation. Unless a statute authorizes it, subordinate legislation cannot conflict with either parent legislation or other acts of Parliament. Where subordinate legislation is said to be inconsistent with another act of Parliament, "*there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments*".[48] Thus, where possible, a court is to prefer an interpretation that avoids a finding of conflict.

87 While not determinative of the issue before the Board, the principles that emerge from these cases are useful in assessing whether the Board's conclusion regarding the alleged conflict between the Regulation and Section 1(4) of the Act was a patently unreasonable one. Section 39(1) of the P.S.L.R.T.A. is a broad and open-ended clause. It is also not a clause that delegates the authority to make regulations. That power is contained in Section 40. In these circumstances the Board chose an interpretation that focused on the express power delegated in Section 40 and arrived at a conclusion that avoided a finding of conflict between the Regulation and Section 1(4) of the Act. In doing so, it narrowly restricted the power of subordinate legislation passed under the P.S.L.R.T.A. to modify or repeal the provisions of the Act.

88 The Board's decision cannot be said to defeat the purposes of the P.S.L.R.T.A.. These purposes are set out in Section 1 which reads:

> 1. The following are the purposes of this Act:
>
> 1. to encourage best practices that ensure the delivery of quality and effective public services that are affordable for

> taxpayers;
>
> 2. to facilitate the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations;
>
> 3. to facilitate collective bargaining between employers and trade unions that are the freely designated representatives of the employees following restructuring in the broader public sector in other specified circumstances;
>
> 4. to foster the prompt resolution of workplace disputes arising from restructuring.

89 There is nothing in the above purposes that is inconsistent with the Board having discretion under Section 1(4) of the Act. Further the Board's interpretation of the provisions of the P.S.L.R.T.A., the Regulation and their relationship cannot be said to render any of the provisions being dealt with meaningless. For example, if the majority of the trustees elected to the Applicant's Board had been elected by electors from the geographic jurisdiction of the former Essex County Board, then, on the reasoning of the Board, pursuant to the provisions of the P.S.L.R.T.A. and the Regulation, the geographic scope of the collective agreement would have been limited to the City of Windsor. One of the necessary preconditions for the exercise of discretion under Section 1(4) of the Act (common control) would not have existed.

90 The question this Court has to ask itself is whether the Board's conclusion was "clear*ly irrational*" or almost bordering "*on the absurd*". Applying this strict test, the Applicant has failed to demonstrate that the necessary threshold has been met. The Board's approach to the problem and their restrictive interpretation of the effect of the Regulation might not be the correct one. However, it is not clearly irrational or almost absurd.

The Board's Decision Under Section 1(4)

91 Section 1(4) of the Act was enacted in 1971 and amended in 1975. As already indicated, it provides as follows:

> 1(4) Where, in the opinion of the Board, associated or related activities or business are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

92 According to the Board, Section 1(4) sets out four preconditions to the exercise of the Board's discretion to make a single employer declaration:

> 1) that there be two or more entities;
>
> 2) that they carry on associated or related businesses or activities;
>
> 3) whether or not simultaneously;
>
> 4) under common direction or control.

93 The Board found that each of these statutory preconditions were present in this case.

1) They found that there were two or more entities, the Windsor Board and the Greater Essex Board (the Applicant). In Section 1(4) "*entities*" are defined as "*corporations, individuals, firms, syndicates, associations or any combination thereof*". While the Board acknowledged that "*These words suggest a commercial enterprise, they are not so strictly limited, and the Board has applied it to virtually any employer, particularly those in the greater public sector*"[49]. The Applicant challenged this finding as "*simply untenable*", arguing that the "*Windsor Board and the Applicant are school boards, statutorily created, statutorily governed and statutorily limited*". While this is undoubtedly true, that does not mean that they are not also subject to the provisions of the Act. The Applicant provided no authority to challenge the Board's finding that the Board has applied Section 1(4) to virtually any employer, particularly those in the greater public sector. Thus, there is no basis for this Court to conclude that that finding was patently unreasonable.

2) The Board found that the Applicant and the Windsor Board carried on associated or related businesses or activities. "*In fact, they carry on the same business that the Windsor Board carried on before January 1, 1998*"[50]. The Applicant argued that this conclusion was also wrong. As put by the Applicant "*Simply stated, the school boards are not businesses*". Again, Section 1(4) uses the phrase "*related businesses or activities*" (emphasis added). Thus, while it may be arguable that the Applicant and the Windsor Board did not carry on related "*businesses*", this does not mean that they did not carry on related "*activities*".

3) The Board found that the section specifically provided that the two entities in question did not have to carry on their activities simultaneously. In doing so, they dealt with the same submission that the Applicant made before this Court on this finding as follows:

> Counsel for the Greater Essex Board argued that while the activities need not be carried out simultaneously, the two entities must exist for at least some period of time contemporaneously. I do not accept that argument. It was precisely because the section was ineffective if one business was wound up before the other was started that the Act was amended in 1975 to include the phrase "whether or not simultaneously". Indeed, the Board has found that subsection 1(4) might, on the proper facts, apply to the relationship between corporations, some of which had been wound up and dissolved prior to the formation of the others. See *I.A.B.S.O.I., Local 786 v. Briecan Construction Ltd.*, [2002] O.L.R.B. Rep. 815 (Ont. L.R.B.).[51]

On the application for judicial review, the Applicant provided no authority that would indicate that the Board's reasoning on this point was incorrect, let alone patently unreasonable.

4) The Board also found that the Windsor Board and the Greater Essex Board were under common control and direction. There is no definition of "control or direction" in the Act. The Applicant argued that this conclusion "*was perverse to the evidence. The evidence was that, in fact, the Windsor Board, when it existed immediately prior to January 1, 1998, was governed by an elected Board of Trustees which was different than the elected Board of Trustees which governed the operations of the Applicant upon its creation effective January 1, 1998*".

As summarized by the Board, the evidence before it was that before January 1, 1998, the Windsor Board and the Essex Board were governed by elected trustees. After January 1, 1998, the Applicant was governed by a board of ten trustees, six of whom were elected by the electors of the City of Windsor.[52] On the basis of this evidence the Board found as follows:

> The commonality of the control or direction need not be entirely co-extensive. If one source of control has meaningful, if not exclusive, control over both of the entities, that level of control satisfies the requirements of the subsection. In this case, the ultimate control is with the electors of the City of Windsor. They elected all of the trustees of the Windsor Board and they elected the majority of the trustees of the Greater Essex Board. In this case, the ultimate source of control has, in fact, ultimate control over both bodies.[53]

This conclusion gives a very expansive meaning to control or direction but, given the evidence, it was not patently unreasonable.

94 Once it determined that the four preconditions were satisfied, the Board went on to consider whether it should exercise its discretion under section 1(4) to grant relief. While recognizing that a court is generally reluctant to intervene where the exercise of a tribunal's discretion is being reviewed, the Applicant argued that, in this instance, the Board ignored its own established jurisprudence to such a degree as to amount to an abuse of its discretion.

95 A review of the Board's jurisprudence on the issue of the criteria the Board used in determining whether to exercise its discretion under Section 1(4) reveals the following:

> 1. One of the significant purposes of Section 1(4) is to guard against the dilution, erosion or undermining of bargaining rights that have already been obtained.[54]
>
> 2. The Board has refused to exercise its discretion where it has determined that the Union is seeking to acquire bargaining rights in order to avoid the certification procedures of the Act.
>
> 3. The other criteria that the Board will consider are:
>
> a) whether a declaration will disturb existing bargaining rights;
>
> b) whether a declaration would interfere with the interests and rights of employees to select their own bargaining representative or to remain unrepresented; and
>
> c) whether the application has been made within a reasonable time after the applicant becomes or with reasonable diligence, should have become aware that the two or more entities were closely related.[55]

96 With respect to these established criteria the Applicant submits that there was no reason to issue the declaration requested as there was no risk of erosion of bargaining rights. The Unions had precisely what they had before January 1, 1998 and the creation of the Applicant — a collective agreement that covered the City of Windsor. In dealing with this submission the Board first pointed out that the argument "*equated the legal rights and responsibilities under the collective agreement with its practical application*".[56] In this case the Unions, by virtue of the Act have provincial collective agreements that are province-wide in scope. Before January 1, 1998 these agreements only affected construction work done in the City of Windsor because the employer with whom they had these agreements, the Windsor Board, only did construction work in the City of Windsor. If that employer had done construction work elsewhere, for example, by annexing an adjacent township so that the size of the geographic area served by that Board had changed, then the collective agreements would have applied to that expanded geographic area without the need for any application under the Act. As put by the Board:

> *The fact that this increase in the size of the area under the control of the Board of Education was (for reasons entirely unrelated to labour relations) effected by the creation of a new entity, is precisely the kind of fact situation to which subsection 1(4) applies.*[57]

In making this statement the Board was referring to its jurisprudence that has established that a union's bargaining rights can be eroded when that union loses the opportunity to participate in the growth of particular enterprise.[58] As put by the Board "*the fact that the expansion was one properly effected under the Fewer School Boards Act and the P.S.L.R.T.A. does not change this analysis for the purpose of the Labour Relations Act, 1995*".[59]

97 The Applicant also argues that issuing a declaration under Section 1(4) amounts to allowing the Unions to appropriate work opportunities that they had not earned by making an application for certification. When dealing with the same submission the Board stated:

> *The Board has often said that subsection 1(4) is concerned with the effect of changes in the structure of an employer, not with questions of propriety or morality in the manner in which a trade union seeks to utilize the Act to defend its bargaining rights. Both subsection 1(4) and an application for certification are ways of acquiring bargaining rights and neither is more appropriate nor statutorily superior to the other: see eg. KNK Ltd.* [*1991] O.L.R.B. Rep. Feb. 209; and E.S. Fox Ltd.* [*1991] O.L.R.B. Rep. July 819. There are no employees of the former Essex Board or the current Greater Essex Board who would be affected by the declaration.*[60]

98 Thus, this is not a case where the Board found that there were employees of an existing business who had an established business relationship without a union and who may not wish to be represented by a union. In these types of situations, the Board has refused to exercise its discretion under Section 1(4) because of a concern that the Union is seeking to use Section 1(4) to avoid the certification procedures under the Act.[61]

99 Connected to this concern is the issue of delay. As articulated by the Board in *Evans-Kennedy Construction Limited*[62], if an employer, based on an understanding of its rights, builds up a non-union workforce then, unless the union acts promptly to secure its bargaining rights, the Board may decline to apply Section 1(4) and indicate to the union that if it desires bargaining rights for the non-union employees it should seek to obtain them through the regular certification procedures.

100 In this case, the Applicant submits that the Unions, by waiting until 2004, had acquiesced in the Applicant's belief that the P.S.L.R.T.A. confined the scope of the provincial collective agreements to the geographic boundaries of the former City of Windsor. When dealing with this submission, the Board found that there were no facts to support the position that before 2004 there was any situation in which the Greater Essex Board contracted out work to a contractor not bound to a collective agreement in the County of Essex of which the Unions knew or ought to have known.[63] Therefore, the Board found no basis to draw the inference that the Unions knew the Applicant's point of view and let the Applicant act upon it without doing anything.

101 In support of their submission on acquiescence, the Applicant also points to the collective agreements that the Applicant negotiated with the Unions after January 1, 1998. Those agreements essentially confirmed that the members of the Respondent Unions would do all labour work (except certain maintenance work) on the current and new properties within the geographic jurisdiction of the former Windsor Board. The Applicant argues that these collective agreements provide evidence that the Unions had accepted the Applicant's view as to the effect of the P.S.L.R.T.A. on the geographic scope of the provincial collective agreements.

102 The Board heard and rejected this submission by the Applicant. In doing so, it found that the collective agreements negotiated by the parties after January 1, 1998 did nothing more than acknowledge the provisions of the P.S.L.R.T.A.. They did not address the construction provisions of the Act and they were not negotiated in accordance with the construction provisions of the Act. Further, the Board found that there was no evidence before it that the scope of the provincial agreements was ever discussed between the parties or that there was ever an occasion on which the Unions were asked or obliged to set forth their position. The Board also found that the evidence before it was that the Unions took action on the first occasion when there was evidence that the provincial collective agreements had been violated. Therefore, the Board concluded that there was nothing in the Unions' conduct that would cause it to refuse to exercise its discretion under Section 1(4).

103 The last question the Board addressed was the issue of the date as of which the order should have effect. The Board made the declaration effective as of the date the Applicant came into existence. In doing so, it acted in accordance with its own jurisprudence that provides that, absent a specific finding that this should not be the case, the wording of the statute is such that a declaration under Section 1(4) has effect from the date the associated or related activities commenced.[64] The Applicant submits that the Unions' delay constituted a good reason why a specific finding should be made in this case that the declaration should be effective as of the date it was given. The Board disagreed and, for the reasons given when it chose to exercise its discretion and grant a declaration, found that "*in this case I have no evidence of delay or any deliberate lulling of the Greater Essex Board into a belief that the Unions did not share their view of the effect of the P.S.L.R.T.A. or provincial collective agreements*".[65]

104 This review of the reasoning of the Board on the issue of whether it should exercise its discretion and make a declaration under Section 1(4) and on the issue of the effective date of that declaration does not demonstrate either that, in coming to the conclusion it did, the Board ignored its own established jurisprudence or, more significantly, that that conclusion was patently unreasonable, producing a result bordering on the absurd. Given this, there is no basis for a reviewing court to interfere with the Board's decision.

Conclusion

105 For the above reasons, I would dismiss the application. Failing agreement on the question of costs, we may be spoken to.

***Spence J.*:**
I concur.

***Carnwath J.*:**

106 I agree with the material contained in the Overview and Factual Background in Sachs J.'s reasons. I agree that the standard of review is patently unreasonable. I agree with the analysis of patent unreasonableness. However, I regret I cannot agree with my colleagues' ultimate conclusion. With respect, I find the decision of the Board patently unreasonable.

107 In the short reasons which follow, I hope to identify several points which the Board chose to ignore or failed, in my respectful view, to adequately explain away. Their cumulative effect compels me to conclude the decision is patently unreasonable.

The Purpose of the P.S.L.R.T.A.

108 As Sachs J. has noted in para. [8] of her reasons, the purpose of the *P.S.L.R.T.A.* was:

. . . . .

> 2. To facilitate the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations.
>
> 3. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees following restructuring in the broader public sector and in other specified circumstances. . . .

109 I point out that the effect of the Board's decision is to *deny*, not facilitate, collective bargaining in the geographical area of the former Essex Board. The construction employees of that geographical area cannot "freely designate" their trade unions. The right to bargain collectively is foreclosed by the Board's decision.

The Effect of the Board's Decision

110 I submit it is clear the government recognized the implications of merging two school boards where one board was subject to a collective agreement applied province-wide, and the other was not. This explains the making of O.Reg. 457/97 (para. [14] in Sachs J.'s reasons). There is no other logical explanation for the action the government took in making the Regulation. The Board's decision ignores the obvious intention of the *Act* and Regulation and turns it on its head. What else explains the existence of the Regulation other than the intention to limit the province-wide bargaining rights to the geographical area of the City of Windsor following merger?

The Possibility of Conflict with other Statutes

111 Recognizing the possibility that the transitional provisions of the *P.S.L.R.T.A.* might conflict or be inconsistent with other legislation, the *P.S.L.R.T.A.* stipulated:

> S. 39(1) In the event of a conflict or inconsistency between this Act or a regulation made under this Act and any other Act, this Act or the regulation prevails.

112 I pause to note that a more unambiguous statement of governmental intention can hardly be imagined. I note further that the Board's interpretation of s. 1(4) of the *Act* both conflicts and is inconsistent with s. 39(1).

113 I submit the purpose of s. 1(4) is to protect the bargaining rights of a trade union from being undermined by a change in the structure of an employer. I am unable to identify any trade unions in the geographical area of the former Essex Board whose bargaining rights needed protection. There were no such unions with bargaining rights. The only undermining was the removal of the option for construction workers in the geographical area of the former Essex Board to freely bargain

collectively or otherwise as they might choose.

The "Henry VIII" Clause

114 Distasteful as it may be to some commentators and surely as it was to the Board, s. 39(1) is a valid and subsisting provision of the *P.S.L.R.T.A.* I agree with my colleagues that the legislature has the power to delegate to the executive the power to amend primary legislation. I agree that the power must receive a strict and narrow construction. However, the construction placed on s. 39(1) by the Board was so narrow as to render it meaningless.

The Board's restriction of s. 39(1) to the P.S.L.R.T.A.

115 The Board stressed that s. 40(1) of the *P.S.L.R.T.A.* provides

> 40(1) The Lieutenant Governor in Council may make regulations
>
> . . . . .
>
> (b) governing how the Act applies with respect to employees of a predecessor employer who perform construction work and who, immediately before the changeover date, are in a bargaining unit in respect to which a construction union has bargaining rights; ...
>
> (3) A regulation under clause (b) may,
>
> (a) vary the application of this Act;
>
> (b) prescribe provisions to operate in place of any part of this Act; and
>
> (c) prescribe provisions to operate in addition to this Act.

116 The Board's reading of s. 40(1) restricts the LGIC's regulation-making power so as to apply only to the *P.S.L.R.T.A.* Therefore, says the Board, s. 39(1) does not extend to prevent the application of s. 1(4) of the *Act*. In order to come to this conclusion, the Board was required to ignore three things:

(1) The plain and unambiguous language of s. 39(1) of the *P.S.L.R.T.A.*;

(2) The fact that O. Reg. 457/97 did apply to those employees in the Windsor Board by making it clear their bargaining rights did not extend to the geographical area of the Essex Board following merger; and,

(3) The existence of ss. 40(3)(c) which says that the LGIC may make regulations prescribing provisions to operate *in addition to this Act.*

Section 1(4) of the Act does not apply in any event

117 Section 1(4) sets out four pre-conditions to the exercise of the Board's discretion to make a single employer declaration:

1) that there be two or more entities;

2) that they carry on associated or related businesses or activities;

3) whether or not simultaneously;

4) under common direction or control.

118 For section 1(4) to apply, two main conditions must be satisfied — there must be more than one corporation and they must be under common control. Before January 1, 1998, there were two corporations, but they were not under common control. Windsor voters elected Windsor Board Trustees. Essex voters elected Essex Board Trustees. There was no common control. On January 1, 1998, there was one board — the Greater Essex Board. The Board's reasons, at paras. 37, 38, 39 and 40 of its decision of January 4, 2006, make it clear the Board found there were two boards on and after January 1, 1998. Such is not the case. The pre-conditions of s. 1(4) can not be met before January 1st, 1998, nor after. With respect, the decision to apply 1(4) is wrong in law.

119 For the above reasons, I respectfully disagree with my colleagues and find the Board's decision to be patently unreasonable. I would allow the application.

Application dismissed.

Footnotes

[1] S.O. 1995, c. 1

[2] R.S.O. 1990, c. E-2

[3] S.O. 1997, c. 3

[4] S.O. 1997, c. 31

[5] S.O. 1997, c. 21

[6] Ibid, s. 1

[7] January 1, 1998

[8] Board Decision, January 4, 2006, para. 25

[9] *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982, [1998], S.C.J. No. 46 (S.C.C.) *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, [2003], S.C.J. No. 18 (S.C.C.); *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17 (S.C.C.).

[10] *Supra* at para. 27

[11] (2006), 80 O.R. (3d) 1 (Ont. C.A.) at para. 38

12 *Ivanhoe inc. c. Travailleurs & travailleuses unis de l'alimentation & du commerce, section 500* (2001), 201 D.L.R. (4th) 577 (S.C.C.) at para. 26; *Canada (Attorney General) v. P.S.A.C.* (1993), 101 D.L.R. (4th) 673 (S.C.C.), at 683 ; *C.A.S.A.W., Local 4 v. Royal Oak Mines Inc.* (1996), 133 D.L.R. (4th) 129 (S.C.C.) at pp.150-151.

13 *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)* (1991), 81 D.L.R. (4th) 121 (S.C.C.) at p. 129.

14 *Supra* at para. 67

15 (2006), 79 O.R. (3d) 444 (Ont. C.A.)

16 (1993), 101 D.L.R. (4th) 673 (S.C.C.) at p.690

17 (1989), 62 D.L.R. (4th) 437, [1989] 2 S.C.R. 983, 40 Admin. L.R. 181 (S.C.C.)

18 [2004] 1 S.C.R. 609 (S.C.C.), para. 18

19 *Supra*, at p. 468

20 Ibid at p. 479

21 Supra at p. 20

22 Board Decision, January 18, 2005 at para. 11

23 *Ibid*, para. 12.

24 [1984] O.L.R.B. Rep. 1433 (Ont. L.R.B.)

25 Board decision, January 4, 2006 at para. 9.

26 para. 12.

27 Board decision, January 4, 2006 para. 52.

28 Rt. Hon. The Lord Rippon of Hexam Q.C., "Henry VIII clauses" (1989) 10 Statute L.Rev. 205.

29 [1997] O.J. No. 3184 (Ont. Gen. Div.).

30 S.O. 1997, c. 3.

31 para. 45.

32 para. 47.

33 para. 49

34 Ibid. para. 50

35 (1918), 57 S.C.R. 150 (S.C.C.)

36 per Idington J. at 165

37 per Sir Charles Fitzpatrick C.J. at 156-157

38 at 181-182

39 *Ontario Public School Boards Association*, *supra* at para. 52.

40 (2003), 67 O.R. (3d) 321 (Ont. C.A.)

41 para. 20.

42 (1996), 31 O.R. (3d) 465 (Ont. Gen. Div.) .

43 [1991] 2 All E.R. 726 (Eng. H.L.).

44 para. 32.

45 [2002] E.W.J. No. 652 (Eng. Q.B.).

46 (2000), [2001] Eu. L.R. 165, [2000] E.W.J. No. 5820 (Eng. Q.B.)).

47 [1992] 1 S.C.R. 3 (S.C.C.) at p.22.

48 para. 42.

49 Board decision January 4, 2006 para. 37.

50 Board decision January 4, 2006 para. 38.

51 Board decision January 4, 2006 para. 39.

52 Board decision January 4, 2006 at para. 22.

53 Board decision January 4, 2006 para. 40.

54 *I.U.O.E., Local 793 v. Donald A. Foley Ltd.*, [1980] O.L.R.B. Rep. 436 (Ont. L.R.B.)

55 *L.I.U.N.A., Local 1059 v. John Hayman & Sons Co.*, [1984] O.L.R.B. Rep. 822 (Ont. L.R.B.); *L.I.U.N.A. v. Evans-Kennedy Construction Ltd.*, [1979] O.L.R.B. Rep. 388 (Ont. L.R.B.)

56 Board decision January 4, 2006 para. 42.

57 Board decision January 4, 2006 para. 43.

58 *I.B. of T.C.W. & H. of A., Local 419 v. Brink's Canada Ltd.*, [1987] O.L.R.B. Rep. 647 (Ont. L.R.B.); *Power Workers' Union v. Milton Hydro-Electric Commission*, [2002] O.L.R.B. Rep. 701 (Ont. L.R.B.)

59 Board decision January 4, 2006 at para. 43.

60 *Ibid* para. 44.

61 See *C.J.A., Local 1256 v. Capricorn Acoustics & Drywall Ltd.*, [1986] O.L.R.B. Rep. 308 (Ont. L.R.B.).

62 *Supra*, relied on in *Brinks Canada, supra*.

63 Board decision, January 4, 2006 para. 45

64 *Carpenters' District Council of Toronto v. J.D.S. Investments Ltd.*, [1981] O.L.R.B. Rep. 294 (Ont. L.R.B.).

65 Board decision, January 4, 2006 para. 51

End of Document

TAB 3

Schmidt v. Ontario (Ministry of Natural Resources), 2008 ONCJ 442

2008 ONCJ 442
Ontario Court of Justice

Schmidt v. Ontario (Ministry of Natural Resources)

2008 CarswellOnt 5564, 2008 ONCJ 442

In the Matter of Michael Schmidt (Applicant) and Ontario Ministry of Natural Resources (Respondent)

P. Kowarsky J.

Heard: September 22, 2008
Judgment: September 22, 2008
Docket: None given.

Counsel: Alan Ryan for Ministry of Natural Resources
Michael Schmidt for himself

Subject: Public

Related Abridgment Classifications

Health law

III Provincial matters
III.1 Health insurance programmes
III.1.g Miscellaneous

Statutes

II Interpretation
II.3 Rules of interpretation
II.3.a Object and purpose

Headnote

Health law --- Provincial matters — Health insurance programmes — Miscellaneous

Statutes --- Interpretation — Rules of interpretation — Object and purpose

Table of Authorities

Statutes considered:

Health Protection and Promotion Act, R.S.O. 1990, c. H.7
Generally — referred to

s. 1(1) "person" — considered

s. 18(1) — considered

Interpretation Act, R.S.C. 1985, c. I-21
s. 10 — considered

Milk Act, R.S.O. 1990, c. M.12
Generally — referred to

***P. Kowarsky J.*:**

1 The Applicant brings a pre-trial motion seeking the following relief:

> • Confirmation that the Health Protection and Promotion Act R.S.O. 1990 applies only to municipalities, boards of health and corporations;
>
> • An order dismissing all charges pursuant to the Health Protection and Promotion Act R.S.O. 1990 ("The Act") against the defendant [Applicant].

2 The motion arises out of charges brought against the Applicant by the Ministry of Natural Resources charging him with numerous offences in relation to his alleged distribution of unpasteurized milk products contrary to the provisions of The Act and the Milk Act. The trial has been set down for hearing in January and February of 2009.

3 Section 18(1) of The Act reads as follows:

> No person shall sell, offer for sale, deliver or distribute milk or cream that has not been pasteurized or sterilized in a Plant that is licenced under the Milk Act or in a plant outside Ontario that meets the standards for plants licenced under the Milk Act.

4 I have read the Applicant's motion, the Respondent's reply and all of the supporting material of both parties. This is my ruling.

5 The essence of the Applicant's argument is that the definition of *"person"* in The Act does not include him, and that consequently, the charges against him should be dismissed. The definition reads as follows:

> ’person’ includes a board of health, a municipality and any other corporation.

6 In support of his motion the Applicant relies on numerous dictionary interpretations of the word *”includes”* as well as Latin maxims, jurisprudence and legislation.

7 It is well-established law that the most fundamental rule in the interpretation of statutes is to determine the intention of the legislative authority. Indeed, section 10 of the Interpretation Act of Canada provides that the law must be interpreted —

> so that effect may be given to the enactment according to its true spirit, intent and meaning.

The court must consider the purpose of the particular provision of the law, and should reject any interpretation that leads to an absurd result.

8 The initial rule in regard to statutory interpretation is to take into account the ordinary meaning of the words unless to do so would result in an absurd result. The ordinary meaning of a word is not necessarily the dictionary meaning; rather it is the meaning that would be understood by a competent reader upon reading the words in the context of the law and the facts of the case.

9 I am totally confident that by inserting the word *”includes”* in the definition of *“person”* The Legislature intended to clarify that the term *”person”* is extended to what is stated as being included. In this case, the meaning of the term is extended to include boards of health, municipalities and corporations. In my view, to rule that the purpose of the extension of the definition is to exclude the primary term would result in an absurdity. Consequently, I reject the Applicant’s argument in its entirety.

10 The purpose of The Act is clearly to prohibit the distribution of unpasteurized milk in Ontario by any *“person,”* meaning *not only* individuals *but also* corporate persons such as boards of health, municipalities and corporations. In my view, to accept that an individual person is not included in this definition of *”person”* would lead to an absurd result; one which is in total discord with common sense and the very purpose and meaning of the legislation under consideration.

11 Accordingly the Applicant’s motion is denied.

End of Document

TAB 4

Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25

2011 SCC 25
Supreme Court of Canada

Canada (Information Commissioner) v. Canada (Minister of National Defence)

2011 CarswellNat 1474, 2011 CarswellNat 1475, 2011 SCC 25, [2011] 2 S.C.R. 306, [2011] S.C.J. No. 25, 18 Admin. L.R. (5th) 181, 201 A.C.W.S. (3d) 425, 331 D.L.R. (4th) 513, 416 N.R. 105, J.E. 2011-834

Information Commissioner of Canada, Appellant and Minister of National Defence, Respondent and Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists, Interveners

Information Commissioner of Canada, Appellant and Prime Minister of Canada, Respondent and Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists, Interveners

Information Commissioner of Canada, Appellant and Minister of Transport Canada, Respondent and Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists, Interveners

Information Commissioner of Canada, Appellant and Commissioner of the Royal Canadian Mounted Police, Respondent and Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists, Interveners

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

Heard: October 7, 2010
Judgment: May 13, 2011
Docket: 33300, 33299, 33296, 33297

Proceedings: affirming *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (2009), 2009 CarswellNat 1521, 2009 FCA 175, 2009 CarswellNat 4766, 393 N.R. 51, 2009 CAF 175 (F.C.A.); affirming *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (2008), 87 Admin. L.R. (4th) 1, [2009] 2 F.C.R. 86, 2008 FC 766, 326 F.T.R. 237 (Eng.), 2008 CarswellNat 1979, 2008 CarswellNat 3718, 2008 CF 766 (F.C.); and affirming *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (2009), 2009 CarswellNat 5640, 2009 CAF 181, 2009 CarswellNat 1523, 2009 FCA 181, 393 N.R. 54, 310 D.L.R. (4th) 748 (F.C.A.); reversing *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (2008), 87 Admin. L.R. (4th) 1, [2009] 2 F.C.R. 86, 2008 FC 766, 326 F.T.R. 237 (Eng.), 2008 CarswellNat 1979, 2008 CarswellNat 3718, 2008 CF 766 (F.C.)

Counsel: Jessica R. Orkin, Marlys A. Edwardh, Laurence Kearley, Diane Therrien, for Appellant
Christopher Rupar, Jeffrey G. Johnston, Mandy Moore, for Respondents
Ryder Gilliland, for Intervener, Canadian Civil Liberties Association
Paul Schabas, for Interveners, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists

Subject: Public

Related Abridgment Classifications

Privacy and freedom of information
IV Freedom of information
IV.1 Federal legislation
IV.1.a General principles

Privacy and freedom of information
IV Freedom of information
IV.1 Federal legislation
IV.1.e Miscellaneous

Headnote

Privacy and freedom of information --- Freedom of information — Federal legislation — General principles

”Government institution” — Access to information requests made for documents of former Prime Minister (”PM”) and former Ministers were denied — Some records were located in Ministers’ offices and PM’s office (”PMO”) — Information Commissioner of Canada (”commissioner”) brought applications for judicial review, which were dismissed as regards records found in ministerial offices — Application judge held such records were not subject to disclosure because PMO and Ministers’ offices were not “government institutions” and government institution did not have control over those records — Commissioner unsuccessfully appealed dismissals of its applications — Federal Court of Appeal (”FCA”) upheld application judge’s decisions on definition of government institutions and control test — Commissioner appealed decision dismissing its appeals — Appeals dismissed — FCA was correct in upholding application judge’s finding that ministerial offices were not “government institutions” — Commissioner’s function-based definition of “government institution” was not accepted as it ignored legislation — FCA did not err in holding that application judge’s control test was adequate — FCA considered all relevant factors in determining records were not under control of government institution — Commissioner’s proposed control test ignored definition of “government institution” and improperly extended reach of Access to Information Act — Control test, properly applied, did not lead to hiding of records in ministerial offices.

Privacy and freedom of information --- Freedom of information — Federal legislation — Miscellaneous

”Officer of government institution” — Access to information requests made for documents of former Prime Minister (”PM”) and former Ministers were denied — Some records were under control of Royal Canadian Mounted Police (”RCMP”) and Privy Council Office (”PCO”) — Information Commissioner of Canada (”commissioner”) brought applications for judicial review — Application judge granted application in regards to documents in possession of RCMP and PCO — Application judge held such records were subject to disclosure by finding PM was “officer of government institution”, and as such, documents were not protected as “personal information” — PM and RCMP successfully appealed application judge’s decision disclosing records in possession of PCO and RCMP — Federal Court of Appeal (”FCA”) held application judge erred in finding PM was officer of government institution — Commissioner appealed decision allowing RCMP and PM’s appeals — Appeals dismissed — FCA was correct in overruling application judge’s finding that PM was “officer of government institution” — Application judge erred in relying on definition of “public officer” in other statutes — Function-based approach to interpreting “officer” was not accepted — Person could not be officer for some purposes and not others — Minister was not intended to be “officer” of government institution merely because he was head of institution.

Vie privée et accès à l’information --- Accès à l’information — Législation fédérale — Principes généraux

« Institution fédérale » — Demandes d’accès à l’information concernant des documents d’un ex-premier ministre (le « PM ») et d’ex-ministres ont été rejetées — Certains dossiers se trouvaient dans les cabinets ministériels et celui du PM (le « CPM ») — Commissaire à l’information du Canada (la « commissaire ») a demandé un contrôle judiciaire de la décision concernant les dossiers se situant dans les cabinets ministériels, sans succès — Juge des requêtes a estimé que ces documents n’étaient pas susceptibles de divulgation parce que le CPM et les cabinets ministériels n’étaient pas des « institutions fédérales » et

parce que ces documents ne relevaient pas de l'institution fédérale — Commissaire a interjeté appel à l'encontre du rejet de ses demandes, en vain — Cour d'appel fédérale (« CAF ») a maintenu les décisions du juge des requêtes concernant la définition d'institutions fédérales et le critère applicable — Commissaire a formé un pourvoi à l'encontre de la décision rejetant ses appels — Pourvois rejetés — CAF a eu raison de maintenir la conclusion du juge des requêtes selon laquelle les cabinets ministériels n'étaient pas des « institutions fédérales » — Approche fonctionnelle de la définition d'« institution fédérale » prônée par la commissaire n'a pas été retenue parce qu'elle ne prenait pas compte de la législation — CAF n'a pas commis d'erreur en estimant que le critère appliqué par le juge des requêtes était adéquat — CAF a pris en considération tous les éléments pertinents avant de déterminer que les dossiers ne relevaient pas d'une institution fédérale — Critère proposé par la commissaire ne prenait pas compte de la définition d'« institution fédérale » et élargissait à tort la portée de la Loi sur l'accès à l'information — Critère en question, lorsqu'appliqué adéquatement, ne conduisait pas à une mise au secret générale des documents se trouvant dans les cabinets ministériels.

Vie privée et accès à l'information --- Accès à l'information — Législation fédérale — Divers

« Cadre d'une institution fédérale » — Demandes d'accès à l'information concernant des documents d'un ex-premier ministre (le « PM ») et d'ex-ministres ont été rejetées — Gendarmerie royale du Canada (la « GRC ») et le Bureau du Conseil privé (le « BCP ») étaient en possession de certains dossiers — Commissaire à l'information du Canada (la « commissaire ») a demandé un contrôle judiciaire — Juge des requêtes a accueilli la demande concernant les documents détenus par la GRC et par le BCP — Juge des requêtes a estimé que ces dossiers étaient susceptibles de divulgation au motif que le PM était un « cadre d'une institution fédérale » et que, partant, les documents n'étaient pas protégés à titre de « renseignements personnels » — PM et la GRC ont interjeté appel à l'encontre de la décision du juge des requêtes de permettre la communication des dossiers détenus par le BCP et la GRC, avec succès — Cour d'appel fédérale (« CAF ») a estimé que le juge des requêtes avait commis une erreur en concluant que le PM était un cadre d'une institution fédérale — Commissaire a formé un pourvoi à l'encontre de la décision ayant accueilli les appels interjetés par la GRC et le PM — Pourvois rejetés — CAF a eu raison d'infirmer la conclusion du juge des requêtes selon laquelle le PM était un « cadre d'une institution fédérale » — Juge des requêtes a commis une erreur en se fondant sur la définition de l'expression « fonctionnaire public » donnée par d'autres lois — Méthode d'interprétation du terme « cadre » fondée sur une approche fonctionnelle n'a pas été retenue — Individu ne pourrait pas être un cadre pour certaines fins et non pour d'autres — Ministre n'était pas censé être un « cadre » d'une institution fédérale du simple fait qu'il était le responsable de cette institution.

Access to information requests made for documents of the former Prime Minister ("PM") and former Ministers were denied. Some records were located in the Ministers' offices and the PM's office ("PMO"), while others were in the control of the Royal Canadian Mounted Police ("RCMP") and the Privy Council Office ("PCO").

The Information Commissioner of Canada ("commissioner") brought applications for judicial review of the dismissals of the access to information requests. The application judge did not allow the disclosure of most records held by the PMO and the ministerial offices, but allowed the disclosure of most records in the possession of the RCMP and the PCO.

The application judge held the documents in the possession of the ministerial offices were not subject to disclosure because the PMO and Ministers' offices were not "government institutions" and the government institution did not have control over those records.

The application judge held the records in the possession of the RCMP and PCO were subject to disclosure by finding that the PM was an officer of a government institution, and as such, the documents were not protected as "personal information".

The commissioner unsuccessfully appealed the dismissals of its applications respecting the documents in the possession of the ministerial offices. The Federal Court of Appeal ("FCA") upheld the application judge's decisions on the definition of government institutions and the control test.

The PM and RCMP successfully appealed the application judge's decision disclosing records in the possession of the PCO and the RCMP. The FCA, in a separate decision, held the application judge erred in finding that the PM was an officer of a government institution.

The commissioner appealed both FCA decisions.

Held: The appeals were dismissed.

Per Charron J. (McLachlin C.J.C, Binnie, Deschamps, Fish, Abella, Rothstein, Cromwell JJ. concurring): The FCA was correct in upholding the application judge's finding that the ministerial offices were not "government institutions". The commissioner's function-based approach to the definition of "government institution" was not accepted as it ignored the legislation. The application judge's interpretative analysis contained no error.

The FCA did not err in holding that the application judge's control test was adequate. The FCA considered all relevant factors in determining the records were not under the control of a government institution. The commissioner's function-based test for determining control was not accepted as it ignored the definition of "government institution" and improperly extended the reach of the Access to Information Act into ministerial offices. The control test, properly applied, did not lead to the hiding of records in ministerial offices.

The FCA was correct in overruling the application judge's finding that the PM was an "officer of a government institution". The application judge erred in relying on the definition of "public officer" in other statutes. A function-based approach to interpreting "officer" was not accepted. A person could not be an officer for some purposes and not others. A minister was not intended to be an "officer" of a government institution merely because he was the head of the institution.

Per LeBel J. (concurring): There was a presumption of access that applied to political records unless the Access to Information Act specifically exempted them.

There was no implied exception for political records simply because a Minister's office was not a "government institution" for the purposes of the Act. Any requested record that was located in a Minister's office was subject to the control test. If the document in the Minister's office was under the control of a government institution, the right of access was presumed to apply, unless the document fell within a specific exemption.

The commissioner had broad investigatory powers to act as a check on the Minister's discretion to disclose or retain political records. A presumption that a Minister's records were beyond the scope of the Act would weaken the commissioner's powers, which were crucial to the balance between access to information and good governance.

The requested records that were in the PMO and the Ministers' offices were created and managed in such circumstances that a government institution would not have a reasonable expectation of obtaining them. Therefore, those documents were not under the control of a government institution and could not be disclosed.

The requested records that were in the possession of the PCO and the RCMP were under the control of a government institution. However, they could not be disclosed as they were subject to s. 19 of the Act.

Des demandes d'accès à l'information concernant des documents d'un ex-premier ministre (le « PM ») et d'ex-ministres ont été rejetées. Certains dossiers se trouvaient dans les cabinets ministériels et celui du PM (le « CPM ») tandis que la Gendarmerie royale du Canada (la « GRC ») et le Bureau du Conseil privé (le « BCP ») étaient en possession des autres dossiers.

La Commissaire à l'information du Canada (la « commissaire ») a demandé le contrôle judiciaire du rejet des demandes d'accès à l'information. Le juge des requêtes n'a pas autorisé la communication de la plupart des dossiers détenus par le CPM et les cabinets ministériels mais a permis la communication de la plupart des dossiers détenus par la GRC et par le BCP.

Le juge des requêtes a estimé que les documents détenus par les cabinets ministériels n'étaient pas susceptibles de divulgation parce que le CPM et les cabinets ministériels n'étaient pas des « institutions fédérales » et parce que ces documents ne relevaient pas de l'institution fédérale.

Le juge des requêtes a estimé que les dossiers détenus par la GRC et le BCP étaient susceptibles de divulgation au motif que le PM était un cadre d'une institution fédérale et que, partant, les documents n'étaient pas protégés à titre de « renseignements personnels ».

La commissaire a interjeté appel à l'encontre du rejet de ses demandes concernant les documents se trouvant dans les cabinets ministériels, en vain. La Cour d'appel fédérale (« CAF ») a maintenu les décisions du juge des requêtes concernant la définition d'institutions fédérales et le critère applicable.

Le PM et la GRC ont interjeté appel à l'encontre de la décision du juge des requêtes de permettre la communication des dossiers détenus par le BCP et la GRC, avec succès. La CAF, dans une décision à part, a estimé que le juge des requêtes avait commis une erreur en concluant que le PM était un cadre d'une institution fédérale.

La commissaire a formé un pourvoi à l'encontre des deux décisions rendues par la CAF.

Arrêt: Les pourvois ont été rejetés.

Charron, J. (McLachlin, J.C.C., Binnie, Deschamps, Fish, Abella, Rothstein, Cromwell, JJ., souscrivant à son opinion) : La CAF a eu raison de maintenir la conclusion du juge des requêtes selon laquelle les cabinets ministériels n'étaient pas des « institutions fédérales ». L'approche fonctionnelle de la définition d'« institution fédérale » prônée par la commissaire n'a pas été retenue parce qu'elle ne prenait pas compte de la législation. Il n'y avait aucune erreur dans l'analyse interprétative du juge des requêtes.

La CAF n'a pas commis d'erreur en estimant que le critère appliqué par le juge des requêtes était adéquat. La CAF a pris en considération tous les éléments pertinents avant de déterminer que les dossiers ne relevaient pas d'une institution fédérale. Le critère proposé par la commissaire et fondé sur une approche fonctionnelle pour déterminer si un document relevait d'une institution fédérale n'a pas été retenu puisqu'il ne prenait pas compte de la définition d'« institution fédérale » et aurait pour effet d'élargir à tort la portée de la Loi sur l'accès à l'information en y englobant les cabinets ministériels. Le critère en question, lorsqu'appliqué adéquatement, ne conduisait pas à une mise au secret générale des documents se trouvant dans les cabinets ministériels.

La CAF a eu raison d'infirmer la conclusion du juge des requêtes selon laquelle le PM était un « cadre d'une institution fédérale ». Le juge des requêtes a commis une erreur en se fondant sur la définition de l'expression « fonctionnaire public » donnée par d'autres lois. La méthode d'interprétation du terme « cadre » fondée sur une approche fonctionnelle n'a pas été retenue. Un individu ne pourrait pas être un cadre pour certaines fins et non pour d'autres. Un ministre n'était pas censé être un « cadre » d'une institution fédérale du simple fait qu'il était le responsable de cette institution.

LeBel, J. (souscrivant à l'opinion des juges majoritaires) : À moins de faire l'objet d'une exception expressément prévue par la Loi sur l'accès à l'information, les documents politiques étaient présumés être accessibles.

Les documents politiques ne faisaient pas l'objet d'une exception implicite du simple fait qu'un cabinet ministériel n'était pas une « institution fédérale » pour les fins de la Loi. Tout document demandé se trouvant au cabinet d'un ministre demeurait assujetti au critère d'application. Si le document se trouvant dans le cabinet ministériel relevait d'une institution fédérale, il fallait présumer que le droit d'y avoir accès s'appliquait, à moins que le document ne fasse l'objet d'une exemption spécifique.

La commissaire disposait d'un large pouvoir discrétionnaire qui pouvait être utilisé comme contrepoids au pouvoir discrétionnaire du ministre l'habilitant à communiquer ou à conserver des documents politiques. Une présomption écartant les documents d'un ministre du champ d'application de la Loi affaiblirait les pouvoirs de la commissaire, lesquels étaient fondamentaux pour le maintien de l'équilibre recherché entre l'accès à l'information et la bonne gouvernance.

Vu les circonstances dans lesquelles les dossiers demandés se trouvant dans le CPM et les cabinets ministériels avaient été rédigés et gérés, une institution fédérale ne pourrait raisonnablement pas s'attendre à les obtenir. Ces documents ne relevaient donc pas d'une institution fédérale et ne pouvaient pas être communiqués.

Les dossiers que possédaient le BCP et la GRC relevaient d'une institution fédérale. Toutefois, ils ne pouvaient pas être divulgués puisqu'ils étaient assujettis à l'art. 19 de la Loi.

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s. 2(1) — considered

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s. 4 — considered

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s. 6 — referred to

ss. 7-9 — referred to

s. 10(1) — referred to

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s. 21 — considered

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***Charron J.*:**

1. Overview

1 These appeals bring together four applications by the Information Commissioner of Canada for judicial review of refusals to disclose certain records to a person who requested them under the *Access to Information Act*, R.S.C. 1985, c. A-1. The records, requested almost a decade ago, generally consist of agendas, notes and emails relating to the activities of then-Prime Minister Jean Chrétien, then-Minister of National Defence Art Eggleton, and then-Minister of Transport David Collenette.

2 The first three applications concern refusals to disclose records located within the offices of the Prime Minister, the Minister of National Defence, and the Minister of Transport, respectively. Each record holder, jointly called the "Government" in these appeals, takes the position that his office is not subject to the *Access to Information Act*. The fourth application concerns the refusal to disclose those parts of the Prime Minister's agenda in the possession of the Royal Canadian Mounted Police ("RCMP") and the Privy Council Office ("PCO"). The record holders in this application agree that they are subject to the Act; they argue, however, that the information contained in the requested records is exempt from disclosure under s. 19(1) of the *Access to Information Act*, as it constitutes "personal information" within the meaning of s. 3 of the *Privacy Act*, R.S.C. 1985, c. P-21.

3 The requester has the right, under s. 4 of the *Access to Information Act*, to be given access to "any record under the control of a government institution". On the first three applications, there is no issue that, by definition, "government institution" includes the PCO, the Department of National Defence, and the Department of Transport. The question is whether each government institution includes the office of the Minister who presides over it. In other words: Is the Prime Minister's office ("PMO") part of the PCO? Is the office of the Minister of National Defence part of the Department of National Defence? Is the office of the Minister of Transport part of the Department of Transport?

4 Following a detailed analysis, Kelen J. of the Federal Court of Canada answered no to each question, holding that the respective entities were separate (2008 FC 766, [2009] 2 F.C.R. 86 (F.C.)). In his view, the words of the statute read in their ordinary sense, in context, and harmoniously with the scheme of the Act and the intention of Parliament made this clear. Expert evidence on the functioning of government also supported this interpretation. He concluded that "no contextual consideration could warrant the Court interpreting Parliament to have intended the PMO to be part of the PCO for the purposes of the Act. The same is true with respect to ministers' offices not being part of the respective government institutions" (para. 77). In a brief oral judgment, Sharlow J.A., speaking for the Federal Court of Appeal, upheld Kelen J.'s interpretation of the statute on this point (2009 FCA 175, 393 N.R. 51 (F.C.A.) ("Decision 1")), and again in 2009 FCA 181, 393 N.R. 54 (F.C.A.) ("Decision 2").

5 As the ministerial entities were held to be separate, a second question arose: Are the records requested, despite being physically located in the respective offices of the Prime Minister, the Minister of National Defence, or the Minister of Transport, nonetheless "under the control" of the related government institution within the meaning of s. 4 of the *Access to Information Act*?

6 After surveying the jurisprudence, Kelen J. concluded that no single factor is determinative of whether a record is under the control of a government institution. However, the relevant factors could usefully be distilled into a two-part test that asks: (1) whether the contents of the document relate to a departmental matter; and (2) whether the government institution could reasonably expect to obtain a copy of the document upon request. If both questions are answered in the affirmative, the document is under the control of the government institution. Kelen J. considered the contents of the records and the circumstances in which they were created, and concluded that none of the records requested was under the control of the related government institution. The Federal Court of Appeal agreed with the control test proposed by Kelen J. It also upheld his decision regarding the requested records, stating that it was open to him to come to this conclusion "by drawing reasonable inferences from the evidence before him, as he did" (Decision 1, at para. 9).

7 Thus, the answers provided by the courts below on the meaning of "government institution" and "control" effectively disposed of the first three applications in favour of the Government.

8 In the fourth application, there is no dispute that the RCMP and the PCO are government institutions and that, subject to any exemption under the *Access to Information Act*, records under their control must be disclosed. While a number of exemptions were at issue in first instance, the question on this appeal is whether the records requested consist of "personal information" within the meaning of s. 19(1) of the *Access to Information Act*. This provision prohibits the head of a government institution from disclosing "any record ... that contains personal information as defined in section 3 of the *Privacy Act*". Under this provision, "personal information" "means information about an identifiable individual that is recorded in any form".

9 The parties agree that the Prime Minister's agenda falls within the general definition of "personal information". However, s. 3 "personal information" (*j*) of the *Privacy Act* creates an exception by excluding from the scope of protection such information which pertains to "an individual who is or was an *officer* or employee of a government institution" and the information "relates to the position or functions of the individual". The exception seemingly reflects the view that federal officers or employees are entitled to less protection when the information requested relates to their position or function within the government. It is this exception that is arguably at play in the fourth application: the disclosure issue turns on the question of whether the Prime Minister is an "officer" of the PCO within the meaning of s. 3 "personal information" (*j*) of the *Privacy Act*.

10 Kelen J. held that the Prime Minister was an "officer" of the PCO. In a separate judgment, the Federal Court of Appeal overturned his decision, finding that the conclusion reached in the related appeals about the separate nature of the PMO from the PCO governed here as well. Sharlow J.A. held that it would be "inconsistent with the intention of Parliament to interpret the *Privacy Act* in a way that would include the Prime Minister within the scope of the phrase 'officer of a government institution'" in s. 3 (Decision 2, at para. 8).

11 The Commissioner appeals from the dismissal of each application. She urges the Court to hold that, as "heads" presiding over departments, the Prime Minister and the Ministers are part of these "government institutions" within the meaning of the *Access to Information Act*, when exercising *departmental functions*. Similarly, she argues that the Prime Minister is an "officer" of the PCO. Alternatively, if ministerial offices are held to be separate entities, the Commissioner argues that any record *relating to a departmental matter* is presumptively under the "control" of the government institution over which the Minister presides, regardless of its creation or location within the ministerial office. Thus, any such record must be disclosed, unless it is specifically exempt under the Act.

12 While the Commissioner raises some specific issues regarding the interpretation in the courts below in support of her position, her arguments are grounded primarily in broad principles of constitutional law, political theory, democratic accountability, and ministerial responsibility. I note at the outset that these principles unquestionably form part of the context in which the *Access to Information Act* operates. The position advanced by the Commissioner also reflects a policy of democratic governance which Parliament could choose to adopt. However, as Kelen J. aptly noted in the introduction to his judgment:

> The question for the Court is not whether the documents should be accessible to the public under Canada's "freedom to information" law, but whether the documents are currently accessible to the public under Canada's existing law. The Court does not legislate or change the law; it interprets the existing law (para. 3).

13 Much as the courts below have concluded, it is my view that the interpretation advanced by the Commissioner on the meaning of "government institution", "control" and "officer" cannot be sustained under the existing statutes at issue. As the Government rightly argues, such interpretation would dramatically expand the access to information regime in Canada, a result that can only be achieved by Parliament.

14 I would dismiss the appeals.

2. The Legislative Scheme

15 As this Court recently stated, "[a]ccess to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance" (*Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 SCC 23, [2010] 1 S.C.R. 815 (S.C.C.), *per* McLachlin C.J. and Abella J., at para. 1). These general principles are reflected in the federal access regime under the *Access to Information Act*. The purpose of the statute is expressly stated as follows:

> **2.** (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

16 Thus, the statute expressly recognizes that information in the hands of government institutions "*should* be available to the public", but the right to access it is subject to "*necessary* exceptions". Before discussing the provisions at issue, I will briefly describe the legislative scheme.

17 The right to "be given access to any record under the control of a government institution" is provided under s. 4(1). This broad right of access is expressly subject to other provisions of the *Access to Information Act*, but supersedes "any other Act of Parliament". What constitutes a "government institution" for the purposes of the statute is key to these appeals. The definition is set out in s. 3 and will be discussed more fully below.

18 The process for accessing government information begins when a member of the public makes a request in writing for a record to a government institution (s. 6). The head of the government institution who receives a request must give written notice to the person who has requested the records as to whether or not access will be given in whole or in part within a reasonable time limit (ss. 7 to 9). Where the government institution refuses to give access to the records requested, it is required to provide notice to the requester that the records do not exist, or to expressly state the exemption it is relying upon in refusing to provide access to the records (ss. 10(1) to (3)). Further, the government institution must inform the requester of his or her "right to make a complaint to the Information Commissioner about the refusal" (s. 10(1)).

19 If the requester elects to exercise this right and makes a complaint, the Commissioner is entitled to commence an investigation if she is "satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act" (s. 30(3)). Once the Commissioner commences an investigation, the *Access to Information Act* grants her significant investigatory powers (s. 36). If the Commissioner concludes that the complaint is well founded, a report is sent to the head of the government institution containing the findings of the investigation and any recommendations the Commissioner considers appropriate; the report may also include a request to be notified of any action taken to implement the recommendations or reasons why no such action has been or is proposed to be taken (s. 37(1)).

20 If the government institution elects not to comply with the Commissioner's recommendations, the individual requesting the record may apply for judicial review pursuant to s. 41 of the *Access to Information Act*. The Commissioner may also apply for judicial review of the government's decision with the consent of the individual who initially requested the records (s. 42). The latter is what occurred here. The Government refused to disclose the information, and the requester complained to the Commissioner. Following her investigation, the Commissioner found the complaints to be well founded

and made recommendations accordingly. The recommendations were not implemented by the Government, and the Commissioner brought these four applications for judicial review.

3. Judicial Review in the Courts Below

21 The four applications for judicial review were combined in one hearing before the Federal Court. Before reviewing the relevant material, Kelen J. determined the appropriate standard of review in accordance with the principles set out in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.). Under *Dunsmuir*, courts may usefully first inquire whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be given to a particular category of questions. Second, where the first inquiry proves unfruitful, courts proceed to analyze the factors that make it possible to identify the proper standard of review (para. 62). Kelen J. ended the inquiry at the first step, holding that this Court's decision in *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, 2003 SCC 8, [2003] 1 S.C.R. 66 (S.C.C.) (*"RCMP"*), determined in a satisfactory manner that the questions raised in these four applications should be reviewed on a "correctness" standard (para. 36).

22 The standard for judicial review of refusals by government institutions to disclose any requested documents under the *Access to Information Act* is not at issue in these appeals. Kelen J. rightly concluded that this Court authoritatively determined the matter in *RCMP*. Determining the appropriate standard of review requires courts to discern the intention of the legislature. Of particular note here is the fact that Parliament expressly states in s. 2(1) that one of the purposes of the *Access to Information Act* is to ensure that "decisions on the disclosure of government information should be reviewed independently of government". Moreover, the burden is put on the government to demonstrate on judicial review that it is authorized to refuse to disclose the records that were requested (s. 48). If the court concludes that the head of the institution does not have the legal authority to refuse to disclose the relevant records, the court may substitute its own decision and order the disclosure of the documents, subject to any conditions it may elect to impose (s. 49).

23 In turn, Kelen J.'s decision is subject to appellate review in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 8-9 and 31-36. His decision on questions of statutory interpretation is reviewable on a standard of correctness. His decision on whether the requested documents were in fact under the control of the government institution, provided it is not premised on a wrong legal principle and absent palpable and overriding error, is entitled to deference. Although not expressly stated, it is apparent from reading both judgments in the Federal Court of Appeal below that Sharlow J.A. reviewed Kelen J.'s decision in accordance with the proper standard of appellate review. I will review the decisions under appeal using the same approach.

4. Analysis

4.1 Issue 1: Is the Office of the Prime Minister, or a Minister, a "Government Institution" Within the Meaning of the Access to Information Act?

24 Subsection 4(1) of the *Access to Information Act* reads as follows:

> **4.** (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is
>
> (a) Canadian citizen, or
>
> (b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,
>
> has a right to and shall, on request, be given access to any record under the control of a government institution.

25 Under s. 3 of the Act:

> ”government institution” means
>
> > (a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and
> >
> > (b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*;

26 Schedule I sets out a list of entities that are government institutions for the purposes of the *Access to Information Act*. This list includes the PCO, the Department of National Defence, the Department of Transport, and the RCMP. However, the PMO, the office of the Minister of National Defence and the office of the Minister of Transport are *not* expressly listed in Schedule I. The term “government institution” is similarly defined under the *Privacy Act*. The question becomes whether Parliament intended to implicitly include ministerial offices within the *Access to Information Act*.

27 The proper approach to statutory interpretation has been articulated repeatedly and is now well entrenched. The goal is to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute. In addition to this general roadmap, a number of specific rules of construction may serve as useful guideposts on the court’s interpretative journey. Kelen J. instructed himself accordingly (paras. 43-49). He then conducted the following analysis:

> First, Kelen J. considered evidence from political scientists about how government actually works to determine the ordinary meaning of the term “government institution” according to the experts. He held that this evidence demonstrated that the PMO and the relevant ministerial offices are not part of the “government institution” for which they are responsible (paras. 50-52).
>
> Second, he noted that pursuant to s. 3 of the statute, the Minister is the “head” of his or her department. This fact supported the argument that the Ministers’ offices and the PMO are part of their respective departments. However, he found that the PMO and the Ministers also have many other functions unrelated to the respective departments for which they are responsible (paras. 53-56).
>
> Third, he considered Hansard debates from 1981, which made it clear that Parliament intended that the *Access to Information Act* apply to information, in any form, held by *specified* government institutions. While the Commissioner agrees that Parliament did not intend the Act to apply to political documents, no exemption or exclusion for such political records is provided for in the Act. Kelen J. therefore reasoned that an interpretation of “government institution” that included the PMO and offices of the Ministers would dramatically extend the right of access. Parliament would not have intended such a “dramatic result” without express wording to that effect (paras. 57-60).
>
> Fourth, following the enactment of the *Access to Information Act*, the Information Commissioner’s 1988-1989 Report to Parliament indicated that Ministers’ offices were *not* subject to the provisions of the Act. The Commissioner adopted the same view in 1992, and again in 1997. These original interpretations confirm that the office of the Information Commissioner itself understood the intent of Parliament was not to include the PMO or a Minister’s office in the government institutions listed in Schedule I of the Act (paras. 61-65).
>
> Fifth, since the time the Commissioner publicly urged Parliament to amend the legislation to clarify that the PMO and ministerial offices are subject to the Act, Parliament amended the Act several times, including recent amendments as part of the 2006 *Federal Accountability Act*, S.C. 2006, c. 9, and has not chosen to make this amendment. While Parliament’s intention may not always be inferred from legislative silence, in this case, the silence is clear and constitutes relevant evidence of legislative intent: *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), at para. 42 (paras. 66-67).
>
> Sixth, the Latin maxim of statutory interpretation *expressio unius est exclusio alterius* (”to express one thing is to exclude another”) supports the Government’s view. If Parliament had intended to include the PMO and Ministers’

offices in Schedule I, it would have referred to them expressly (para. 68).

Seventh, the evidence at trial demonstrated that there have been many Ministers without a portfolio since Confederation. If the *Access to Information Act* was intended to apply to the offices of Ministers, the Act would not apply to a Minister without a portfolio because he or she would not have a corresponding "government institution" set out in Schedule I. Such a result is absurd (para. 69).

Eighth, the internal structure of the Act also provides insight on this question. Paragraphs 21(1)(*a*)-(*b*), s. 21(2)(*b*) and s. 26 of the *Access to Information Act* demonstrate that Parliament distinguished between a "government institution" and "a minister of the Crown". When drafting legislation, Parliament is assumed to have used words precisely and carefully, and so Parliament intended the terms to have different meanings (paras. 70-73).

Ninth, provisions of the *Library and Archives of Canada Act*, S.C. 2004, c. 11, also draw a distinction between governmental records and ministerial records. The principle of consistent expression in statutory interpretation means that Parliament distinguishes between a "ministerial record" and a "departmental record" (paras. 74-76).

28 At the conclusion of his analysis, Kelen J. held that the words in s. 4(1) of the *Access to Information Act* mean that the PMO and the relevant ministerial offices are *not* part of the "government institution" for which they are responsible. That is, the PMO cannot be interpreted as part of the PCO, the office of the Minister of National Defence is not part of the Department of National Defence, and the office of the Minister of Transport is not part of the Department of Transport.

29 The Commissioner presents very little argument on any of the above-noted points. As I understand her submissions, she has only two specific complaints about the approach adopted by Kelen J. and affirmed by the Federal Court of Appeal. First, she argues that the applications judge erred in his use of expert evidence as an interpretative aid. Second, and somewhat related to the first point, she argues that the Federal Court of Appeal erred in relying on a non-existing "constitutional convention" for distinguishing between ministerial offices and their respective government departments. I will therefore deal specifically with these two arguments.

4.1.1. The Use of Expert Evidence

30 After setting out the relevant principles of statutory interpretation, Kelen J. briefly considered the evidence tendered from "experts in government machinery" (para. 50). In particular, he examined the evidence of Mr. Nicholas d'Ombrain, Mr. Justice John Gomery, and a reference relied upon by Mr. d'Ombrain from the Honourable Robert Gordon Robertson, Clerk of the Privy Council and Secretary to the Cabinet from 1963 to 1975. Kelen J. summarized the gist of this evidence as follows, at paras. 50-51:

While the two entities work closely together on some matters, the PMO is responsible for many matters unrelated to the PCO. The same is true with respect to the relationship between a minister's office and the department over which the minister presides.

Accordingly, the evidence demonstrates that in the ordinary sense of the words in subsection 4(1) of the Act, the PMO and the relevant ministerial offices are not part of the "government institution" for which they are responsible.

31 The Commissioner submits that reliance upon such expert evidence to interpret the *Access to Information Act* constitutes an error of law. She maintains that it was entirely appropriate for her office to consider expert political science evidence at the investigatory stage. However, opinion evidence is inadmissible in the courtroom to prove the ordinary meaning of legislative terms, "as the interpretation and articulation of domestic law lies at the very heart of the judicial function" (A.F., at para. 110). She contends that this approach confirms that both courts below "viewed the central issue of the reach of a 'government institution' as a question of fact, to be determined primarily if not entirely on the basis of expert evidence" (para. 112). She argues further that the courts below "did not at any point seek to determine what was included within a 'government institution' as a matter of law"; rather, they simply accepted "the assertion that a ministerial office is separate from the department over which the Minister presides" (para. 112).

32 In response, the Government first observes that the Commissioner's position on this point is "particularly curious", as the expert evidence generated by the Commissioner's office and compiled for her investigation was used extensively to support her recommendations and then placed in the record before the Federal Court (R.F., at para. 103). In any event, the Government submits that expert evidence can be properly used as an interpretive aid in discerning the ordinary meaning of words by Parliament when such evidence is relevant and reliable: *Francis v. Baker*, [1999] 3 S.C.R. 250 (S.C.C.), at para. 35; and *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 (S.C.C.), at para. 47. Further, Kelen J.'s reasons demonstrate that the expert evidence played a limited role in his analysis. He did not rely on any expert opinion on the meaning of the words used by Parliament as contended, given that no such opinion was tendered by the witnesses. He considered this evidence, rather, to situate the interpretative exercise in its proper context, an approach which was then correctly upheld by the Federal Court of Appeal.

33 I agree with the Government. No objection was raised in respect of this evidence in first instance, not surprisingly in my view, as consideration of expert evidence in the context of these applications was entirely appropriate. It is also apparent from Kelen J.'s reasons that he merely relied upon the expert evidence tendered by both parties to better appreciate the day-to-day workings of the government and to situate his interpretation of the *Access to Information Act* within its proper context. Further, Kelen J.'s meticulous analysis of the law belies any contention that he "viewed the central issue of the reach of a 'government institution' as a question of fact" (para. 112). His reasons demonstrate, rather, that he conducted a full analysis of the text, guided by well-established principles of statutory interpretation. I see no merit to the Commissioner's argument on the alleged misuse of expert evidence.

4.1.2. Alleged Reliance on a Non-Existing Constitutional Convention

34 Along the same lines, the Commissioner takes issue with Sharlow J.A.'s characterization of the distinction between ministerial offices and their respective government departments as a "well understood convention" (Decision 1, at para. 7; Decision 2, at para. 7). The Commissioner focuses a significant portion of her argument on the legal criteria for a constitutional convention and takes the position that none is met here. She therefore argues that this phrase demonstrates that the Federal Court of Appeal "erroneously accorded constitutional weight to a disputed, ill-defined and inconsistently followed practice" (A.F., at para. 116).

35 The Government responds that the Commissioner used the term "convention" in her material in the courts below simply to describe an understanding of the roles and duties of Ministers and government institutions. The Government submits that, similarly, when Sharlow J.A. used the phrase "well understood convention", it is clear from the context that she was simply referring to the day-today workings or "conventions" of government.

36 Again, I agree with the Government on this point. I find no support at all in the record for the suggestion that Sharlow J.A. was actually referring to constitutional conventions in their legal sense.

4.1.3 "Function-Based" Approach Advocated by the Information Commissioner

37 Except for the above-noted specific complaints about the use of expert evidence and the reliance on government "conventions", the Commissioner's arguments are grounded primarily in broad principles of constitutional law, political theory, democratic accountability, and ministerial responsibility. The Commissioner expounds on these principles in considerable detail and submits that "the right of access and apparatus created by [the *Access to Information Act* was] meant [by Parliament] to be integrated into these legal rules" and "to function as a supplementary mechanism to ensure accountability for the exercise of executive power" (A.F., at para. 102). She therefore urges the Court to adopt a "function-based analysis" so as to create a dividing line between a Minister's departmental functions on the one hand and non-departmental functions on the other. She explains in her factum that this "analysis is easily translated into the scheme" of the *Access to Information Act* in respect of the ministerial offices at issue in the following manner (A.F., at para. 150):

> ... a record is subject to [the *Access to Information Act*], regardless of its physical form or location, where it was created by or on behalf of a Minister to document or give effect to a Minister's exercise of departmental powers, duties or

> functions, or relies directly on departmental staff in order to exercise the Minister's departmental powers, duties or functions. By contrast, the record is not subject to [the *Access to Information Act*] if it is created by the Minister or exempt staff for political or non-departmental purposes. Similarly, if the Minister or exempt staff receive information from departmental staff, and then generate further records for political, non-departmental purposes, the additions are not subject to [the *Access to Information Act*].

38 The Commissioner further submits that a similar analysis could be adopted in relation to Ministers of State "[t]o the extent that a Minister of State exercises the powers, duties and functions of a department", and also "in relation to government institutions other than departments that fall within the portfolio responsibilities of a given Minister (or Minister of State)" (A.F., at paras. 152-53).

39 The Government submits that the "function-based" approach advocated by the Commissioner renders the list of institutions detailed in Schedule I essentially meaningless. Her approach is entirely focused on the nature and content of the record and, as such, conflates the issue of defining "government institution" with the issue of how one determines which entity has "control" of a specific record. Moreover, although the Commissioner recognizes that political and non-departmental matters would not be subject to release under the Act, the statute provides no exemption for such records. Her attempt to remedy this deficiency by conceptually building it into a function-based definition of "government institution" goes "well beyond any concept of statutory interpretation recognized by this or any other Court" (R.F., at para. 129).

40 I agree with the Government. None of the broad principles relied upon by the Commissioner is contentious in these appeals. In my respectful view, nor are they particularly helpful in answering the questions of statutory interpretation at issue. For example, the Commissioner relies heavily on the quasi-constitutional characterization of the *Access to Information Act*. (See *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773 (S.C.C.), where the Court affirmed this status in respect of the *Official Languages Act* and the *Privacy Act* (paras. 23-25)). She argues that, as such, the purpose of the Act becomes of paramount importance in the interpretative exercise, and that the legislation should be interpreted broadly in order to best promote the principles of responsible government and democratic accountability. While I agree that the *Access to Information Act* may be considered quasi-constitutional in nature, thus highlighting its important purpose, this does not alter the general principles of statutory interpretation. The fundamental difficulty with the Commissioner's approach to the interpretation of the term "government institution" is that she avoids any direct reference to the legislative provision at issue. The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted.

41 It is important to recall that Parliament's statement of purpose in s. 2 of the Act recognizes that exceptions to public accessibility are "necessary". For example, in s. 21, Parliament has recognized the need for confidential advice to be sought by and provided to a Minister and, consequently, records in a government institution offering such advice are exempt from disclosure at the discretion of the head of the institution. The advice provided to a Minister may come from a variety of sources and may pertain to a broad range of matters, including matters relating to the department over which the Minister presides. Some of these matters may have a political dimension and some may not. Similarly, the policy rationale for excluding the Minister's office altogether from the definition of "government institution" can be found in the need for a private space to allow for the full and frank discussion of issues. As the Government rightly submits: "It is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records" that Parliament sought to protect by not extending the right of access to the Minister's office (R.F., at para. 82). Of course, not all documents in a Minister's office are excluded from the scope of the Act. As we shall see, despite its physical location in a ministerial office, any document which is "under the control" of the related, or any other, government institution is subject to disclosure.

42 The functional approach advocated by the Commissioner not only creates the problem identified by Kelen J. that some Ministers would be covered by the Act, whereas others would not. It also ignores the practical difficulty of carving out a political class exemption when none is provided in the Act. If a Minister's office is a government institution, all records under its control would be subject to release under the Act, unless expressly exempted or excluded by the Act. The proposal of carving out "political" documents based on an analysis of their content is easier said than done. As the Government notes, "records in a Minister's office are not neatly arranged into clearly defined 'political', 'constituent' and 'departmental' piles. The intermingling of these issues and facts is what makes the Minister's office unique. The simplistic approach of 'carving out' political records is unrealistic" (R.F., at para. 88).

43 Of course, Parliament could have opted for a different access scheme. However, it did not. Kelen J.'s interpretative analysis contains no error. The meaning of "government institution" is clear. In my view, the courts below rightly concluded that no contextual consideration warrants the Court interpreting Parliament to have intended that the definition of "government institution" include ministerial offices. I would not give effect to this ground of appeal.

4.2 Issue 2: Are the Records Requested, Despite Their Physical Location in the Respective Ministerial Offices, "Under the Control" of the Related Government Institution Within the Meaning of Section 4 of the Access to Information Act?

44 In light of my conclusion regarding the first issue, the question then becomes whether the requested records held within the respective ministerial offices are nonetheless "under the *control*" of their related government institutions within the meaning of s. 4(1) of the Act. Kelen J. concluded that they were not, and the Federal Court of Appeal upheld his decision. The Commissioner appeals from this conclusion.

45 None of the Commissioner's arguments is directed at the findings of fact made by Kelen J. regarding the particular records requested. The success of the Commissioner's appeal on this point is dependent, rather, on whether the Court accepts her proposed test for determining what constitutes "control" for the purposes of access under the Act. As I will explain, the test for control proposed by the Commissioner is entirely focussed on the function or content of the record and, in substance, is essentially the same as the test she proposes for defining a "government institution". Consequently, much for the reasons stated above, the Commissioner's interpretation of the word "control" cannot be sustained as it finds no support in the wording of the Act.

46 First, I will review the control test adopted by the courts below.

47 The word "control" is an undefined term in the statute. Its meaning has been judicially considered in a number of cases, and Kelen J. turned to this jurisprudence for guidance. In particular, he reviewed the following cases: *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (Fed. T.D.); *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (Fed. C.A.); *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)* (2000), 257 N.R. 66 (Fed. C.A.); *Rubin v. Canada (Minister of Foreign Affairs & International Trade)*, 2001 FCT 440, 204 F.T.R. 313 (Fed. T.D.); *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 (Fed. C.A.); and *Canada Post Corp. v. Canada (Minister of Public Works & Government Services)*, 2004 FCA 286, 328 N.R. 98 (F.C.A.). From this jurisprudence, Kelen J. gleaned a number of principles, which I will paraphrase as follows.

48 As "control" is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the *control* of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "*de jure*" as well as "*de facto*" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The *Canadian Oxford Dictionary* defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "*de facto*" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act (paras. 91-95).

49 In applying these principles to the records at issue, Kelen J. articulated the following test, at para. 93:

> Upon review by the Court, if the content of a document in the PMO or the offices of the Ministers of National Defence and Transport relates to a departmental matter, and the circumstances in which the document came into being show that the deputy minister or other senior officials in the department could request and obtain a copy of that document to deal with the subject-matter, then that document is under the control of the government institution.

50 The Federal Court of Appeal agreed with this test, holding that, in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request? (Decision 1, at paras. 8-9).

51 As I understand her arguments, the Commissioner does not take issue with any of the principles Kelen J. gleaned from his review of the relevant jurisprudence. Indeed, she substantially adopts these principles in her factum at para. 168 and rightly so. Those principles should inform the analysis. Her complaint lies, rather, with how these principles were distilled into the two-step inquiry described above. She submits that the courts below have erred in law by essentially reducing the legal inquiry concerning "control" to two seemingly simple factual questions — whether the record relates to a departmental matter and whether senior members of the departmental staff could request and obtain a copy of the record. She submits that these factual indicia can be too easily manipulated by government actors to avoid releasing documents that validly fall within the scope of the Act. In particular, she submits that the "mechanism of a hypothetical request" under step two of the test is weak and unacceptable as it "inappropriately relies on past practices and prevalent expectations, rather than the legal relationships at issue" (A.F., at para. 169). Put more colloquially, she argues that if this Court adopts the control test articulated in the courts below, the Minister's office may effectively become a "black hole" used to shield certain sensitive documents that properly fall within the ambit of the *Access to Information Act* (A.F., at para. 162).

52 I agree with the Commissioner that it would be an error to interpret the words "under the *control*" in a manner that allowed government actors to turn the Minister's office into a "black hole" to shelter sensitive records that should otherwise be produced to the requester in accordance with the law. However, as I will explain, I am not persuaded that the courts below erred as she contends. In essence, the Commissioner's complaint on this ground of appeal is based on the same criticism of the institutional distinction between the Minister and the department over which he or she presides argued under the first ground. This is readily apparent from the alternative test that she proposes. In order to counter the "black hole" problem, the Commissioner urges the Court to hold that a record in a Minister's office is under the control of the corresponding government institution when the following two conditions are met:

> (a) the record was obtained or generated by the Minister or on his or her behalf; and
>
> (b) the record documents or gives effect to the Minister's exercise of departmental powers, duties or functions, or relies directly on departmental staff in order to exercise the Minister's departmental powers, duties or functions. [A.F., at para. 172]

53 As the Government rightly responds, the test for control proposed by the Commissioner effectively eliminates the need to consider the definition of "government institution". As the Government puts it in its factum: "If the function or content of the record determines control, then it does not matter if the record is in a government institution or a Minister's Office, as they are the same entity for the purposes of determining 'control'" (R.F., at para. 179). I agree. A decision on the issue of control based almost exclusively on the content of the record would have the effect of extending the reach of the Act into the Minister's office where, as discussed earlier, Parliament has chosen not to go.

54 Further, the Commissioner's argument on the deficiency of the control test crafted by the courts below presupposes that the two-part distillation of the test, particularly as articulated by the Federal Court of Appeal, is not intended to fully capture the principles upon which the test was crafted. I do not read the judgments below as having that effect. As Kelen J. made clear, the notion of control must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister's office, this does not end the inquiry. The Minister's office does not become a "black hole" as contended. Rather, this is the point at which the two-step inquiry commences. Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.

55 Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the *Access to Information Act* is not intended to capture

non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.

56 Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* (A.F., at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.

57 My colleague LeBel J. agrees with this control test, but takes exception to the creation of "an implied presumption that the public does not have a right of access to records in a Minister's office" (para. 76). With respect, his concern is founded on a misinterpretation of these reasons. There is no presumption of inaccessibility. As LeBel J. rightly notes, at para. 91:

> The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head must facilitate access to it on the basis of the procedure and the limits specified in the Act.

58 I agree. Conversely, if a document is under the control of the Minister's office and *not* under the control of the related, or any other, government institution, it does not fall within the purview of the *Access to Information Act.* If one views this result as creating a factual "presumption of inaccessibility", or alternatively an implied exemption for political records, in my respectful view, it is a consequence that inevitably flows from the fact that Ministers' offices are not government institutions within the meaning of the Act, a conclusion with which LeBel J. agrees.

59 Thus, the test articulated by the courts below, properly applied, does not lead to the wholesale hiding of records in ministerial offices. Rather, it is crafted to answer the concern. In addition, as the Government rightly notes, Parliament has included strong investigatory provisions that guard against intentional acts to hinder or obstruct an individual's right to access. My colleague reviews some of these investigatory powers. It is true, as he points out, that the statutory power to enter any "government institution" would not allow the Commissioner to enter a Minister's office. However, again here, it seems to me that this result inevitably flows from the limited scope of the term "government institution" and must be taken to have been intended by Parliament. I disagree with my colleague that this limitation on the Commissioner's powers effectively leaves the Minister as head of the government institution with the final say as to whether a given document is under the control of a government institution (para. 109). The Commissioner has significant powers of investigation that include the authority to "summon and enforce the appearance of persons", including Ministers, "and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record": s. 36(1)(*a*). Further, as an additional safeguard, any refusal to disclose requested records is subject to independent review by the courts on a standard of correctness.

60 In the result, I agree with the Federal Court of Appeal that the two questions posed by Kelen J. were adequate to determine whether the records requested in the three applications at issue were under the control of a government institution. It is also clear from his detailed analysis that he considered all relevant factors on an objective basis, as discussed above. Applying this test to the material before him, he concluded that none of the requested records was in the control of a government institution. In brief, he disposed of the first three applications on the following bases.

61 First, the Prime Minister's agendas were not under the control of the PCO. The agendas were created by the Prime Minister's exempt staff and were always in possession of the Prime Minister or his exempt staff. No "government institution" had physical possession of the records or the right to obtain them.

62 Second, the Minister of Transport's unabridged and abridged agendas were not under the control of a government institution. The unabridged agendas were always in the possession of the Minister's office and were not provided to the Deputy Minister or anyone else in the government institution. The abridged agendas were in the possession of the government institution for a limited time, but were not kept after the relevant date and there was no expectation that the Minister's office would provide the agendas for a second time.

63 Third, the notebooks held in the Minister of National Defence's office were not under the control of the Department of National Defence. They were created and maintained by exempt staff for their personal use and would not have been produced to government officials. While the Minister relied upon his exempt staff for taking notes of meetings, he himself never looked at the notes. The emails also were not under the control of the Department of National Defence. They did not contain substantive information about departmental matters.

64 As stated earlier, the Commissioner presents virtually no argument in respect of the findings of fact made by Kelen J. I agree with the Federal Court of Appeal that the conclusions reached by Kelen J. on the issue of control were open to him on the record and entitled to deference.

65 I would not give effect to the second ground of appeal on the issue of control. Consequently, I would dismiss the Commissioner's appeals on the first three applications with costs.

66 On the fourth application, it is agreed that the Prime Minister's agendas in the possession of the RCMP and the PCO were under the control of a "government institution" for the purposes of the *Access to Information Act*. Therefore, this brings us to the final issue.

4.3 Issue 3: Are the Prime Minister's Agendas at Issue Exempt or Excluded From Disclosure Pursuant to Section 19 of the Access to Information Act and Section 3(j) of the Privacy Act?

67 The definition of "government institution" is the same under both the *Access to Information Act* and the *Privacy Act*. The RCMP and the PCO are specifically listed in Schedule I and, as such, are government institutions. Records under their control must be disclosed, subject to certain statutory exemptions. Section 19(1) of the *Access to Information Act* prohibits the head of a government institution from releasing any record that contains "personal information as defined in section 3 of the *Privacy Act*". However, s. 3(*j*) creates an exception by allowing for the disclosure of personal information where such information pertains to "an individual who is or was an *officer* or employee of a government institution" and where the information in question "relates to the position or functions of the individual". In short, the s. 3(*j*) exception will apply, and those parts of the Prime Minister's agenda that relate to his job must be disclosed, if the Prime Minister is an "officer ... of a government institution".

68 Under both statutes, the "head" of a government institution includes "in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada". The Prime Minister is the head of the PCO under this definition. The term "officer", however, is not defined. The question is whether the Prime Minister as "head" of a government institution is also an "officer" of that institution.

69 Kelen J. held that he was. In reaching this conclusion, he relied upon the definition of "public officer" found in the *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 2, which includes "a minister of the Crown and any person employed in the federal public administration". He also relied on the definition of "public officer" in the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2, which includes "any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment" (para. 107).

70 The Federal Court of Appeal reversed this finding, holding that Kelen J. "erred in law in importing into the *Privacy Act* the definitions of 'public officer' from statutes dealing with different subjects that use that term in different contexts" (Decision 2, at para. 5). In its view, "[t]he same understanding about the special governmental role of the Prime Minister" discussed in the first three applications "would have formed part of the foundation for the drafting of the *Privacy Act*" (para. 8). The Federal Court of Appeal concluded that it would be inconsistent with Parliament's intention to interpret the *Privacy*

Act in a way that would include the Prime Minister as an officer of a government institution.

71 I agree with the Federal Court of Appeal that Kelen J. erred in relying on the definition of "public officer" in two other statutes. It is clear that the definition of "public officer" found in the *Financial Administration Act* is a broad definition which deals with an unrelated subject and operates in a different context. The definition contained in the *Interpretation Act* could arguably be relevant, as s. 3(1) states: "Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act". However, I find no support for incorporating the definition of "public officer" in this context. First, while there may be overlap between the two terms, the term "public officer" used in the *Interpretation Act* is simply not the same as the term "officer ... of a government institution" used in the *Privacy Act*. Second, the definition "public officer" is contained in the list of definitions under s. 2 of the *Interpretation Act*, which is expressly stated to apply "[i]n this Act". The definition is not repeated in the definitions contained in s. 35, which conversely, apply "[i]n every enactment". Finally, the *Interpretation Act* itself differentiates between a "public officer" and a "minister of the Crown" (see, for example, s. 24). In my view, the Federal Court of Appeal rightly concluded that the meaning of "officer of a government institution" must be ascertained in its proper context.

72 In effect, the Commissioner's position on this issue follows the same rationale underlying her arguments on the other grounds of appeal. She argues in favour of a function-based approach in order to interpret the term "officer", according to which a Minister would be considered an officer of a government institution when exercising powers in relation to the institution, and not an officer of a government institution when exercising powers unrelated to the institution. The problem with this approach, however, is that there is nothing in either statute suggesting that a person might be an officer for some purposes and not for others.

73 Nor is there any support in either statute for finding that a Minister is intended to be an "officer" of the government institution simply because he is the "head" of that institution. In fact, s. 73 of the *Access to Information Act* suggests the opposite, given that it provides that the "head" of the government institution may delegate powers and duties under the Act to one or more "officers or employees" of the government institution. A distinction is therefore drawn between "head" and "officer" in that provision. Further, as noted earlier in discussing the definition of "government institution", s. 21 of the *Access to Information Act* also makes a distinction between "officer", "employee", and "minister".

74 Finally, as this Court explained in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.) (*per* La Forest J. in dissent but not on this point), and reiterated in *RCMP*, the *Access to Information Act* and the *Privacy Act* are to be read together as a seamless code. The interpretation of Kelen J. and the Commissioner would create discordance between the two statutes. Under the *Access to Information Act*, a Minister or Prime Minister would not be part of a government institution, while under the *Privacy Act*, he would be considered an "officer" of the government institution. I agree with the Federal Court of Appeal. Had Parliament intended the Prime Minister to be treated as an "officer" of the PCO pursuant to the *Privacy Act*, it would have said so expressly. Applying s. 3(*j*) of the *Privacy Act* to the relevant portions of the Prime Minister's agenda under the control of the RCMP and the PCO, I conclude that they fall outside the scope of the access to information regime.

75 I would therefore dismiss the Commissioner's appeal on the fourth application with costs.

***LeBel J.*:**

1. Overview

76 I agree with Charron J.'s conclusions and with much of what she says in her reasons, including her findings on the applicable standard of review and on the use of expert evidence, and the control test she proposes. I also agree with my colleague's view that a Minister's office is not a "government institution" for the purposes of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("the Act"). Nonetheless, in my opinion, this conclusion cannot be the basis for an implied exception for political records. The legal relationship between a Minister's office and the government institution for which the Minister is responsible may have some bearing on whether or not the institution in question controls a requested record. However, that relationship does not give rise to an implied presumption that the public does not have a right of access to records in a Minister's office.

77 As my colleague points out, at para. 41, s. 2 of the *Access to Information Act* indicates that exceptions to the public's right of access must be "necessary". Moreover, such exceptions must be "limited and specific" according to the Act. If the Act does not specifically exempt political records, the right of access is presumed to apply to them. For the reasons that follow, I disagree with my colleague and with the Government that this presumption, which follows from a plain reading of the Act, "would dramatically expand the access to information regime in Canada" (see para. 13).

2. Purpose of the *Access to Information Act*: To Strike a Balance Between Democracy and Efficient Governance

78 As my colleague points out in para. 15, this Court recently stated that access to government information "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance" (*Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 SCC 23, [2010] 1 S.C.R. 815 (S.C.C.), *per* McLachlin C.J. and Abella J., at para. 1).

79 Access to information legislation embodies values that are fundamental to our democracy. In *Criminal Lawyers' Association*, this Court recognized that where access to government information is essential, it is protected by the right to freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* as a derivative right. Statutes that protect *Charter* rights have often been found to have quasi-constitutional status (see *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773 (S.C.C.), at paras. 21-23, for example, but also *Robichaud v. Brennan*, [1987] 2 S.C.R. 84 (S.C.C.), *F.E.E.S.P. c. Béliveau St-Jacques*, [1996] 2 S.C.R. 345 (S.C.C.)). One such statute is the *Privacy Act*, R.S.C. 1985, c. P-21, which, as has often been stated, must be read together with the *Access to Information Act* as a "seamless code" (see *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, 2003 SCC 8, [2003] 1 S.C.R. 66 (S.C.C.), at para. 22, and *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441 (S.C.C.), at para. 2).

80 Moreover, this Court's position is consistent with the view that access to information legislation creates and safeguards certain values — transparency, accountability and governance — that are essential to making democracy workable (see M. W. Drapeau and M.-A. Racicot, *Federal Access to Information and Privacy Legislation Annotated 2011* (2010), at p. v). Before the advent of modern government, the mechanisms that embodied these values were subsumed in the doctrine of ministerial responsibility, according to which Ministers were accountable to Parliament for their actions. The sovereign Parliament, and only Parliament, was responsible for holding governments to account (J. F. McEldowney, "Accountability and Governance: Managing Change and Transparency in Democratic Government" (2008), 1 *J.P.P.L.* 203, at pp. 203-04).

81 As McEldowney observes, the growing complexity of modern government has entailed unprecedented delegation of parliamentary powers to the executive branch of government. In this context, "[t]he complexity and variety of bodies involved in decision-making has contributed to a gap in our system of accountability" (p. 209). In Canada, access to information legislation was enacted to respond to and deal with the rising power of administrative agencies (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.), at paras. 60-61; see also G. J. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia* (2007), at pp. 109-10).

82 This being said, in access to information matters, the Court has consistently sought to ensure a degree of government accountability to Canadian citizens, while at the same time accepting that rights of access and the values they safeguard must be balanced against the interests of efficient governance (see *Criminal Lawyers' Association*, at para. 1, and *Dagg*, at paras. 45-57). This balance has been struck in access to information legislation by means of a presumption of a right of access — as opposed to a presumption that access should be refused — to all records, subject to exceptions that are specified in the legislation.

83 In *Criminal Lawyers' Association*, this Court reaffirmed that the right of access to government documents is not absolute (para. 35; see also *Rubin v. Canada (Clerk of the Privy Council)*, [1996] 1 S.C.R. 6 (S.C.C.)). There is no constitutional right of access. The right is created by statute and is subject to specific exceptions provided for in the statute. Though the right must be interpreted liberally, exceptions to it must be interpreted narrowly, as is suggested by s. 2 of the Act, which requires that exceptions be not only "specific", but "limited". Accordingly, it is imperative that exemptions be limited to those provided for in ss. 13 to 26; qualifying words should not be read into the Act (see *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (Fed. C.A.)).

3. To Protect "Full and Frank Discussion" in a Minister's Office Without Excluding Ministers' Offices from the Scope of the Act

84 "[P]olitical records" are not explicitly exempt from disclosure under the *Access to Information Act*. They are records that pertain to a Minister's activities as a member of a political party, as opposed to his or her duties as a member of Cabinet who is accountable to Parliament for the administration of a government department. In line with the interpretative approach adopted by this Court in *Criminal Lawyers' Association*, we must conclude that the right of access can be presumed to apply to political records but that it is subject to any of the statutory exceptions that apply. These exceptions reflect the complexity of the various functions of Ministers of the Crown in a modern parliamentary democracy.

85 I agree completely with my colleague that this interpretative approach must be reconciled with "the need for a private space to allow for the full and frank discussion of issues" (para. 41). I also agree with her that in s. 21 of the Act, Parliament has recognized "the need for confidential advice to be sought by and provided to a Minister and [that], consequently, records in a government institution offering such advice are exempt from disclosure at the discretion of the head of the institution" (para. 41). I would contend, however, that the structure of the Act and the inclusion of s. 21 already address this concern explicitly.

86 As a result, I disagree with the assertion that the need for a full and frank discussion justifies excluding Ministers' offices from the scope of the Act. To read such a broad exemption into the Act is not "necessary" within the meaning of s. 2, because the concern is already addressed explicitly. In my view, to read this exclusion into the Act is to deviate from the approach adopted by the Court in *Criminal Lawyers' Association*, as outlined above.

87 The conclusion that a Minister's office is not a government institution flows from the modern approach to statutory interpretation, which my colleague describes as a "general roadmap", at para. 27. But I feel it necessary to distance myself from the findings of Kelen J., which my colleague draws on as "useful guideposts" for her interpretation (para. 27).

88 More specifically, I take issue with Kelen J.'s interpretation of Parliament's silence regarding political records (2008 FC 766, [2009] 2 F.C.R. 86 (F.C.), at paras. 57-60). On the basis of that silence, Kelen J. reasoned that an interpretation of the term "government institution" that included Ministers' offices would dramatically extend the right of access. I cannot agree with this view.

89 As I mentioned above, this Court's approach has been that access to information legislation creates a general right of access to which there are necessary exceptions that must be limited and specific. If the legislature is silent with respect to a given class of documents, such as political records, courts must assume, *prima facie* at least, that the documents in question are not exempt. Whether access can indeed be obtained as requested is a different matter for which it is necessary to design an appropriate control test. Therefore, it cannot be inferred from the legislature's silence that political records were not intended to be disclosed at all. Politics and administration are sometimes intertwined in our democratic system. As a result, the contents of ministerial records may straddle the two worlds of politics and pure administration, if it is even possible to draw so sharp a distinction between the different roles of Ministers in Canada's political system. On this basis, the much bolder inference that Ministers' offices are presumptively excluded from the purview of the *Access to Information Act* is also incorrect.

90 Kelen J. also concluded that all ministerial records are presumptively excluded on the basis that the *Library and Archives of Canada Act*, S.C. 2004, c. 11, differentiates "government records" from "ministerial records". Government records and ministerial records are indeed different. In s. 2 of the *Library and Archives of Canada Act*, a "government record" is defined as "a record that is under the control of a government institution". On the other hand, a "ministerial record" is a record

> ... of a member of the Queen's Privy Council for Canada who holds the office of a minister and that pertains to that office, other than a record that is of a personal or political nature or that is a government record.

91 With respect, the fact that these two kinds of records are treated differently in the *Library and Archives of Canada Act* does not mean that ministerial records are presumptively outside the scope of the *Access to Information Act*. My position on the legal relationship between a Minister's office and the government institution for which the Minister is responsible flows from a plain reading of the Act. As my colleague mentions, Ministers' offices are not listed in Schedule I to the Act, and I accordingly agree with her that they should not be considered "government institutions" for the purposes of the Act. This being said, it does not follow that Ministers' offices are presumptively excluded from the scope of the Act. The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head must facilitate access to it on the basis of the procedure and the limits specified in the Act.

92 The *Access to Information Act* applies to records. Ministers' offices remain within the scope of the Act inasmuch as they possess "record[s] under the control of a government institution" (s. 4). The right of access is presumed to apply to such records unless they fall under a specific exemption.

93 In my view, the presumption that the Act applies to Ministers' offices does not expand the right of access at all. Any requested record that is located in a Minister's office is subject to the two-part control test proposed by my colleague.

94 For this purpose, the "head" of the government institution must determine, first, whether the requested record relates to a departmental matter. In other words, does the record contain government information? This first stage of the test, "a useful screening device" (para. 55), will exclude all documents, such as political records (e.g. plans for a party fundraiser), that do not relate to a departmental matter.

95 Second, the head of the government institution must determine whether the institution could reasonably expect to obtain a copy of the record upon request. As my colleague proposes, this stage of the test requires an objective analysis to determine whether that expectation is reasonable in which all relevant factors, including the content of the record, the circumstances in which it was created and the legal relationship between the government institution and the record holder, are taken into account (para. 56). If the record holder is the Minister, the fact that his or her office is not part of the government institution he or she oversees may weigh in the balance; it does not, however, create a presumption of an exception to the right of access.

4. Question of "Hybrid" Records

96 The *Access to Information Act* is of course not applied in a vacuum. The reality that Ministers wear many hats must be taken into account in doing so. Thus, a Minister is a member of Cabinet who is accountable to Parliament for the administration of a government department, but is usually also a Member of Parliament in addition to being a member of a political party for which he or she performs various functions and, finally, a private person. Records connected with these different functions may blend into each other in the course of regular business.

97 As I mentioned above, the right of access is presumed to apply to "political records", but such records are unlikely to be under the control of a government institution if they do not relate to a departmental matter. At the other end of the spectrum are records that relate to departmental matters and are under the control of a government institution. I will refer to the latter as "government records" for the purposes of this discussion. If requested, government records should be disclosed under the *Access to Information Act*.

98 It is conceivable, however, that many records will not fall neatly into one category or another. For example, departmental matters are sometimes decided on the basis of political priorities. Documents in which departmental targets are assessed in light of political aims would fall into a grey area. I will refer to such documents as "hybrid records".

99 The *Access to Information Act* provides for the existence of this grey area, at least to some extent. Thus, s. 25 provides for the severance of part of a record. Where a Minister is authorized to refuse to disclose a record, the Minister can redact the exempted portions of the document, but must disclose the portions that are not exempted.

100 In addition, s. 21(1) provides that, subject to specific exceptions in s. 21(2), a Minister has a very broad authorization

to refuse to disclose a requested record that contains any of the following:

> **21.** (1) ... (a) advice or recommendations developed by or for a government institution or a minister of the Crown,
>
> (b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,
>
> (c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or
>
> (d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,
>
> if the record came into existence less than twenty years prior to the request.

Section 21(2) reads as follows:

> (2) Subsection (1) does not apply in respect of a record that contains
>
> (a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or
>
> (b) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

101 Section 21 covers many of the circumstances in which certain kinds of hybrid records that contain information relating to departmental matters are produced (see s. 21(1)(*a*)). Section 21(1) is specifically designed to cover material produced in the course of *full and frank discussions*, such as deliberations in which directors, officers or employees of a government institution participate together with a Minister or a Minister's staff (see s. 21(1)(*b*)).

5. Investigatory Powers of the Commissioner

102 Though the head of a government institution has a broad discretion to either disclose or retain hybrid records, the Information Commissioner is given equally broad investigatory powers in s. 36 of the *Access to Information Act*. These powers can act as a check on the Minister's discretion. As I mentioned above, Parliament has sought to strike a balance between access rights and efficient governance. On the one hand, through s. 21 and the general structure of the Act, Parliament has created a space in which Ministers may review and debate issues in private. On the other hand, through s. 36 and the general structure of the Act, Parliament has ensured that this private space is not abused.

103 The Commissioner has the same power to summon witnesses and compel them to give evidence as a superior court of record (s. 36(1)(*a*)), and also has the power to administer oaths (s. 36(1)(*b*)), and to receive and accept such evidence as the Commissioner sees fit (s. 36(1)(*c*)). The Commissioner may also enter any premises of a government institution for the purposes of an investigation, as well as converse with persons and examine documents in those premises (s. 36(1)(*d*)). However, since a Minister's office is not a government institution for the purposes of the Act, the Commissioner does not have the power to enter one.

104 Importantly, pursuant to s. 36(2), the Commissioner has the power to examine "any record to which this Act applies that is under the control of a government institution". In light of the above reasoning, records located in a Minister's office can fall within the ambit of this provision. Section 36(2) is crucial to the balance Parliament intended to strike. Indeed, it is

the first mechanism, prior to judicial review, for applying the principle that "decisions on the disclosure of government information should be reviewed independently of the government" (s. 2).

105 Under s. 21, the head of a government institution is responsible for determining whether requested hybrid documents located in a Minister's office should be disclosed. The first step in the assessment is to consider whether the records fall within the scope of the Act: for this purpose, the head must perform the control test we propose. If the requested documents are found to fall within the scope of the Act, the head must then perform the second step of the assessment process: to determine whether the requested records fall under any of the exemptions provided for in the Act, including in s. 21. Depending on which exemption applies, the head may or may not have the discretion to disclose the document.

106 The purpose of the Commissioner's investigatory powers is to determine whether the head of a government institution has complied with the Act in performing his or her duties. This includes an inquiry into whether the head has conducted the correct analysis at both stages.

107 If a head claims to have refused access on the basis that the requested document was not under the control of a government institution, then the Commissioner may exercise only his or her powers under s. 36(1)(*a*) to (*c*). If the evidence garnered under those subsections leads the Commissioner to believe that the documents are likely under the control of a government institution, he or she may examine them to ascertain whether the control test was applied properly.

108 If the Commissioner is entitled to inquire into whether the head applied the control test properly, the Commissioner may require access to some documents that are ultimately outside the scope of the Act. This does not broaden the public's right of access. Section 35(1) of the Act provides that "[e]very investigation of a complaint ... by the Information Commissioner shall be conducted in private." Further, in the course of an investigation, parties affected by the investigation have a right to make representations (s. 35(2)). Following an investigation, the Commissioner cannot compel the head of a government institution to disclose the documents in question; rather, the Commissioner may only make recommendations to the head (s. 37). Finally, anyone who has been refused access to such records after an investigation is entitled to apply for judicial review of the decision (s. 41).

109 With respect, I am of the view that a presumption that a Minister's records are beyond the scope of the Act would upset the balance between the head's discretionary powers and the Commissioner's powers of investigation. My colleague's analysis involves a presumption that the Commissioner would have no power whatsoever to examine records located in a Minister's office. The Commissioner's power would be limited to summoning witnesses and compelling them to give evidence concerning such records. Even if that evidence led the Commissioner to suspect that the control test had not been applied properly, the Commissioner would not be able to examine the documents to confirm his or her suspicions. Such an interpretation of the Act would effectively leave the head of a government institution with the final say as to whether a given document was under the institution's control and would run counter to the purpose of the Act as outlined in s. 2, according to which decisions on the disclosure of government information must be reviewed independently. In my opinion, the presumption of an exception to the right of access that my colleague proposes would significantly weaken the Commissioner's powers of investigation, which are crucial to the intended balance between access to information and good governance.

6. Application to the Records at Issue

110 I agree with my colleague that, in the circumstances in which the records at issue in the first three applications were created and managed, a government institution would not have a reasonable expectation of obtaining them and that these documents were therefore not under the control of a government institution.

111 As for the records in the possession of the Privy Council Office and the Royal Canadian Mounted Police, I agree with my colleague that, even though they were under the control of a government institution, they were subject to s. 19 of the *Access to Information Act* and the heads of those institutions accordingly had an obligation to refuse to disclose them.

112 For these reasons, I would dismiss the appeals.

Appeals dismissed.

Pourvois rejetés.

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TAB 5

R v. McIntosh, [1995] 1 SCR 686

1995 CarswellOnt 4
Supreme Court of Canada

R. v. McIntosh

1995 CarswellOnt 4, 1995 CarswellOnt 518, [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16, 178 N.R. 161, 21 O.R. (3d) 797 (note), 26 W.C.B. (2d) 201, 36 C.R. (4th) 171, 79 O.A.C. 81, 95 C.C.C. (3d) 481, J.E. 95-457, EYB 1995-67422

R. v. BEVIN BERVMARY McINTOSH

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: November 28, 1994
Judgment: February 23, 1995
Docket: Doc. 23843

Counsel: *Michael Bernstein* and *Alexander Alvaro*, for the Crown.
Russell S. Silverstein and *Michelle Levy*, for respondent.

Subject: Criminal

Related Abridgment Classifications

Criminal law

V Defences
V.21 Self defence
V.21.e Effect of provocation

Headnote

Criminal Law --- Defences — Self-defence — Effect of provocation

Defences — Self-defence — Defence under s. 34(2) of Criminal Code being available to initial aggressor and words "without having provoked the assault" not to be read in — No ambiguity on face of provision and accused to be given more favourable interpretation even if result being illogical and absurd — Legislation required to clarify Criminal Code self-defence regime.

The accused gave the deceased an amplifier and other equipment to repair. Over the next eight months the accused made several attempts to retrieve the equipment but the deceased actively avoided him. Informed that the deceased was working outside, the accused obtained a kitchen knife and approached the deceased. According to the accused, he told the deceased

"Get my fucking amp because I need it. Go suck your mother and bring my fucking amp". According to the accused, the deceased pushed him and a struggle followed. Then the deceased picked up a dolly, raised it to head level, and came at the accused. The accused reacted by stabbing the deceased with the kitchen knife. He then threw the knife down and fled. He later turned himself in to police.

At the accused's trial on a charge of second degree murder, the trial judge, in instructing the jury on the defence of self-defence, told them that s. 34(2) of the *Criminal Code* would not be applicable if they found that the accused had been the initial aggressor, having provoked the deceased. His defence would be the more restricted defence in s. 35, applying to those who had provoked the assault and requiring that the accused have retreated as far as it was feasible. The jury found the accused guilty of the lesser offence of manslaughter. The trial judge imposed a sentence of two and one-half years.

The accused's appeal against conviction was allowed by the Ontario Court of Appeal. The court held that the trial judge had erred in holding that s. 34(2) was not applicable to an initial aggressor who had provoked the deceased. The words "with- out having provoked the assault" should not be read into s. 34(2). The Crown appealed.

Held:

The appeal was dismissed.

Per Lamer C.J.C. (Sopinka, Cory, Iacobucci and Major JJ. concurring)

Sections 34 and 35 of the *Criminal Code* are highly technical and excessively detailed provisions deserving of much criticism. These provisions overlap and are internally inconsistent. They are unbelievably confusing. Legislation is required to clarify the *Criminal Code* self-defence regime.

The defence of self-defence under s. 34(2) is available to an initial aggressor, and the words "without having provoked the assault" should not be read in. No ambiguity arose on the face of the statutory provision and, under the golden rule of literal construction, it should be interpreted in a manner consistent with its plain meaning. The contextual approach to statutory interpretation lent no support to the Crown's position for three reasons. First, Parliament's intent was unclear. Second, it did not generally mandate courts to read words into a statutory provision. That would be tantamount to amending what was a legislative, not a judicial function. Third, the overriding principle governing the interpretation of penal provisions is that where two interpretations of a provision which affect the liberty of the subject are available, the court should adopt the one more favourable to the accused. There was no ambiguity on the face of s. 34(2) and the section should be enforced even though the interpretation might seem illogical in light of s. 35 and might lead to some absurdity. The interpretation was consistent with the clear wording of the section and would provide certainty for citizens.

It had not been necessary to instruct the jury as to s. 37. There was no room for it in this case as the defence was covered by ss. 34 and 35.

Per McLachlin J. (dissenting) (La Forest, L'Heureux-Dubé and Gonthier JJ. concurring)

The trial judge had correctly not left s. 34(2) to the jury. The point of departure for interpretation is not the plain meaning of the words but the intention of Parliament. The words of s. 34(2) permitted doubt as to Parliament's intent, and it was

necessary to examine the history of the section, practical problems and absurdities resulting from particular interpretations. On such an analysis, it was clear that Parliament intended s. 34(2) to apply only to unprovoked assaults, and the omission of the words "without having provoked the assault" was most likely an oversight. Parliament's intention was to reflect the long-standing common law distinction between justifiable homicide, where the killer had not provoked the aggression, and excusable homicide, where he had. In the latter case, the killer must have retreated as far as possible. Sections 34(1) and (2) did not impose a duty to retreat and therefore dealt with justifiable homicide. Section 35 did impose a duty to retreat and dealt with excusable homicide. The obligation to retreat from provoked assault has stood the test of time and should not be lightly discarded. Life is precious; the justification for taking it must be defined with care and circumspection.

The trial judge had correctly declined to leave s. 37 with the jury. Section 37 had no application where death or grievous bodily harm had occurred.

Annotation

R. v. McIntosh re-establishes the canon of construction that penal provisions must be strictly applied. The court agrees that, where there are two reasonable interpretations of a provision affecting the liberty of the subject, the interpretation most favourable to the accused should be adopted. The minority does not contest this principle but takes the position that in this case there was no real ambiguity and hence only one reasonable interpretation. The court makes no mention of the position of Cory J. in *R. v. Hasselwander*, [1993] 2 S.C.R. 398, 20 C.R. (4th) 277, 152 N.R. 247, 62 O.A.C. 285, 81 C.C.C. (3d) 471, at pp. 284-285 C.R. (La Forest and Gonthier JJ. concurring), that the rule of strict construction has a "subsidiary role" to the provision in s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 that:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Parliament should act promptly on Chief Justice Lamer's strong call to reform our "unbelievably confusing" provisions governing self-defence in ss. 34(1), 34(2), 35 and 37. It is quite extraordinary that these unduly complex and conflicting provisions have been intact so long despite widespread dissatisfaction by judges. If judges are baffled, pity juries and pity accused who are at the mercy of laws that few pretend to understand.

Parliament should not be swayed by the minority view of McLachlin J., that established common law and policy considerations favour retaining a much more restricted defence of self-defence contained in s. 35 for initial aggressors, including the requirement of a duty to retreat. It is not clear why 19th century English jurisprudence, reflecting a purported distinction between situations of justification and excuse, should continue to rule.

Imposing a duty to retreat on the initial aggressor is inconsistent with the clear trend of Canadian courts over the years to allow flexibility in judging claims of self-defence. Although there is a proportionality requirement in s. 34(1), courts have repeatedly emphasized that defenders cannot be expected, with the benefit of hindsight, to measure with nicety the degree of force necessary to repel an attack. There are no automatic requirements that the defender cannot strike the first blow or, apart from the rule in s. 35, that the defender cannot succeed if he or she could have retreated. Courts have tended to bend over backwards to instruct only on ss. 34(1) and (2), which are quite confusing enough without the complexities of ss. 35 and 37. The Supreme Court in *R. v. Lavallee*, [1990] 1 S.C.R. 852, 76 C.R. (3d) 329, [1990] 4 W.W.R. 1, 55 C.C.C. (3d) 97, 108 N.R. 321, 67 Man. R. (2d) 1, and reasserted in *R. c. Pétel*, [1994] 1 S.C.R. 3, 26 C.R. (4th) 145, 162 N.R. 137, 59 Q.A.C. 81, 87 C.C.C. (3d) 97, has urged that the reasonableness test be applied with special sensitivity in situations where the defender is trapped in an abusive relationship. It may well be that a trier of fact ought to be less sympathetic to self-defence by an aggressor. But it is highly questionable whether there should be a rigid rule that the aggressor is always subject to a much restricted defence. In some cases, a rule like that in s. 35 might lead to injustice. Take the context of self-defence in an abusive relationship. It will often be difficult to determine in a volatile fight who the initial aggressor was. If the trier of fact decides that the initial aggressor on this occasion was the victim of the abusive relationship surely there should be no rigid requirement of a duty to retreat from one's home?

It is time for the *Criminal Code* to reflect approaches in other jurisdictions, which do not distinguish in advance between situations of fatal and non-fatal self-defence, defences of those under protection and defence of strangers, and self-defence by an aggressor and simple self-defence. There is much to be said for the approach of the Canadian Bar Association Task Force,

Principles of Criminal Liability: Proposals for a new General Part of the Criminal Code of Canada (1992), pp. 71-80, who suggest a simple defence of self-defence, modelled on a proposed New Zealand Crimes Bill:

Every person is justified in using, in self-defence or in the defence of another, such force as, in the circumstances as that person believes them to be, it is reasonable to use.

Such a formulation captures the need for flexibility which our courts have tried to find within the straight-jackets of present *Criminal Code* complexity and requirement. Unfortunately, the 1993 Government White Paper (Department of Justice, *Proposals to Amend the Criminal Code (General Principles)* (1993)) is far too cautious in drafting a defence that includes a mechanical and restrictive requirement that the accused's acts must be "reasonable" and "proportionate" to the harm sought to be avoided.

It is time for the Minister of Justice to initiate a long overdue reform. The most advisable strategy might be to appoint a Task Force to finalize a Bill on a coherent General Part defining forms of fault, act requirements and defences such as self-defence.

Don Stuart

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Per Lamer C.J.C. (Sopinka, Cory, Iacobucci and Major JJ. concurring)

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Per McLachlin J. (dissenting) (La Forest, L'Heureux-Dubé and Gonthier JJ. concurring)

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R. v. Stubbs (1988), 28 O.A.C. 14 (C.A.) — *referred to*

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s. 48(2) [re-en. S.N.Z. 1980, No. 63, s. 2]

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s. 53(1)

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s. 34

s. 34(1)

s. 34(2)

s. 35

Criminal Code, R.S.C. 1985, c. C-46 —

s. 19

s. 34

s. 34(1)

s. 34(2)

s. 35

s. 35(*c*)

s. 36

s. 37

Appeal from judgment reported at (1993), 24 C.R. (4th) 265, 15 O.R. (3d) 450, 65 O.A.C. 199, 84 C.C.C. (3d) 473 (C.A.) allowing appeal from conviction on charge of manslaughter.

***Lamer C.J.C. (Sopinka, Cory, Iacobucci* and *Major JJ.* concurring):**

I. Factual Background

1 On February 7, 1991, Basile Hudson, who made his living repairing appliances and electronic equipment, was stabbed to death by the respondent. The circumstances surrounding Hudson's death arose during the summer of 1990 when the respondent, a 26-year-old man, was working as a disc jockey. He gave the deceased, who lived in the same neighbourhood, an amplifier and other equipment to repair. Over the next eight months, the respondent made several attempts to retrieve his equipment, but the deceased actively avoided him. On one occasion, the respondent, armed with a knife, confronted the

deceased and told him he would "get him" if the equipment were not returned. On another occasion, the deceased fled through the back exit of his home when the respondent appeared at the front door.

2 On the day of the killing, the respondent's girlfriend saw the deceased working outside and informed the respondent. The respondent obtained a kitchen knife and approached the deceased. Words were exchanged. The respondent testified that he told the deceased, "Get my fucking amp because I need it. Go suck your mother and bring my fucking amp." According to the respondent, the deceased pushed him, and a struggle ensued. Then the deceased picked up a dolly, raised it to head level, and came at the respondent. The respondent reacted by stabbing the deceased with the kitchen knife. He then threw the knife down and fled the scene. Later that day, after consulting with a lawyer, the respondent turned himself in.

3 On November 25, 1991, the respondent appeared in the Ontario Court (General Division) before Moldaver J. and a jury on a charge of second degree murder. He entered a plea of not guilty, and took the position at trial that the stabbing of the deceased was an act of self-defence. The jury found the respondent guilty of the lesser and included offence of manslaughter. He was sentenced to two and one- half years' imprisonment.

4 The respondent appealed his conviction to the Ontario Court of Appeal on the ground that the trial judge erred in instructing the jury that s. 34(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, was not applicable in the event they found that the respondent had been the initial aggressor, having provoked the deceased. The Court of Appeal allowed the respondent's appeal, set aside the conviction and ordered a new trial: (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199.

5 The Crown now appeals to this court, arguing that the Ontario Court of Appeal erred when it reached the conclusion that self-defence as defined in s. 34(2) of the*Criminal Code* is available to accused persons who are initial aggressors.

II. Relevant Statutory Provisions

Criminal Code, R.S.C. 1985, c. C-46

6

Defence of Person

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(*a*) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily

harm;

(*b*) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

III. Decisions Below

A. Ontario Court, General Division

7 Moldaver J. first charged the jury with respect to self-defence under s. 34(1), and then turned to the application of s. 34(2). The portion of the charge with respect to s. 34(2) which the Court of Appeal found to be in error is the following:

Moving on from there, you will notice, ladies and gentlemen, that the words "without having provoked the assault", which we saw in s. 34(1), do not appear in s. 34(2). If you take a look on your paper and you look at s. 34(1), you will see the words "without having provoked the assault". You will not see those words in s. 34(2).

However, as a matter of law, I direct you that those words are to be read into s. 34(2). You will see the reason for this when we deal with s. 35, but for the present time you must accept that the words "without having provoked the assault" are to be read into s. 34(2).

8 Moldaver J. then charged the jury with respect to s. 35. After reading s. 35 to the jury, Moldaver J. stated:

Now, for the purposes of this case, ladies and gentlemen, this section relates to a situation where the accused has, without justification, provoked an assault upon himself. It defines the nature and scope of the force which a person may use to defend himself after he has provoked an assault upon himself and the steps he must take before the force used in response can be justified.

B. Ontario Court of Appeal

9 Austin J.A. (Goodman and McKinlay JJ.A. concurring) considered two issues: (1) was the trial judge in error in reading the words "without having provoked the assault" into s. 34(2) of the *Criminal Code*?; and (2) was the trial judge in error in not leaving s. 37 to the jury as a basis on which they could have found that the respondent was acting in self-defence?

10 In resolving the first issue, Austin J.A. felt that it was unnecessary to consider the history of s. 34, principles of statutory interpretation, the law in other jurisdictions, and the views of academics. Instead, the focus should be on the structure of s. 34, and Canadian jurisprudence. In Austin J.A.'s view, the problem with s. 34(2) (i.e., that it does not include the words "without having provoked the assault", whereas s. 34(1) does) has been apparent from the very first *Criminal Code* provisions dating from 1892. For this reason, legislative history did not resolve the problem.

11 Austin J.A. then considered the relevant case law. The Crown relied on the following cases for the proposition that "without having provoked the assault" should be read into the provision: *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 [33 C.R.N.S. 22] (Ont. C.A.); *R. v. Bolyantu* (1975), 29 C.C.C. (2d) 174 (Ont. C.A.); *R. v. Merson* (1983), 4 C.C.C. (3d) 251 (B.C. C.A.); *R. v. Chamberland* (1988), 96 A.R. 1 (C.A.). The respondent relied on the following cases to support his position that provocation is irrelevant to s. 34(2): *R. v. Stubbs* (1988), 28 O.A.C. 14; *R. v. Nelson* (1992), 71 C.C.C. (3d) 449 [13 C.R. (4th) 359].

12 Austin J.A. determined that the cases relied on by the Crown did not directly confront the issue he had to consider, and were "broad brush" statements concerning the interrelationship between ss. 34 and 35 of the *Criminal Code*. In contrast, the issue was addressed in the two cases on which the respondent relied. In both of those cases, the Ontario Court of Appeal had concluded that provocation is not relevant to s. 34(2). These cases, in his opinion, were conclusive.

13 Austin J.A. then turned to the second issue. He disagreed with the respondent that s. 37 of the *Criminal Code* should be put to the jury in every case where self-defence might arise. He noted that counsel for the respondent had been invited to suggest a scenario which would not be covered by ss. 34 and 35, and which might therefore be covered by s. 37. No scenario was put forward. There was therefore no basis on which s. 37 could have been put to the jury.

14 As a result, the court set aside the respondent's conviction and ordered a new trial.

IV. Analysis

15

A. Introduction

16 This case raises a question of pure statutory interpretation: is the self-defence justification in s. 34(2) of the *Criminal Code* available where an accused is an initial aggressor, having provoked the assault against which he claims to have defended himself? The trial judge, Moldaver J., construed s. 34(2) as not applying in such a circumstance. The Ontario Court of Appeal disagreed.

17 The conflict between ss. 34 and 35 is obvious on the face of the provisions. Section 34(1) begins with the statement, "Every one who is unlawfully assaulted without having provoked the assault ...". In contrast, s. 34(2) begins, "Every one who is unlawfully assaulted ...". Missing from s. 34(2) is any reference to the condition, "without having provoked the assault". The fact that there is no non- provocation requirement in s. 34(2) becomes important when one refers to s. 35, which explicitly applies where an accused has "without justification provoked an assault ...". Therefore, both ss. 34(2) and 35 appear to be available to initial aggressors. Hence, the issue arises in this case of whether the respondent, as an initial aggressor raising self-defence, may avail himself of s. 34(2), or should be required instead to meet the more onerous conditions of s. 35.

18 As a preliminary comment, I would observe that ss. 34 and 35 of the *Criminal Code* are highly technical, excessively detailed provisions deserving of much criticism. These provisions overlap, and are internally inconsistent in certain respects. Moreover, their relationship to s. 37 (as discussed below) is unclear. It is to be expected that trial judges may encounter difficulties in explaining the provisions to a jury, and that jurors may find them confusing. The case at bar demonstrates this. During counsel's objections to his charge on ss. 34 and 35, the trial judge commented, "Well, it seems to me these sections of the *Criminal Code* are unbelievably confusing." I agree with this observation.

19 Despite the best efforts of counsel in the case at bar to reconcile ss. 34 and 35 in a coherent manner, I am of the view that any interpretation which attempts to make sense of the provisions will have some undesirable or illogical results. It is clear that legislative action is required to clarify the *Criminal Code*'s self-defence regime.

B. Did the Trial Judge Err in Charging the Jury that s. 34(2) of the Criminal Code is not Available to an Initial Aggressor?

(i) Section 34(2) is not Ambiguous

20 In resolving the interpretive issue raised by the Crown, I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise (*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 29).

21 While s. 34(1) includes the statement, "without having provoked the assault", s. 34(2) does not. Section 34(2) is clear, and I fail to see how anyone could conclude that it is, on its face, ambiguous in any way. Therefore, taking s. 34(2) in isolation, it is clearly available to an initial aggressor.

22 The Crown has asked this court to read into s. 34(2) the words, "without having provoked the assault". The Crown submits that by taking into consideration the common law of self-defence, legislative history, related *Criminal Code* provisions, margin notes, and public policy, it becomes clear that Parliament could not have intended s. 34(2) to be available to initial aggressors. Parliament's failure to include the words, "without having provoked the assault" in s. 34(2) was an oversight, which the Crown is asking this court to correct.

23 The Crown labels its approach "contextual". There is certainly support for a "contextual approach" to statutory interpretation. Driedger, in *Construction of Statutes* (2nd ed. 1983), has stated the modern principle of contextual construction as follows (at p. 87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament ... Lord Atkinson in *Victoria (City) v. Bishop of Vancouver Island* [[1921] A.C. 384, at p. 387] put it this way:
>
> > In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

Driedger then reduces the principle to five steps of construction (at p. 105):

> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
>
> 2. The words of the individual provision to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.
>
> 3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.
>
> 4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in *pari materia*, or the general law, then an unordinary meaning that will produce harmony is to be given the words, *if they are reasonably capable of bearing that meaning*.

> 5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected. [Emphasis added.]

24 Certainly, interpreting statutory provisions in context is a reasonable approach. However, a "contextual approach" lends no support to the Crown's position. First, the contextual approach takes as its starting point the intention of the legislature. However, given the confused nature of the *Criminal Code* provisions related to self-defence, I cannot imagine how one could determine what Parliament's intention was in enacting the provisions. Therefore, it seems to me that in this case one is prevented from embarking on a contextual analysis ab initio.

25 The Crown argues that it was Parliament's intention that neither s. 34(1) nor s. 34(2) be available to initial aggressors, and that it was a mere oversight that the words chosen in s. 34(2) do not give effect to this intention. I would have thought it would be equally persuasive to argue that Parliament intended both ss. 34(1) and (2) to be available to initial aggressors, and that Parliament's mistake was in *including* the words "without having provoked the assault" in s. 34(1).

26 Parliament's intention becomes even more cloudy when one refers to s. 45 of *The Criminal Code, 1982*, S.C. 1892, c. 29, which was the forerunner of ss. 34(1) and 34(2):

> 45. Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; *and every one so assaulted* is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. [Emphasis added.]

There is a clear ambiguity in this provision. Does the expression "everyone so assaulted" refer to "every one unlawfully assaulted", or to "every one unlawfully assaulted, not having provoked such assault"? This question is academic, since Parliament appears to have resolved the ambiguity in its 1955 revision of the *Criminal Code*, S.C. 1953-54, c. 51. The first part of the former s. 45 was renumbered s. 34(1), and the second part became s. 34(2). The new s. 34(2) omitted any reference to a non-provocation requirement.

27 If Parliament's intention is to be implied from its legislative actions, then there is a compelling argument that Parliament intended s. 34(2) to be available to initial aggressors. When Parliament revised the *Criminal Code* in 1955, it could have included a provocation requirement in s. 34(2). The result would then be similar to s. 48(2) of the New Zealand *Crimes Act, 1961*, S.N.Z. 1961, No. 43 (repealed and substituted 1980, No. 63, s. 2) which was virtually identical to s. 34(2) save that it included an express non-provocation requirement:

> 48. ...
>
> (2) Every one unlawfully assaulted, *not having provoked the assault*, is justified in repelling force by force although in so doing he causes death or grievous bodily harm, if ... [Emphasis added.]

The fact that Parliament did not choose this route is the best and only evidence we have of legislative intention, and this evidence certainly does not support the Crown's position.

28 Second, the contextual approach allows the courts to depart from the common grammatical meaning of *words* where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually. I would agree with Pierre-André Côté's observation in his book *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 231, that:

> Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the

terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say.

The Crown is asking this court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to *amending* s. 34(2), which is a legislative and not a judicial function. The contextual approach provides no basis for the courts to engage in legislative amendment.

29 Third, in this case we cannot lose sight of the overriding principle governing the interpretation of penal provisions. In *Marcotte v. Canada (Deputy Attorney General)*, [1976] 1 S.C.R. 108, DicksonJ. (as he then was) stated the principle as follows, at p. 115:

> Even if I were to conclude that the relevant statutory provisions were ambiguous and equivocal ... I would have to find for the appellant in this case. It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced.

Section 34(2), as a defence, acts as a "subtraction" from the liability which would otherwise flow from the criminal offences contained in the *Criminal Code*. *Criminal Code* provisions concerning offences and defences both serve to define criminal culpability, and for this reason they must receive similar interpretive treatment.

30 This principle was eloquently stated by La Forest J.A. (as he then was) in *Re Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201 (C.A.), at p. 210:

> There is no doubt that the duty of the courts is to give effect to the intention of the Legislature as expressed in the words of the statute. And however reprehensible the result may appear, it is our duty if the words are clear to give them effect. This follows from the constitutional doctrine of the supremacy of the Legislature when acting within its legislative powers. The fact that the words as interpreted would give an unreasonable result, however, is certainly ground for the courts to scrutinize a statute carefully to make abundantly certain that those words are not susceptible of another interpretation. For it should not be readily assumed that the Legislature intends an unreasonable result or to perpetrate an injustice or absurdity.
>
> This scarcely means that the courts should attempt to reframe statutes to suit their own individual notions of what is just or reasonable.

31 It is a principle of statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation. By this same reasoning, where such a provision is, on its face, favourable to an accused, then I do not think that a court should engage in the interpretive process advocated by the Crown for the sole purpose of narrowing the provision and making it less favourable to the accused. Section 34(2), on its face, is available to the respondent. It was, with respect, an error for the trial judge to narrow the provision in order to preclude the respondent from relying on it.

32 I therefore conclude that s. 34(2) is not an ambiguous provision, and is available to an initial aggressor. I find myself in agreement with the Ontario Court of Appeal, which has reached a similar conclusion in its rulings in *Stubbs*, supra, *Nelson*, supra, and in the case at bar.

(ii) Even Though s. 34(2) May Give Rise to Absurd Results, the Crown's Interpretation Cannot be Adopted

33 It is important to reiterate that there is no ambiguity on the face of s. 34(2). The Crown's argument that the provision is ambiguous relies on legislative history, the common law, public policy, margin notes, and the relationship between ss. 34 and 35. The Crown alleges that it would be absurd to make s. 34(2) available to initial aggressors when s. 35 so clearly applies. Parliament, the Crown submits, could not have intended such an absurd result, and therefore the provision cannot mean what it says. Essentially, the Crown equates absurdity with ambiguity.

34 The Crown asks this court to resolve the absurdity/ambiguity by narrowing s. 34(2) so that it does not apply in the case of an initial aggressor. If the Crown is correct, then an initial aggressor could only rely on s. 35 of the *Criminal Code*, which imposes more onerous requirements. In particular, s. 35(*c*) only allows an initial aggressor to raise self-defence where:

> (*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

35 The respondent takes the position that if there is ambiguity, it must be resolved in the manner most favourable to accused persons. As a result, s. 34(2) must be made available to initial aggressors.

36 I am of the view that the Crown's argument linking absurdity to ambiguity cannot succeed. I would adopt the following proposition: where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be (*Maxwell on the Interpretation of Statutes*, supra, at p. 29). The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.

37 In *Altrincham Electric Supply Ltd. v. Sale Urban District Council* (1936), 154 L.T. 379 (H.L.), Lord Macmillan criticized the view that absurdity alone would justify the rejection of a literal interpretation of a statutory provision. He emphasized that an "absurdity approach" is generally unworkable because of the difficulty of developing criteria by which "to judge whether a particular enactment, if literally read, is so absurd that Parliament cannot have intended it to be so read ..." (p. 388). He then proceeded, at p. 388, to outline what I believe to be the correct approach to statutory interpretation where absurdity is alleged:

> ... if the language of an enactment is ambiguous and susceptible of two meanings, one of which is consonant with justice and good sense while the other would lead to extravagant results, a court of law will incline to adopt the former and to reject the latter, even although the latter may correspond more closely with the literal reading of the words employed.

38 Thus, only where a statutory provision is ambiguous, and therefore reasonably open to two interpretations, will the absurd results flowing from one of the available interpretations justify rejecting it in favour of the other. Absurdity is a factor to consider in the interpretation of ambiguous statutory provisions, but there is no distinct "absurdity approach".

39 However, assuming for the moment that absurdity by itself is sufficient to create ambiguity, thus justifying the application of the contextual analysis proposed by the Crown, I would still prefer a literal interpretation of s. 34(2).

40 As stated above, the overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons. Moreover, in choosing between two possible interpretations, a compelling consideration must be to give effect to the interpretation most consistent with the terms of the provision. As Dickson J. noted in *Marcotte*, supra, when freedom is at stake, clarity and certainty are of fundamental importance. He continued, at p. 115:

> If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

Under s. 19 of the *Criminal Code*, ignorance of the law is no excuse to criminal liability. Our criminal justice system presumes that everyone knows the law. Yet we can hardly sustain such a presumption if courts adopt interpretations of penal provisions which rely on the reading-in of words which do not appear on the face of the provisions. How can a citizen possibly know the law in such a circumstance?

41 The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special

nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests. Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law.

42 I would agree that some absurdity flows from giving effect to the terms of s. 34(2). One is struck, for example, by the fact that if s. 34(2) is available to an initial aggressor who has killed or committed grievous bodily harm, then that accused may be in a better position to raise self-defence than an initial aggressor whose assault was less serious. This is because the less serious aggressor could not take advantage of the broader defence in s. 34(2), as that provision is only available to an accused who "causes death or grievous bodily harm". Section 34(1) would not be available since it is explicitly limited to those who have not provoked an assault. Therefore, the less serious aggressor could only have recourse to s. 35, which imposes a retreat requirement. It is, in my opinion, anomalous that an accused who commits the most serious act has the broadest defence.

43 Even though I agree with the Crown that the interpretation of s. 34(2) which makes it available to initial aggressors may be somewhat illogical in light of s. 35, and may lead to some absurdity, I do not believe that such considerations should lead this court to narrow a statutory defence. Parliament, after all, has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly.

44 What is most important in this case is that s. 34(2) applies on its face to initial aggressors, and is therefore open to such an interpretation. This interpretation is more favourable to accused persons than the alternative advanced by the Crown. Moreover, this interpretation is consistent with the clear wording of s. 34(2), thus providing certainty for citizens. Although I appreciate the efforts of the Crown to underscore the problems with the *Criminal Code*'s self-defence regime through a broad historical, academic and policy-based analysis, I suspect that very few citizens are equipped to engage in this kind of interpretive approach. Rare will be the citizen who will read ss. 34 and 35, and recognize the logical inconsistencies as between the two provisions. Rarer still will be the citizen who will read the provisions and conclude that they are inconsistent with the common law, or with Parliament's intention in 1892, or with margin notes. Given that citizens have to live with the *Criminal Code*, and with judicial interpretations of the provisions of the Code, I am of the view that s. 34(2) must be interpreted according to its plain terms. It is therefore available where an accused is an initial aggressor, having provoked the assault against which he claims to have defended himself.

C. Section 37 of the Criminal Code

45 Before concluding, I will briefly address the respondent's argument related to s. 37 of the *Criminal Code*. Section 37, itself a distinct justification, contains a general statement of the principle of self-defence:

> 37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.
>
> (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

46 Section 37 adds to the confusion surrounding ss. 34 and 35, since it appears to make the self-defence justification available to an accused in any circumstance where the force used by that accused was (i) necessary, and (ii) proportionate. If s. 37 is available to an initial aggressor (and there is no indication that it is not), then it would appear to be in conflict with s. 35. Moreover, it is difficult to understand why Parliament would enact the specific and detailed justifications in ss. 34 and 35, yet then make available a broad justification in s. 37 which appears to render ss. 34 and 35 redundant.

47 Although Parliament's intention in enacting s. 37 is unclear, at the very least the provision must serve a gap-filling role, providing the basis for self-defence where ss. 34 and 35 are not applicable. The respondent, though taking the position that Moldaver J. erred in not putting s. 37 to the jury at his trial, has been unable to advance a scenario under which ss. 34 (as interpreted above) and 35 would not afford him a defence. Therefore, there appears to be no room left for s. 37 in this case.

48 The respondent has suggested that s. 37 should be put to the jury in all cases because it outlines the basic principles of self-defence, and this will be helpful to the jury. However, a trial judge can explain these principles without resort to s. 37, since these principles form the foundation of ss. 34 and 35.

D. Conclusion

49 With respect, Moldaver J. erred in instructing the jury at the respondent's trial that s. 34(2) was not available to an initial aggressor. I therefore am in agreement with the Ontario Court of Appeal. The appeal is dismissed, the respondent's conviction set aside and a new trial ordered.

***McLachlin J.* (dissenting) (*La Forest, L'Heureux-Dubé*] and *Gonthier JJ.* concurring):**

Introduction

50 This case raises the issue of whether a person who provokes another person to assault him can rely on the defence of self-defence, notwithstanding the fact that he failed to retreat from the assault he provoked. The Chief Justice would answer this question in the affirmative. I, with respect, take a different view.

51 The accused McIntosh was a disc jockey. He had given some sound equipment to the deceased to repair. Over the next eight months, McIntosh tried to get the equipment, without success. On one occasion, McIntosh told the deceased he would "get him" if the equipment were not returned. On another occasion, the deceased fled though the back door when McIntosh appeared at his front door. On the day of the killing, McIntosh, armed with a kitchen knife, ordered the deceased to return the equipment. According to McIntosh, the deceased responded by pushing him. They struggled. The deceased picked up a dolly, raised it to head level, and came at the respondent. McIntosh stabbed him, threw the knife down, and fled.

52 It was open to the jury to find, in this scenario, that McIntosh had provoked the assault by threatening the deceased while armed with a knife. This raised the question of which of the self-defence provisions of the *Criminal Code* apply to a person who provokes the aggression that led to the killing. The answer depends on the inter pretation accorded to ss. 34 and 35 of the *Criminal Code*, R.S.C. 1985, c. C-46, which codify self-defence in Canada. Section 35 clearly applies where the accused initiated the aggression; however, it contains a requirement that the accused have attempted to retreat, and might not have assisted McIntosh. Sections 34(1) and 34(2), on the other hand, contain no requirement to retreat. Section 34(1) clearly does not apply to the initial aggressor. The debate, in these circumstances, focused on s. 34(2). If McIntosh could avail himself of s. 34(2), he would be entitled to rely on self-defence, notwithstanding findings that he provoked the fight and did not retreat.

53 The trial judge instructed the jury that s. 34(2) would not apply if they found that McIntosh had provoked the fight in which he killed the deceased. In his view, only s. 35 was available to an initial aggressor. The jury returned a verdict of guilty of manslaughter. McIntosh appealed on the ground that the trial judge erred in telling the jury that s. 34(2) did not apply to the initial aggressor. The Court of Appeal agreed and ordered a new trial: (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199. The Crown now appeals to this court, arguing that the trial judge correctly instructed the jury that s. 34(2) is not available to persons who provoke the attack which led to the killing.

54 A second issue arose with respect to s. 37 of the *Criminal Code*. The trial judge declined to put it to the jury, on the ground that counsel had not indicated how it could be applied to the evidence in the case. The Court of Appeal agreed.

Analysis

55

1. Does Section 34(2) of the Criminal Code Apply to a Person Who Provokes an Attack?

56 McIntosh raises one main argument. It is this. Section 34(1) states expressly that it does not apply to people who have provoked the assault from which they defended themselves. Section 34(2), by contrast, does not expressly exclude provokers. Therefore, s. 34(2) must be read as applying to people who have provoked the assault from which they defended themselves. In order to prevent s. 34(2) from applying to initial aggressors, it would be necessary to "read in" to s. 34(2) the phrase found in s. 34(1): "without having provoked the assault". On this basis, it is argued that the provisions contain no ambiguity. It is further argued that even if they did contain an ambiguity, it must be resolved in favour of the accused, following the principle that an ambiguity in penal provisions should be resolved in the manner most favourable to accused persons.

57 Section 34(1), as mentioned, contains the phrase "without having provoked the assault". It reads:

Self-defence against unprovoked assault

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

58 Section 34(2), on the other hand, contains no such phrase. It reads:

Extent of justification

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

59 Section 35 specifically refers to initial aggressors or provocateurs. It reads:

Self-defence in case of aggression

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(*a*) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(*b*) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

60 At first blush the argument seems attractive that the absence of the phrase "without having provoked the assault" in s.

34(2) makes it applicable to all cases of self-defence, even those where the accused provoked the attack. Yet, a closer look at the language, history and policy of ss. 34 and 35 of the *Criminal Code* suggests that this argument should not prevail.

61 The Chief Justice starts from the premise that "the language of the statute is plain and admits of only one meaning" (p. 181). From this he concludes that "the task of interpretation does not arise" (p. 181). I cannot agree. First, the language is not, with respect, plain. The facial ambiguity of s. 34(2) is amply attested by the different interpretations which it has been given by different courts. But even if the words were plain, the task of interpretation cannot be avoided. As *Driedger on the Construction of Statutes* (3rd ed. 1994) puts it at p. 4, "no modern court would consider it appropriate to adopt that meaning, however 'plain', without first going through the work of interpretation".

62 The point of departure for interpretation is not the "plain meaning" of the words, but the intention of the legislature. The classic statement of the "plain meaning" rule, in the *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85, 8 E.R. 1034 (H.L.), at p. 1057, makes this clear: "the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act." To quote *Driedger*, at p. 3, "[t]he purpose of the legislation must be taken into account, even where the meaning appears to be clear, and so must the consequences." As Lamer C.J.C. put it in *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025, at p. 1042: "the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and purpose of the legislation". The plain meaning of the words, if such exists, is a secondary interpretative principle aimed at discerning the intention of the legislator. If the words admit of only one meaning, they may indeed "best declare the intention of the lawgiver" as suggested in the *Sussex Peerage Case* at p. 1057, but even here it is the intention, and not the "plain meaning" which is conclusive. But if, as in the case of s. 34(2), the words permit of doubt as to the intention of Parliament, other matters must be looked to to determine that intention.

63 I also depart from the Chief Justice on his application of the proposition that "where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation". This court in *Marcotte v. Canada (Deputy Attorney General)*, [1976] 1 S.C.R. 108, at p. 115, made it clear that this rule of construction applies only where "real ambiguities are found, or doubts of substance arise" (per Dickson J. (as he then was)). If the intention of Parliament can be ascertained with reasonable precision, the rule has no place. As La Forest J. put it in *R. v. Deruelle*, [1992] 2 S.C.R. 663, at pp. 676-77:

> In the court below, the majority suggested that any ambiguity in a penal provision should be resolved in favour of the accused ... While it is true that s. 254(3) is not a model of clarity, in this instance the intent of Parliament is sufficiently clear that there is no need for the aid of that canon of statutory construction.

64 In summary, then, I take the view that this court cannot evade the task of interpreting s. 34(2). The court's task is to determine the intention of Parliament. The words of the section, taken alone, do not provide a clear and conclusive indication of Parliament's intention. It is therefore necessary to look further to determine Parliament's intention to the history of the section and the practical problems and absurdities which may result from interpreting the section one way or the other. These considerations lead, in my respectful view, to the inescapable conclusion that Parliament intended s. 34(2) to apply only to unprovoked assaults. This in turn leads to the conclusion that the trial judge was correct in declining to leave s. 34(2) with the jury.

The History of s. 34(2)

65 Self-defence at common law rested on a fundamental distinction between cases where no fault was attributable to the killer, and cases where the killing was partly induced by some fault of the killer. Where the killer was not at fault — that is where he had not provoked the aggression — the homicide was called "justifiable homicide". Where blame could be laid on the killer, as where he had provoked the aggression, on the other hand, the homicide was called "excusable homicide". (See E.H. East, *A Treatise of the Pleas of the Crown* (1803), vol. 1; William Blackstone, *Commentaries on the Laws of England* (1769), Book IV.)

66 Justifiable homicide and excusable homicide attracted different duties. In the case of justifiable homicide, or homicide in defending an unprovoked attack, the killer could stand his ground and was not obliged to retreat in order to rely on the

defence of self-defence. In the case of excusable homicide, on the other hand, the killer must have retreated as far as possible in attempting to escape the threat which necessitated homicide, before he could claim self-defence. In other words, unprovoked attacks imposed no duty to retreat. Provoked attacks did impose a duty to retreat.

67 The two situations recognized at common law — justifiable homicide and excusable homicide — were codified in the first Canadian *Criminal Code* in 1892, S.C. 1892, c. 29, in ss. 45 and 46. Section 45 when enacted in 1892 differed from its modern equivalent, s. 34, in that it was not divided into two subsections. Rather, it consisted of two parts divided by a semi-colon. The wording too was slightly different. Its wording indicated that the phrase at the heart of this appeal — "not having provoked the assault" — was applicable to both halves of the section. Section 45 read:

> **Self-defence against unprovoked assault**
>
> 45. Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is more than is necessary for the purpose of self-defence; and every one so assaulted is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

68 The 1892 Code was clear and conformed to the common law on which it was based. An accused who had not provoked the assault was a semi-person "unlawfully assaulted". He was entitled to stand his ground and need not retreat. An accused who had provoked the assault, on the other hand, was covered by s. 46 and could not claim to have acted in self-defence unless he retreated.

69 In 1906 the *Criminal Code* underwent a general revision. One of the policies of the revision was to divide longer provisions into subsections. In accordance with this policy, s. 45 became ss. 53(1) and (2). The wording, however, remained identical. The marginal note to s. 53(1) read "Self defence. Assault.", and the marginal note to s. 53(2) read "Extent justified." In 1927, while the section remained identical in wording and numbering, the marginal note to s. 53(1) reverted to "Self-defence against unprovoked assault".

70 In 1955, in the course of another general revision, S.C. 1953-54, c. 51, s. 53 became s. 34. The words "Every one so assaulted is justified, though he causes" in the second subsection were removed, and the words "Everyone who is unlawfully assaulted and who causes" were substituted. The second subsection was further divided into two paragraphs, but all else remained the same. Section 35, like the former s. 46, dealt with provoked assault. As might be expected, s. 34 imposed no requirement of retreat; s. 35 did. Thus the common law distinction between justifiable homicide and excusable homicide was carried forward.

71 One incongruity, however, emerged with the 1955 revision. The phrase "so assaulted" in the second part of the old s. 45 had clearly referred back to the phrase in the first part "unlawfully assaulted, not having provoked such assault". In 1955, however, when "Every one so assaulted" was replaced in the severed subsection by "Every one who is unlawfully assaulted", the clear reference back that had been present in the older versions became less clear. The phrase "not having provoked such assault", which in the old s. 45 had modified or explained the term "unlawfully assaulted" in both the first and second part of the section, was thus effectively deleted from s. 34(2).

72 History provides no explanation for why the explanatory phrase was omitted from s. 34(2). Certainly there is no suggestion that Parliament was attempting to change the law of self-defence. The more likely explanation, given the history of the changes, is inadvertence. In the process of breaking the old s. 45 into two subsections and later substituting new words for the old connector "so assaulted", and in the context of the significant task of a general revision of the entire Code, the need to insert the modifying phrase "not having provoked such assault" in the newly worded subsection was overlooked.

73 The marginal notes accompanying ss. 34 and 35 support the view that the omission of the phrase "without having provoked the assault" in the 1955 Code was inadvertent and that Parliament continued to intend that s. 34 would apply to unprovoked assaults and s. 35 to provoked assaults. The note for s. 34 is "Self defence against unprovoked assault/Extent of

justification", for s. 35 "Self defence in case of aggression", namely assault or provocation. While marginal notes are not part of the legislative act of Parliament, and hence are not conclusive support in interpretation, I agree with the view of Wilson J. in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at pp. 556-58, that they may be of some limited use in gleaning the intention of the enactment. Inasmuch as they do indicate an intention, they clearly support the interpretation suggested by the above discussion.

74 Parliament's retention of the phrase "unlawfully assaulted" in both s. 34(1) and s. 34(2) provides yet further confirmation of the view that Parliament did not intend to remove the long-standing distinction between provoked and unprovoked assault. The meaning of that phrase, in the context of the two sections, is indicated by its conjunction with the phrase "not having provoked the assault" which modified "unlawfully assaulted" in the 1892 codification. This phrase in the 1892 codification suggests that "unlawfully assaulted" in the context of that section meant "not having provoked the assault". There is no reason to suppose that the meaning of the phrase "unlawfully assaulted" changed in the intervening years. If so, then on its plain wording s. 34(2) applies only to an unprovoked assault, even in the absence of the phrase "without having provoked the assault".

75 Parliament's intention to retain the long-standing distinction between provoked and unprovoked assault in the context of self-defence is also confirmed by the fact that neither s. 34(1) nor s. 34(2) imposes a duty to retreat, indicating that these provisions deal with the common law category of justifiable homicide, contrasted with the excusable homicide of s. 35.

76 Taking all this into account, can it be said that Parliament intended to change the meaning of s. 34(2) in the 1955 codification, thus abrogating sixty years of statutory criminal law, based on hundreds of years of the common law? I suggest not. To effect such a significant change, Parliament would have made its intention clear. This it did not do. If the word "unlawful" is given its proper meaning, it is unnecessary to read anything into the section to conclude that it does not apply to provoked assaults. Alternatively, if it were necessary to read in the phrase "without having provoked the assault", this would be justified. *Driedger* at p. 106 states that a court will be justified in making minor amendments or substituting one phrase for another where a drafting error is evidenced by the fact that the provision leads to a result that cannot have been intended. Redrafting a provision, it suggests at p. 108, is acceptable where the following three factors are present: (1) a manifest absurdity; (2) a traceable error; and (3) an obvious correction. All three conditions are filled in the case at bar. In a similar vein, Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), suggests that words may be read in to "express what is already implied by the statute" (p. 232). This condition too is met in the case of s. 34(2).

77 The argument that Parliament intended to effect a change to the law of self-defence in 1955 rests finally on the presumption that a change in wording is intended to effect substantive change. But this presumption is weak and easily rebutted in Canada, where making formal improvements to the statute book is a minor industry. This is particularly the case where, as in this case, there is evidence of a drafting error: *Driedger*, at pp. 450-51.

78 I conclude that the intention of Parliament is clear and that s. 34(2), read in its historical context, applies only to unprovoked assaults.

The Jurisprudence

79 For many years after the 1955 amendments to the *Criminal Code*, ss. 34 and 35 were interpreted in the way that the history of the sections and the marginal notes suggest. In two 1975 cases, the Ontario Court of Appeal made broad statements to the effect that s. 34 was available only to the victims of unprovoked assaults. In *R. v. Bolyantu* (1975), 29 C.C.C. (2d) 174, at p. 176, the Ontario Court of Appeal (per Kelly, Lacourciere and Zuber JJ.A.) stated:

> The trial Judge did not instruct the jury as to the effect of s. 35 of the *Criminal Code* and in our view, he should have so done. Section 34 entitles one to defend himself from an unlawful assault that he has not provoked. Section 35 deals with the right of a person to defend himself from an assault which he has provoked. Section 35 should have been left with the jury in the event that they were of the view that Bolyantu had provoked an assault (either actual or believed) by Stimac.

In *R. v. Squire* (1975), 26 C.C.C. (2d) 219 [31 C.R.N.S. 314] (Ont. C.A.), at p. 233 [C.C.C., p. 328 C.R.N.S.], Martin J.A. for the court distinguished between the situation where the deceased had been provoked and hence had a "legal right" to strike

back, and a situation where he had not been provoked, in which case the deceased's strike would be "unlawful". In the former case, s. 35 governed, in the latter s. 34.

> It is clear that a blow struck justifiably in self-defence by the deceased cannot afford provocation, since it is something that the deceased "had a legal right to do", within the proviso to s. 215(3) of the *Code*. In such circumstances the blow is not a wrongful act.
>
> *The case of a person who has willingly engaged in a fight without any necessity for defending himself falls within the provisions of s. 35 of the Code* which establishes the conditions necessary to justify the subsequent use of force in self-defence by one who has without justification assaulted another or who has without justification provoked an assault upon himself. *It is difficult to see how in such circumstances one who has actually and willingly begun to fight could be said to be the victim of an unprovoked assault under s. 34.* [Underlining added; italics in original.]

80 The British Columbia Court of Appeal has followed the same approach. In *R. v. Merson* (1983), 4 C.C.C. (3d) 251, at p. 255, it stated, per Nemetz C.J.B.C. (in dissent, but not on this point):

> Generally speaking, s. 34 provides a defence of self-defence to a victim. Section 35 provides such a defence to the aggressor.

And per Taggart J.A., at p. 266:

> Unlike s. 34, s. 35 is available to an accused notwithstanding the fact that he initiates the conflict by assaulting, or by provoking an assault by, the other combatant.

The Alberta Court of Appeal has taken the same view in *R. v. Alkadri* (1986), 29 C.C.C. (3d) 467, at p. 470, per Kerans J.A.:

> If he did not provoke that assault, the killing is justified under s. 34(2) if the jury has a doubt whether the accused caused the death under reasonable apprehension of death and in the belief he had no choice. If, on the other hand, the jury views the accused as the original aggressor, he can only invoke s. 35 and the jury must additionally ask itself both whether he did not, before the threat to his life arose, himself try to kill and whether he had, after he started the fight, retreated from it as far as was feasible.

81 More recently, the Ontario Court of Appeal in two cases, *R. v. Stubbs* (1988), 28 O.A.C. 14, and *R. v. Nelson* (1992), 71 C.C.C. (3d) 449 [13 C.R. (4th) 359], took the view that the court took in this case, that s. 34(2) is available to an aggressor. Viewed in the historical continuum, these decisions represent a departure from the settled view at common law and throughout most of the first century of the Canadian *Criminal Code* that both branches of s. 34 apply only in the situation of justifiable assault, that is where the accused did not provoke the fight that led to the killing.

Policy Considerations

82 The interpretation of ss. 34 and 35 which I have suggested is supported by policy considerations. The Crown argues that it would be absurd to make s. 34(2) available to aggressors when s. 35 so clearly applies. Parliament, it argues, could not have intended such a result. More practically, as the Chief Justice notes, the sections read as McIntosh urges may lead to absurd results. If s. 34(2) is available to an initial aggressor who has killed or committed grievous bodily harm, then that accused may be in a better position to raise self-defence than an initial aggressor whose assault was less serious; since s. 34(2) is only available to an aggressor who "causes death or grievous bodily harm", the less serious aggressor would not fall under its ambit. The less serious aggressor, forced to rely on s. 35, would have no defence in the absence of retreat. It is anomalous, to use the Chief Justice's word, that an accused whose conduct is the more serious has the broader defence.

83 Common sense suggests that ss. 34 and 35 set out two situations, each with its corresponding defence. The broader defence of s. 34, not requiring retreat, goes naturally with the less serious category of conduct by the accused, namely, the situation where the accused is unlawfully attacked, not having provoked the assault. The narrower defence of s. 35 similarly goes naturally with the more serious conduct by the accused, the situation where the accused as aggressor provoked the assault.

84 While I agree with the Chief Justice that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear indication to the contrary, the courts must impute a rational intent to Parliament. As Lord Scarman put it in *Stock v. Frank Jones Tipton Ltd.*, [1978] 1 W.L.R. 231 (H.L.), at p. 239: "If the words used by Parliament are plain, there is no room for the 'anomalies' test, unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake." That, in my view, describes this case. Indeed, as noted earlier, the law goes so far as to permit a missing provision to be read in where absurdity, traceable error and obvious correction combine.

85 Not only is the result McIntosh argues for anomalous; to my mind it is unwise and unjust. The common law has for centuries insisted that the person who provokes an assault and subsequently kills the person he attacks when that person responds to the assault must retreat if he wishes to plead self-defence. Otherwise, a person who wished to kill another and escape punishment might deliberately provoke an attack so that he might respond with a death blow. People who provoke attacks must know that a response, even if it is life-threatening, will not entitle them to stand their ground and kill. Rather, they must retreat. The obligation to retreat from provoked assault has stood the test of time. It should not lightly be discarded. Life is precious; the justification for taking it must be defined with care and circumspection.

Conclusion on Section 34(2)

86 In summary, the history, the wording and the policy underlying s. 34(2) all point to one conclusion

87 Parliament did not intend it to apply to provoked assault. It follows that the trial judge did not err in limiting s. 34(2) in this way in his instructions to the jury.

2. Should s. 37 of the Criminal Code Have Been Left with the Jury?

88 Section 37 refers to two aspects of defence of the person self- defence and defence of others. With respect to defence of others, the section is unique, and its meaning is therefore clear. I agree with the Chief Justice that the purpose of s. 37 in the self-defence context is not readily apparent and appears to conflict with s. 35, insofar as it applies to an initial aggressor. However, again the section must be viewed in keeping with the overall scheme of self-defence established by Parliament. Section 37 gives a broad overview of the principles of self-defence. Sections 34 and 35 deal with the common law of justifiable and excusable homicide. They thus deal with death and grievous bodily harm. It must therefore be assumed that ss. 34 and 35 exclusively dictate the application of the principles laid out in s. 37 where death or grievous bodily harm has occurred. Where death or grievous bodily harm has not occurred, the principles of s. 37 apply without the focus and direction provided by ss. 34 or 35. It follows that the trial judge was correct in declining to leave it to the jury.

Conclusion

89 I would allow the appeal and restore the conviction.

Appeal dismissed.

TAB 6

Maynes v. British Columbia (Minister of the Environment), 2009 BCCA 499

2009 BCCA 499
British Columbia Court of Appeal [In Chambers]

Maynes v. British Columbia (Minister of the Environment)

2009 CarswellBC 3033, 2009 BCCA 499, [2009] B.C.W.L.D. 8511, [2009] B.C.W.L.D. 8577, [2009] B.C.J. No. 2237, 182 A.C.W.S. (3d) 507, 278 B.C.A.C. 113, 471 W.A.C. 113

Dennis Maynes and Margaret Maynes (Appellants / Plaintiffs) and The Minister of the Environment for The Province of British Columbia (Respondent / Defendant)

Ryan J.A.

Heard: September 25, 2009
Judgment: November 12, 2009
Docket: Vancouver CA037424

Counsel: M. Campbell for Appellants
E. Ross for Respondent

Subject: Natural Resources; Public; Civil Practice and Procedure; Environmental

Headnote

Natural resources --- Fish and wildlife — Offences — Illegal possession — Wildlife

Conservation officer seized three hawks and one falcon from M's property under provisions of s. 33 of Wildlife Act, which makes it offence for person to have live wildlife in his personal possession except as authorized under licence or permit or as provided by regulation — Birds were bred in captivity outside British Columbia — M's application for return of birds failed on basis that they fell within definition of "wildlife" in Act and he had not obtained permits to possess them — On appeal, Supreme Court justice agreed — M applied for order that birds not be destroyed or disposed of pending hearing of appeal as to their ownership — Application dismissed — Minister submitted that Act provides that unless licensed, all wildlife in province is property of government, that definition of "wildlife" specifies "raptors," that definition of "raptors" specifies falcons and hawks, and that M did not acquire property in birds in question — M submitted that proper approach to determining meaning of "raptor" in Act was to read definition of "raptor" in context of implied exclusion of domestic-bred, "non-dangerous alien species" — Definition of "wildlife" in Act exhaustive and specifies that wildlife means "raptors" — Word "raptor" is clear and precise and uses scientific classification — Meaning is therefore plain and unambiguous — It followed that M's argument was bound to fail — Decision of Supreme Court justice was correct and M did not have arguable case that she erred in her interpretation of Act — Application for stay of execution dismissed.

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — Stay of execution

Conservation officer seized three hawks and one falcon from M's property under provisions of s. 33 of Wildlife Act, which makes it offence for person to have live wildlife in his personal possession except as authorized under licence or permit or as provided by regulation — M's application for return of birds failed on basis that they fell within definition of "wildlife" in Act and he had not obtained permits to possess them — On appeal, Supreme Court justice agreed — M applied for order that birds not be destroyed or disposed of pending hearing of appeal as to their ownership — Application dismissed — Fact that Minister of Environment planned to dispose of birds if stay were not granted favoured M, since appeal would then become academic — Minister submitted that Act provides that unless licensed, all wildlife in province is property of government, that definition of "wildlife" specifies "raptors,"

that definition of "raptors" specifies falcons and hawks, and that M did not acquire property in birds in question — M submitted that proper approach to determining meaning of "raptor" in Act was to read definition of "raptor" in context of implied exclusion of domestic-bred, "non-dangerous alien species" — Definition of "wildlife" in Act exhaustive, and specifies that wildlife means "raptors" — Word "raptor" is clear and precise and uses scientific classification — Meaning is therefore plain and unambiguous — It followed that M's argument was bound to fail — Decision of Supreme Court justice was correct and M did not have arguable case that she erred in her interpretation of Act — Application for stay of execution dismissed.

Table of Authorities

Cases considered by *Ryan J.A.*:

Gill v. Darbar (2003), 2003 BCCA 3, 2003 CarswellBC 4 (B.C. C.A. [In Chambers]) — followed

Statutes considered:

Court of Appeal Act, R.S.B.C. 1996, c. 77
Generally — referred to

s. 18(1) — pursuant to

Offence Act, R.S.B.C. 1996, c. 338
Generally — referred to

ss. 103-114 — considered

Wildlife Act, R.S.B.C. 1996, c. 488
Generally — referred to

s. 1(1) — considered

s. 1(1) "controlled alien species" — considered

s. 1(1) "controlled alien species" (a) — considered

s. 1(1) "native species" — considered

s. 1(1) "raptor" — considered

s. 1(1) "wildlife" — referred to

s. 1(1) "wildlife" (a) — considered

s. 1(1) "wildlife" (b) — considered

s. 2 — considered

s. 2(1) — considered

s. 2(2) — considered

s. 6.4 [en. 2008, c. 33, s. 11] — considered

s. 6.5 [en. 2008, c. 33, s. 11] — considered

s. 6.6 [en. 2008, c. 33, s. 11] — considered

s. 33 — considered

s. 94(2) — considered

s. 97.4 [en. 2003, c. 90, s. 33] — considered

s. 97.6 [en. 2003, c. 90, s. 33] — considered

s. 97.6(1) [en. 2003, c. 90, s. 33] — considered

s. 97.6(1)-97.6(5) [en. 2003, c. 90, s. 33] — considered

s. 97.6(2) [en. 2003, c. 90, s. 33] — considered

s. 97.6(3) [en. 2003, c. 90, s. 33] — considered

s. 97.6(4) [en. 2003, c. 90, s. 33] — considered

s. 97.6(4)(a) [en. 2003, c. 90, s. 33] — considered

s. 97.6(5) [en. 2003, c. 90, s. 33] — considered

Rules considered:

Court of Appeal Rules, B.C. Reg. 297/2001
R. 9(3) — pursuant to

Regulations considered:

Wildlife Act, R.S.B.C. 1996, c. 488
Controlled Alien Species Regulation, B.C. Reg. 94/2009

s. 2 — considered

Sched. 1 — referred to

Permit Regulation, B.C. Reg. 253/2000

Generally — referred to

s. 2(j) — considered

APPLICATION for stay of execution of order that four birds seized by Ministry of Environment be destroyed pending hearing of appeal.

***Ryan J.A.*:**

Introduction

1 This is an application pursuant to s. 18(1) of the *Court of Appeal Act* and R. 9(3) of the *Court of Appeal Civil Rules* for an order that four birds - three hawks and a falcon - seized by the Ministry of the Environment from the applicant, Mr. Maynes, under the provisions of the *Wildlife Act*, RSBC 1996 c. 488, ("the Act") shall not be destroyed or disposed of pending the hearing of the appeal relating to ownership of the birds.

2 The birds are described as three Harris Hawks and one Hybrid Falcon. The birds were bred in captivity outside British Columbia and are said to have no native equivalent in this Province.

How this Matter Came to this Court

3 Section 33 of the *Wildlife Act* provides that "a person commits an offence if the person has live wildlife in his or her personal possession except as authorized under a licence or permit or as provided by regulation."

4 The *Wildlife Act Permit Regulation*, B.C. Reg. 253/2000 provides for issuance of licences and permits. Section 2(j) of the regulation authorizes a regional manager to issue a permit authorizing a person to possess live wildlife.

5 Section 94(2) of the *Wildlife Act* authorizes a conservation officer or constable to seize wildlife "if the conservation officer believes on reasonable grounds that the right of property in that wildlife is with the government or remains in the government".

6 On November 1, 2007 a conservation officer seized the birds in question from Mr. Maynes' property in Surrey and detained them under s. 97.4 of the Act which permits the officer to detain the seized wildlife for up to 12 months. Mr. Maynes was subsequently given notice under s. 97.6 of the Act that the birds were not required for evidence. Section 97.6(1) - (5) provides:

> (1) This section applies in respect of wildlife detained under section 97.4 if a responsible official determines that the wildlife is not required for law enforcement purposes and gives notice of that determination to the person from whom the wildlife was seized.
>
> (2) The person from whom the wildlife was seized may make an application to a justice on at least 3 days' notice to the minister.
>
> (3) An application under subsection (2) must be made within 30 days from the date that the person receives notice referred to in subsection (1).
>
> (4) On the hearing of an application under subsection (2), the justice must order that the wildlife be returned
>
> (a) to the person from whom it was seized, if satisfied that the person is lawfully entitled to his wildlife,
>
> (b) to another person, if
>
> (i) satisfied that the person from whom the wildlife was seized is not lawfully entitled to the wildlife but that the other person is, and
>
> (ii) this other person is known, or
>
> (c) if neither paragraph (a) nor (b) apply, to the government to be disposed of as the minister directs.
>
> (5) A person aggrieved by an order under this section may appeal the order to the Supreme Court and, for the purposes of the appeal, sections 103 to 114 of the *Offence Act* apply.
>
> [Emphasis added.]

7 Accordingly Mr. Maynes applied to a justice for the return of the birds on the basis that he was lawfully entitled to their possession. Having failed in that application, he appealed to the Supreme Court. In that court Madam Justice Gropper agreed with the Provincial Court Judge that Mr. Maynes was not entitled to possession of the birds as they fell within the definition of "wildlife" in the *Wildlife Act* and Mr. Maynes had not obtained permits to possess them.

8 As can be seen, the *Wildlife Act* provides for an application to the Provincial Court and an appeal to the Supreme Court. It does not provide a further appeal. Sections 103 to 114 of the *Offence Act* set out the procedure to be applied when the appeal is taken to the Supreme Court. The sections do not provide a further appeal to this Court. I asked counsel to address this question when they appeared on this application. Counsel did so, but the request was on short notice and they did not have an opportunity to fully examine the issue. As I am able to resolve this application on the basis of its merit, it is not necessary to consider the question further. Whether the *Offence Act* should be read to provide a further appeal, whether an appeal lies pursuant to the *Court of Appeal Act*, or whether the applicants' remedy lies in an application for leave to appeal to the Supreme Court of Canada, must be left for another day.

Some Further Factual Background

9 Mr. Maynes is an experienced falconer. He operates a small business specializing in environmental pest bird clearance. For that purpose he owns several types of domestic bred raptors. Mr. Maynes' counsel, Ms. Campbell, explained that the business consists of flying the birds in different places, for example airport hangars, to clear them of pest birds such as pigeons. In his affidavit filed in Provincial Court, Mr. Maynes attested that he is of the view that domestic bred birds, often alien species to this jurisdiction, or hybrids which have no counterpart in the wild, should not be treated in a similar fashion to the wildlife in our forests. Mr. Maynes says that he has lobbied for several years for the removal of domestic-bred raptors from the provisions of the *Wildlife Act*.

The Test to Apply on an Application for a Stay of Execution

10 In *Gill v. Darbar*, 2003 BCCA 3 (B.C. C.A. [In Chambers]), para. 7, Mr. Justice Smith succinctly described the applicable principles that govern this application:

> The applicable principles are not in dispute. Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if satisfied that it is in the interests of justice to do so: *Voth Brothers Construction (1974) v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 at 44-45 ([Lambert J.A. in Chambers]). The trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay: *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.). The applicant for a stay must satisfy the familiar three-stage test, that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted: *British Columbia (Milk Marketing Board) v. Grisnich* (1996), 50 C.P.C. (3d) 249 at 252 (B.C.C.A. [in Chambers]).

11 On this application Ms. Campbell submitted that Mr. Maynes has an arguable case that the Supreme Court Justice erred in her interpretation of the *Wildlife Act* as it currently stands. If Ms. Campbell is right I would be inclined to grant the stay. The material shows that the Minister plans to dispose of the birds if a stay is not granted. In my view this fact favours the applicants with respect to the last two parts of the test. Mr. Maynes' appeal will be academic if a stay is not granted. The question is therefore reduced to the first aspect of the test - does Mr. Maynes have an arguable ground of appeal?

Discussion - Do the applicants have an arguable case?

a. The Position of the Parties

12 Mr. Maynes does not dispute that he did not have a permit to possess the birds in question. He asserted that the licencing provisions of the *Wildlife Act* did not apply to his birds which are domestic-bred non-dangerous alien species. Counsel for the Minister, Ms. Ross, took the position that the birds were covered by the provisions of the Act. The Supreme Court Justice accepted the Minister's position.

13 The Minister's argument relies on s. 2 and the interpretation section, s. 1(1), of the *Wildlife Act*.

14 Section 2(1) of the *Wildlife Act* provides that "ownership in all wildlife in British Columbia is vested in the government." Subsection 2(2) states that "a person does not acquire a right of property in any wildlife except in accordance with a permit or licence under this Act or the *Game Farm Act* or as provided in subsection (3) of this section." I have set out the provisions of the appropriate regulation in paragraph [4] above.

15 The *Wildlife Act* defines wildlife in s. 1(1) as:

> "wildlife"
>
> (a) means raptors, threatened species, game and other species or vertebrates prescribed by regulation, and
>
> (b) for the purposes of sections 3 to 5, 7, 8 ... includes fish, but does not include controlled alien species.
>
> [Emphasis added.]

16 The Act defines a raptor as, "*raptor means a bird of the order Falconiformes known as vultures, eagles, falcons and hawks* or the order Stringiformes known as owls, and includes its eggs". [Emphasis added.]

17 The Minister's position can be reduced to this: The *Wildlife Act* provides that, unless licensed, all wildlife in British Columbia is the property of the government. The definition of "wildlife" specifies "raptors" and other animals. The definition of "raptor" specifies "falcons" and "hawks". Mr. Maynes did not acquire property in the birds in question unless he obtained a licence or permit for that purpose. He did not possess a permit. The birds in question are therefore lawfully in the possession of the Ministry to dispose of as it sees fit.

18 Mr. Maynes says that this is not the proper interpretation of the Act. Counsel for Mr. Maynes submitted that a reading of the legislation as a whole, in the context of legislative intent, demonstrated that the *Wildlife Act* applies only to native species and dangerous alien species which require regulating. In a novel approach to the interpretation of a word specifically defined in a statute, Ms. Campbell submitted that in determining the meaning of "raptor" in the *Wildlife Act* the proper approach was to read the definition of "raptor", in her words, "in the context of the implied exclusion of non-dangerous alien species."

19 In support of her argument, Ms. Campbell first turns to the definition of "wildlife" in s. 1(1) of the Act. As will be recalled, s. 1(1) defines "wildlife" as "raptors", "threatened species", "endangered species", "game", other species of vertebrates prescribed by regulation and [for certain purposes] fish. The section also specifically excludes "controlled alien species." Each of the categories is further defined in the Act. It is unnecessary to refer to definitions other than "controlled alien species" as the applicants' argument focuses on that definition alone.

20 Controlled alien species is defined in s. 1(1) of the Act as:

> "controlled alien species" means
>
> (a) a species designated by regulation under s. 6.4 as a controlled alien species, and
>
> (b) hybrid animals and fish that have an ancestor within 4 generations that is a species designated as a controlled alien species;

[Emphasis added.]

21 Section 6.4 states:

If the minister considers that a non-native species described in paragraph (a) or (b) of the definition of "species" poses a risk to the health or safety of any person or poses a risk to property, wildlife or wildlife habitat, the minister may make regulations designating the species as a controlled species.

[Emphasis added.]

22 "Non-native species" is not defined in the Act, but "native species" is. Section 1(1) provides:

"native species" means a species that

(a) is indigenous to British Columbia

b) has extended its range into British Columbia from another part of North America, unless

(i) the species was introduced to North America by human intervention or activities, or

(ii) any part of the extension of its range within North America was aided by human intervention or activities;

23 Sections 6.5 and 6.6 enable the Minister to regulate "controlled alien species". There is no need to reproduce those sections here.

24 Section 2 of the appropriate regulation, the *Wildlife Act: Controlled Alien Species Regulation*, B.C. Reg. 94/2009 states:

For the purpose of paragraph (a) of the definition of controlled alien species in section 1(1) of the Act, the species listed in Schedule 1 are designated as controlled alien species.

25 Only one bird, which is not a raptor, is defined in Schedule 1 as a "controlled alien species".

26 Examining these provisions as a whole, Ms. Campbell submits that it was clearly the intent of the Legislature that the provisions of the *Wildlife Act* apply only to native species and dangerous alien species which require regulating. They do not apply, she says, to domestic-bred birds that are not dangerous. Ms. Campbell makes this submission on the basis that "controlled alien species" are not included in the definition of "wildlife", and that to qualify as a "controlled alien species" the animal in question, by virtue of s. 6.4 of the Act, must be non-native. Since this is the only reference in the definitions to a non-native animal, it follows that the rest of the definitions do not include non-native animals.

27 For support, Ms. Campbell refers to what was said by the Minister of the Environment when amendments to the Act creating the category of "controlled alien species," was given second reading in the legislature May 20, 2008. In his remarks (British Columbia, Legislative Assembly, *Hansard*, (16 April 2008) Mr. Penner said at 11441:

I am pleased to speak to this bill, which contains a number of amendments to the *Wildlife Act* and to the *Environmental Management Act* that will enhance this government's ability to regulate with respect to public health and safety, environmental protection and the effective management of our wildlife resources.

As with my remarks at first reading, I would like to begin by speaking to the changes proposed for the *Wildlife Act*. One of the most significant changes being proposed for the Act is the introduction of new provisions to enable regulation of the ownership of potentially harmful "alien species" in British Columbia. These amendments build on

> my commitments and on those given by the Minister of Agriculture and Lands last year to regulate alien species that may be harmful to British Columbians and to our native wildlife.
>
> Traditionally, in Canada there have been very few legal tools that provincial governments have had to regulate the possession of alien species. The amendments in this bill will close this gap for British Columbia.
>
> It was almost a year ago that we learned of the tragic death of Tanya Dumstrey-Soos in Bridge Lake. This young woman was attacked by a captive Siberian tiger at a privately owned zoo. There have been other troubling incidents involving alien species since Ms. Dumstrey-Soos' death. It was only a few months ago, I think shortly before Christmas, that a young man was bitten by his pet cobra in the Lower Mainland, and only his good luck helped him escape serious injury or worse, although I believe he eventually suffered amputation of several fingers of his hand.
>
> These incidents show that some alien species need to be regulated, if they are a threat to public safety. Potentially harmful species that are foreign to British Columbia, such as tigers and exotic venomous snakes, will be listed as "controlled alien species" in regulation under the *Wildlife Act*. This list will be updated from time to time as needed.
>
> These changes to the *Wildlife Act* will allow the government to regulate, prohibit and impose requirements on the possession, breeding, release, trafficking, shipping and transporting of controlled alien species in British Columbia.
>
> It is also important to recognize that not all alien species are harmful. We are only concerned with controlling the possession of those species that pose a risk to human health and safety, property, wildlife or wildlife habitat.
>
> A limited number of alien species will be designated as "controlled alien species." Not all controlled alien species will be treated the same way but will be managed according to their level of risk. For example, cobras and tigers will be more strictly regulated than less harmful animals. We anticipate that the list of controlled alien species will be divided into three categories: prohibited, referring to the most harmful alien species; restricted, referring to those species where potential risks can be effectively reduced through correct care and handling; and monitored, referring to those alien species where there's simply a reporting requirement.

b. The Decision of the Chambers Judge

28 Madam Justice Gropper concluded that she ought not to look at *Hansard* because the words of the legislation itself were not ambiguous. For the reasons that follow, I too see no reason to examine the remarks of the Minister. That said, I am also of the view that they do not support the applicants' position. The remarks reveal that the government of the day saw a lacuna in the existing legislation in the area of non-native alien animals. It did not start from the premise that the Act did not cover any alien animal at all.

29 In the end Madam Justice Gropper concluded that she need not venture beyond the "plain meaning" of the words in question. She accepted the argument of the Minister noting:

> The argument of Mr. Maynes is creative but convoluted. While he suggests that the Act does not embrace alien species that do not require regulating or controlling (which are not capable of creating harm), such a construction is clearly contrary to the words of the statute and the definition of "raptors".

c. Principles of Statutory Interpretation

30 Ms. Campbell does not rely on the words of the statute alone, but argues that they should be placed in an overall context.

31 This argument would have more force if what was at issue here was something other than a definition provided by the statute itself. As Ruth Sullivan notes in *Sullivan on the Construction of Statutes* 5th ed., (Lexis Nexis Canada, 2008) at p. 62:

> Statutory definitions may be exhaustive or non-exhaustive. Exhaustive definitions declare the complete meaning of the defined term and completely displace whatever meanings the defined term might otherwise bear in ordinary or technical usage. An exhaustive definition is normally introduced by the word "means"... Exhaustive definitions are used
>
> - to clarify a vague or ambiguous term
> - to narrow or enlarge the scope of a word or expression
> - to ensure that the scope of a word or expression is not narrowed or enlarged
> - to create an abbreviation or other concise form of reference for a lengthy expression.

32 The definition of "wildlife" in the Act is exhaustive. The definition specifies that wildlife means "raptors." The word "raptor" is not modified. It is clear and precise and uses scientific classification. The meaning is therefore plain and unambiguous. In my view it follows that the applicants' argument is bound to fail.

33 I pause to note here that Mr. Maynes resorted to the language of jurisdiction when asserting that the statute had no jurisdiction over domestic-bred non-dangerous raptors. I do not take him to be saying that the Province lacks the constitutional authority to legislate with respect to such birds found in British Columbia. He is saying that the legislature did not intend this Act to apply to such birds.

Conclusion

34 For these reasons I have concluded that the decision of the Supreme Court Justice was correct and that the applicants' argument in this Court does not have merit. It is bound to fail. I would therefore dismiss the application to stay the execution of the order of Madam Justice Gropper.

Application dismissed.

TAB 7

Northrup v. Windsor Energy Inc., 2017 NBCA 37

2017 NBCA 37, 2017 CarswellNB 407, 2017 CarswellNB 408, 283 A.C.W.S. (3d) 191

2017 NBCA 37
New Brunswick Court of Appeal

Northrup v. Windsor Energy Inc.

2017 CarswellNB 407, 2017 CarswellNB 408, 2017 NBCA 37, 283 A.C.W.S. (3d) 191

BRUCE NORTHRUP (APPELLANT) and WINDSOR ENERGY INC. and KHALID AMIN (RESPONDENTS)

Larlee J.A., Richard J.A., Quigg J.A.

Heard: May 24, 2017
Judgment: September 7, 2017
Docket: 86-16-CA

Counsel: Frederick C. McElman, Q.C., Josie H. Marks, for Appellant
D. Andrew Rouse, Q.C., for Respondents

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Natural Resources; Torts

Related Abridgment Classifications

Natural resources

III Oil and gas
III.8 Statutory regulation
III.8.j Miscellaneous

Torts

VII Fraud and misrepresentation
VII.1 Fraudulent misrepresentation
VII.1.b Specific elements
VII.1.b.i Known falsity

Headnote

Natural resources --- Oil and gas — Statutory regulation — Miscellaneous

Plaintiffs advanced two tort claims against defendant, which were injurious falsehood and misfeasance in public office — Plaintiffs contended that both claims relied upon same alleged wrong, which was that defendant stated in press release and to RCMP that corporate plaintiff violated Oil and Natural Gas Act [Gas Act] and Geophysical Exploration Regulation, by conducting seismic testing inside boundaries of town without requisite permission from town counsel — Plaintiffs claimed they had consent to conduct geophysical exploration and to complete 2D seismic surveys along highway, and it was of no consequence that they were inside municipal boundary — Defendant brought motion seeking determination of question of law prior to trial, and, in event that question posed was determined in his favour, grant of judgment on admission of facts, resulting in finding that plaintiffs were not in violation of Gas Act by conducting geophysical exploration within municipal

boundary — Trial judge found plaintiffs did not need prior written consent from municipality — Trial judge found plaintiffs did not require consent unless testing was carried out on municipal land — Section 17 of Regulation was clear — Trial judge found it would be inconsistent with scheme of highway control under provincial legislation for municipality to have joint consent power with provincial highway administration — Defendant appealed — Appeal allowed, action dismissed — Permittee requires consent in writing of municipality before it undertakes any work within territorial limits of municipality, regardless of who owns land — Restricting wording to land owned by municipality would require reading in words — Purpose of Gas Act is to establish regulatory scheme, for exploration for oil and gas in New Brunswick — Trial judge improperly did not refer to Gas Act to Interpret Regulations but instead relied on Municipalities Act and Highway Traffic Act — Purpose of s. 17(1) of Gas Act is not to secure municipality's consent as landowner — Trial judge should have considered scheme and object of enabling legislation rather than rely on irrelevant extrinsic documents produced after enactment of Gas Act and Regulations — Trial judge erred in finding that s. 17(1)(a) of Gas Act was subordinate to s. 17(1)(b) — Error in law for trial judge to make factual determination that District Transportation Engineer's consent had been given as required and, implicitly, that all other provisions of Gas Act had been met, when those matters had not been put before her — Consent provided by District Transportation Engineer explicitly excluded work performed along highway within municipal boundaries of Sussex.

Torts --- Fraud and misrepresentation — Fraudulent misrepresentation — Specific elements — Known falsity

Plaintiffs advanced two tort claims against defendant, which were injurious falsehood and misfeasance in public office — Plaintiffs contended that both claims relied upon same alleged wrong, which was that defendant stated in press release and to RCMP that corporate plaintiff violated Oil and Natural Gas Act and Geophysical Exploration Regulation, by conducting seismic testing inside boundaries of town without requisite permission from town counsel — Plaintiffs took position that they had consent to conduct geophysical exploration and to complete 2D seismic surveys along highway, and it was of no consequence that they were inside municipal boundary — Defendant brought motion seeking determination of question of law prior to trial, and, in event that question posed was determined in his favour, grant of judgment on admission of facts, resulting in finding that plaintiffs were not in violation of Gas Act by conducting geophysical exploration within municipal boundary — Trial judge found plaintiffs did not need prior written consent from municipality — Trial judge found plaintiffs did not require consent unless testing was carried out on municipal land — Section 17 of Regulation was clear — Trial judge found it would be inconsistent with scheme of highway control under provincial legislation for municipality to have joint consent power with provincial highway administration — Defendant appealed — Appeal allowed, action dismissed — Claim for injurious falsehood not made out — False statement pleaded was statement in press release that Gas Act had been breached by conducting seismic testing within municipal boundaries without municipality's consent, which was not false.

Table of Authorities

Cases considered:

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559, 2002 CSC 42 (S.C.C.) — followed

Bourque Estate (Trustee of) v. Cormier (2006), 2006 NBQB 186, 2006 CarswellNB 291, *(*sub nom. *Bourque Estate v. Cormier)* 298 N.B.R. (2d) 205, *(*sub nom. *Bourque Estate v. Cormier)* 775 A.P.R. 205 (N.B. Q.B.) — considered

Canadian National Railway v. Canada (Attorney General) (2014), 2014 SCC 40, 2014 CSC 40, 2014 CarswellNat 1625, 2014 CarswellNat 1626, 371 D.L.R. (4th) 219, 67 Admin. L.R. (5th) 220, 458 N.R. 150, [2014] 2 S.C.R. 135 (S.C.C.) — referred to

Doiron v. Wilcox (2012), 2012 NBCA 70, 2012 CarswellNB 543, 2012 CarswellNB 544, 1017 A.P.R. 183, 393 N.B.R. (2d) 183 (N.B. C.A.) — referred to

Gauthier v. New Brunswick (Workplace Health, Safety & Compensation Commission) (2003), 2003 NBCA 25, 2003 CarswellNB 174, 2003 CarswellNB 175, 259 N.B.R. (2d) 176, 681 A.P.R. 176 (N.B. C.A.) — considered

Gautreau v. Saulnier (2014), 2014 NBCA 22, 2014 CarswellNB 159, 2014 CarswellNB 160 (N.B. C.A.) — referred to

Heritage Capital Corp. v. Equitable Trust Co. (2016), 2016 SCC 19, 2016 CSC 19, 2016 CarswellAlta 790, 2016 CarswellAlta 791, 395 D.L.R. (4th) 656, [2016] 6 W.W.R. 1, 65 R.P.R. (5th) 51, 48 M.P.L.R. (5th) 1, 482 N.R. 361, 6 P.P.S.A.C. (4th) 1, [2016] 1 S.C.R. 306 (S.C.C.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

Johnson v. Nova Scotia (2005), 2005 NSCA 99, 2005 CarswellNS 278, (sub nom. *Nova Scotia v. Johnson)* 256 D.L.R. (4th) 105, 87 L.C.R. 82, (sub nom. *Nova Scotia v. Johnson)* 234 N.S.R. (2d) 260, (sub nom. *Nova Scotia v. Johnson)* 745 A.P.R. 260 (N.S. C.A.) — referred to

Kenmont Management Inc. v. Saint John Port Authority (2002), 2002 NBCA 11, 2002 CarswellNB 35, 210 D.L.R. (4th) 676, 248 N.B.R. (2d) 1, 646 A.P.R. 1, 2002 CarswellNB 626 (N.B. C.A.) — considered

Lyons v. Lyons Estate (1989), 99 N.B.R. (2d) 220, 250 A.P.R. 220, 1989 CarswellNB 147 (N.B. Q.B.) — referred to

Nesbitt v. Miramar Mining Corp. (2000), 2000 BCSC 187, 2000 CarswellBC 295, [2000] B.C.T.C. 98 (B.C. S.C.) — considered

Odhavji Estate v. Woodhouse (2003), 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, 19 C.C.L.T. (3d) 163, 233 D.L.R. (4th) 193, 312 N.R. 305, 180 O.A.C. 201, [2003] 3 S.C.R. 263, 11 Admin. L.R. (4th) 45, 70 O.R. (3d) 253 (note), [2004] R.R.A. 1, 2003 CSC 69 (S.C.C.) — considered

PIPSC v. Canada (Attorney General) (2012), 2012 SCC 71, 2012 CarswellOnt 15718, 2012 CarswellOnt 15719, D.T.E. 2012T-892, 352 D.L.R. (4th) 491, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 438 N.R. 1, (sub nom. *Prof. Inst. of the Public Service of Canada v. Canada (Attorney General))* 2012 C.E.B. & P.G.R. 8017 (headnote only), (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 300 O.A.C. 202, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 274 C.R.R. (2d) 30, (sub nom. *Professional Institute of the Public Service Alliance of Canada v. Canada (Attorney General))* [2012] 3 S.C.R. 660, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 119 O.R. (3d) 80 (note), 1 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

R. v. Mullins (2005), 2005 NBCA 111, 2005 CarswellNB 749, 2005 CarswellNB 750, 204 C.C.C. (3d) 144, 294 N.B.R.

(2d) 265, 765 A.P.R. 265 (N.B. C.A.) — referred to

R. v. Palmer (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, 1979 CarswellBC 533, 1979 CarswellBC 541 (S.C.C.) — followed

Ryan v. Law Society (New Brunswick) (2000), 2000 CarswellNB 183, 187 D.L.R. (4th) 270 (N.B. C.A.) — referred to

Schaeffer v. Woods (2013), 2013 SCC 71, 2013 CarswellOnt 17584, 2013 CarswellOnt 17585, 7 C.R. (7th) 59, 367 D.L.R. (4th) 1, 312 O.A.C. 1, 62 Admin. L.R. (5th) 1, 304 C.C.C. (3d) 445, 452 N.R. 286, *(*sub nom. *Wood v. Schaeffer)* [2013] 3 S.C.R. 1053, *(*sub nom. *Wood v. Schaeffer)* 297 C.R.R. (2d) 260, 128 O.R. (3d) 719 (note) (S.C.C.) — considered

Smith v. Agnew (2001), 2001 NBCA 83, 2001 CarswellNB 275, 240 N.B.R. (2d) 63, 622 A.P.R. 63, 16 M.V.R. (4th) 246, 33 C.C.L.I. (3d) 196, 2001 CarswellNB 599 (N.B. C.A.) — referred to

Stickel v. Lezzaik (2015), 2015 ONSC 4659, 2015 CarswellOnt 11051, 77 C.P.C. (7th) 401 (Ont. S.C.J.) — considered

Wilson v. British Columbia (Superintendent of Motor Vehicles) (2015), 2015 SCC 47, 2015 CSC 47, 2015 CarswellBC 2940, 2015 CarswellBC 2941, [2015] 11 W.W.R. 429, 23 C.R. (7th) 44, 84 M.V.R. (6th) 1, 76 B.C.L.R. (5th) 1, 476 N.R. 60, 391 D.L.R. (4th) 43, 329 C.C.C. (3d) 527, [2015] 3 S.C.R. 300, 378 B.C.A.C. 58, 650 W.A.C. 58 (S.C.C.) — followed

Statutes considered:

Highway Act, R.S.N.B. 1973, c. H-5
Generally — referred to

Municipalities Act, R.S.N.B. 1973, c. M-22
Generally — referred to

Oil and Natural Gas Act, S.N.B. 1976, c. O-2.1
Generally — referred to

s. 9 — considered

s. 9(1)(a) — referred to

s. 12 — referred to

s. 59 — considered

s. 59(1)(i) — referred to

2017 NBCA 37, 2017 CarswellNB 407, 2017 CarswellNB 408, 283 A.C.W.S. (3d) 191

Rules considered:

Rules of Court, N.B. Reg. 82-73
R. 1.02.1 [en. N.B. Reg. 2013-1] — considered

R. 23 — considered

R. 23.01(1)(c) — considered

R. 37.10 — considered

R. 37.10(a) — considered

R. 51 — considered

R. 51.03 — considered

R. 51.04(1) — considered

R. 62.21(1) — considered

Regulations considered:

Oil and Natural Gas Act, S.N.B. 1976, c. O-2.1
Geophysical Exploration Regulation, N.B. Reg. 86-191

Generally — referred to

s. 17 — considered

s. 17(1) — considered

s. 17(1)(a) — considered

s. 17(1)(b) — considered

Words and phrases considered:

Geophysical exploration

Geophysical exploration includes a wide range of activities, including

seismic operations, test drilling, and blasting with dynamite.

APPEAL by defendants from judgment reported at *Windsor Energy Inc. v. Northrup* (2016), 2016 NBBR 200, 2016 NBQB 200, 2016 CarswellNB 504, 2016 CarswellNB 505 (N.B. Q.B.), determining question in tort claim arising out of oil and gas operations.

Per curiam:

I. Introduction

1 The question on appeal is whether it is a violation of the *Oil and Natural Gas Act*, S.N.B. 1976, c. 0-2.1 (”*ONGA*”), and *Geophysical Exploration Regulation*, NB Regulation 86-191(”Reg 86-191”), to conduct geophysical exploration within municipal boundaries, through which there is a Provincial highway right-of-way, without obtaining the municipality’s consent in writing. Prior to the hearing, the respondents filed a motion requesting they be allowed to introduce new evidence, withdraw admissions and amend their statement of claim. Redundantly, the appellant filed a motion requesting this Court dismiss the respondents’ motion to introduce new evidence and withdraw admissions.

II. Background

2 The essential facts in the motion below and this appeal are straightforward and undisputed. In October 2011, the first respondent, Windsor Energy (”Windsor”), conducted seismic testing along Highway 1, within what it believed at the time to be the boundary of the municipality of Sussex. Khalid Amin, the second respondent, is the President and Chief Executive Officer of Windsor Energy Inc. On November 2, 2011, the appellant, Bruce Northrup, then Minister of Natural Resources, issued a press release stating that Windsor was in violation of the *ONGA* and Reg 86-191, having conducted the testing without the written consent of the municipality. The Minister also filed a complaint with the Royal Canadian Mounted Police (”RCMP”).

3 On August 15, 2014, the respondents commenced an action against the appellant and the Province of New Brunswick (”Province”). Thirteen claims were advanced, all but one of which were based on the assertion the statements made in the press release and to the RCMP were false. Three claims now remain, all against the former Minister: two misfeasance in public office, and one injurious falsehood. The Province is no longer a defendant.

4 Because the substance of the three claims pertained to the accuracy of his statements, the appellant filed a Notice of Motion seeking a pre-trial determination of the following question of law:

> Is it a violation of the *ONGA* or Reg 86-191 to conduct geophysical exploration within municipal boundaries without first obtaining the municipality’s consent in writing?

5 The appellant (and the Province) also requested an order granting judgment on admissions of facts pursuant to Rule 23.01(1)(c) of the *Rules of Court*. They contended that: (1) Windsor had carried out the testing within the municipal boundaries of Sussex without its consent; and (2) if under the Regulation, Windsor was required to obtain the consent of the municipality, then Windsor breached Reg 86-191 and the *ONGA*. That alleged breach could be an answer to the claims of injury to reputation.

6 Therefore, central to the motion was the admission that Windsor or its agents conducted the testing within Sussex’s municipal boundaries without Sussex’s consent in writing.

7 The respondents delineate the issues on their motion as follows:

> 1. Whether the admissions are in substance not admissions of fact;
>
> 2. Whether they should be permitted to withdraw the admissions;
>
> 3. Whether amending a pleading is appropriate on the interlocutory appeal;
>
> 4. Whether it is appropriate to permit the respondents to file an amended appeal submission.

8 The respondents submit the admissions they made, if they are admissions, are in the nature of admissions of law. The relevant law would be the law applicable to the interpretation of the boundaries of the Town of Sussex.

9 The respondents hired an independent surveyor and now question the territorial limits of the Town of Sussex. They say the boundaries may not be the same as they believed them to be at the time of the testing. They submit the original description of the boundary of Sussex relies on the expression "Trans-Canada Highway" while today, the highway is known as Route 1.

10 The respondents submit if the admissions are admissions of law, then, generally, the rule is they can be withdrawn at anytime. In the alternative, assuming the admissions are admissions of fact, they argue that the jurisprudence indicates a favourable approach to the allowance of withdrawal of admissions.

11 The respondents further submit, the new evidence, which includes a survey prepared by Don-More Surveys & Engineering Ltd. and an affidavit from the surveyor, Mr. Toole, should be admitted, in order to determine whether the evidence discloses a triable issue. The triable issue means the new evidence raises doubts about the accuracy of the statements that the testing took place within the municipal boundaries of Sussex. This Court would not be required to rule on whether the evidence is true. The respondents say since new evidence has come to light regarding the boundaries of Sussex, it would be appropriate to allow them to file a new factum to take the new information into consideration.

12 The appellant submits this appeal and the entirety of the litigation to date has proceeded upon the basis of the respondents' admission - in the initial statement of claim and its many amendments - that they conducted seismic testing within the municipal boundaries of Sussex. The appellant provided at least five examples where this admission was made. The respondents did not serve a Notice of Refusal to Admit Facts after they had been served with a Notice of Request to Admit Facts on May 16, 2016. They are, therefore, deemed to have admitted the truth of these facts. At the hearing of the appellant's motion for judgment on admissions, the factual record included: (1) the repeated admission in the Statement of Claim; (2) the admission pursuant to the non-response to the Notice of Request to Admit Facts; and (3) the content of the affidavit of Khalid Amin, sworn to on August 17, 2016.

13 In March 2017 (after the appeal had been perfected), the respondents filed a motion in the Court of Queen's Bench seeking to withdraw their admission that in October of 2011, Windsor had conducted testing within the municipal boundaries of Sussex. The Court of Queen's Bench declined to hear the matter since it was before this Court.

14 On May 4, 2017, the respondents filed their motion in this Court. On May 12, 2017, the appellant filed a Cross-Motion to primarily raise a preliminary objection to receipt of the new evidence and to strike the respondents' motion. The appellant submits the respondents should not be permitted to enter the new evidence and their motion to withdraw admission should be dismissed.

15 The appellant argues the new evidence should not be admitted as the criteria as set out in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), have not been met (see also *Doiron v. Wilcox*, 2012 NBCA 70, 393 N.B.R. (2d) 183 (N.B. C.A.); *Ryan v. Law Society (New Brunswick)*, [2000] N.B.J. No. 540 (N.B. C.A.) (QL); and *Gautreau v. Saulnier*, 2014 NBCA 22, [2014] N.B.J. No. 87 (N.B. C.A.) (QL)). I agree. In my view, the respondents have not shown that the new evidence could not have been obtained and placed before the motion judge with reasonable diligence. Further, the new evidence fails to satisfy the remaining criteria. The new evidence contradicts the evidence of the respondents themselves. Mr. Amin provided sworn evidence to the court below that "Windsor conducted 2D seismic testing on Highway 1 within the municipal boundary of Sussex by approximately 200 meters". Furthermore, the author of the new evidence has not been qualified as an expert and was not subject to cross-examination.

16 As a result, there are questions regarding the credibility and usefulness of the evidence. The opinion evidence, which contradicts not only the evidence of the appellant but also the sworn evidence of the respondents, is not suitable to be received by this Court. Mr. Amin has not explained why he previously deposed the testing occurred "200 meters" within the municipal boundary. I would have expected the Court to have been presented with evidence explaining when and why Mr. Toole was retained and what led the respondents to hire him. I also would have expected information explaining why the respondents' previous understanding with respect to the boundary was incorrect.

17 Therefore, the criteria to admit new evidence have not been met.

18 The appellant submits he would suffer serious prejudice if the withdrawal of admissions were allowed. The jurisprudence prescribes a stringent three-part test that must be met before a court will permit withdrawal of an admission. The same test applies whether the admission was made in the pleadings or pursuant to a Notice of Request to Admit Facts. In *Bourque Estate (Trustee of) v. Cormier*, 2006 NBQB 186, 298 N.B.R. (2d) 205 (N.B. Q.B.), Glennie J. applied the following test:

> The law as it relates to withdrawing admissions was referred to in *Lyons v. Lyons Estate*, [1989] N.B.J. No. 617, 1989 CarswellNB 147, 99 N.B.R. (2d) 220 in which Richard, C.J.Q.B., as he then was, writes at para. 12:
>
> > 12. In *BAYDON CORP LTD. et al. v. DUPONT GLORE FORGAN CANADA LTD. et al. (1974)*, 4 O.R. (2d) 290, Henry J. stated at page 296 as follows:
> >
> > > From these authorities I understand the principle to be that before leave is given to withdraw an admission by amendment to pleadings, the Court ought to be satisfied of three things:
> > >
> > > (a) that the fact admitted is not true;
> > >
> > > (b) that the admission was inadvertent or the solicitor was wrongly instructed;
> > >
> > > (c) that the withdrawal of the admission will not result in an injustice to the action, it being understood that if the other parties can be compensated by costs there is no injustice.
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> See also: *Duivenvoorden v. Belarus Tractor, Canada LLP*, 2005 CarswellNB 630, 290 N.B.R. (2d) 192 where the defendant in that case successfully satisfied the Court that the original admission by the defendant in its Statement of Defence was not true and that the withdrawal of the admission would not result in an injustice to the plaintiff in that case. [para. 48]

19 This three-part test remains the law in Ontario today, although the first criterion is often formulated as a requirement that falsity of the admission be a "triable issue". In the recent decision of *Stickel v. Lezzaik*, 2015 ONSC 4659, [2015] O.J. No. 3873 (Ont. S.C.J.) (QL), the Ontario Superior Court says:

> Before the court will grant leave for an admission to be withdrawn, the person seeking the withdrawal must: (1) raise a triable issue; (2) provide a reasonable explanation for the admission and for its withdrawal; and (3) establish that the withdrawal will not result in non-compensable prejudice: *Antipas v. Coroneos*, [1988] O.J. No. 137 (H.C.J.); *Szelazek Investments Ltd. v. Orzech*, [1996] O.J. No. 336 (C.A.); *147619 Canada Inc. v. Chartrand*, [2006] O.J. No. 1877 (C.A.); *1679753 Ontario Ltd. v. Muskoka Lakes (Township)*, [2010] O.J. No. 736 (S.C.J.), aff'd 2011 ONSC 1997 (Div. Ct.). All three elements must be established for leave to be granted: *BNP Paribas (Canada) v. Donald S. Bartlett Investments Ltd.*, 2012 ONSC 5604.
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> [para. 29]

20 All three elements must be established for leave to be granted. New Brunswick jurisprudence confirms the moving party has the burden of proving the admission sought to be withdrawn is untrue. The quality of the evidence provided is insufficient to discharge even the lesser burden of "triable issue". The respondents have not discharged the burden in this

case. None of the three criteria were met.

21 The respondents seek to withdraw the admission that they conducted seismic testing within the boundaries of Sussex. However, the appeal record contains many facts which support the truth of this admission. If we accept the further evidence provided by the parties on the motion, it reinforces the fact that seismic testing occurred within the Town's boundaries. For example, the respondents sought permission from the Town to conduct the testing; the agent who undertook the testing confirmed it occurred within the Town's boundaries; and the Province's surveyor personally examined the location of the testing and confirmed it occurred within the boundaries of the Town. The only evidence provided by the respondents in support of the withdrawal of the admission is their surveyor's materials and report.

22 The surveyor's report relies on data which is not attached or disclosed and was completed more than five years after the testing occurred. Therefore, in my view, the surveyor's report as well as his affidavit are based upon undisclosed hearsay and as a result, "lac[k] the hallmarks of trustworthiness" (see *Johnson v. Nova Scotia*, 2005 NSCA 99, [2005] N.S.J. No. 261 (N.S. C.A.) (QL) at para. 89).

23 The report does not provide sufficient evidence to rebut the strong evidence put forward by the appellant. The appellant's evidence includes a sworn affidavit from the surveyor for the Department of Natural Resources (Mr. Bastarache), who visited the site of the seismic testing seven days after the testing took place and produced his full survey on October 17, 2011, 23 days after the seismic testing occurred. In preparation of this survey, Mr. Bastarache used the original data from the agent who conducted the testing, which is disclosed and attached to his sworn affidavit. Mr. Bastarache's evidence is also consistent with the understanding of the respondents' own agents who were on the ground at the time of the testing, as well as the conduct of the respondents from October 2011 to March 2017 inclusive. Therefore, the respondents have not put forward sufficient evidence to meet the first of the three mandatory criteria to obtain leave to withdraw the admission.

24 The second criterion which must be satisfied by the respondents is that the admission was "inadvertent". A review of the jurisprudence indicates that a bald assertion that an admission was made through inadvertence is insufficient. A reasonable explanation, such as a misunderstanding between client and lawyer or a typographical error, must be provided. When an admission has been maintained throughout the proceedings, such as in this case, it is difficult to plead inadvertence. The jurisprudence on this point tends to be based on situations where there have been disagreements between lawyers and clients or clients have retained new lawyers. In most of these situations courts have found admissions could not be withdrawn based on inadvertence. In the case before us the respondents have not discharged their burden of proving the admission was made inadvertently. No evidence of inadvertence has been provided by the respondents. The only evidence proffered by the respondents in this regard is the bare assertions made by Mr. Amin in his April 27, 2017 affidavit:

> Based on the information received by the Defendant, Northrup, and other officials at the DNR, I instructed my solicitors, by inadvertence, to admit in the Statement of Claim and the amendments thereto that Windsor had carried out seismic testing within the municipal boundary of Sussex on October 17, 2011. [para. 14]

25 This assertion falls short of the evidentiary standard required to prove inadvertence. The respondents' Statement of Claim has been amended three times. The respondents were served with the Notice of Request to Admit Facts in May 2016 and then with the motion below for judgment on admissions, each of which forced them to turn their minds to the specific issue of the seismic testing location. On each of these occasions, they not only maintained their admission, but filed further affidavit evidence reiterating the same. No attempt to withdraw the admission was made until the week prior to the appeal hearing. Furthermore, the admission is with respect to a fact that is within the sole control of the respondents. It is not credible for sophisticated parties such as the respondents, who deal with this type of testing regularly, to suggest they had not mapped out where they would be undertaking the testing in 2011. Nor is it credible for the respondents to now say they had no method to determine where the seismic testing had occurred until consulting a surveyor in 2017, a surveyor who had no personal knowledge of the testing that occurred in 2011. The data used to calculate the seismic testing points was in the respondents' possession and it was their agent who stated the seismic testing had occurred within the bounds of the municipality. In *Nesbitt v. Miramar Mining Corp.*, 2000 BCSC 187, [2000] B.C.J. No. 279 (B.C. S.C.) (QL), the Court states:

> The judicial admission was not made without full information and documentation nor in haste or inadvertently. The

> defendant had 10 months, from the time of the commencement of the action on March 2, 1992, until it made the admission in its Amended Statement of Defence, to carefully consider the matter. It can only be assumed that the defendant was aware of the consequences of making such an admission. The defendant also included the admission that the option had been exercised in its Notice to Admit to the plaintiff of August 30, 1993. While this document may not in itself bind the defendant, it does verify that counsel revisited this matter, further suggesting that the defendant was well aware of the admission it was making. Lastly, no new information developed after the judicial admission was made that was not already available to the defendant and in this respect, the defendant had at the time more complete information and documentation than did the plaintiff. [para. 67]

26 There is no evidence to support the respondents' assertion the oft-repeated admission, of having conducted seismic testing within the Town of Sussex, was inadvertent. The respondents have not met the second of the three mandatory criteria to withdraw their admission.

27 The third and final criterion for the respondents to prove is that the withdrawal of admissions would not prejudice the appellant in a way that cannot be compensated by damages. The appellant submits he will be seriously prejudiced as the impact on his case would be one that cannot be compensated by damages. The appellant says he will be subjected to the following prejudices if the withdrawal is allowed:

> **Availability of Data:** there is no evidence from the Respondents as to if the testing data still exists, and if so, its physical location, status or availability.
>
> **Impact of Time:** the seismic testing took place over five and half years ago. The lapse of time will undoubtedly impact the accuracy of memories and availability of evidence. The Appellant could have collected this information years ago if the Respondents had not admitted from the beginning of this litigation that the testing occurred within the bounds of the Town of Sussex.
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> [para. 79, Appellant's Brief on Motion]

28 The appellant submits the unavailability of this evidence makes it such that the respondents have not met their onus of proving he would not be prejudiced by withdrawal of the admission. The appellant has proceeded in this litigation on the basis the interpretation of s. 17(1) of Reg 86-191 of the *Act* is the issue to be determined. The respondents have always admitted to conducting seismic testing within the boundaries of the Town of Sussex, thereby falling under s. 17(1)(*a*). The appellant has relied on this fact in preparation of pleadings and strategies for his defence. The key question in this litigation, from the time the claim was first filed in 2014, is whether the respondents were subject to both s. 17(1)(*a*) and (*b*).

29 In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), Karakatsanis J. discusses several relevant principles of general application, particularly in light of the proportionality principle now codified in Rule 1.02.1 of the New Brunswick *Rules of Court*:

> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
>
> [paras. 27-28]

The same principles have long been present in New Brunswick (see *Lyons v. Lyons Estate* (1989), 99 N.B.R. (2d) 220, [1989] N.B.J. No. 617 (N.B. Q.B.) (QL)).

30 In light of *Hryniak* and *Lyons* it is apparent the most exhaustive process is not always the most equitable. The appellant has made best efforts to utilize pre-trial procedures to secure a just, least expensive and most expeditious determination of the proceeding, based on the claim put forward by the respondents. In ***A.C. Poirier & Associates Inc.* the defendant brought an application to amend his Statement of Defence to, among other things, withdraw his admission that he was the owner of certain equipment. The trustee said permitting the amendment would render all steps taken to that point a waste. In disallowing the amendments, Glennie J. agreed the plaintiff would be prejudiced:

> In my opinion, the Plaintiff will be prejudiced by allowing the Defendant to withdraw his admission in paragraph 4 of his Statement of Defence that he was the owner of the Equipment mentioned in paragraph 5 of the Statement of Claim. If this amendment is allowed, the Plaintiff's action and the steps taken to date will have been wasted and the Plaintiff will be required to commence a new action. As well, the corporate charter of FotoExpert Inc. has been forfeited. The corporation no longer exists.
>
> In this regard, the Defendant has not discharged the onus which requires him to satisfy the Court there will not be any prejudice if his admission of ownership was allowed to be withdrawn. See: *Quinn v. Moncton Hospital*, [1990] N.B.J. No. 1015and *Sampson & McNaughton Ltd. v. Nicholson et al.* (1984), 46 O.R. (2d) 339. [paras. 50-51]

31 Substantial delays can lull a party into refraining from further investigation of a matter because they have relied on admissions by opposing parties (see *Nesbitt*). The respondents' proposed amendments would completely change the substance of the case before us and would result in an injustice which could not be compensated by costs.

32 For the reasons specified above I would dismiss the respondents' motion to admit further evidence on appeal and would not allow the admissions to be withdrawn. This renders the appellant's Cross-Motion moot. Frankly, it was redundant in any event. One need not file a motion to oppose a motion.

33 I will now turn to the appeal of the motion judge's determination that written consent of the municipality was not required if the testing that occurred within municipal boundaries was also within a highway right-of-way, thus concluding the respondent had complied with the law when Windsor conducted its testing on October 17, 2011.

III. Grounds of Appeal

34 The appellant says the motion judge erred in law by:

> a. failing to read the words of s. 17(1) of Reg 86-191 in their grammatical and ordinary sense;
>
> b. implicitly substituting the phrase "on municipal land" for the phrase "within the bounds of a municipality" in s. 17(1)(*a*) of Reg 86-191;
>
> c. implicitly substituting the "New Brunswick Highway Corporation" for the "District Transportation Engineer" in s. 17(1)(*b*) of Reg 86-191;
>
> d. implicitly considering the landowner consent of the New Brunswick Highway Corporation to be equivalent to the consent of the District Transportation Engineer (required by s. 17(1)(*b*) of Reg 86-191);
>
> e. interpreting the word "or" between paragraphs (*a*) and (*b*) of s. 17(1) of Reg 86-191 as meaning that if (*b*) applies (*a*) does not apply - prioritizing (*b*) over (*a*);
>
> f. going beyond the objective question of law which was before the Court and making a subjective finding of fact

unrelated to legislative intent to interpret the *ONGA* and Reg 86-191;

g. interpreting the statutory provisions before the Court in accordance with "the scheme of highway control under provincial legislation" rather than in accordance with the scheme and object of the *ONGA* and its regulations;

h. relying upon other statutes and specifically the *Highway Act* and the *Municipalities Act*, and extrinsic documents; and

i. finding that no consent in writing of the municipality was required (i.e. s. 17(1)(*a*) of Reg 86-191 did not apply).

35 The appellant also contends the motion judge's method of statutory interpretation conflicts with the approach endorsed by this Court and the Supreme Court of Canada.

IV. Standard of Review

36 The issue raised by this appeal is a question of statutory interpretation. It therefore presents as a question of law (see *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (S.C.C.), at para. 33; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306 (S.C.C.), at para. 23). The standard of review is correctness and this Court may substitute its view for that of the motion judge if appellate intervention is warranted.

V. Analysis

37 The motion judge was asked to interpret s. 17(1) of Reg 86-191 enacted pursuant to the *ONGA*. This provision states:

17(1) A geophysical permittee shall not work

(a) within the bounds of a municipality unless the consent in writing of the municipal authority is obtained; or

(b) within any highway right of way unless the consent in writing of the District Transportation Engineer is obtained.

17(1) Il est interdit au titulaire d'un permis de travaux géophysiques d'exécuter des travaux

a) dans les limites d'une municipalité, à moins d'avoir obtenu le consentement écrit de l'autorité municipale; ou

b) à l'intérieur d'une emprise de route, à moins d'avoir obtenu le consentement écrit de l'ingénieur régional des transports.

38 The legal issue before the motion judge was whether the municipal consent requirement at s. 17(1)(*a*) applies when a geophysical permittee is working within the bounds of a municipality *and* within a highway right-of-way. The motion judge determined it does not. She found that, if a geophysical permittee is working within a highway right-of-way that is also within the bounds of a municipality, s. 17(1)(*a*) is not engaged and the consent of the municipality is not required. The appellant submits that this is an error of law. He asks this Court to reverse the motion judge's finding and in light of admissions made by the respondents, to grant him judgment dismissing the action pursuant to Rule 23.01(10(*c*) and/or Rule 37.10 of the *Rules of Court*.

39 The appellant submits that, while the grounds of appeal are numerous they can be grouped as follows:

1) Improper Approach to Statutory Interpretation;

2) Erroneous determination of a question of law; and

3) Erroneous determination of a question of fact not before the Court.

A. Improper Approach to Statutory Interpretation

40 The appellant says the motion judge erred in law by applying an incorrect approach to statutory interpretation, in that she failed to read the words of s. 17(1) in their ordinary and grammatical sense (grounds 1(a) to (e)) and in their entire context, harmoniously with the scheme and object of Reg 86-191 and the *ONGA* and the intention of the Legislature (grounds 1(g) and (h)).

(1) Statutory interpretation

41 In *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), the Supreme Court outlines the proper approach to statutory interpretation:

> In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> [para. 26]

42 This is further confirmed in *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300 (S.C.C.):

> When assessing the reasonableness of an administrative decision maker's interpretation, Driedger's modern rule of statutory interpretation provides helpful guidance:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87) [para. 18]

43 The jurisprudence sets out several principles to be considered when applying this approach to statutory interpretation. Firstly, one must not read in words that are not included in the text. In *Wilson*, the Supreme Court explains:

> Mr. Wilson submits that the officer's belief must be based not only on the ASD result, but also on confirmatory evidence showing that the driver's ability to drive is affected by alcohol. I would reject this interpretation. It is not supported by the text of the provision, and it requires the court to read in words that are simply not there. This Court has cautioned against judicial rewriting of legislation under the guise of interpreting it:
>
> > ... the contextual approach allows the courts to depart from the common grammatical meaning of words where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually.... The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function. [First emphasis in original; second emphasis added.]
>
> (*R. v. McIntosh*, [1995] 1 S.C.R. 686, at p. 701; cited with approval in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 174. See also *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at paras. 8-9 and 36; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 40.) [para. 27]

44 Secondly, when interpreting statutes in New Brunswick, both the English and French version of the text are equally authoritative. In the event of ambiguity between them, the preferred interpretation is that which gives effect to the shared meaning of both versions. As explained by Drapeau, J.A. (as he then was) in *Kenmont Management Inc. v. Saint John Port Authority*, 2002 NBCA 11, 248 N.B.R. (2d) 1 (N.B. C.A.), (dissenting in part):

> Of course, both the English and the French versions are equally authentic in construing s. 2 (see s. 14 of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1) and this Court must, if at all possible, give effect to their common or shared meaning. It is settled law that where the two versions of a bilingual statute are reconcilable, one must be interpreted by the other and, if one is ambiguous and the other plain and unequivocal, the latter will generally be preferred unless a contrary legislative intention is otherwise apparent. See R. Sullivan, *Statutory Interpretation* (Concord, Ont.: Irwin Law, 1996) at 90-96. In my view, both versions of s. 2 are easily reconcilable. The French version is unambiguous; it equates "specialty" to "formal contract". The contract under seal was "[o]ne of the classic formal contracts at common law" [Emphasis added]. See S. Williston, *A Treatise on the Law of Contracts*, 4th ed., vol. 1 (Rochester, New York: Lawyers Cooperative Publishing, 1990) at 31. [para. 37]

45 Thirdly, when the statutory provision being interpreted is a regulatory provision, the scheme and purpose of the enabling legislation is of critical importance. In *Schaeffer v. Woods*, 2013 SCC 71, [2013] 3 S.C.R. 1053 (S.C.C.), the Court explains:

> Answering the question posed by this appeal requires interpreting s. 7(1) of the regulation. The words of the provision must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the regulation, its objective, and the intention of the legislature. Critically, the provisions of the regulation must be read in light of the purpose of the enabling legislation — the Act. That purpose "transcends and governs" the regulation (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 38). An interpretation of s. 7(1) that leads to conflict with another provision of the regulation, or that runs contrary to the purpose of the legislative scheme, must be avoided. [para. 33]

(2) Section 17 is not restricted to municipally owned land

46 The motion judge determined that s. 17(1)(*a*) is not engaged by the simple fact that a permittee is working within the bounds of a municipality; rather, it applies only if the permittee is working within the bounds of the municipality and on land owned by the municipality. It is apparent that interpreting "within the bounds of a municipality" to mean land "owned" by the municipality is inconsistent with the grammatical and ordinary words of the text, particularly when read in the context of the *ONGA* and Reg 86-191 as a whole. The plain meaning of the phrase "within the bounds of a municipality" at s. 17(1)(*a*) refers to all land within a municipality's territorial limits, and is not limited to land owned by the municipality. In the French version of Reg 86-191, the phrase, "dans les limites d'une municipalité" cannot be interpreted as meaning lands owned by the municipality. The ordinary meaning of the word "limite" denotes a territorial boundary. In my view s. 17(1)(*a*) means exactly what it says: a permittee requires the consent in writing of the municipality before it undertakes any work within the territorial limits of the municipality. This applies regardless of who owns the land. To restrict the wording to land owned by the municipality would require reading in words that are simply not there.

47 The fact that s. 17(1)(*a*) is not restricted to municipally owned land is further supported by the context of the statutory scheme as a whole and, in particular, by the purpose and wording of the *ONGA*. The *Act* regulates the exploration for oil and gas in the province. It declares Crown ownership over all oil and natural gas reserves and imposes a blanket prohibition upon exploration for oil and natural gas unless an enterprise possesses a proper licence or permit. The *Act* then establishes a regulatory scheme by which the executive branch of government is empowered to issue licences and permits for geophysical exploration; to impose terms and conditions upon licensees and permittees; and to enact regulations. All licensees are required to comply with the *ONGA* and Reg 86-191. Any breach of the Regulation is an offence under the *ONGA*. The purpose of the *ONGA* is to establish a regulatory scheme, under the control of the Minister, for the exploration for oil and gas in New Brunswick. The *ONGA* prohibits geophysical exploration without permission from the Minister by way of an appropriate licence or permit and permission from any landowner upon whose land work will be conducted (s. 12, s. 9(1)(*a*) *ONGA*).

48 The delegated authority under s. 59 of the *ONGA* includes making regulations regarding the terms and conditions of geophysical permits and the method, manner and location in which, and where, geophysical exploration is carried out. The motion judge did not refer to the *ONGA* in order to interpret s. 17(1) of the Regulation. The judge instead focused upon the *Municipalities Act*, R.S.N.B. 1973, c. M-22, its Regulation and the *Highway Act*, R.S.N.B. 1973, c. H-5. In my view, had she considered the *ONGA* it would have been apparent the purpose of s. 17(1) is not to secure a municipality's consent as a landowner. The consent of landowners is addressed at s. 9 of the *ONGA*. Section 17(1) goes beyond s. 9 of the *ONGA* by requiring the consent of the municipality for all work done within its territorial boundaries, regardless of who owns the land.

49 Geophysical exploration includes a wide range of activities, including seismic operations, test drilling, and blasting with dynamite. The invasive nature of these activities could have an important impact on municipalities, for example with respect to the structural integrity of water and sewer systems. From a purposive perspective it is apparent why municipal consent would be required in addition to the landowner's consent already required by the *ONGA*. The intent of s. 17(1)(*a*) is to recognize that a municipality has an interest in whether geophysical testing within its boundaries occurs and, therefore, requires municipal consent.

50 The motion judge should have considered the scheme and object of the enabling legislation rather than rely upon extrinsic documents produced after the enactment of the *ONGA* and Reg 86-191. Extrinsic documents produced after legislation is enacted, even if issued by a Crown corporation, or government entity, are generally irrelevant to statutory interpretation. Statutory interpretation is a legal matter for determination by the judicial, not executive, branch of government (see *PIPSC v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 (S.C.C.), at paras. 98-99).

51 The consent of the New Brunswick Highway Corporation as referred to by the motion judge does not provide insight into the legislative intent at the time of the enactment of the *ONGA* or Reg 86-191. It is not a legislated form under the *ONGA* or its Regulations. Similarly, emails from employees of the Department of Natural Resources, presented by the respondents at the motion should not have been given weight in interpreting the meaning of s. 17(1). They are not evidence of legislative intent and offer no value in a statutory interpretation analysis. Therefore, in my view, the motion judge erred in reading s. 17(1)(*a*) restrictively so as to only apply to work undertaken on municipally owned land, rather than to any work undertaken within the bounds of the municipality.

52 Section 17(1)(*a*) was enacted pursuant to the Lieutenant Governor in Council's delegated authority to regulate "the method, manner and location in which and where geophysical exploration is to be carried out" (*ONGA* s. 59(1)(*i*)). The proper interpretation requires the respondents to obtain the written consent of the municipality before undertaking seismic testing within town limits, regardless of the ownership of the land upon which their work was being performed.

(3) Section 17(1)(a) is not subordinate to s. 17(1)(b)

53 In addition to restricting s. 17(1)(*a*) to municipally owned land, the motion judge determined s.17(1)(*a*) is subordinate to s. 17(1)(*b*). That is, if a permittee is working on land located within the bounds of the municipality and within a highway right-of-way, s. 17(1)(*a*) has no application; only s. 17(1)(*b*) applies. In my view this interpretation does not correspond to the grammatical and ordinary sense of the wording of the provision or to the broader legislative context and purpose of Reg 86-191 and the *ONGA*. Subsection 17(1) mandates that consent is required in different circumstances. If a permittee is within the bounds of the municipality, municipal consent is required. If the permittee is within a highway right-of-way, consent of the District Transportation Engineer is required. As pointed out by the appellant, the list could have continued: if a permittee is within a watershed, consent of the Department of Environment is required.

54 There is nothing in the wording to suggest if the circumstances of both s. 17(1)(*a*) and (*b*) exist, that is work within the bounds of both a municipality and a highway right-of-way, only (*b*) applies. The motion judge concluded this because the subsections were divided by the word "or" which she determined required the subsections to be read disjunctively. Even if "or" is attributed a disjunctive meaning, it could not prioritize s. 17(1)(*b*) over s. 17(1)(*a*). In *Gauthier v. New Brunswick (Workplace Health, Safety & Compensation Commission)*, 2003 NBCA 25, 259 N.B.R. (2d) 176 (N.B. C.A.), this Court confirms, despite being disjunctive, "or" is frequently inclusive, depending on the context (see also *R. v. Mullins*, 2005 NBCA 111, 294 N.B.R. (2d) 265 (N.B. C.A.); *Smith v. Agnew*, 2001 NBCA 83, 240 N.B.R. (2d) 63 (N.B. C.A.)). In other words, even if these two subsections are read in isolation (disjunctively), it does not mean they cannot both apply to the same situation. If work occurs within the bounds of a municipality, municipal consent is required. This requirement arises under s. 17(1)(*a*) regardless of whether the work is also within a highway right-of-way. Similarly, if work is occurring within a highway right-of-way, the consent of the District Transportation Engineer is required regardless of whether the work is also within a municipality. The fact that "or" is disjunctive does not preclude it from being inclusive: independent, disjunctive assessments can conclude that the consent of both apply, resulting in simultaneous application to the same situation.

55 Furthermore, even if "or" was given a disjunctive and exclusive meaning, it would not result in the conclusion reached by the motion judge. A disjunctive and exclusive meaning would allow a permittee to choose between two alternatives, a conclusion rejected by the motion judge. The interpretation adopted by the motion judge is, if both subsections are engaged, only the consent at s. 17(1)(*b*) is required. This is not a disjunctive and exclusive interpretation of "or". It rewrites the provision to state that s. 17(1)(*a*) applies unless you are also within s. 17(1)(*b*), which would result in only (*b*) being applicable. This requires reading words into the text that are not there.

56 In the decision, the motion judge explains prioritizing s. 17(1)(*b*) over (*a*) because "[t]he purpose of section 17 is to provide a mechanism for consent with regard to seismic testing" and "consent is either required from one or the other; that is from the province or the municipality"; a review of the Regulation and the *ONGA* in their entirety suggests that this is not correct. These subsections impose requirements upon geophysical permittees before commencing blasting or other seismic tests. A geophysical permittee, by definition, has obtained "consent from the province" through the issuance of its permit by the Minister. Thus, s. 17(1)(*b*) cannot be targeting provincial consent as found by the motion judge. Rather, the purpose of s. 17(1) is to require consent from entities that, in addition to the Province and the Minister who always have an interest, may have an interest in proposed geophysical exploration given the location of the proposed work. If the work is occurring within a highway right-of-way, the consent of the District Transportation Engineer is required in addition to the consent of others prescribed under the *ONGA* and Reg 86-191, because the District Transportation Engineer has an interest in activities conducted on highway rights-of-way. If the work is occurring within the bounds of the municipality, municipal consent is required in addition to any other consent required because the municipality has an interest in the work.

57 When the Regulation is read in its entire context, including that of its enabling legislation, it is clear the purpose of the *ONGA* is to require consent from the full range of parties who may be impacted by the work. This purpose leads to an inclusive interpretation. If a geophysical permittee is working within a municipality and within a highway right-of-way, the

interests of both the municipality and the District Transportation Engineer are engaged such that the consent of both are required.

B. Erroneous Determination of a Question of law

58 The appellant submits the motion judge erred in finding that the respondents did not require the consent of the municipality in writing, to conduct seismic testing within the bounds of the municipality of Sussex (ground 1(i)).

59 The appellant sought determination of the following question of law in his motion to the Court of Queen's Bench:

> Is it a violation of the *ONGA* or REG 86-191 to conduct geophysical exploration within municipal boundaries without first obtaining municipality's consent in writing?

The motion judge responded negatively. Before us the appellant submits this is an error of law. I agree. The words of s. 17(1)(*a*) read in their entire grammatical and ordinary sense, harmoniously with the scheme and object of Reg 86-191 and the *ONGA*, clearly confirm the written consent of the municipality is required before conducting geophysical exploration within municipal bounds.

C. Erroneous Finding of Fact on Question Not Before the Court

(1) Erroneous finding of fact on question not before the court

60 The appellant also says the motion judge erred in making the disputed factual determination that Windsor did not violate the *ONGA* or Reg 86-191 when this issue was not before the court and the evidence explicitly contradicted the motion judge's determination (ground 1(f)).

61 The appellant submits that the motion judge not only answered the question of law negatively, she proceeded to make a positive finding of fact on a matter not before the court. In the decision, the judge states:

> Finally, the answer to the question, whether or not the plaintiffs in this factual situation were in violation of the *ONGA* or its Regulation 86-191 with regard to conducting geophysical exploration within the municipal boundary of Sussex, is in the negative. [para. 27]

It appears the judge based this finding on: 1) her determination that s. 17(1)(*a*) of Reg 86-191 did not apply; and 2) an implicit finding of fact that the requirements of s. 17(1)(*b*) of Reg 86-191 and all other provisions of the *ONGA* and Reg 86-191 were met.

62 The second point was not before the motion judge and it was not permissible for her to make a disputed finding of fact on a motion pursuant to Rule 23 of the *Rules of Court*. This finding of fact, that the requirements of s. 17(1)(*b*) were met, appears to be contradicted by the evidence offered by the respondents. The judge determined the respondents required the consent of the District Transportation Engineer to conduct seismic testing within a highway right-of-way in the municipality of Sussex and that this consent had been obtained. Yet, the facts before the Court indicate the consent provided by the District Transportation Engineer explicitly excluded the work performed along Highway 1 within the municipal boundaries of Sussex. The consent of the District Transportation Engineer that the respondents' filed with the court states:

> Please accept this letter as written consent pursuant to section 17(1)(b) of Regulation 86-191 under the *Oil and Natural Gas Act* authorizing Windsor Energy Inc. ("Windsor") to conduct geophysical exploration along highways and Public (not maintained) roads as attached hereto as schedule "A" with the exception of the identified Highway 1 and designated highways and Public (not maintained) roads within the boundaries of a municipality at this time.
>
> [Emphasis in original.]

63 In my view, it was an error in law for the motion judge to make a factual determination that the respondents had obtained the District Transportation Engineer's consent as required by s. 17(1)(*b*) and, implicitly, that all other provisions of the *ONGA* and all Regulations had been met, when those matters had not been put before her.

(2) Rule 23.01(1)(c): judgment on admissions of fact

64 In the court below, the appellant sought determination of the legal question of whether conducting geophysical exploration within municipal boundaries without written consent from the municipality is a violation of the *ONGA* or Reg 86-191. If it had been determined to be so, the appellant sought judgment in his favour based upon the respondents' admissions that Windsor had conducted geophysical exploration within the municipal boundaries of Sussex without the municipality's consent.

65 Rule 62.21(1) instructs:

> **62.21 Powers of Court of Appeal**
>
> ***To Draw Inferences and Make Decisions***
>
> (1) The Court of Appeal may draw inferences of fact, render any decision and make any order which ought to have been made, and may make such further or other order as the case may require.
>
> **62.21 Attributions de la Cour d'appel**
>
> ***Pouvoir d'inférer et de décider***
>
> (1) La Cour d'appel peut faire des inférences à partir des faits et rendre toute décision ou ordonnance qui aurait dû être rendue. Elle peut également rendre toute autre ordonnance appropriée à la cause.

66 Therefore, if this Court determines the question of law should have been answered positively, we could grant judgment under Rule 23.01(1)(c) and/or Rule 37.10(a).

67 In the case before us, two important admissions of fact have been made: Windsor or its agents conducted approximately eight seismic tests within the municipal boundaries of Sussex; and, at the time of the seismic tests, Windsor had not obtained the consent in writing of the Town of Sussex. The first admission is made at paragraph eight of the second Further Amended Statement of Claim. The second admission is established by the respondents' failure to respond to a Request to Admit Facts under Rule 51 of the *Rules of Court*. Rules 51.03 and 51.04(1) state:

> **51.03 Effect of Refusal or Failure**
>
> (1) The party on whom a Request to Admit Facts is served shall be deemed to admit the truth of such facts unless, within 10 days thereafter, he serves a Notice of Refusal to Admit Facts (Form 51B).
>
> (2) The court, in exercising its discretion as to costs, shall take into account a refusal or failure to admit any fact which is subsequently proved at trial.
>
> **51.04 Effect of Admission**
>
> (1) A fact admitted or deemed to be admitted under this rule is conclusively established unless the court permits withdrawal or amendment of the admission.
>
> **51.03 Effet d'une demande laissée sans réponse**

(1) La partie à qui une demande d'aveux est signifiée est réputée admettre la véracité des allégations qui y sont contenues, à moins qu'elle ne signifie, dans les 10 jours qui suivent, un avis de refus de faire des aveux allégués (formule 51B).

(2) Lorsqu'elle exerce son pouvoir relatif aux dépens, la cour doit prendre en considération tout refus ou défaut d'admettre un fait dont la véracité est par la suite établie au procès.

51.04 Effet de l'aveu

(1) Un fait admis ou réputé admis en application de la présente règle est établi définitivement à moins que la cour ne permette la rétractation ou la rectification de l'aveu.

68 The effect of a formal admission of fact, whether through the pleadings or by failing to serve a Notice of Refusal to Admit Facts, is binding on the party who has made the admission. It can only be withdrawn with leave of the court, which leave is exercised only in very limited circumstances.

69 Despite their admission that seismic tests were conducted within the boundaries of the Town of Sussex without the municipality's approval in writing, the respondents pleaded the appellant made a false statement when he said these actions violated the *ONGA* and Reg 86-191. When interpreted properly, the *Act* and the Regulations confirm the respondents' pleading is incorrect in law. The appellant was correct to characterize Windsor's actions as contrary to provincial legislation. As a result, there is no basis upon which the respondents' tort claims can succeed. An essential element that must be proven in order for the respondents to succeed with their injurious falsehood claim is the existence of a false statement. In this case, the false statement pleaded is the appellant's statement in the press release that Windsor violated the *ONGA* and Reg 86-191 by conducting seismic testing within municipal boundaries without the municipality's consent. A proper interpretation of s. 17(1)(*a*) of Reg 86-191, combined with the admissions of fact made by the respondents, confirm this statement was true. Therefore, the injurious falsehood claim cannot succeed.

70 In *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), the Supreme Court confirms misfeasance in public office is an intentional tort requiring proof of deliberate unlawful conduct; the defendant must have deliberately acted unlawfully in the exercise of his or her public functions (para. 32). In this case, the alleged unlawful act is the appellant falsely stated in the press release and to the RCMP, that Windsor violated the *ONGA* and Reg 86-191. Yet the respondents' admissions of fact, combined with existing jurisprudence, confirm this statement was true. The Minister was commenting truthfully in the press upon matters of public interest and the complaint to the RCMP was not a deliberate unlawful act. Therefore, the injurious falsehood claim and the misfeasance in public office claim cannot succeed and the appellant is entitled to judgment in his favour in this regard.

VI. Conclusion

71 Initially, the respondents admitted they conducted geophysical exploration within the boundaries of the municipality of Sussex without the written consent of the municipality. Their initial complaint was that the appellant characterized this conduct as a violation of the *ONGA* and Reg 86-191. However, an application of the proper principles of statutory interpretation to s. 17(1)(*a*) confirms that conducting seismic testing within the bounds of the municipality without its consent is a violation of the *ONGA* and Reg 86-191. Accordingly, the appellant's characterization of the respondents' conduct as being unlawful was accurate and cannot form the basis of a tort claim. Judgment should, therefore, be granted in the appellant's favour, dismissing the action.

VII. Disposition

72 I would dismiss the motion by the respondents and allow the appeal. I would direct judgment be issued dismissing the action. The appellant is entitled to costs of $5,000 in the court below, and $3,500 on appeal, which includes the costs relating to the dismissal of the respondents' motion.

Appeal allowed.

End of Document

TAB 8

Friesen v. Canada, 1995 CarswellNat 422 (SCC)

1995 CarswellNat 422, 1995 CarswellNat 988, [1995] 2 C.T.C. 369, [1995] 3 S.C.R. 103...

1995 CarswellNat 422
Supreme Court of Canada

Friesen (J.) v. Canada

1995 CarswellNat 422, 1995 CarswellNat 988, [1995] 2 C.T.C. 369, [1995] 3 S.C.R. 103, [1995] S.C.J. No. 71, 102 F.T.R. 238 (note), 127 D.L.R. (4th) 193, 186 N.R. 243, 57 A.C.W.S. (3d) 667, 95 D.T.C. 5551, J.E. 95-1776

Jake Friesen v. Her Majesty The Queen

Iacobucci, L'Heureux-Dubé, Sopinka, Gonthier, Major, JJ

Heard: March 1, 1995
Judgment: September 21, 1995
Docket: Court File No. 23922

Proceedings: on appeal from the Federal Court of Appeal reported at [1993] 2 C.T.C. 123

Counsel: *Craig C. Sturrock* for the appellant.
Rogert E. Taylor and *Al Meghji* for the respondent.

Subject: Criminal; Income Tax (Federal)

Related Abridgment Classifications

Tax

II Income tax
  II.6 Business and property income
    II.6.k Inventory
      II.6.k.ii Valuation

Tax

II Income tax
  II.6 Business and property income
    II.6.k Inventory
      II.6.k.iii Miscellaneous

Headnote

Income tax --- Business and property income — Inventory — General

Income tax --- Capital gains and losses — Capital gain vs income — Adventure or concern in the nature of trade

Income tax --- Income from business and property — Income from business vs. income from property

Income tax --- Income from business and property — Deductions — Miscellaneous deductions

Income tax — Federal — Income Tax Act, R.S.C. 1985 (5th Supp), c. 1 — 3, 9, 10, 248(1) "business", "inventory" — Income Tax Regulations — 1801 — Inventory valuation — Lower of cost and market.

In January 1982, the appellant and several others bought a parcel of land in Calgary. The property was acquired for the purpose of reselling it at a profit. In the years immediately following its acquisition, the property substantially decreased in value and the mortgage thereon was foreclosed in 1986. The appellant sought to deduct the decline in the fair market value of the land as a business loss in his 1983 and 1984 taxation years. The Minister disallowed the deductions on the basis that the property was not "inventory in a business" within the meaning of subsections 10(1) and 248(1). The appellant argued that he was entitled to make such fair market deductions because subsection 10(1) permits the use of such a valuation scheme should the initiative to purchase the land be deemed a "business" and should the land be defined as "inventory". The Federal Court Trial Division and the Federal Court of Appeal dismissed the appellant's appeal. The appellant then appealed to the Supreme Court of Canada.

HELD:

Per Major, Sopinka, L-Heureux-Dubé, JJ. (majority):

The appellant's venture was a business pursuant to the definition in subsection 248(1) since it met the test for an adventure in the nature of trade. The property was inventory pursuant to the definition in subsection 10(1) because its cost or value was relevant to the computation of business income in a taxation year, namely the year of disposition. The use of the valuation system established in subsection 10(1) and Regulation 1801 was governed by the application of well-recognized commercial and accounting principles. These principles established that the value of inventory is relevant to the calculation of business income because it contributes to the cost of sale. The valuation system established in subsection 10(1) and Regulation 1801 was a specific legislated exception to the principles of matching, realization and symmetry and reflected well-recognized commercial and accounting principles which aimed to achieve a conservative picture of business income. Neither the common law restriction to stock-in-traders nor other policy considerations could serve to override the explicit wording of subsection 10(1) which made the valuation system therein applicable to all inventory used in the computation of business income. In summary, the plain reading of subsection 10(1) allowed single items of inventory held as part of an adventure in the nature of trade to utilize the inventory valuation method contained therein. This conclusion was consistent with the basic dichotomy in the Act between income and capital and the different schemes for taxing each of these. In the result, the appellant was entitled to make use of the inventory valuation method in subsection 10(1) in order to recognize a business loss on the property in the 1983 and 1984 taxation years. Appeal allowed.

Per Iacobucci, Gonthier JJ. (dissenting):

Notwithstanding that the appellant's initiative was a "business" pursuant to the definition thereof, the property was not inventory in the 1983 and 1984 taxation years because it bore no relation whatsoever to the appellant's "business income" for

tax purposes in those years. This conclusion was mandated by the principles underlying section 9, the defining section on business income. Consequently, the appellant could not benefit from the application of the valuation system established by subsection 10(1).

Table of Authorities

Cases referred to:

Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, [1984] C.T.C. 294, 84 D.T.C. 6305;

Canada v. Antosko, [1994] 2 S.C.R. 312, [1994] 2 C.T.C. 25, 94 D.T.C. 6314;

California Copper Syndicate v. Harris (1904), 5 T.C. 159;

Bailey v. M.N.R., [1990] 1 C.T.C. 2450, 90 D.T.C. 1321;

Minister of National Revenue v. Irwin, [1964] S.C.R. 662, [1964] C.T.C. 362, D.T.C. 5227;

Canada v. Dresden Farm Equipment Ltd., [1989] 1 C.T.C. 99, 89 D.T.C. 5019;

Weatherhead v. M.N.R., [1990] 1 C.T.C. 2579, 90 D.T.C. 1398;

Van Dongen v. Canada, [1991] 1 C.T.C. 86, 90 D.T.C. 6633;

Skerrett v. M.N.R., [1991] 2 C.T.C. 2787, 91 D.T.C. 1330;

Cull v. The Queen, [1987] 2 C.T.C. 63, 87 D.T.C. 5322;

Gresham Life Assurance Society v. Styles, [1892] A.C. 309, 3 Tax Cas. 185;

Neonex Int'l Ltd. v. The Queen, [1978] C.T.C. 485, 78 D.T.C. 6339;

Ostime v. Duple Motor Bodies, [1961] 2 All E.R. 167;

M.N.R. v. Anaconda American Brass Ltd., [1956] C.T.C. 311, 55 D.T.C. 1220;

Whimster & Co. v. CIR (1925), 12 T.C. 813;

BSC Footwear Ltd. v. Ridgeway, [1972] 2 All E.R. 534;

M.N.R. v. Consolidated Glass Ltd., [1957] S.C.R. 167, [1957] C.T.C. 78, 57 D.T.C. 1041;

M.N.R. v. Shofar Investment Corp., [1980] 1 S.C.R. 350, [1979] C.T.C. 433, 79 D.T.C. 5347;

Edwards v. Bairstow, [1956] A.C. 14, [1955] 3 All E.R. 48;

Irrigation Industries Ltd. v. M.N.R., [1962] S.C.R. 346, C.T.C. 215, 62 D.T.C. 1131;

Regal Heights Ltd. v. M.N.R., [1960] S.C.R. 902, [1960] C.T.C. 384, 60 D.T.C. 1270;

The Queen v. Cyprus Anvil Mining Corp., [1990] 1 C.T.C. 153, 90 D.T.C. 6063;

Daley v. M.N.R., [1950] C.T.C. 254, 50 D.T.C. 877;

Dominion Taxicab Association v. M.N.R., [1954] S.C.R. 82, C.T.C. 34, 54 D.T.C. 1020;

Friedbeg v. M.N.R., [1993] 4 S.C.R. 285, 2 C.T.C. 306, 93 D.T.C. 5507;

Oryx Realty Corp. v. M.N.R., [1974] C.T.C. 430, 74 D.T.C. 6352;

Tara Exploration and Development Co. v. M.N.R., [1970] C.T.C. 557, 70 D.T.C. 6370, affirmed *Minister of National Revenue v. Tara Exploration & Development Co.* (1972), 28 D.L.R. (3d) 135, 1972 CarswellNat 137, [1972] C.T.C. 328, 72 D.T.C. 6288, [1974] S.C.R. 1057, 1972 CarswellNat 414 (S.C.C.);

West Kootenay Power and Light Co. v. Canada, [1992] 1 C.T.C. 15, 92 D.T.C. 6023;

Tobias v. The Queen, [1978] C.T.C. 113, 78 D.T.C. 6028;

Symes v. Canada, [1993] 4 S.C.R. 695, [1994] 2 C.T.C. 40, 94 D.T.C. 6001;

Ken Steeves Sales Ltd. v. M.N.R., [1955] C.T.C. 47, 57 D.T.C. 1044;

Publishers Guild of Canada Ltd. v. M.N.R., [1957] C.T.C. 1, 57 D.T.C. 1017;

Associated Investors of Canada Ltd. v. M.N.R., [1967] C.T.C. 138, 67 D.T.C. 5096:

Maritime Telegraph and Telephone Co. v. Canada, [1991] 1 C.T.C. 28, 91 D.T.C. 5038.

***Major J. (Sopinka, L-Heureux- Dubé, JJ, concurring)*:**

1 *Background*

2 As set out in greater detail in the reasons of my colleague Iacobucci J., the appellant was a participant in an adventure in the nature of trade involving a piece of Calgary real estate known as the Styles Property. The Styles Property was acquired for the sole purpose of reselling it at a profit. The anticipated profit was to be split between a charitable donation to Trinity Western College and other organizations and the investors in their personal capacity. Contrary to the expectations of the investors, real estate prices fell instead of rising.

3 The appellant claimed business losses on his 1983 and 1984 tax returns relying on subsection 10(1) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, which permits inventory to be valued at the lower of cost or market value. The Minister of National Revenue disallowed this claim.

4 II. *Analysis*

5 A. Introduction

6 The narrow issue in this appeal is whether land held for resale as an adventure in the nature of trade may be valued as inventory under subsection 10(1) of the *Income Tax Act*. I have read the reasons of my colleague Iacobucci J., and, with respect, I disagree with his conclusion. In my opinion the provisions of the *Income Tax Act* allow land held as an adventure in the nature of trade to be valued as inventory under subsection 10(1) and therefore I would allow this appeal.

7 B. The Scheme of the *Income Tax Act*

8 It is necessary to make some comments on the basic scheme of the *Income Tax Act* given my analysis of the issue raised in this appeal.

9 Section 3 of the *Income Tax Act* sets out the ground rules for the computation of a taxpayer's income for a taxation year. Section 3 recognizes two basic categories of income: "ordinary income" from office, employment, business and property, all of which are included in s. 3(a), and income from a capital source, or capital gains which are covered by s. 3(b). The whole structure of the *Income Tax Act* reflects the basic distinction recognized in the Canadian tax system between income and capital gain.

10 Subdivision b of Division B of the Act entitled "Income or Loss from a Business or Property" contains all the rules which govern business and property income. The leading section in this subdivision is section 9 which provides that a taxpayer is taxable on the *profit* for a business or property for the year. Profit is not defined in the *Income Tax Act*.

11 Unlike business or property income which is fully taxable, income from capital sources was not subject to tax at all in

Canada until 1972 and is still partially protected from taxation. Subdivision c of Division B of the Act entitled "Taxable Capital Gains and Allowable Capital Losses" contains all of the rules which apply to income derived from a capital source. The leading section in this subdivision is s. 38 which provides that a taxpayer is taxable on 3/4 of the capital gain from the disposition of property in the year.

12 The distinction between income from office, employment, business and property sources and that from a capital source and the preferential treatment of the latter has long been the subject of academic criticism: see B. J. Arnold, T. Edgar and J. Li, eds., Materials on Canadian Income Tax (10th ed. 1993), at page 297; and Report of the Royal Commission on Taxation (Carter Report) (1966), vol. III, at pages 62-67. The distinction between amounts of an income nature and those of a capital nature was imported into the Canadian tax system from the United Kingdom where it is believed to have originated from a primarily agricultural economy whose concept of income was the fruits of productive source. In spite of the uncertainty of origins of the distinction between capital gain and other income and the criticisms of preferential tax treatment of capital gain, differential tax treatment of capital gain and income remains a fundamental feature of the Canadian taxation system.

13 C. Principles of Interpretation

14 The central question on this appeal of whether the appellant is entitled to take advantage of the inventory valuation method in section 10 of the Act involves a careful examination of the wording of the provisions of the Act and a consideration of the proper interpretation of these sections in the light of the basic structure of the Canadian taxation scheme which is established in the *Income Tax Act*.

15 In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, C.T.C. 294, D.T.C. 6305, is to apply the plain meaning rule. Estey J. at page 578 (C.T.C. 316, D.T.C. 6323) relied on the following passage from E.A. Driedger, Construction of Statutes (2nd ed. 1983), at page 87:

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

16 The principle that the plain meaning of the relevant sections of the *Income Tax Act* is to prevail unless the transaction is a sham has recently been affirmed by this Court in *Canada v. Antosko*, [1994] 2 S.C.R. 312, [1994] 2 C.T.C. 25, 94 D.T.C. 6314. Iacobucci J., writing for the Court, held at S.C.R. pages 326-27 that:

> While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, [1988] 2 C.T.C. 294, at S.C.R. page 194; see also *Symes v. Canada*, [1993] 4 S.C.R. 695, [1994] 2 C.T.C. 40, 94 D.T.C. 6001.

17 I accept the following comments on the *Antosko* case in P.W. Hogg's Notes on Income Tax (3rd ed. 1994), Section 22.3 "Strict and purposive interpretation", at page 22:12:

> It would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.....[The *Antosko* case] is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the *Income Tax Act*. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.

18 D. Plain Meaning of Section 10

19 The primary section whose interpretation is in dispute is section 10:

> 10(1) For the purpose of computing income from a business, the property described in an inventory shall be valued as its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

20 The plain reading of this section is that it is a mandatory provision requiring a taxpayer who computes income from a business to value the inventory at the lower of cost or market value or as permitted by regulation. Thus, *prima facie*, the taxpayer must meet two requirements in order to use this section: the venture at issue must be a "business" and the property in question must be "inventory".

21 1. *Is the Appellant's Venture a Business?*

22 The definition of "business" in subsection 248(1) specifically includes an adventure in the nature of trade:

> "business", includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, *except for the purposes of paragraph 18(2)(c), an adventure or concern in the nature of trade* but does not include an office or employment;
>
> *[Emphasis added.]*

23 An adventure in the nature of trade is not defined in the Act but is a term which has a meaning established by the common law.

24 Both parties in this appeal accept that the appellant's real estate venture constitutes an adventure in the nature of trade. Nevertheless, it is useful to briefly examine the requirements for an adventure in the nature of trade since these requirements serve to limit the scope of ventures which are eligible to use the provisions of subsection 10(1).

25 The concept of an adventure in the nature of trade is a judicial creation designed to determine which purchase and sale transactions are of a business nature and which are of a capital nature. This question was particularly important prior to 1972 when capital transactions were completely exempt from taxation. The question was succinctly stated by Clerk L.J. in *Californian Copper Syndicate v. Harris* (1904), 5 T.C. 159(Ex., Scot.), at page 166:

> Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in the operation of business in carrying out a scheme for profit-making?

26 The first requirement for an adventure in the nature of trade is that it involve a "scheme for profit-making". The taxpayer must have a legitimate intention of gaining a profit from the transaction. Other requirements are conveniently summarized in Interpretation Bulletin IT-459 "Adventure or Concern in the Nature of Trade" (September 8, 1980) which references Interpretation Bulletin IT-218 "Profit from the Sale of Real Estate" (May 26, 1975) for a summary of the relevant factors when the property involved is real estate.

27 IT-218R, which replaced IT-218 in 1986, lists a number of factors which have been used by the courts to determine whether a transaction involving real estate is an adventure in the nature of trade creating business income or a capital transaction involving the sale of an investment. Particular attention is paid to:

> (i) The taxpayer's intention with respect to the real estate at the time of purchase and the feasibility of that intention and the extent to which it was carried out. An intention to sell the property for a profit will make it more likely to be characterized as an adventure in the nature of trade.
>
> (ii) The nature of the business, profession, calling or trade of the taxpayer and associates. The more closely a taxpayer's business or occupation is related to real estate transactions, the more likely it is that the income will be considered business income rather than capital gain.
>
> (iii) The nature of the property and the use made of it by the taxpayer.
>
> (iv) The extent to which borrowed money was used to finance the transaction and the length of time that the real estate was held by the taxpayer. Transactions involving borrowed money and rapid resale are more likely to be adventures in the nature of trade.

28 The factual record in this case reveals a legitimate "scheme for profit-making" with respect to the Styles Property. The appellant and his associates purchased the Styles Property with the intention of reselling it at a profit. The appellant and his associates planned to split the anticipated profit between designated charities and themselves on a *pro rata* basis. The persons involved in this venture were experienced business people who treated the transaction as a business venture. The land involved was undeveloped real estate which was suitable for resale but unsuitable as an income producing investment or for the personal enjoyment of the appellant or his associates.

29 I agree with Iacobucci J. that the appellant meets the tests which have been established in the common law for an adventure of trade. The speculative venture in which the appellant was involved was clearly an adventure of a business nature rather than an investment of a capital nature. Like my colleague, I respectfully disagree with the trial judge (*Friesen v. R.*, [1992] 1 C.T.C. 296, 92 D.T.C. 6248) and affirmed by Marceau J.A. ([1993] 2 C.T.C. 113, 93 D.T.C. 5313 (F.C.A.) that subsection 10(1) does not apply to a business which is an adventure in the nature of trade: see *Bailey v. Minister of National Revenue*, [1990] 1 C.T.C. 2450, 90 D.T.C. 1321 at page 2459 (D.T.C. 1328) (T.C.C.). I affirm the succinct summary of the law contained in IT-218R:

> The word "business" is defined in subsection 248(1) so as to include, inter alia, an adventure or concern in the nature of trade. This definition can cause an isolated transaction involving real estate to be considered a business transaction. As a business, any gain or loss which arises therefrom is, by virtue of section 9, required to be included in computing income or loss, as the case may be.

30 (2) *Is the Styles Property "Inventory"?*

31 In order to take advantage of the valuation method in subsection 10(1), a taxpayer must also establish that the property in question is inventory. A definition of "inventory" is contained in subsection 248(1) of the Act:

> "inventory" means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year;

32 The first point to note about this definition of inventory is that property is not required to contribute directly to income in a taxation year in order to qualify as inventory. Provided that the *cost or value* of an item of property is *relevant in computing* business income in a year that property will qualify as inventory. Generally the cost or value of an item of property will appear as an expense (and the sale price as revenue) in the computation of income.

33 Reduced to its simplest terms, the income or profit from the sale of a single item of inventory by a sales business is the ordinary tracing formula calculated by subtracting the purchase cost of the item from the proceeds of sale. This is the basic formula which applies to the calculation of profit before the value of inventory is taken into account, as is made clear by Abbott J. in *Minister of National Revenue v. Irwin*, [1964] S.C.R. 662, [1964] C.T.C. 362, 64 D.T.C. 5227 at page 664-665

(C.T.C. 364, D.T.C. 5228):

> The law is clear therefore that for income tax purposes gross profit, in the case of a business which consists of acquiring property and reselling it, is the excess of sale price over cost, subject only to any modification effected by the "cost or market, whichever is lower" rule.

34 Thus, for any particular item:

Income = Profit = Sale Price - Purchase Cost.

35 It is clear from the formula above that the cost of an item of property sold by a business is relevant in computing the income from the business in the taxation year in which it is sold. As discussed above, an adventure in the nature of trade constitutes a business under the Act. Therefore, an item of property sold as part of an adventure in the nature of trade is relevant to the computation of the taxpayer's income from a business in the taxation year of disposition and so is inventory according to the plain language of the definition in subsection 248(1).

36 The respondent argued that even if the Styles Property were inventory in the year of disposition it would not qualify as inventory in preceding years. Specifically the respondent urged that the phrase "*relevant* in computing a taxpayer's income from a business *for a taxation year*" requires that the characterization of each item of property as inventory (or not) be made on an annual basis on the basis of the relevance of the item to the computation of income *for that taxation year*. The respondent relied on dicta to this effect in *The Queen v. Dresden Farm Equipment Ltd.*, [1989] 1 C.T.C. 99, 89 D.T.C. 5019 (F.C.A.), at C.T.C. page 105, a case which held that a taxpayer may not deduct an inventory allowance on goods in which the taxpayer has no property but merely holds on consignment. The respondent's argument on this point was accepted by Létourneau J.A. in the Federal Court of Appeal and is relied upon by Iacobucci J. In my opinion, the interpretation urged by the respondent runs contrary to the natural meaning of the words used in the definition of inventory in subsection 248(1) and to common sense. The plain meaning of the definition in subsection 248(1) is that an item of property need only be relevant to business income in a single year to qualify as inventory: "relevant in computing the taxpayer's income from a business for *a* taxation year". In this respect the definition of inventory in the *Income Tax Act* is consistent with the ordinary meaning of the word. In the normal sense, inventory is property which a business holds for sale and this term applies to that property both in the year of sale and in years where the property remains as yet unsold by a business.

37 In addition to the plain meaning of the words, several other considerations militate against the respondent's interpretation of the definition of inventory in s. 248(1).

38 First, an examination of other definitions in the *Income Tax Act* reveals that there is a particular phraseology used in the definition of things, amounts or concepts which must be determined on an annual basis. The definitions of income (in section 9) and taxable capital gain (in s. 38), both of which must be determined on an annual basis, contain the characteristic phraseology which denotes that requirement:

> 9(1) Subject to this Part, a taxpayer's income *for a taxation year* from a business or property is his profit therefrom *for the year*.
>
> (2) Subject to section 31, a taxpayer's loss *for a taxation year* from a business or property is the amount of his loss, if any, *for the taxation year* from that source computed by applying the provisions of this Act respecting computation of income from that source *mutatis mutandis*.
>
> 38. For the purposes of this Act,
>
> > (a) a taxpayer's taxable capital gain *for a taxation year* from the disposition of any property is 3/4 of his capital gain *for the year* from the disposition of that property;
> >
> > (b) a taxpayer's allowable capital loss *for a taxation year* from the disposition of any property is 3/4 of his capital loss *for the year* from the disposition of that property;

[Emphasis added.]

39 This formulaic phraseology appears innumerable times in the definitions in the *Income Tax Act*: see for example: section 3 “income”; section 5 “income from office or employment”, “loss from office or employment”, subsection 38(c) “allowable business investment loss”; section 39 “capital gain”, “capital loss” and “business investment loss”; section 41 “taxable net gain”; subsection 63(3) “eligible child”; paragraph 127.2(6)(a) “share-purchase tax credit”; paragraph 127.3(2)(a) “scientific research and experimental development tax credit”; subsection 248(1) “appropriate percentage”, “balance-due day”, and “gross revenue”.

40 The respondent is asking this Court to interpret the definition of inventory as though it read:

> “inventory” [*for a taxation year*] means a description of property the cost or value of which is relevant in computing a taxpayer’s income from a business for [*the*] taxation year;

41 The principal problem with the respondent’s interpretation is that the bracketed words do not appear in the definition in the *Income Tax Act*. The addition of these words to the definition effects a significant change to the sense of the definition. It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording. Reading extra words into a statutory definition is even less acceptable when the phrases which must be read in appear in several other definitions in the same statute. If Parliament had intended to require that property must be relevant to the computation of income in a particular year in order to be inventory in that year, it would have added the necessary phraseology to make that clear.

42 The second problem with the interpretation proposed by the respondent is that it is inconsistent with the basic division in the *Income Tax Act* between business income and capital gain. As discussed above, subdivision b of Division B of the Act deals with business and property income and subdivision c of Division B deals with capital gains. The Act defines two types of property, one of which applies to each of these sources of revenue. Capital property (as defined in paragraph 54(b)) creates a capital gain or loss upon disposition. Inventory is property the cost or value of which is relevant to the computation of business income. The Act thus creates a simple system which recognizes only two broad categories of property. The characterization of an item of property as inventory or capital property is based primarily on the type of income that the property will produce.

43 As discussed above in the context of the definition of an adventure in the nature of trade, a comprehensive discussion of whether the sale of real estate will create income or capital gain can be found in Interpretation Bulletin IT-218R (September 16, 1986). The full title of this Interpretation Bulletin, “Profit, Capital Gains and Losses from the Sale of Real Estate, Including Farmland and Inherited Land and Conversion of Real Estate from Capital Property to Inventory and Vice Versa” emphasizes what the bulletin makes clear — *real estate, like other forms of property, must fall into one of two basic categories under the Income Tax Act*: inventory or capital property.

44 IT-218R clarifies that real estate which is held by the taxpayer as capital property may be used as personal-use property or as an investment for the purpose of gaining or producing income. The sale of this kind of property creates capital gain or capital loss. On the other hand, real estate which is purchased for profitable resale value is inventory which creates business income or loss. In determining whether the gains from a sale of real estate are income or capital particular emphasis is placed on the taxpayer’s intention at the time of the initial purchase of the real estate. Thus, a particular piece of real estate becomes either inventory or capital property in the hands of the taxpayer *from the time of the original purchase*.

45 The basic scheme of dividing property into one of two broad classes under the *Income Tax Act* is further assisted by subsections 13(7) and 45(1). These sections make specific provision for the conversion of real estate from capital property to inventory and vice versa in particular circumstances. As IT-218R explains, these circumstances arise only when the taxpayer’s intention and use of the property change subsequent to the initial purchase. Subsections 13(7) and 45(1) provide for the transfer to be made by means of a deemed disposition and reacquisition at fair market value. The deemed reacquisition at the time when the taxpayer’s intention with respect to the property is materially changed reflects the fact that the category of the property is determined according to the taxpayer’s intention at the time of acquisition.

46 The interpretation of "inventory" urged by the respondent is fundamentally incompatible with the statutory dichotomy between inventory and capital property in two respects. First, it would require a change in the characterization of particular items of property on the basis of annual relevance to income rather than according to the carefully tailored circumstances enumerated in ss. 13(7) and 45(1). Second, and more seriously, if an item of property is not relevant to income in a particular year, it does not convert to capital property unless it meets the requirements of ss. 13(7) and 45(1). Under the respondent's proposed interpretation, an item of property would not be inventory in a year in which it was not relevant to income and thus would cease to exist for the purposes of the *Income Tax Act* in that year. This runs contrary to the scheme of the Act which classifies every piece of property owned by a taxpayer into one of the two broad classes. It creates an absurdity for items of property held for sale by a business to simply disappear from the scheme of the Act in years prior to sale.

47 Thirdly, the interpretation proposed by the respondent is inconsistent with the commonly understood definition of the term. In the ordinary sense of the term, an item of property which a business keeps for the purpose of offering it for sale constitutes inventory at any time prior to the sale of that item. The ordinary sense of the word also reflects the definition of inventory which is accepted according to ordinary principles of commercial accounting and of business. The Canadian Institute of Chartered Accountants has defined "inventory" as including, inter alia "[i]tems of tangible property which are held for sale in the ordinary course of business": Terminology for Accountants (3rd ed. 1983), at page 81. In the specific context of real estate the Canadian Institute of Public Real Estate Companies states that land held for sale and land held for future development and sale is inventory: *Canadian Institute of Public Real Estate Companies Recommended Accounting Practices for Real Estate Companies* (November 1985), at page 204-1.

48 It was held in *Bailey*, and is accepted by Iacobucci J., that single pieces of real estate held for sale as an adventure of the nature of trade meet the definitions of inventory accepted by the commercial and accounting worlds. These definitions are consistent with the plain meaning interpretation of the definition in the Act which would require only that the item of property be relevant to the computation of income in a single year. However, the interpretation sought by the respondent is considerably more restricted because it would require a connection to income in years prior to sale. I agree with my colleague that the express wording of the *Income Tax Act* is capable of overruling accounting and commercial principles where it is sufficiently explicit. Nevertheless, the Court should be cautious to adopt a interpretation which is clearly inconsistent with the commonly accepted usage of a technical term particularly where an interpretation consistent with common usage is more natural on a plain reading of the definition.

49 The fourth problem with the interpretation of "inventory" proposed by the respondent is that the relationship between subsection 10(1) and the definition of "inventory" in section 248 would become circular. Specifically, reading subsection 10(1) and the definition of "inventory" proposed by the respondent in tandem would mandate the conclusion that subsection 10(1) applies if the property in question is inventory *and* that the property in question is inventory if subsection 10(1) applies. Under the respondent's interpretation, if the inventory valuation method in subsection 10(1) applies then the cost or value of the property is relevant in computing income in the year in question and the property is inventory. On the other hand, if the valuation method does not apply then the cost or value of the property is not relevant to the computation of income and the property is not inventory. Interpretations which lead to circular definitions are contrary to common sense and should be avoided.

50 For all of the reasons discussed above, I conclude that the correct interpretation of the term of inventory in subsection 248(1) is the one which appears most obvious on a literal reading of the wording that an item of property is inventory if it is relevant to the computation of *business* income in *a* year. As a general principle, items of property sold by a business venture will always be relevant to the computation of income in the year of sale.

51 To the extent that *Dresden Farm Equipment* relies upon an interpretation which is inconsistent with this approach, I choose not to follow it as it does not deal directly with the issue raised in this case. Instead I prefer to follow the well-established line of cases which have specifically held as part of their rationes decidendi that real estate held for resale in an adventure in the nature of trade constitutes "inventory" for the purposes of subsection 10(1): *Bailey*; *Weatherhead v. Minister of National Revenue*, [1990] 1 C.T.C. 2579, 90 D.T.C. 1398 (T.C.C.); *Van Dongen v. Canada*, [1991] 1 C.T.C. 86, 90 D.T.C. 6633 (F.C.T.D.); *Skerrett v. Minister of National Revenue*, [1991] 2 C.T.C. 2787, 91 D.T.C. 1330 (T.C.C.); and *Cull v. The Queen*, [1987] 2 C.T.C. 63, 87 D.T.C. 5322 (F.C.T.D.). I endorse the approach taken in these cases of considering the definition of "inventory" in the context of the basic distinction between business income and capital gain. As Cullen J.

stated in *Van Dongen* at page 87 (D.T.C. 6634):

> The characterization of these properties as inventory is significant, because *any gain or loss from the disposition of the inventory will be treated as business income or loss* rather than capital gain or loss.

[Emphasis added.]

52 The Styles Property was relevant to the computation of *business income* in the taxation year of disposition and therefore it is correctly categorized as "inventory" for the purposes of the *Income Tax Act* both in that year and in preceding years.

53 (3) *The Calculation of "Profit" in Section 10(1)*

54 As noted earlier in these reasons, a taxpayer must establish that he or she is involved in a "business" and that the property in question is "inventory" before the valuation scheme in subsection 10(1) can be invoked. Since the appellant's adventure in the nature of trade was a "business" and the Styles Property constituted "inventory", the appellant was prima facie entitled to make use of the valuation scheme set out in subsection 10(1). However, as Iacobucci J. has pointed out, the valuation scheme in subsection 10(1) does not provide an automatic deduction from income nor does it mandate that any taxpayer with inventory can deduct any loss on fair market value arising therefrom. Rather subsection 10(1) mandates how the valuation procedure must take place when ordinary commercial and accounting principles establish that the value of inventory is relevant to the computation of business income in a taxation year.

55 The computation of business income is rooted in section 9 of the *Income Tax Act*. Section 9 provides that the income from a business for a year is the profit and that loss is to be calculated by applying the same provisions mutatis mutandis:

> 9(1) [Income from business or property] Subject to this Part, a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year.
>
> (2) [Loss from a business or property] Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of his loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source mutatis mutandis.

56 The Act does not define "profit" nor does it provide any specific rules for the computation of profit. Tax jurisprudence has established that the determination of profit under section 9(1) is a question of law to be determined according to the business test of "well-accepted principles of business (or accounting) practice" or well-accepted principles of commercial trading" except where these are inconsistent with the specific provisions of the *Income Tax Act*: see *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309, 3 Tax Cas. 185 (U.K.H.L.); *Neonex Int'l Ltd. v. The Queen*, [1978] C.T.C. 485, 78 D.T.C. 6339 (F.C.A.); *Symes v. Canada*, [1993] 4 S.C.R. 695, [1994] 2 C.T.C. 40, 94 D.T.C. 6001, at page 723 (D.T.C.) 6009; *Materials on Canadian Income Tax*, at page 291; and R. Huot, *Understanding Income Tax for Practitioners* (1994-95 edition), at page 299.

57 In calculating profit under section 9 of the *Income Tax Act*, a business calculates its gross profit and then subtracts allowable operating and non-operating expenses. Under well-accepted principles of business and accounting practice gross profit for a business involved in sale is calculated according to the following formula:

Gross Profit = Proceeds of Sale - Cost of Sale

and:

Cost of Sale = (Value of Inventory at beginning of year + Cost of Inventory acquisitions) - Value of Inventory at end of year.

58 Thus for a business involved in sales:

Gross Profit = Proceeds of Sale - [(Value of Inventory at beginning of year + Cost of Inventory acquisitions) - Value of Inventory at end of year.]

59 This formula was originally designed for companies with significant inventories at a time when computer technology did not allow the specific cost of each item to be easily traced on an individual basis. The formula allowed a business to calculate gross profit on the basis of a single inventory valuation each year rather than keeping detailed ongoing records. It is rather an anachronism in an age where most businesses with significant inventories carefully track both the cost and sale price of each item by means of computer technology. A moment of thought, however, will lead to the conclusion that this formula is merely a convenient shorthand for a two-step process which recognizes profit as the excess of sale proceeds over value for inventory sold in the year and the change in the value of inventory still on hand at the end of the year. Thus the formula could equally be expressed as:

Gross Profit = (Proceeds of Sale - Value of Inventory Sold) + Change in Value of Unsold Inventory.

60 Thus, under well-accepted principles of commercial and accounting practice the value of unsold inventory is relevant to the computation of business income. This is based on the accounting presumption that holding onto unsold inventory represents a cost to a business. This is a principle generally applicable to the calculation of business income from businesses of any size and with inventories of any size although the popular formula was originally created as a convenient shortcut for the computation of business income for companies with large inventories.

61 Subsection 10(1) of the *Income Tax Act* recognizes the well accepted commercial and accounting principle of requiring a business to value its inventory at the lower of cost or market value. This principle is an exception to the general principle that neither profits nor losses are recognized until realized. As well, it represents a departure from the general principle that assets are valued at their historical cost. The underlying rationale for this specific exception to the general principles is usually explained as originating in the principle of conservatism. The generally accepted accounting principle applicable in this situation is explained by D.E. Kieso et al., *Intermediate Accounting* (2nd ed. 1986), at pages 421-22, as follows:

> A major departure from adherence to the historical cost principle is made in the area of inventory valuation. *Applying the constraint of conservatism in accounting means recognizing known losses in the period of occurrence. In contrast, known gains are not recognized until realized.* If the inventory declines in value below its original cost for whatever reason ....., the inventory should be written down to reflect this loss. *The general rule is that the historical cost principle is abandoned when the future utility (revenue-producing ability) of the asset is no longer as great as its original cost. A departure from cost is justified on the basis that a loss of utility should be reflected as a charge against the revenues in the period in which the loss occurs.* Inventories are valued, therefore, on the basis of the lower of cost and market instead of on an original cost basis.

[Emphasis added.]

62 As the above passage makes clear, the well-accepted principle of conservatism which underlies the valuation method in subsection 10(1) represents not only an exception to the realization principle (in cases of loss) but also an exception to the principle of symmetry since gains are not recognized until they are realized. Thus the taxpayer who is entitled to rely on subsection 10(1) is allowed to claim a business loss where the value of inventory falls but is not required to declare a business profit until the inventory is sold even if the value of the inventory rises.

63 In *Ostime v. Duple Motor Bodies*, [1961] 2 All E.R. 167 (U.K.H.L.), at pages 172-73, Lord Reid discussed the fact that generally items should be valued at historical cost but that the 'lower of cost or market' exception allows valuation at market value only if market value falls below cost. As Lord Reid pointed out, this lack of symmetry is not entirely logical but it represents good conservative accountancy and therefore has always been recognized as legitimate for taxation purposes:

> If market value [rather than cost] were taken [in all cases], that would generally include an element of profit, and *it is a cardinal principle that profit shall not be taxed until realised*; if the market value fell before the article was sold the profit might never be realised. But an exception seems to have been recognised for a very long time; if market value has already fallen before the date of valuation, so that, at that date, the market value of the article is less than it cost the taxpayer, then the taxpayer can bring the article in at market value, and in this way anticipate the loss which he will probably incur when he comes to sell it. *That is no doubt good conservative accountancy*, but it is quite illogical. The fact that *it has always been recognised as legitimate* is only one instance going to show that these matters cannot be settled by any hard and fast rule or strictly logical principle.

[Emphasis added.]

64 The well-accepted business and accounting principles applicable to real estate held out as inventory are illustrated in the *Canadian Institute of Public Real Estate Companies Handbook* (September 1990), at sections 301 and 302:

> 301. INTRODUCTION
>
> 301.1 Real estate property in normally carried at the lower of cost and net realizable value if it is held as inventory and at cost if it held for investment purposes.....
> 302. PROPERTY HELD AS INVENTORY
>
> 302.1 Property held as inventory should be stated at the lower of cost and net realizable value.
>
> 302.2 Land held for sale currently and land held for future development and sale is inventory and generally accepted accounting principles require that it be stated at the lower of cost and net realizable value.
>
> (Note that "net realizable value" is the estimated selling price plus other estimated revenue reduced by the costs to improve and sell the property for the purposes of this analysis it is equivalent to fair market value.)

65 In summary, I conclude that the valuation method in subsection 10(1) is available for inventory held as part of an adventure in the nature of trade. The valuation method becomes relevant in any particular taxation year through the calculation of business income. Business income is calculated according to well-accepted commercial and accounting principles. According to these principles the value of inventory is relevant to the computation of income in years prior to sale since it comprises part of the cost of sale. According to the same principles inventory is to be valued at the lower of cost or market value, a specific exception to the general principle of realization. This exception is well accepted in the specific instance relevant to this appeal: the valuation of real estate inventory. This conclusion is fully consistent with the line of cases following *Bailey*. As Cullen J. states in *Van Dongen* at page 6639:

> The later *Bailey* case appears to have settled the issue that land held as an adventure in the nature of trade is eligible for inventory write-down.

66 See also: *Weatherhead*, *Skerrett*, and *Cull*, *supra*

67 (4) *The Common Law Restriction to Stock-in-Traders*

68 The final argument of the respondent which should be addressed is that the inventory valuation method in subsection 10(1) is simply a codification of the common law and so is restricted to stock-in-traders. The respondent is correct to note that the common law recognized an exception to the realization principle by allowing inventory to be valued at the lower of cost or market value in the case of stock-in-trade. The common law in Canada is summarized in *Minister of National Revenue v. Anaconda American Brass Ltd.*, [1956] C.T.C. 311, 55 D.T.C. 1220, a Canadian case which was appealed from this Court to the Privy Council. Viscount Simonds, speaking for the Privy Council stated at page 1224:

> The income tax law of Canada, as of the United Kingdom, is built upon the foundations described by Lord Clyde in *Whimster & Co. v. CIR* (1925), 12 T.C. 812, 823, in a passage cited by the Chief Justice which may be here repeated. "In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the *Income Tax Act*, or of that Act as modified by the provisions and schedules of the

> Acts regulating Excess Profits Duty, as the case may be. *For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in- trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there is nothing about this in the taxing statutes.*

69 See also: *Whimster & Co. v. CIR* (1925), 12 T.C. 813(Ct. Sess., Scot.), at page 823 (per Lord Clyde); and *BSC Footwear Ltd. v. Ridgway*, [1972] 2 All E.R. 534, A.C. 544 (U.K.H.L.).

70 Interestingly, the exception to the realization principle for stock-in-traders existed at common law without any statutory authorization and was based solely on ordinary commercial principles as they existed at that time. As discussed above, ordinary commercial principles would now suggest that all inventory be valued at the lower of cost or market value. The respondent, however, argues that subsection 10(1) is merely a codification of the common law as it existed in 1948 when the provision first appeared in the *Income Tax Act*. This argument is accepted by Iacobucci J. who cites the comments of Abbott J. in Irwin as authority for this proposition.

71 I do not accept the argument that subsection 10(1) is merely a codification of ordinary commercial principles as they existed and were recognized by the common law in 1948. The *obiter* comments by Abbott J. in Irwin (at page 665, C.T.C. 365, D.T.C. 5229) to the effect that the former version of subsection 10(1), subsection 14(2), was merely a codification of the common law and that subsection 14(2) probably did not apply to single pieces of real estate were explicitly not made part of the ratio of the decision. Abbott J. did not give any consideration to the specific wording of subsection 14(2) which would have been a sine qua non to expressing an authoritative opinion on this point.

72 The appropriate focus in determining whether subsection 10(1) is a mere codification of the common law is upon the wording of the section itself. For ease of reference I quote that section once again:

> 10(1) For the purpose of computing income *from a business*, the property described in *an inventory* shall be valued as its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

[Emphasis added.]

73 The common law rule was restricted to stock-in-traders. Subsection 10(1) on the other hand explicitly states that it applies to the inventory of a *business*. As discussed above, the word business is defined in the Act and specifically includes adventures in the nature of trade. If Parliament had wanted to simply codify the common law it could and would have used the term "ordinary trading business" or "stock-in-trader" both of which had judicially established definitions. Since Parliament chose to use the broader term "business", there is simply no basis on which to assume that subsection 10(1) was no more than a codification of a common law rule. To place such a judicial limit on the clear and unambiguous wording of the statute is a usurpation of the legislative function of Parliament.

74 In rejecting the principal argument of the respondent that subsection 10(1) is restricted to stock-in-traders, I must also, with respect, reject a number of other corollary arguments accepted by Iacobucci J.

75 First, I do not accept the argument that subsection 10(1) applies only to those who "carry on a business". A specific judicial interpretation has evolved for the phrase "carry on a business". That phrase is used in the *Income Tax Act* and is useful for determining the residence of a taxpayer (see section 253). Once again if Parliament had intended to restrict the ambit of subsection 10(1) to taxpayers which carry on a business it would have done so. I can do no better on this point than to quote with approval the response of Rip J.T.C.C. to this argument in *Bailey* at page 2461 (D.T.C. 1330):

> Subsection 10(1) directs a property to be valued "for the purpose of computing income from a business". The phrase does not contemplate computing income only from carrying on a business, as suggested by counsel for the respondent. The phrases "carrying on a business" and "carried on a business" are found in several provisions of the Act: see, for example, paragraph 2(3)(b) and subsections 115(1) and 219(1). "To carry on something," stated Jackett P. in *Tara*

> *Exploration and Development Co. v. Minister of National Revenue*, [1970] C.T.C. 557, 70 D.T.C. 6370 (Ex. Ct.) page 563 (D.T.C. 6376), "involves continuity of time or operations such as is involved in the ordinary sense of a 'business'". When this expression "carry on" is used in the Act, Parliament describes a continuity of time or operations with respect to the factual situation contemplated by the particular provision. Such continuity is not required in subsection 10(1) and its addition to that provision would add nothing to that provision's ordinance.

76 I am also unable to accept the argument that because subsection 10(1) represents an exception to the general commercial and accounting principle of realization (see *Minister of National Revenue v. Consolidated Glass Ltd.*, [1957] S.C.R. 167, [1957] C.T.C. 78, 57 D.T.C. 1041, at page 174 (D.T.C. 1043), (per Rand J.)) and because this exception has been the subject of some academic criticism (see B. J. Arnold, *Timing and Income Taxation*: The Principles of Income Measurement for Tax Purposes (1983), at pages 332-33), therefore the exception should be read more narrowly than the express words chosen by Parliament.

77 Although the inventory valuation scheme in subsection 10(1) representsan exception to the normal principle of realization, the exception itself is also a well- accepted commercial and accounting principle. While the realization principle applies with respect to capital property, it is subject to an exception in the case of inventory as Rand J. recognized in *Consolidated Glass* at page 174 (D.T.C. 1043):

> "Losses sustained" and "profits and gains made" are clearly correlatives and of the same character; but how can profits and gains be considered to have been made in any proper sense of the words otherwise than by actual realization? *This [sic] is no inventory valuation feature in relation to capital assets.*

[Emphasis added.]

78 Furthermore, it is not the role of the court to restrict the interpretation of the clear statutory language because the exception created by the language has been the subject of academic criticism. Many sections of the *Income Tax Act* have been the subject of academic criticism. By way of example, the basic distinction between capital gain and income has been criticized in a tax text edited by the same Professor Arnold whose criticisms of conservative inventory valuation are relied upon by Iacobucci J.: see *Materials on Canadian Income Tax*, at page 297. Moreover, Professor Arnold's criticisms of conservative inventory valuation are aimed at any exception to the realization principle and have no greater force when applied to an adventure in the nature of trade seeking to apply the exception on a single item of inventory than to stock-in-trader who seeks to apply the exception to hundreds if not thousands of items of inventory.

79 My colleague Iacobucci J. accepts the fact that subsection 10(1) applies to an adventure in the nature of trade. However, he would restrict the use of the valuation method in subsection 10(1) to stock-in-traders and those who "carry on" a business. This effectively prevents subsection 10(1) from being applied to an adventure in the nature of trade since by definition an adventurer in the nature of trade is neither a stock-in-trader nor does he "carry on" a business. The restriction placed upon this section by my colleague is based on his view that the object and purpose of the section is to provide a limited exception to the realization principle for stock-in-traders as was provided for at common law. However, as discussed at the beginning of these reasons, the clear language of the *Income Tax Act* takes precedence over a court's view of the object and purpose of a provision. As Hogg stated in Notes on Income Tax at page 22:12:

> It would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.

80 Therefore, the object and purpose of a provision need only be resorted to when the statutory language admits of some doubt or ambiguity. In this case, there is no doubt or ambiguity in the statutory language of subsection 10(1) which clearly applies to the inventory of a business including an adventure in the nature of trade. Although there is no need to resort to the object and purpose of the section in this case, I would note that the object and purpose of subsection 10(1) is fully consistent with allowing the valuation method in that section to be used for adventures in the nature of trade. Subsection 10(1) is specifically designed as an exception to the principles of realization and matching in order to reflect the well-accepted

principle of accounting conservatism. In addition to recognizing accounting conservatism, the section is designed to stop a business from accumulating pregnant losses from declines in the value of inventory. The object and purpose of the section is to prevent businesses from artificially inflating the value of inventory by continuing to hold it at cost when the market value of that inventory has already fallen below cost.

81 Thus, it should not be assumed that Parliament is opposed to the inventory valuation exception to the realization principle simply because this exception allows unrealized losses in certain circumstances. Although the principal goal of the *Income Tax Act* is to raise national revenue, there are many competing demands and priorities which may shape tax policy in any given circumstances. Changes to the Income Tax Regulations, C.R.C. 1978, c. 945, made subsequent to the years at issue in this appeal strongly suggest that Parliament supports the principle of accounting conservatism which underlies the inclusion of inventory valuation in the determination of business income.

82 Section 10(1) provides that inventory must be valued at the lower of cost or fair market value or as otherwise permitted by regulation. The relevant regulation is Regulation 1801 which read as follows in the years in question on this appeal:

> 1801. [Valuation] Except as provided by section 1802, for the purpose of computing the income of a taxpayer from a business
>
> (a) all the property described in all the inventories of the business may be valued at the cost to him; or
>
> (b) all the property described in all the inventories of the business may be valued at the fair market value.

83 The combined effect of subsection 10(1) and Regulation 1801 was explained in Interpretation Bulletin IT-473 “Inventory Valuation” (March 17, 1981 (as revised by Special Release dated December 5, 1986)) as follows:

> Valuation of Inventory
>
> 4. Except where an individual has elected under subsection 10(6) to value inventory at nil in computing income from an artistic endeavour (see IT-504), subsection 10(1) of the Act and section 1801 of the Regulations provide three alternative methods of valuing inventory. These are:
>
> (a) valuation at the lower of cost or fair market value for each item (or class of items if specific items are not readily distinguishable) in the inventory;
>
> (b) valuation of entire inventory at cost;
>
> (c) valuation of entire inventory at fair market value.
>
> Once a taxpayer has adopted, or has been required to adopt, one of the foregoing methods of valuing inventory, the taxpayer must continue to use that method on a consistent basis in subsequent years.....

84 In 1989, Regulation 1801 was amended to read:

> 1801. [Valuation] Except as provided by section 1802, for the purpose of computing the income of a taxpayer from a business, all the property described an all the inventories of the business may be valued at its fair market value.

85 The 1989 amendment removed from the taxpayer the option of choosing to value inventory at historical cost and left only the more conservative methods of fair market value or the lower of cost or market value. The practical effect of this amendment is that in years following 1989 the taxpayer must declare a loss for taxation purposes in any year in which the fair

market value of inventory falls below historical cost. The taxpayer no longer has the option of postponing this loss until the taxation year in which the loss is actually realized upon sale of the inventory. This is made clear in the "Regulatory Impact Analysis Statement" published along with the amended regulation, SOR/89-419:

> This change, which is part of the measures announced by the Minister of Finance on January 15, 1987 relating to the application of losses and other deductions, will prevent a corporation from maintaining at cost inventories which have declined in value and thereby deferring the recognition of a loss by postponing the write-down to fair market value until after a change in control.

86 The Department of Finance release of January 15, 1987 which accompanied the introduction of this and other amendments to the *Income Tax Act* amply supports the appellant's submission that this amendment was part of a concerted effort by the Department of Finance "to prevent trafficking in loss companies, that is, the acquisition by a profitable company of a "pregnant loss" company". Thus the Department had a valid policy reason to change the exception to the realization principle recognized by accounting conservatism from an optional to a mandatory requirement.

87 (5) Policy Considerations

88 Finally, I wish to address some of the policy concerns raised by counsel for the respondent.

89 The respondent has raised the concern that if subsection 10(1) inventory valuation applies to adventures in the nature of trade then the realization principle will only apply to capital property. The respondent also argued that the inventory valuation scheme in subsection 10(1) undermines the matching principle and gives rise to asymmetry since it allows for business losses when inventory declines in value but does not create taxable income where there has been an unrealized gain created by a rise in fair market value. All of these are valid criticisms of the inventory valuation scheme in subsection 10(1) but they cannot serve to thwart the intention of Parliament as expressed in the plain wording of the statute. Furthermore these criticisms are relevant to subsection 10(1) as a whole and have no particular application to adventures in the nature of trade. I cannot accept that applying subsection 10(1) to adventures in the nature of trade in accordance with the wording of that provision will cause significant harm especially when the respondent admits that the same section should be applied to all the inventory of all businesses with significant quantities of inventory.

90 Of greater concern is the interpretation proposed by the respondent which would create a whole new category of property unrecognized in the Act. This new class of property would attract the higher tax rate applicable to business income upon disposition but in years prior to disposition would be subject to the strictures which the realization, matching and symmetry principles impose upon the disposition of capital property. The *Income Tax Act* has established a system with two distinct categories of property inventory, which creates business income or loss, and capital property, which creates capital gain or loss. There are separate rules for each of these two categories of property and the taxpayer should be entitled to take the benefit as well as bear the burden applicable to the category into which the property falls. As Reed J. stated in *Cull* at pages 68 (D.T.C. 5325-26):

> Had the partnership realized a profit from the venture, there can be no question that, on the basis of the Fraser line of cases, it would have been business income, and not a capital gain. Thus, the taxpayer should be allowed to treat the losses according to the same principle.

91 It is true that an annual appraisal of the property which constitutes inventory is required in order for the taxpayer to comply with the requirements of subsection 10(1). This, however, is simply a cost of doing business which must be borne by the taxpayer and it is no more burdensome than the same requirement which is imposed upon companies with far larger inventories to value that inventory each year. It should be remembered that the categorization of inventory (and hence subsection 10(1)) will only apply to those who meet the judicially established test for an adventure in the nature of trade, namely that the taxpayer has a trading or business intention with respect to the property. This categorization will not apply to taxpayers who own personal-use property or who hold property for the purpose of long-term investment since this is categorized as capital property.

92 The fear that allowing adventures in the nature of trade to take advantage of the inventory valuation in subsection 10(1) will lead to tax avoidance is unfounded. It is the rare taxpayer who will be faced with the situation of this appellant. In order to meet the test for an adventure in the nature of trade the taxpayer must have an intention to enter into a "scheme of profit- making". It is only where that scheme goes awry contrary to the intentions of the taxpayer that the taxpayer will be entitled to take advantage of the inventory valuation scheme in subsection 10(1) in order to recognize a business loss. Schemes entered into with the intention of creating a business loss would not qualify as adventures in the nature of trade and would be tantamount to a sham. Further, any loss claimed by a taxpayer when the fair market value falls below cost is subject to recapture by the Minister in the year of disposition if the fair market value rises again. For greater clarity, in the year of disposition the taxpayer is subject to taxation on the difference between the proceeds of sale and the lowest value ascribed to the inventory in the years prior to sale.

93 It is true that the application of the formula Gross Profit = Proceeds of Sale - Cost of Sale [(Value of Inventory at beginning of year + Cost of Inventory acquisitions) - Value of Inventory at end of year] could lead to a negative cost of sale if the taxpayer chose to value inventory at fair market value as permitted by the current Regulation 1801. This problem can be obviated if the taxpayer chooses to value according to the lower of cost or fair market value method set out in subsection 10(1). This method only recognizes unrealized losses and never recognizes unrealized gains. It is only unrealized gains which could give rise to a negative cost of sale. A negative cost of sale is not, however, a problem confined to single items of inventory used in an adventure in the nature of trade where the fair market value method is chosen. Trading companies with larger inventories would face the same problem on a larger scale in any year where the increase in the market value of inventory on hand exceeds the value of new inventory purchased in a year.

94 Further, the fact that proceeds of sale may be zero in a given year does not cast any doubt on the applicability of the formula. In any year in which there is a loss under this formula, the proceeds of sale will be less than the cost of sale and the fact that proceeds of sale are zero simply reflects this general truth on a smaller scale. A taxpayer is statutorily entitled by section 9(2) to calculate loss using the same formula as would apply for the calculation of profit. Moreover, it is conceivable that a company with a large inventory could generate no sales in a year. It would be far more anomalous if the ability of such a company to recognize declines in the value of its inventory in a year were dependent on the existence of a single sale.

95 III. Conclusions

96 In summary I arrive at the following conclusions:

1. The appellant's venture is a business pursuant to the definition in subsection 248(1) of the Act since it meets the test for an adventure in the nature of trade.

2. The Styles Property is inventory pursuant to the definition in subsection 248(1) because its cost or value is relevant to the computation of business income in a taxation year, namely the year of disposition.

3. The use of the valuation system established in subsection 10(1) and Regulation 1801 is governed by the application of well-recognized commercial and accounting principles. These principles establish that the value of inventory is relevant to the calculation of business income because it contributes to the cost of sale.

4. The valuation system established in subsection 10(1) and Regulation 1801 is a specific legislated exception to the principles of matching, realization and symmetry and reflects well- recognized commercial and accounting principles which aim to achieve a conservative picture of business income.

5. Neither the common law restriction to stock-in-traders nor other policy considerations can serve to override the explicit wording of subsection 10(1) which makes the valuation system therein applicable to all inventory used in the computation of business income.

6. The plain reading of subsection 10(1) would allow single items of inventory held as part of an adventure in the nature of trade to utilize the inventory valuation method contained therein. This conclusion is consistent with the basic dichotomy in the Act between income and capital and the different schemes for taxing each of these.

7. For all of the above reasons, the appellant was entitled to make use of the inventory valuation method in subsection 10(1) in order to recognize a business loss on the Styles Property in the taxation years in question, namely 1983 and 1984.

97 IV. Disposition

98 I would allow the appeal with costs in this Court and in the courts below and would direct that the Minister's assessment for the taxation years 1983 and 1984 be set aside and that the appellant's tax liability for the years in question be redetermined in a manner consistent with these reasons.

***Iacobucci J., (Gonthier, J, dissenting):*:**

99 This appeal involves a technical question of income taxation the disposition of which will have an important impact on the collection of tax revenues in Canada. It also has implications for many businesses because this Court is being asked to clarify how general commercial principles affect the determination of profit under income tax legislation.

100 The specific issue in this appeal is whether the vacant land purchased by the appellant, who is not engaged in an ordinary trading business but, instead, in an adventure in the nature of trade, is "inventory" in a "business" pursuant to s. 10(1) of the *Income Tax Act*, S.C. 1970-71-72, c. 63 and, hence, the land's decline in value is deductible from profit as a business expense. The determination of this issue must, however, be made with an eye to the legal nature of "profit": in other words, whether it is consonant with income taxation principles and jurisprudence to permit a taxpayer to claim the fair market depreciation in the value of a piece of property as a business loss in taxation years in which the property was neither disposed of nor generated any income.

101 I conclude that the appellant fails to qualify for the valuation scheme established by subsection 10(1) and, therefore, cannot deduct the claimed expenses in the 1983 and 1984 taxation years.

102 1. *Background*

103 In January 1982, the appellant and several others bought a parcel of land (the "Styles Property") in the city of Calgary. The land was registered in the name of Trinity Western College. The College held the property as nominee for the group of investors. The property was acquired for the purpose of reselling it at a profit. Part of the anticipated profit was to be paid to the College and to other organizations as charitable donations and the balance of the profit was to be divided on a *pro rata* basis among the members of the investor group.

104 In the years immediately following its acquisition, the property substantially decreased in value and the mortgage thereon was eventually foreclosed in 1986. The appellant, relying on subsection 248(1), 10(1), section 9 and Regulation 1801 (as it then read) of the *Income Tax Act*, sought to deduct the decline in the fair market value of the land as a business loss in his 1983 and 1984 tax returns. The amounts claimed as business losses specifically relating to the Styles Property were $252,954 in 1983 and $25,800 in 1984. It should be noted that the amount claimed for 1983 was found to be incorrect and it was subsequently agreed by all parties that the correct sum should be $197,690. The appellant argued that he was entitled to make such fair market deductions because subsection 10(1) of the Act permits the use of such a valuation scheme should the initiative to purchase the land be deemed a "business" *and* should the land be defined as "inventory". I underscore that there was no disposition of the Styles Property in the 1983 or 1984 taxation years; in fact, the land remained completely undeveloped.

105 The Minister of National Revenue disallowed these business losses on the basis that the property was not "inventory in a business" within the meaning of ss. 10(1) and 248(1) of the *Income Tax Act*. The taxpayer appealed and both the Federal Court, Trial Division, [1992] 1 C.T.C. 296, 92 D.T.C. 6248 (F.C.T.D.) and the Federal Court of Appeal, [1993] 2 C.T.C. 113, 93 D.T.C. 5313, upheld the Minister's disallowance of the losses. Leave to appeal was granted by this Court on April 28, 1994, [1994] 1 S.C.R. vii.

106 2. *Relevant Statutory Provisions*

107 *Income Tax Act*, S.C. 1970-71-72, c. 63

> 9(1) [Income from business or property] Subject to this Part, a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year.
>
> (2) [Loss from business or property] Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of his loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source *mutatis mutandis*.
>
> 10(1) [Valuation of inventory property] For the purpose of computing income from a business, the property described in an inventory shall be valued as its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.
>
> (2) [Idem] Notwithstanding subsection (1), for the purpose of computing income for a taxation year from a business, the property described in an inventory at the commencement of the year shall be valued at the same amount as the amount at which it was valued at the end of the immediately preceding year for the purpose of computing income for the preceding year.
>
> 248 (1) [Definitions] In this Act,
>
> .....
>
> "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), an adventure or concern in the nature of trade but does not include an office or employment;
>
> "inventory" means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year;

108 Income Tax Regulations, C.R.C. 1978, c. 945

> 1801. [Valuation] Except as provided in section 1802, for the purpose of computing the income of a taxpayer from a business
>
> (a) all the property described in all the inventories of the business may be valued at the cost to him; or
>
> (b) all the property described in all the inventories of the business may be valued at the fair market value.

109 3. *Judgments Below*

110 Federal Court, Trial Division, [1992] 1 C.T.C. 296, 92 D.T.C. 6248

111 Rouleau J. dismissed the appellant's appeal from the Minister's reassessment. He first reviewed the case law which considered the definition of "business" and "adventure or concern in the nature of trade". In *Bailey v. Minister of National Revenue*, [1990] 1 C.T.C. 2450, 90 D.T.C. 1321, the Tax Court of Canada concluded that, for the purpose of subsection 10(1), "business" included "an adventure or concern in the nature of trade". As well, it was held that an isolated transaction may fall within the meaning of the word "business" in subsection 10(1). In *Bailey* it was also held that land acquired for resale in an adventure in the nature of trade could be classified as inventory for the purposes of subsection 10(1) and the land was eligible for an inventory "write down". This reasoning was also followed in *Van Dongen v. Canada*, [1990] 1 C.T.C. 86, 90 D.T.C. 6633 (F.C.T.D.), and *Weatherhead v. Minister of National Revenue*, [1990] 1 C.T.C. 2579, 90 D.T.C. 1398 (T.C.C.).

112 Rouleau J. noted that both parties conceded that the property in issue was an adventure in the nature of trade. However, he held that subsection 10(1) should not be interpreted in the manner suggested by the appellant. He emphasized that the *Income Tax Act* must be read as a whole. Thus, one must also consider other relevant provisions such as section 9 (meaning of income and loss) and subsection 248(1) (definition of inventory and business). Rouleau J. observed that a taxpayer's profit must be determined in accordance with ordinary commercial and accounting principles and practices. It was held that these ordinary commercial principles and practices dictated that in any business the revenues should be matched against the expenses before any loss or profit is recognized. Generally, in the case of a trading business the profit (loss) equals the proceeds of sales less the cost of sales. The cost of sales is calculated by adding the value of the inventory at the beginning of the year to the cost of acquisitions during the year and subtracting the value of inventory at the end of the year. Rouleau J. then stated (at page 300 (D.T.C. 6251)):

> Adopting this formula, a trading business can determine its costs of sales by calculating the change in the value of its inventory from the beginning to the end of a given period. The valuation of inventory can therefore affect the business' gross profit. It is only to this extent that the inventory value becomes relevant. It is not by itself deductible from the taxpayer's income.

113 Rouleau J. then referred to the decision in *Minister of National Revenue v. Shofar Investment Corp.*, [1980] 1 S.C.R. 350, [1979] C.T.C. 433, 79 D.T.C. 5347, for approval of this approach. It was emphasized that the computation of profit must be different for a business with relatively few transactions from that of a business engaged in continuous trading (at page 300 (D.T.C. 6251)):

> For example, when there is but one item in inventory, profit or loss cannot be ascertained until the disposition of that particular item since, before disposition, there would be no revenues upon which to set off costs.

114 Rouleau J. held that in a business of few transactions the value of the inventory is not relevant in computing income until disposition. Thus, in a year when the property is not sold, it would not be included in the computation of income for tax purposes and subsection 10(1) would not apply. In the case at bar, the trial judge expressed the opinion that applying subsection 10(1) to an adventure in the nature of trade would lead to an absurdity since the Act does not tax unrealized profits and, accordingly, should not recognize unrealized losses. If the property had increased in value during the time it was held, there would be no taxation of the increased value until the moment of disposition. When considering section 9(1), Rouleau J. stated that it becomes apparent that an inventory "write down" of the property would not reflect the truest picture of the appellant's income position.

115 Federal Court of Appeal, [1993] 2 C.T.C. 113, 93 D.T.C. 5313

116 (i) *per* Létourneau J.A. (majority)

117 The first issue discussed by Létourneau J.A. (writing for himself and Linden J.A.) was whether subsection 10(1) of the *Income Tax Act* applied to property held in an adventure in the nature of trade (at pages D.T.C. 5315):

> It is true that the inventory rule makes more sense in the context of an ordinary trading business where goods are regularly bought and sold, making it difficult to keep track of the actual cost and sale price of each piece of property. The rule becomes then the only sound basis for computing the profits from the sales made in the year. Like Martland J. in *Minister of National Revenue v. Irwin*, [1964] S.C.R. 662, C.T.C. 362, 64 D.T.C. 5227, at pages 664-665 (D.T.C. 5315), I doubt that there is a need for the rule to apply in a case like the present one when there is only one item and its actual costs and eventual sale price can easily be established. But I cannot conclude that its application to an adventure in the nature of trade necessarily leads to an absurdity. The fact that there are fewer transactions when it is a mere adventure in the nature of trade than there would be if it were an ordinary trading business does not render section 10 nugatory with respect to adventures in the nature of trade.

118 Thus, a property held for resale as an adventure in the nature of trade can be inventory under subsection 10(1) and is eventually eligible for inventory write-down. The only question is when this eligibility arises.

119 The issue, then, is whether the appellant could apply subsection 10(1) to the taxation years 1983 and 1984. It was noted that subsection 10(1) is not a specific provision overriding section 9 which establishes the basic rules for determining business income. Thus, section 10 becomes relevant only when it comes to computing business income; under section 9 such computation must relate to the actual taxation year. As well, the definition of "inventory" in subsection 248(1) is also linked to a taxpayer's income from a business for a taxation year. Létourneau J.A. held (at page D.T.C. 5316):

> As it appears from this decision of our Court [*Canada v. Dresden Farm Equipment Ltd.*, [1989] 1 C.T.C. 99, 89 D.T.C. 5019 (F.C.A.)], a property is inventory in a taxation year because its cost or value is relevant in the computation of the inventory business income that year. This is so in the year in which the property is sold. A property can be designated as inventory in a taxation year in which it is not sold if that property is included in the computation of the income produced by that business in that year. However, there has to be a computation of income, i.e., profit or loss, from the business.
>
> In cases where the business itself consists in the buying and reselling of a parcel of land as in the present case, there are no business receipts or proceeds, and therefore no possible determination of a business profit or loss within the terms of subsection 9(1), unless and until the land bought is disposed of. The valuation of inventory property according to subsection 10(1) then becomes relevant in assessing the profit, i.e., the business income, for *that* year because it determines the cost of sale. When there is more than one sale and more than one property held in inventory, the cost of sales is "computed by adding the value placed on inventory at the beginning of the year to the cost of acquisitions to inventory during the year, less the value of inventory at the end of the year". As can be seen from these provisions, the value of inventory is relevant in determining the profit of a business, and the cost of an inventory item, as the Supreme Court of Canada ruled, "can affect the ascertainment of the gross profit of the business, but is not, in itself, deductible from the taxpayer's income".

[Emphasis in original.]

120 Létourneau J.A. concluded that, in the case at bar, the losses could not be claimed in 1983 and 1984 since there was no disposition of the property. As has been noted by the trial judge, this was consistent with the matching principle which requires the determination of income revenues to be paired with the expenditures made to earn them. Simply put, there was no business income in 1983 or 1984 to be matched with the losses claimed.

121 (ii) *Marceau J.A. (concurring in the result)*

122 Marceau J.A. shared his colleague's view that the appeal should be dismissed but expressed reasons similar to those of the trial judge that the wording of subsection 10(1) does not apply to the case at bar. Otherwise, an application of the disposition would lead to an absurdity, this being a finding not arrived at by Létourneau J.A.

123 As to the wording of the provisions, Marceau J.A. stated that there is no calculation of income when no transaction that could lead to a receipt or expense is performed throughout the year. As well, the definition of "inventory" in section 248 as applied in s. 10 makes no sense when the whole business is itself composed of the *one* property alleged to be inventory.

124 The absurdity would result from the fact that the Act does not require a taxpayer who has claimed a loss for a decrease in the market value of a property acquired as an adventure in the nature of trade to pay tax in subsequent years where there are increases in the market value beyond original cost. Such increases are only taxable when the property is disposed of. Section 9 could hardly be construed as requiring the taxpayer to report income on his "continuing adventure" by apprising the property in each subsequent year. This would create obvious practical problems.

125 It was also held that the valuation of inventories flows from the carrying on of a business. The same cannot be said for an adventure in the nature of trade involving a single property. In closing, Marceau J.A. held (at page 611) that:

> [S]ection 10, in the case of a trade, necessarily implies writing up and writing down inventory values, where the market value of the inventories are used in computing the cost of goods sold year after year, but not so in the case of a so-called adventure in the nature of trade, involving a sole property.

126 IV. *Issue on Appeal*

127 Can the appellant benefit from the valuation scheme established by subsection 10(1) and Regulation 1801 of the *Income Tax Act* with regard to the Styles Property and, if so, can the decline in the fair market value of that property be claimed as a business loss in each of the 1983 and 1984 taxation years?

128 V. *Analysis*

129 A. Introduction

130 In order for the appellant to prevail, he must satisfy this Court that the following two requirements are met:

> 1. He must demonstrate the he is eligible for the valuation scheme proposed by subsection 10(1) of the Act. In order to prove such eligibility, the appellant must show that his real estate transaction regarding the Styles Property was a "business" pursuant to the definition set out in subsection 248(1) of the Act.

and

> 2. Given that subsection 10(1) and Regulation 1801 simply create a valuation scheme and not an automatic taxation deduction, the appellant must show that he can, under the applicable principles and provisions of the *Income Tax Act*, utilize the subsection 10(1) valuation scheme in order to calculate and claim a business loss under section 9 of the Act. This involves an inquiry into whether the appellant is the kind of businessperson intended to be covered by subsection 10(1) and, furthermore, whether a single piece of property that realizes no income or loss can, pursuant to subsection 248(1) of the Act, be properly considered to be "inventory" for the taxation years in question.

131 Although the appellant's initiative is in fact a "business", in my opinion the Styles Property is not "inventory" under subsection 248(1) for the taxation years in question. Persons in the position of the appellant cannot utilize the subsection 10(1) valuation scheme to deduct fair market depreciations in their "inventory" as business losses in years in which that "inventory" is not sold. I shall focus much of my attention on this latter consideration given that it raises important issues touching upon the interpretation of taxation legislation generally.

132 B. *Are the Losses Deductible under Section 9 in the Years in Question?*

133 As I have already outlined, the appellant must first satisfy this Court that (a) his speculative land deal constituted a "business", namely an adventure or concern in the nature of trade; and (b) that, under the governing principles and provisions of the *Income Tax Act*, the raw land constituted "inventory" under subsection 248(1) for the taxation years in question, namely 1983 and 1984.

134 (i) *Is the Appellant's Venture a Business?*

135 The relevant definition of "business" is found in subsection 248(1):

> "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever *and except for the purposes of paragraph 18(2)(c), an adventure or concern in the nature of trade* but does not include an office or employment;

[Emphasis added.]

136 Of all of the items included in the definition of "business", the one bearing the closest relationship with the appellant's initiative is the "adventure in the nature of trade". The question that must now be answered is whether the appellant's real estate venture in fact meets the judicial interpretation on what constitutes an "adventure in the nature of trade". Since this point is not seriously challenged by the respondent, I shall very quickly review the authorities on this point.

137 Perhaps the best place to start is Interpretation Bulletin IT-459 (September 8, 1980), which synthesizes the Canadian and U.K. jurisprudence on the definition of an "adventure or concern in the nature of trade" (such as, for example, *Californian Copper Syndicate v. Harris* (1904), 5 T.C. 159(Ex., Scot.); *Edwards v. Bairstow*, [1956] A.C. 14, [1955] 3 All E.R. 48 (U.K.H.L.); *Irrigation Industries Ltd. v. Minister of National Revenue*, [1962] S.C.R. 346, C.T.C. 215, 62 D.T.C. 1131; and *Regal Heights Ltd. v. Minister of National Revenue*, [1960] S.C.R. 902, [1960] C.T.C. 384, 60 D.T.C. 1270). There are several elements used to determine an "adventure in the nature of trade". These include:

> (i) The taxpayer's conduct: the consideration here is whether the taxpayer's actions in regard to the property in question were essentially what would be expected of a dealer in such a property.
>
> (ii) The nature of the property: sometimes an inference of "trading" will emerge from the type of property and whether it appears that its purchase cannot be justified by reasons that the property would procure personal enjoyment or a return to the purchaser other than arising from its disposition.
>
> (iii) The intention of the taxpayer and the manner in which the property was purchased. Evidence that an attempt was made to sell the property shortly after its acquisition reveals such a trading intention.
>
> (iv) It is clear that the mere fact that the transaction was a single or isolated one is neither determinative nor prohibitive of a finding that the initiative was in fact an adventure in the nature of trade.

138 See also E. C. Harris, *Canadian Income Taxation* (1979), at page 170; B. J. Arnold, T. Edgar and J. Li, eds., *Materials on Canadian Income Tax* (10th ed. 1993), at page 303 *et seq*.

139 In the case at bar, the factual record reveals that the Styles Property was acquired for the purpose of reselling it for financial gain. There was a purchase and an intention to derive a profit therefrom. This anticipated profit was planned to be given partly to charity and partly divided on a *pro rata* basis among the investors, including the appellant. The type of property in question was a parcel of raw land, often the subject matter of real estate trading ventures. Although the actual transaction was a single one, it does not appear that the individuals involved, at least certainly not the appellant, were inexperienced; quite the contrary: the evidentiary record reveals a sophisticated level of business correspondence among the parties to the arrangement in which it was obvious that they were treating it as a trading adventure. For these reasons, I find that the real estate deal was an adventure in the nature of trade and, consequently, a "business" under subsection 248(1) of the *Income Tax Act.*

140 However, on another note, I, with respect, disagree with the trial judge (and Marceau J.A.) that subsection 10(1) of the Act does not apply to a business such as the appellant's which is an adventure in the nature of trade. Nowhere in subsection 248(1) is it indicated that something determined to be a "business" because it is an "adventure" is exempt from the definition of "business" for any provisions of the Act other than ss. 18(2)(c), 54.2, 95(1) and 110.6(4)(f). (Sections 54.2 and 110.6(4)(f) were added to the definition in 1988 and section 95(1) in 1995.) As noted by the Tax Court of Canada in *Bailey*, *supra*, at page 2459 (D.T.C. 1328):

> The definition of "business" in subsection 248(1) includes "an adventure or concern in the nature of trade". It is the word "business" so defined that is used in subsection 10(1). When Parliament does not intend an adventure or concern in the nature of trade to be included in the word "business" it provides for the exception in the substantive definition of "business"; for example, the word "business" used in paragraph 18(2)(c) does not include an adventure or concern in the nature of trade.....

141 Having found that the appellant's undertaking comes within the definition of "business", the next question to decide is whether the appellant is entitled to claim the decline in his land value under section 9. This brings us to the principles and jurisprudence regarding that section of the Act.

142 (ii) *The Governing Principles of Profit and Loss under Section 9 of the Act: Can the Appellant Use the Section 10(1) Valuation Scheme to Deduct as a Business Loss the Decline in the Fair Market Value of the Property?*

143 At the outset, I underscore (as did Rouleau J. at trial) that neither subsection 10(1) nor Regulation 1801 provides a deduction from income nor do they mandate that any person with inventory can deduct any loss (on fair market value) arising therefrom. They simply give some direction as to how the valuation procedure should take place once ordinary commercial principles establish whether a business loss should be claimed under section 9.

144 As noted by Urie J.A. in *The Queen v. Cyprus Anvil Mining Corp.*, [1990] 1 C.T.C. 153, 90 D.T.C. 6063 (F.C.A.), at page 158 (D.T.C. 6067):

> Subsection 10(1) and Regulation 1801.....[are].....provision[s] of general application conferring the possibility for a taxpayer to make a choice of his method of inventory valuation..... Computation of income, on the other hand, must relate to the taxpayer's taxation year. I do not think, therefore, that it can be said that subsection 10(1) is a specific provision overriding the general one, subsection 9.
>
> .....[subsection 10(1)] must be construed within the context of the Act and be harmonious with its scheme and with the object and intention of Parliament.

145 Under section 9 of the Act, a taxpayer is required to recognize profit from a business in a particular year as income. Profit (or loss) normally equals the proceeds of sales less the cost of those sales. I underscore that computation of profit and loss under section 9 runs independently from the determination whether a taxpayer is eligible for the subsection 10(1) valuation procedure. Inventory valuation is not an expense and is not in itself deductible as such: *Shofar*, *supra*, at page 355 (C.T.C. 435-436, D.T.C. 5349-5350) Consequently, this Court must thus determine whether, in this case, the appellant is entitled to use the subsection 10(1) procedure to compute his losses for the 1983 and 1984 taxation years and, then, whether he can deduct these from his proceeds from the same source, which were nil in both years.

146 This determination must be made with an eye to the principles that govern the computation of profit; in fact, I find these principles are largely dispositive of the instant appeal. As held by Thorson P. in *Daley v. Minister of National Revenue*, [1950] C.T.C. 254, 50 D.T.C. 877 (Ex. Ct.), at page 880 (D.T.C. 260):

> [T]he first inquiry whether a particular disbursement or expense is deductible.....[is] whether its deduction is permissible by the ordinary principles of commercial, trading or accepted business and accounting practice.

147 Cartwright J., in *Dominion Taxicab Association v. Minister of National Revenue*, [1954] S.C.R. 82, C.T.C. 34, 54 D.T.C. 1020, was even less equivocal on this matter. He held (at page 85 (C.T.C. 37, D.T.C. 1021)):

> The expression "profit" is not defined in the Act. It has not a technical meaning and *whether or not the sum in question constitutes profit must be determined on ordinary commercial principles unless the provisions of the Income Tax Act* require a departure from such principles.

[Emphasis added.]

148 See also V. Krishna, *The Fundamentals of Canadian Income Tax* (4th ed. 1993), at page 275 *et seq.*; R. Huot, *Understanding Income Tax For Practitioners* (1994-95 edition), at page 299; and *Materials on Canadian Income Tax*, *supra*, at page 336 *et seq.*

149 Probably the key taxation principle relevant to the case at bar is the realization principle, which provides that, in the computation of income from an adventure in the nature of trade, gains or losses must be realized in order for them to be included in the computation of income for tax purposes: *Friedberg v. Canada*, [1993] 4 S.C.R. 285, 2 C.T.C. 306, 93 D.T.C. 5501. In *Minister of National Revenue v. Consolidated Glass Ltd.*, [1957] S.C.R. 167, [1957] C.T.C. 78, 57 D.T.C. 1041, Rand J. held at page 174 (C.T.C. 83, D.T.C. 1043):

> [H]ow can profits and gains be considered to have been made in any proper sense of the words otherwise than by actual realization? This [*sic*] is no inventory valuation feature in relation to capital assets..... The word "loss" in the context means absolute and irrevocable, finality. That state of things is realized upon a sale.....

150 In the case at bar, it is obvious that the "loss" that the appellant seeks to deduct in computing his 1983 and 1984 income had not been realized at that time since the properties had not been disposed of. In fact, no revenues were generated from the Styles Property in either 1983 or 1984. In a sense, in the applicable taxation years the "adventure" consisted only of a purchase. It was therefore not fully completed. Although insufficient to extract it from the definition of "business" under subsection 248(1), the fact that the adventure was only half-completed in 1983 and 1984 strikes at the heart of the computation of any business losses arising therefrom during those years.

151 Professor B.J. Arnold, in *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), remarks at page 333:

> One of the basic principles of income taxation is that appreciation or depreciation in the value of property is not taken into account in the computation of income until such appreciation or depreciation has been realized, usually by means of a sale.

152 The importance of this principle is reflected in the fact that, whenever the *Income Tax Act* permits deemed dispositions at fair market value without actual realizations, it does so narrowly and in a highly circumscribed manner: for example, when a taxpayer ceases to be a Canadian resident (section 48 (now repealed)), or upon death (section 70), or upon change of control (section 111). Exceptions from the realization principle are thus clearly stipulated and explicitly codified, unlike the exception upon which the appellant seeks to rely. For the most part, the Act does not recognize "unrealized" or "paper" gains or losses: *Krishna*, *supra*, at pages 278-79.

153 The respondent correctly notes, however, that the principle of realization in the computation of profit and loss is subject to an exception in the case of stock-in-trade: *Whimster & Co. v. Inland Revenue Commissioners* (1925), 12 T.C. 813(Ct. Sess., Scot.), at page 823, per Lord Clyde; *BSC Footwear Ltd. v. Ridgway (Inspector of Taxes)*, [1972] A.C. 544, 2 All E.R. 534 (U.K.H.L.). In Canada, this exception is presently codified in subsection 10(1) of the *Income Tax Act*: *Minister of National Revenue v. Irwin*, [1964] S.C.R. 662, C.T.C. 362, 64 D.T.C. 5227 (referring to the former version of subsection 10(1), subsection 14(2)). Such stock-in-trade can be valuated at the lower of cost and fair market value and, consequently, can permit a dealer therein to deduct unrealized losses through the cost of goods sold formula. The result of this principle is effectively to enable a business to increase its cost of goods sold and thus reduce its profits (or increase its losses) in a given year by the amount by which the market value of its inventory at the end of the year falls below the cost of that inventory. The effect of this is to permit a business to recognize as a loss the decline in the value of its inventory in the year in which this decline occurs as opposed to the year in which the inventory is actually sold. However, the commercial principles and jurisprudential authority underpinning the *Income Tax Act* do not recognize that this exception to the realization principle should operate for unsold single pieces of land that are held by adventurers in trade and alleged to be inventory. The situation of dealers in stock-in-trade is markedly different from that faced by a business adventurer such as the appellant. Whereas these dealers are engaged in the "carrying on of a business", the appellant has launched a single adventure. These dealers regularly purchase hundreds of goods which are quickly sold. Since there are many sales, over which it is impossible to keep track on an individual basis, an averaging formula is used and discrepancies are, over time, evened out: *BSC*, *supra*, at page 536. Such an averaging formula is required since it is not practicable for such dealers to determine their profit by looking at each individual item sold. In fact, in businesses where it is neither possible nor desirable to keep a running total of the cost of the goods being sold on a daily basis, the only feasible way to determine the cost of all the goods sold in an accounting period

is to add the value of the inventory on hand at the beginning of the period to the cost of the inventory purchased during the period and then subtract the value of the inventory on hand at the end of the period: *Krishna*, *supra*, at page 324.

154 This situation must be contrasted with that in which the appellant finds himself. The profit/loss from the Styles Property is readily ascertainable in the year of disposition. The piece of inventory is easily traceable. The importance of these considerations was underscored by Jackett C.J. in his decision in *Oryx Realty Corp. v. Minister of National Revenue*, [1974] C.T.C. 430, 74 D.T.C. 6352 (F.C.A.). Although the facts of *Oryx* are different from those in the appeal at bar, I find the following passage (at page 433 (D.T.C. 6354)) to be helpful to the present analysis:

> Gross trading profit for a taxation year may be obtained by adding together the profits of the various transactions completed in the year or by adding together the prices at which sales were effected in the year and deducting the aggregate of the costs of the various things sold. Either of such methods would be suitable for a business consisting of relatively few transactions. In the ordinary trading business, however, the practice, which has hardened into a rule of law, is that profit for a year must be computed by deducting from the aggregate "proceeds" of all sales the "cost of sales" [involving inventory].

155 Drawing from this decision, the respondent makes the following submission, which I fully endorse:

> The introduction of section 10 in the Act was intended only to recognize statutorily the rule that only "ordinary trading businesses" [not the appellant] could properly use the lower of cost or market rule. The section was not intended to extend the use of that rule to cases such as the present one where there is only a single transaction.

156 This legal interpretation has even woven its way into the prior jurisprudence of this Court. In effect, in *Irwin*, *supra*, Abbott J. remarked, in passing at page 665, that he was "doubtful whether..... the inventory provisions [presently subsection 10(1) and Regulation 1801].....are applicable in the circumstances of a case.....where the actual cost and sale price of each particular piece of property are well established". At the time these comments were *obiter dicta*, but I now treat them as an important part of the *ratio decidendi* of the instant appeal.

157 It is well accepted that adventurers do not "carry on" a business. As remarked by Jackett P. (as he then was) in *Tara Exploration and Development Co. v. Minister of National Revenue*, [1970] C.T.C. 557, 70 D.T.C. 6370 (Ex. Ct.), at page 567 (D.T.C. 6376), aff'd [1974] S.C.R. 1057, [1972] C.T.C. 328, 72 D.T.C. 6288 (S.C.C.):

> I have concluded that the better view is that the words "carried on" are not words that can aptly be used with the word "adventure". To carry on something involves continuity of time or operations such as is involved in the ordinary sense of a "business". An adventure is an isolated happening. One *has* an adventure as opposed to *carrying on* a business.

[Emphasis in original.]

158 Although an adventure in the nature of trade (just as a stock-in-trade retail establishment and other examples of "carried on" enterprises) are "businesses" under s. 248(1), I conclude that it is only persons who carry on a business who ought to be entitled to benefit from s. 10. This position is echoed in previous decisions of this Court: *Irwin*, *supra*, and *Shofar*, *supra*. In fact, in *Shofar*, Martland J., writing for a unanimous Court, held at page 354 (C.T.C. 435, D.T.C. 5349):

> [T]he practice, "hardened into a rule of law" in the computation of the profit *of a trading business* is to deduct from the aggregate proceeds of all sales the cost of sales computed by adding the value placed on inventory at the beginning of the year to the cost of acquisitions to inventory during the year, less the value of inventory at the end of the year.

[Emphasis added.]

159 For his part, Harris, *supra*, remarks at page 170 that, if the taxpayer had "a trading motivation, his gain or loss on the

transaction would be a business gain or loss". I highlight his use of the words "on the transaction": implicit in this terminology is the recognition that there be a purchase *and* a sale and that the proceeds arising therefrom be used to calculate the profit or loss flowing from that source and, in turn, be entered under section 9 in the year in which the trading venture is completed.

160 The appellant is concerned with the alleged unfairness resulting from the adoption of the respondent's interpretation. According to the appellant, the respondent's methodology would result in an inequitable situation in which a business, if it were to own 100 lots and sell one of these, would be eligible for the inventory "write down" and if it were to sell none it would not be so eligible. I do not see how the decision in the instant appeal would lead to such a result. It is clear that any profits or losses arising from that sale of the one piece of property actually sold could be included under section 9. However, the ability to deduct the fair market depreciation of the 99 unsold lots hinges not upon whether or not one lot is sold but, rather, upon the determination whether "ordinary commercial principles" would recognize the holding of 100 lots (in which only one was sold) as tantamount to "stock-in-trade". If so, then such a fictional taxpayer might very well be entitled to claim any decline in fair market value as a business loss. But this is a hypothetical question for a future court to decide. It does not arise upon the facts of this case. This appeal only involves one transaction, this being very far removed from the level of continuous activity at which the cost of goods sold formula is geared to operate.

161 What does arise in this case is my observation that, if adopted, the appellant's argument would have a wide range of undesirable ramifications from a policy standpoint. It would create a situation in which any property acquired for the purpose of resale at a profit (that is as part of an adventure in the nature of trade), outside of the normal carrying on of a business (shares, art, stamps, gold, land, antiques), would constitute a source of income in each year, thus requiring, in the absence of the sale of the property, an annual computation of profit or loss in which, necessarily, a valuation of the fair market value of the property would have to be undertaken. Moreover, this loss could be carried over to offset any actual business profits regardless whether the loss was actually realized during the year. It would thus only be in cases of capital property that the realization principle would continue to operate. I have serious doubts that this was the intent of the drafters of the exception to the realization principle contained in subsection 10(1) and Regulation 1801. I also doubt that it was their intention to oblige the owners of such a vast array of property to make yearly appraisals of the worth of that property for taxation purposes; moreover, given that these calculations would merely be appraisals, significant uncertainty and unreliability in the computation of tax liability might very well arise.

162 The appellant's interpretation would also undermine the matching principle underpinning section 9 of the Act: *Neonex International Ltd. v. The Queen*, [1978] C.T.C. 485, 78 D.T.C. 6339 (F.C.A.) (for an affirmation of the importance of this principle and an invalidation of an attempt to claim expenses in a year in which they were not incurred); see also *West Kootenay Power and Light Co. v. Canada*, [1992] 1 C.T.C. 15, 92 D.T.C. 6023 (F.C.A.). This principle emphasizes that receipts and expenditures which produce the net income are to be properly "matched" in the same time period: *Krishna*, *supra*, at page 279. The importance of the "match" flows from the critical role timing considerations play in taxation matters. In the case of an adventure in the nature of trade, the profit or loss from the transaction is computed at the time the adventure is effected, not in any year prior to the settlement: see *Tobias v. The Queen*, [1978] C.T.C. 113, 78 D.T.C. 6028 (F.C.T.D.). Instead, the adoption of the appellant's interpretation would permit a wide array of these "adventures in the nature of trade" to expense the costs (or a portion thereof) in one taxation year while recognizing the revenues in another year.

163 As was proposed by the respondent before this Court:

> It is submitted that it is settled law that in the case of an adventure in the nature of trade, the profit or loss from the transaction is computed at the time the adventure is settled and no computation of profit or loss is necessary or appropriate in any year prior to the settlement.....
>
> In the case of isolated transactions, the use of the lower of cost or market method typically would significantly distort the profit from such transactions. For example, where the sale of a particular piece of property does not occur for several years, the taxpayer would be permitted to deduct over the several years losses in respect of unrealized depreciations in value of the property. By contrast, with ordinary trading businesses, the stock-in-trade of the particular business typically turns over in the next fiscal period and, hence, the anticipated losses deducted at the end of any one year are more likely (because of the continuing sales activity of the trading business) to be in fact realized in the next year. The distortion of profit in such cases is therefore likely to be substantially less than in the case of an adventure in the nature

> of trade where the realization of the profit or loss may not take place for a number of years.

164 This distortion can, for those with profits and losses emanating from other non-related sources, effectively permit individuals to avoid tax through a careful balancing of their varied isolated investments. I cannot accept that this is conduct Parliament intended to encourage.

165 I also find that the appellant's interpretation undermines broad principles of symmetry. If we permit the appellant to deduct the losses he claims he is entitled to, then, if the taxation system is to remain symmetrical, business gains on unrealized "inventory" would also have to be filed. This is not the case. I am aware of the fact that the appellant points out that, if in a year subsequent to acquisition but prior to disposition, a property which in a previous year fell in value then increases in value, any increase up to original cost will have to be taken into account in the income calculation. However, I observe that no unrealized increase beyond original cost is ever taxed, thereby giving rise to an asymmetry since any drop below cost would, on the appellant's interpretation, immediately give rise to a business loss.

166 It was submitted before this Court that denying the appellant the benefit of subsection 10 impinges upon the principle of conservatism which constitutes a principal element of the generally accepted accounting procedures used to calculate profit/loss under section 9. In response, I note that this Court, in *Symes v. Canada*, [1993] 4 S.C.R. 695, [1994] 2 C.T.C. 40, 94 D.T.C. 6001, at page 723 (D.T.C. 6009), held that it is more appropriate in the taxation context to rely upon well-accepted commercial principles given that strict adherence to accounting conservatism might not be consonant with the purposes of the taxation system. This conclusion is echoed in the academic context. *Arnold*, *supra*, at page 332-33, concludes:

> [T]he lower of cost and fair market value rule.....is a product of the conservatism of accounting practice, which finds an understatement of income preferable to an overstatement. There is some justification for this conservatism for purposes of financial accounting; however, substantial doubt has been raised as to the validity of the lower of cost and fair market value rule even for financial accounting purposes. For tax purposes, there is no justification for either the lower of cost and fair market value rule or the "all fair market value" rule for the valuation of inventory.

167 It is for this reason that the lower of cost and market method of inventory valuation contained in subsection 10(1) and Regulation 1801 is recognized as an exception limited only to stock-in-traders. I see no reason to extend its reach beyond this group, and certainly not to adventures in the nature of trade. The applicable method of accounting within the taxation context should be that which best reflects the taxpayer's true income position: *Ken Steeves Sales Ltd. v. Minister of National Revenue*, [1955] C.T.C. 47, 55 D.T.C. 1044 (Ex. Ct.); *Publishers Guild of Canada Ltd. v. Minister of National Revenue*, [1957] C.T.C. 1, 57 D.T.C. 1017 (Ex. Ct.), at pp. 1026 and 1030; *Associated Investors of Canada Ltd. v. Minister of National Revenue*, [1967] C.T.C. 138, 67 D.T.C. 5096 (Ex. Ct.), at pages 5098-99; and *Maritime Telegraph and Telephone Co. v. Canada*, [1991] 1 C.T.C. 28, 91 D.T.C. 5038 (F.C.T.D.). In the case at bar, the appellant's income position is best reflected by not declaring the decline in the fair market value of the Styles Property as a business loss in 1983 and 1984, but instead waiting until the year of disposition to enter any such losses, this being 1986.

168 The appellant further alleges that the respondent's interpretation of the expense scheme for inventory would lead to a mathematical absurdity. It is submitted that in determining the raw land to be inventory yet in insisting that the inventory valuation can only be done in the year of disposition, the Federal Court of Appeal has created a situation in which the real loss suffered by the taxpayer can never be realized. I have two responses to this line of argument.

169 First, the problem is entirely obviated if the land is not held to be "inventory" or the taxpayer is precluded from utilizing the inventory valuation scheme for the purposes of section 9; in such a scenario, the loss in the year of disposition is simply calculated by subtracting the proceeds of the disposition from the original amount disbursed to purchase the property (and vice versa for profits). Second, upon closer scrutiny, it is the appellant's interpretation which yields mathematical improbabilities: it would recognize a negative cost of goods sold, something of a surprise, in a year in which there were in fact no sales, an even greater surprise. Furthermore, it would seem that a negative cost of goods sold would render askew the entire deemed realization formula contained within subsection 10(1).

170 In closing, I emphasize my discomfort with a ruling that would permit speculative investments constituting

"adventures in the nature of trade" to be written down to the lower of cost and market value in years in which their value declines yet they are not sold. This discomfort appears to be shared by the drafters of the Act as well as the authors of much of the jurisprudence and academic commentaries dealing with the computation of profit under section 9 of the Act. Both the application of subsection 10(1) as well as the definition of "inventory" must be very sensitive to these considerations.

171 (iii) Is the land "inventory"?

172 With an eye to the aforementioned principles of profit and loss within the context of income taxation, I turn to the question whether the Styles Property could be considered to be "inventory". Subsection 248(1) defines "inventory" as follows:

> "inventory" means a description of property *the cost or value of which is relevant in computing a taxpayer's income from a business for a* taxation year*;*

[Emphasis added.]

173 In my mind the key element of this definition is that the property, in order to be properly classified as "inventory", must have a cost or value which, in the particular taxation year in question, bears some relevance to the amount of the taxpayer's income (profit or loss) for that particular year. Under the principles of tax accounting, the value of inventory bears no direct relationship with profit/loss. Rather, profit or loss is calculated by subtracting the cost of sales (the value of the inventory at the beginning of the year plus the cost of acquisitions, less the value of the inventory at the end of the year) from the proceeds of sale: *Shofar*, *supra*. Thus, the value of inventory (which, according to subsection 10(1) can be based on cost or fair market value) only plays a part in calculating the cost of sales. Ostensibly, in order for there to be "costs of sales", there must have been a sale in the first place. Once again, the realization principle is triggered.

174 In 1983 and 1984 there was no sale of the land. Nor was there a purchase. The land was not involved in any transaction whatsoever. To this end, the drop in the fair market value of the land had no effect whatsoever on the income of the appellant. It may have affected the appellant's wealth or the size of his asset portfolio, but neither of these constitute his "income" for the taxation years in question. In a sense, I find that the appellant has neglected the importance of the phrase "for a taxation year" inserted in the definition in subsection 248(1).

175 In fact, at paragraph 7(d) of his factum, the appellant submits that his "interest in the Styles Property was inventory because the cost or value of that property is relevant in determining his income from a business". Of course, over the lifetime of the business, the purchase of that property might very well have a significant impact on that business's income. But the *Income Tax Act* does not levy funds based upon the lifetime of a business. Rather, taxation is organized in discrete yearly units; the ability to carry over deductions/inclusions from one year to the other is highly circumscribed. This rationale appears to have infused the definition of "inventory" since, in order to fit within this definition, there must be *relevance* to the income *for that* taxation year. This is plainly not the case in the appeal at bar. In short, the appellant should be able to claim, under the ordinary tracing formula (proceeds less the purchase cost), the drop in the value of the land in the year in which the property is disposed of, but not in years where the property remains dormant.

176 At this juncture, it must be remembered that the Act's definition of "inventory" is not identical to the definition proposed for accounting or real estate purposes. After all, as this Court concluded in *Symes*, *supra*, at page 723, the *Income Tax Act* is motivated by the purpose of raising public revenues and, as such, differs from the goals of the accounting world. I note in this regard that the Canadian Institute of Chartered Accountants has defined "inventory" as including, *inter alia*, "[i]tems of tangible property which are held for sale in the ordinary course of business": Terminology *for Accountants* (3rd ed. 1983), at page 81. Similarly, a publication entitled *Canadian Institute of Public Real Estate Companies Recommended Accounting Practices for Real Estate Companies* (November 1985) states that land currently held for sale and land held for future development and sale is inventory. Under both of these definitions, the appellant's land would likely be included as "inventory". But the *Income Tax Act* has taken a very different approach. It has expressly codified (and hence, in cases of conflict, overruled the principles that underlie the accounting or commercial worlds) a definition that clearly connects the property to the yearly income and, in the appellant's case, this link is missing for the taxation years 1983 and 1984. So, too, is the principal condition precedent to the applicability of the inventory valuation scheme, namely that the taxpayer be a stock-in-trader.

177 The appellant relies on a series of cases in support of the proposition that even undisposed property which is the subject matter of an adventure in the nature of trade can constitute inventory and, thus, should its fair market value drop, the taxpayer is entitled to register that unrealized decline in value as a business loss for that year: *Bailey*, *supra*; *Weatherhead*, *supra*; *Van Dongen*, *supra*; and *Skerrett v. Minister of National Revenue*, [1991] 2 C.T.C. 2787, 91 D.T.C. 1330 (T.C.C.). I note in passing that the Federal Court of Appeal has never heard any of these cases; in fact, the only Federal Court of Appeal authority in this area of the law is its decision in the case at bar. With respect, I choose not to follow this line of authority. I note that in none of these decisions was the meaning of "inventory" under subsection 248(1) properly placed within the context of the principles of profit and loss (developed under section 9 and the predecessor sections thereto) discussed *supra* which I have found to be of crucial importance.

178 For the reasons discussed above, I find the distinction drawn by Rouleau J. in the instant appeal between taxpayers holding one or a few items of inventory (such as the appellant) and those with thousands of items (a retail store) to be instructive. Retail companies do not purchase items and then retain them for years should the market turn against them. Items are generally purchased in bulk and then sold with quick turnaround. To this end, in such a situation it can be safely assumed that there is a relation between the value of the goods claimed to be inventory and the overall income of the taxpayer for the year in question (thus the definition of "inventory" would be met and subsection 10(1) would be applicable), even though in each individual case it might be impossible to trace the actual moment when the item in question was sold. It is consequently appropriate to rely upon averaging calculations. Thus, the "cost of sales" formula yields constructive and practical results; on the other hand, in a business with relatively few transactions such as the appellant's, the cost of sales formula "does not reflect the true picture of [the] business' income position" (per Rouleau J., at page 300 (D.T.C. 6251)).

179 VI. Conclusions and Disposition

180 To summarize, I arrive at the following conclusions:

1. The appellant's initiative is a "business" pursuant to the definition thereof in subsection 248(1) of the Act since it amounts to an adventure in the nature of trade.

2. The exception to the realization principle carved out by subsection 10(1) and Regulation 1801 is not a method of valuation the benefit of which should accrue to adventurers such as the appellant. Instead, this exception is to permit cost of sale inventory valuations only for dealers in stock-in-trade, these persons necessarily being engaged in the "carrying on of a business".

3. The land is not inventory for the taxation years in question under the *Income Tax Act*'s definition (subsection 248(1)) since it bears no relation whatsoever to the appellant's "business income" for tax purposes in those years. This conclusion is mandated by the principles underlying section 9. Consequently, the appellant cannot benefit from the application of the valuation system established by subsection 10(1).

181 I would therefore dismiss the appeal with costs. It should, however, be noted that, by rejecting this taxpayer's appeal, this Court is not denying him the right to claim any losses (that are otherwise available) on the Styles Property as business losses. Rather, this Court is simply ensuring that these losses can only be recorded on his 1986 tax return, the only year in which they actually relate to his income.

182 Finally, with respect to my colleague Major J.'s reasons, I have the following comments. First, I do not dispute that the *Income Tax Act* is based on a system that recognizes only two broad categories of property, inventory or capital property. In my opinion, the analysis I have set out above is not inconsistent with this basic division. I agree that the Styles Property could be viewed as inventory in the year of disposition. In fact, I would note my disagreement with the trial judge and Marceau J.A. about the applicability of the inventory valuation method embodied in subsection 10(1) to an adventure in the nature of trade. Subsection 10(1) applies to a business which includes an adventure in the nature of trade. However, the real question is not whether the Styles Property is inventory, or whether subsection 10(1) is applicable, but whether the appellant is entitled to claim the decline in value under section 9, the defining section on business income. The analysis turns not upon whether the property is inventory, but upon determining the most appropriate method for determining a taxpayer's profit. In

the case of an adventurer in the nature of trade, who is not carrying on business, and who has made no disposition, it is not appropriate to determine profit using the inventory valuation method, for the reasons I have outlined above.

183 Second, I have difficulty with my colleague's reasoning with respect to the difference between the phrasing "for the taxation year", and "for a taxation year". Income is determined under the Act each year, and the characterization of property can change from year to year. I fail to understand how property that has received a particular characterization in one year *ipso facto* receives that characterization in another, or all other, years.

184 Third, I disagree with my colleague that the inventory valuation method is an anachronism in this age of computer technology; rather, it is my view that the method is still a vital tool for businesses with significant and complex inventories.

Appeal allowed.

TAB 9

University Health Network v. Ontario (Minister of Finance), [2001] O.J. No. 4485 (ONCA)

Most Negative Treatment: Not followed
Most Recent Not followed: Sunnybrook & Women's College Health Sciences Centre v. Ontario (Minister of Finance) | 2002 CarswellOnt 3433 | (Ont. S.C.J., Jun 6, 2002)

2001 CarswellOnt 4072
Ontario Court of Appeal

University Health Network v. Ontario (Minister of Finance)

2001 CarswellOnt 4072, [2001] O.J. No. 4485, [2001] O.T.C. 337, 110 A.C.W.S. (3d) 146, 151 O.A.C. 286, 2002 D.T.C. 6817, 208 D.L.R. (4th) 459

UNIVERSITY HEALTH NETWORK (formerly TORONTO GENERAL HOSPITAL, TORONTO WESTERN HOSPITAL and ONTARIO CANCER INSTITUTE, c.o.b. as PRINCESS MARGARET HOSPITAL) (Applicant / Respondent in Appeal) and HER MAJESTY IN RIGHT OF ONTARIO (BY HER REPRESENTATIVE, THE MINISTER OF FINANCE) (Respondent / Appellant)

Laskin J.A., Feldman J.A. and Simmons J.A.

Heard: September 5, 2001
Judgment: November 20, 2001
Docket: CA C35847

Proceedings: reversing (2001), 2001 G.T.C. 3498, 2001 CarswellOnt 98 (Ont. S.C.J.)

Counsel: *Lynn Tosolini*, for Appellant
Bernie McGarva, *Louise Summerhill*, for Respondent in Appeal

Subject: Civil Practice and Procedure; Tax — Miscellaneous; Provincial Tax

Related Abridgment Classifications

Health law

IV Regional matters
IV.1 Hospitals
IV.1.g Liability of hospital
IV.1.g.vi Miscellaneous

Tax

V Provincial taxation
V.9 Ontario
V.9.b Sales tax
V.9.b.iii Exemptions

2001 CarswellOnt 4072, [2001] O.J. No. 4485, [2001] O.T.C. 337, 110 A.C.W.S. (3d) 146...

Headnote

Health law --- Hospitals — Miscellaneous issues

Taxation --- Provincial and territorial taxes — Ontario — Sales tax — Exemptions

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R. v. Black & Decker Manufacturing Co. (1974), 15 C.C.C. (2d) 193, [1975] 1 S.C.R. 411, 13 C.P.R. (2d) 97, 43 D.L.R. (3d) 393, 1 N.R. 299 (S.C.C.) — referred to

Shell Canada Ltd. v. R., *(*sub nom. *Shell Canada Ltd. v. Canada)* [1999] 3 S.C.R. 622, *(*sub nom. *Shell Canada Ltd. v. Canada)* 178 D.L.R. (4th) 26, 99 D.T.C. 5669 (Eng.), 99 D.T.C. 5682 (Fr.), *(*sub nom. *Minister of National Revenue v. Shell Canada Ltd.)* 247 N.R. 19, [1999] 4 C.T.C. 313 (S.C.C.) — referred to

Smith v. Humbervale Cemetery Co. (1915), 33 O.L.R. 452, 22 D.L.R. 773 (Ont. C.A.) — referred to

Toronto Transit Commission v. Ontario Regional Assessment Commissioner, Region No. 9 (1994), 23 M.P.L.R. (2d) 66, 1994 CarswellOnt 621 (Ont. Gen. Div.) — referred to

University of Windsor v. Ontario Regional Assessment Commissioner, Region No. 37 (1992), 94 D.L.R. (4th) 328 (Ont. Gen. Div.) — referred to

Statutes considered:

Assessment Act, R.S.O. 1990, c. A.31
s. 3 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
s. 179(b) — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 186 — referred to

Cancer Act, R.S.O. 1990, c. C.1
Pt. II — referred to

s. 29 — referred to

Corporations Act, R.S.O. 1990, c. C.38
Generally — referred to

s. 23 — referred to

s. 113(1) — referred to

Interpretation Act, R.S.O. 1990, c. I.11
s. 14(1)(c) — referred to

Retail Sales Tax Act, R.S.O. 1990, c. R.31
Generally — referred to

s. 2 — referred to

s. 2(1) — referred to

s. 7 — referred to

s. 7(1) ¶ 38 — referred to

Succession Law Reform Act, 1977, S.O. 1977, c. 40
s. 52 — referred to

Sunnybrook and Women's College Health Sciences Centre Act, 1998, S.O. 1998, c. 12
Generally — referred to

s. 21(1) — referred to

Sunnybrook Hospital Act, 1966, S.O. 1966, c. 150
Generally — referred to

s. 10(3) — referred to

Toronto General Hospital Act, R.S.O. 1937, c. 396
Generally — referred to

s. 12 — referred to

Toronto Hospital Act, 1986, S.O. 1986, c. 36
Generally — referred to

s. 2(1) — referred to

s. 4(3) — considered

s. 4(3)(a) — considered

s. 17 — referred to

Toronto Hospital Act, 1997, S.O. 1997, c. 45
s. 2(1) — referred to

s. 3(1) — considered

s. 15 — referred to

s. 16 — referred to

Toronto Western Hospital Act, 1942, S.O. 1942, c. 59
Generally — referred to

s. 14 — referred to

Western Hospital of Toronto, Act to incorporate the, S.O. 1899, c. 118
Generally — referred to

Regulations considered:

Retail Sales Tax Act, R.S.O. 1990, c. R.31
Definitions, Exemptions, Forms and Rebates, R.R.O. 1990, Reg. 1012

Generally

APPEAL by Minister from judgment reported at 2001 CarswellOnt 98, 2001 G.T.C. 3498 (Ont. S.C.J.), granting hospital association's application for, inter alia, declaration that hospital was exempt from duty to pay provincial retail sales tax.

***Laskin J.A.*:**

A. INTRODUCTION

1 The question on this appeal is whether the respondent hospital, the University Health Network ("UHN") is exempt from paying retail sales tax. It is a difficult question of statutory interpretation.

2 UHN is an amalgamation of the Ontario Cancer Institute, better known as the Princess Margaret Hospital, ("OCI") and The Toronto Hospital. The Toronto Hospital itself was an amalgamation of Toronto General Hospital ("TGH") and Toronto Western Hospital. The enabling statutes of the three individual hospitals - OCI, TGH and Toronto Western - each contained an express tax exemption. These statutes were repealed on amalgamation. Neither of the two amalgamation statutes contains an explicit tax exemption provision. Each, however, contains a "continuation of rights" clause providing that all rights of the amalgamating corporations become the rights of the amalgamated corporation. Relying on these clauses, Rivard J. granted UHN's application for a declaration that neither amalgamation nullified the tax exemption granted to the three hospitals.

3 The Minister of Finance appeals. His appeal raises two questions. First, is a tax exemption a "right" under the continuation of rights clauses in the amalgamation statutes? If so, second, does that right continue after the repeal of the statute in which the express tax exemption was granted? Although I think it likely that the tax exemptions in issue in this case are "rights", it is unnecessary to finally decide this first question because I would answer the second question "no". I would therefore allow the Minister's appeal and dismiss UHN's application.

B. RELEVANT LEGISLATION

4 I will briefly outline the statutes and statutory provisions relevant to this appeal.

(a) TGH, Toronto Western and OCI

5 TGH, Toronto Western and OCI were each incorporated by a special act of the Legislature. TGH was first incorporated in 1847. Subsequent amendments to its enabling statute were consolidated in *The Toronto General Hospital Act*, R.S.O. 1937, c. 396 (the "TGH Act").

6 Toronto Western was first incorporated under *An Act to incorporate the Western Hospital of Toronto* in 1899. Subsequent amendments to that Act were incorporated in *The Toronto Western Hospital Act, 1942*, S.O. 1942, c. 59 (the "Toronto Western Act").

7 The Ontario Cancer Institute was founded in 1952 and established under Part II of the *Cancer Act*, R.S.O. 1990, c. C.1.

(b) The Express Tax Exemptions

8 The TGH Act, the Toronto Western Act and the *Cancer Act* each contained a broad tax exemption.

9 Section 12 of the TGH Act provided:

> 12. The building and land of and attached to or otherwise *bona fide* used in connection with and for the purposes of the hospital, so long as such buildings and land are actually used and occupied for the purposes of the hospital, and the personal property of the Board shall be exempt from all taxation, including school rates or taxes.

10 Section 14 of the Toronto Western Act provided:

> 14. The buildings and land of and attached to or otherwise *bona fide* used in connection with and for the purpose of the Hospital, so long as such buildings and land are actually used and occupied for the purpose of the Hospital and the personal property of the Hospital shall be exempt from all taxation including school rates and taxes.

11 Section 29 of the *Cancer Act* provided:

> The real and personal property, business and income of the Institute are not subject to taxation for municipal or provincial purposes.

12 In *Ontario Cancer Institute v. Ontario (Minister of Revenue)* (1997), 150 D.L.R. (4th) 351 (Ont. Gen. Div.), Lederman J. held that s. 29 of the *Cancer Act* was broad enough to exempt OCI from paying retail sales tax. On this appeal, the Minister accepts that s. 12 of the TGH Act and s. 14 of the Toronto Western Act were also broad enough to exempt the TGH and Toronto Western from paying retail sales tax. As I will discuss, however, all of these tax exemptions were repealed on the subsequent amalgamations.

(c) The Amalgamations

13 In 1986, TGH and Toronto Western were "amalgamated and continued as a corporation without share capital under the name of the Toronto Hospital" by s. 2(1) of the *Toronto Hospital Act, 1986*, S.O. 1986, c. 36. Section 17 of that amalgamation statute repealed the TGH Act and the Toronto Western Act. Therefore on the 1986 amalgamation, the tax exemptions granted to TGH and Toronto Western were abolished. And they were not expressly re-enacted in the amalgamation statute.

14 However, the amalgamation statute contained a continuation of rights clause on which the respondent relies. Section 4(3)(a) of the *Toronto Hospital Act, 1986* provided that the Toronto Hospital shall:

> (a) possess all the property, rights, privileges and franchises and shall be subject to all liabilities, contracts, disabilities and debts of Toronto General Hospital and Toronto Western Hospital existing on the day this Act comes into force[.]

15 Effective January 1, 1998, the Toronto Hospital and OCI were "amalgamated and continued as a corporation without share capital under the name of The Toronto Hospital" pursuant to s. 2(1) of the *Toronto Hospital Act, 1997*, S.O. 1997, c. 45. The amalgamated entity, The Toronto Hospital, later changed its name to the respondent UHN. Sections 15 and 16 of the amalgamation statute repealed both Part II of the *Cancer Act* (including the tax exemption in s. 29) and the *Toronto Hospital Act, 1986*. The express tax exemption in s. 29 of the *Cancer Act* was not re-enacted in the *Toronto Hospital Act, 1997*. However, the 1997 Act contains a continuation of rights clause. Section 3(1) provides:

> 3. (1) All rights, obligations, assets and liabilities of The Toronto Hospital and The Ontario Cancer Institute become the rights, obligations, assets and liabilities of the corporation and the corporation stands in the place of The Toronto Hospital and The Ontario Cancer Institute for all purposes.

The interpretation of this provision and s. 4(3) of the 1986 amalgamation statute lie at the heart of this appeal.

(d) **Retail Sales Tax**

16 The Minister of Finance is responsible for the administration and enforcement of the *Retail Sales Tax Act*, R.S.O. 1990, c. R. 31. The general obligation to pay retail sales tax is contained in s. 2 of the Act. Section 2(1) requires purchasers to pay an 8 per cent sales tax on tangible personal property purchased for consumption or use. Section 7 of the Act lists a series of exemptions. Section 7(1)38 applies to public hospitals. It[1] exempts public hospitals from paying sales tax on any equipment used for patient care. However, other goods purchased by hospitals, such as office furniture, kitchenware and accounting equipment, are subject to tax.

17 The public hospitals involved in this appeal - TGH, Western, OCI, Toronto Hospital and UHN - have all regularly paid retail sales tax on their purchases of tangible personal property for their consumption or use. UHN has now applied for a refund on the ground that the taxes were paid in error. Its application has not been processed pending the outcome of this litigation.

C. ANALYSIS

18 To succeed on this appeal, UHN must show that the tax exemptions granted to TGH, Toronto Western and OCI are rights under the continuation of rights clauses in the amalgamation statutes, and that these rights survived the repeal of the exemptions.

19 ***First Issue****: Are the tax exemptions "rights" under s. 4(3) of the Toronto Hospital Act, 1986 and s. 3(1) of the Toronto Hospital Act, 1997?*

20 A tax exemption is a right. A convenient definition of "right" is found in *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing, 1990) at p. 1324:

> a power, privilege, faculty, or demand, inherent in one person and incident upon another . . .
>
> A power, privilege, or immunity guaranteed under a constitution, statutes or decisional laws, or claimed as a result of long usage . . .

A tax exemption comes within this definition. See also Locke J. in *Canadian Pacific Railway v. Winnipeg (City)* (1951), [1952] 1 S.C.R. 424 (S.C.C.), at 488-89.

21 The more difficult question is whether a tax exemption is a "right" under s. 4(3) of the 1986 amalgamation statute and 3(1) of the 1997 amalgamation statute. On an amalgamation, two or more corporations "coalesce to create a homogeneous whole". See *R. v. Black & Decker Manufacturing Co.* (1974), 43 D.L.R. (3d) 393 (S.C.C.), at 400.[2] Continuation of rights clauses like ss. 4(3) and 3(1) are typically included on an amalgamation.[3] Their purpose is to ensure that a wide array of rights and liabilities belonging to the amalgamating corporations are transferred to the amalgamated entity. In *R. v. Black & Decker Manufacturing Co.* at p. 400, Dickson J. explained that a continuation of rights clause operates to "spell out in broad language amplification of a general principle", that amalgamating companies continue on amalgamation. He expanded on this principle at pp. 400-401:

> The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be.

22 The Minister submits that the rights and obligations in a continuation of rights clause include contractual or corporate rights, like leases or employment contracts, and even criminal liability, but not statutory rights, like the right to a tax exemption. What supports the Minister's position is the broad principle that tax exemptions must be expressly granted by statute. Holding that a continuation of rights clause includes the statutory right to a tax exemption may arguably conflict with this principle.

23 The contrary argument is that the Minister's interpretation of ss. 4(3) and 3(1) seems unduly narrow and inconsistent

with the recognized meaning of "right". Had the legislature intended to restrict the meaning of "right" and exclude the statutory right to a tax exemption, it could easily have said so. Moreover, what little authority exists supports a broad interpretation of "right" (or "obligation") in a continuation of rights clause to include statutory rights (or obligations). See *Ebco Industries Ltd. v. R.*, [2000] F.C.J. No. 24 (Fed. T.D.) and *Smith v. Humbervale Cemetery Co.* (1915), 33 O.L.R. 452 (Ont. C.A.). As I said earlier, it is unnecessary to decide whether the tax exemptions granted to TGH, Toronto Western and OCI were rights under the continuation of rights clauses in the two amalgamation statutes because even if they were, these rights ended when the statutes granting them were repealed.

***Second Issue*: Do the tax exemptions continue after their repeal?**

24 Before the applications judge, UHN sought a declaration that the amalgamations did not nullify the tax exemptions granted to TGH, Toronto Western and OCI. In seeking this declaration, UHN has mischaracterized the issue. The issue is not the effect of the amalgamations, but the effect of the repeal of the individual tax exemptions. The question the court must answer is whether the continuation of rights clauses preserve the tax exemptions for UHN, even though the statutes expressly authorizing these exemptions were repealed on the amalgamations.

25 UHN argues that the tax exemptions continue because ss. 4(3) and 3(1) of the amalgamation statutes incorporated the exemptions by reference before they were repealed. The repeal of the exemptions was irrelevant, argues UHN, because by the time of repeal ss. 4(3) and 3(1) had swept the exemptions into the bundle of rights continued on amalgamation. The Minister, however, contends that if the right to the tax exemptions was continued in the amalgamated entities, the Toronto Hospital and UHN, by ss. 4(3) and 3(1), it would continue only until the statutes explicitly authorizing these exemptions were repealed. As those statutes authorizing the exemptions were repealed on the effective dates of the amalgamations, the exemptions ended on those dates. Therefore the Minister contends that UHN must pay retail sales tax.

26 In my view, the Minister's position is correct. To resolve the competing positions of the parties, the court must interpret s. 4(3) and s. 3(1) of the amalgamation statute. The modern approach to statutory interpretation calls on the court to interpret a provision in its total context. The court's interpretation should comply with the legislative text, promote the legislative purpose and produce a reasonable and just meaning. In short, the court must take into account all relevant indicators of legislative meaning. See Ruth Sullivan, *Driedger on the Construction of Statutes* 3rd ed. (Toronto: Butterworths, 1994) at p. 131. Here, three related indicators of legislative meaning support the Minister's position.

27 First, it is a basic principle of statutory interpretation that "[w]hen a repeal takes effect, the repealed legislation ceases to be law and ceases to be binding or to produce legal effects." Sullivan, at p. 492. Holding that the tax exemptions continue after the repeal of the statutes granting them offends this principle.

28 Admittedly, there are exceptions to this principle, but none apply here. For example, a statutory right will survive the repeal if the right is already acquired or vested: *Interpretation Act*, R.S.O. 1990, c. I.11, s. 14(1)(c). Therefore, if OCI became entitled to a retail sales tax refund before its exemption was repealed, it could still claim the refund after repeal. The right to the refund would have been an acquired right. However, the general right to take advantage of a tax exemption is not an acquired or vested right.

29 Even if the statutory right is not an acquired right, the Legislature can still provide for its survival after repeal. The Legislature can do so by a specific transitional provision. See Sullivan, *supra*, at 526. An example of a specific transitional provision is s. 52 of the *Succession Law Reform Act 1977*, S.O. 1977, c. 40, which provided that a repealed law would continue to apply to the wills of those who died before a specified date. That section stated:

> The enactments repealed or amended by sections 50 and 51 continue in force as if unrepealed or unamended in respect of a death occurring before the 31st day of March, 1978.

Neither s. 4(3) nor s. 3(1) of the amalgamation statutes can be construed as a specific transitional provision permitting the tax exemptions to survive after their repeal. Instead the basic principle applies: after their repeal the tax exemptions ceased to produce legal effects.

30 One further example illustrates the application of the principle in this case. Section 3 of the *Assessment Act*, R.S.O. 1990, c. A. 31, exempts all public hospitals from paying real property tax.[4] If the Legislature were to abolish s. 3 tomorrow, one would expect that Ontario public hospitals would lose their entitlement to this exemption. However, to interpret s. 3(1) of the *Toronto Hospital Act, 1997* as effecting the survival of all the amalgamating hospitals' statutory rights as they existed on amalgamation would produce a very different result. Despite the repeal of s. 3, UHN would continue to benefit from this statutory right. It strains credulity to think that the Legislature intended this result.

31 The second indicator of legislative meaning flows from the principle of implied exclusion. Professor Sullivan explains this principle at p. 168:

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly.

32 In other words, legislative exclusion can be implied when an express reference is expected but absent. Tax exemptions must be expressly granted by statute and therefore if they are to be granted an express reference is expected. The absence of any express exemptions in the amalgamation statutes suggests that the Legislature did not intend to grant them.

33 The expectation of an express reference on which the principle of implied exclusion depends may be found by considering a related statute. See *Sullivan, supra*, at p. 172. Here a comparison of the 1986 and 1997 Toronto Hospital Acts with the provisions of the *Sunnybrook and Women's College Health Sciences Centre Act, 1998*, S.O. 1998, c. 12, is apt. That 1998 statute amalgamated Sunnybrook Hospital and Orthopaedic and Arthritic Hospital and transferred all the assets and liabilities of Women's College Hospital to the amalgamated entity. Sunnybrook Hospital was incorporated in 1966, S.O. 1966, c. 150. Section 10(3) of the 1966 statute exempted Sunnybrook from tax in terms similar to the exemptions granted to TGH, Toronto Western and OCI. The 1998 Sunnybrook amalgamation statute contains a continuation of rights provision similar to ss. 4(3) and 3(1) of the 1986 and 1997 Toronto Hospital Acts. But the Sunnybrook amalgamation statute also contains an explicit exemption from tax. Section 21(1) states:

> 21. (1) All real and personal property vested in the corporation and all lands and premises leased to or occupied by the corporation shall not be liable to taxation for provincial, municipal or school purposes, and shall be exempt from every description of taxation so long as the same are actually used and occupied for the purposes of the corporation.

34 The inclusion of an explicit tax exemption in the Sunnybrook amalgamation statute and the absence of an explicit exemption in either of the two amalgamation statutes under consideration in this appeal together indicate that the Legislature did not intend to continue the tax exemptions granted to TGH, Toronto Western and OCI.

35 The applications judge took the opposite view. He held at para. 25,

> I find it difficult to believe that the Ontario Legislature specifically intended to preclude the applicant from enjoying the same kind of tax benefits as Sunnybrook Hospital . . . I find it unreasonable to draw the inference that the failure to include a tax exemption provision in the 1986 and 1997 acts signifies the intention by the Legislature not to grant three of Toronto's major hospital the same tax benefits available to Sunnybrook and Women's College.

36 In my view, the applications judge read a tax exemption into the amalgamation statutes, an exemption which he recognized the Legislature had failed to provide. Doing so runs contrary to Supreme Court of Canada jurisprudence, which has warned against finding an unexpressed legislative intention in taxing provisions:

> This Court has consistently held that courts must therefore be cautious before finding within the clear provisions of the [Income Tax] Act an unexpressed legislative intention . . . Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act.

See *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 (S.C.C.), at 643. See also *Ludmer c. Ministre du Revenu national*, [2001] S.C.J. No. 58 (S.C.C.).

37 The obligation to pay taxes is an obligation created by statute, and any exemption from that obligation must also be explicitly expressed by statute. See *Toronto Transit Commission v. Ontario Regional Assessment Commissioner, Region No. 9*, [1994] O.J. No. 2004 (Ont. Gen. Div.); and *University of Windsor v. Ontario Regional Assessment Commissioner, Region No. 37* (1992), 94 D.L.R. (4th) 328 (Ont. Gen. Div.). A tax exemption cannot be read into legislation. For whatever reason - perhaps different negotiations - the Legislature continued the tax exemption in the Sunnybrook amalgamation statute but not in the Toronto Hospital amalgamation statutes.

38 Any apparent unfairness in this different treatment is diluted by considering the third indicator of legislative meaning, the statutes of other Ontario public hospitals. In addition to UHN, 21 other public hospitals in Ontario have been established by special act of the legislature. None of these other hospitals - including another major hospital in Toronto, the Hospital for Sick Children - was granted a tax exemption. They all pay retail sales tax. Viewed in this larger context I do not consider it unreasonable to infer that the Legislature intended that UHN not be exempt from paying retail sales tax.

39 UHN advanced two other arguments in support of its position. First, it pointed to the statements in Ontario Hansard at the time of the amalgamations in 1986 and 1997. The applications judge also relied on these statements, which pronounced that the amalgamations would provide better patient care, significant savings and a more efficient use of resources. The applications judge considered these general pronouncements at odds with an interpretation of the amalgamation statutes that would deprive UHN of the tax exemptions. I do not think that these pronouncements in Ontario Hansard assist in interpreting the continuation of rights clauses. Greater efficiency and cost savings are the intended results of any amalgamation. The statements in the Legislature say nothing about whether the tax exemptions were to continue.

40 UHN's other argument focuses on the express list of powers granted to the Toronto Hospital in the 1986 amalgamation statute and the absence of such a list in the 1997 amalgamation statute. UHN submits that the Legislature must have intended the continuation of rights clause - s. 3(1) of the *Toronto Hospital Act, 1997* - to incorporate the list of powers from the 1986 statute. Otherwise, UHN would have few powers to administer the hospital. And if s. 3(1) incorporated the list of powers, it must also have incorporated the tax exemption in s. 29 of the *Cancer Act*.

41 This submission, however, ignores s. 23 of the *Corporations Act*, which applies to all incorporated public hospitals in Ontario and which grants broad powers to these hospitals. A specific list of powers was not needed in the 1997 amalgamation statute. Moreover, one of the listed powers in the 1986 amalgamation statute - the hospital's power to invest its funds in securities authorized by by-law - was re-enacted in the 1997 amalgamation statute. This re-enactment would have been unnecessary if the continuation of rights clause had the effect UHN claims it has. For all these reasons I conclude that UHN is not exempt from paying retail sales tax.

D. CONCLUSION

42 I would allow the appeal, set aside the judgment of Rivard J. and dismiss UHN's application. The Minister is entitled to his costs of the application and the appeal. The Minister also sought declaratory relief, but as he did not bring a cross-application he is not entitled to such relief.

***Feldman J.A.*:**

43 I agree.

***Simmons J.A.*:**

44 I agree.

Appeal allowed.

Footnotes

[1] Together with R.R.O. 1990 regulation 1012.

[2] Section 113(1) of the *Corporations Act*, R.S.O. 1990, c. C.38 permits amalgamations of non-share capital corporations.

[3] Section 4(3) and s. 3(1) of the amalgamation statutes mirror the similar provisions in s. 179(b) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 and s. 186 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C.44. Ontario public hospitals established by statute are governed by the *Corporations Act*, which does not contain a provision like s. 179(b) of the OBCA or s. 186 of the CBCA. The absence of a general provision in the *Corporations Act* explains why s. 4(3) and s. 3(1) were needed.

[4] The existence of this exemption does not, of course, depend on a continuation of rights clause.

TAB 10

Ruth Sullivan*, Sullivan on the Construction of Statutes* (5th ed.) (LexisNexis: Markham), 2008

Sullivan on the Construction of Statutes

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by

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of trial whereas para. (i) refers to conclusion of the judge or jury on the ultimate issue of guilt or innocence.[46]

The presumption can also be rebutted by suggesting reasons why in the circumstances the legislature may have wished to be redundant or to include superfluous words. Drafters sometimes anticipate potential misunderstandings or problems in applying the legislation and, in an effort to forestall these difficulties, resort to repetition or the inclusion of unnecessary detail.[47] Repetition or superfluous words may also be introduced to make the legislation easier to read or work with or, in the case of bilingual legislation, to preserve parallelism between the two language versions. Repetition is not an evil when it serves an intelligible purpose. When tautologous words are deliberately included in legislation for reasons such as these, the courts say they are added *ex abundanti cautela*, out of an abundance of caution, and the presumption against tautology is rebutted.

In the *Chrysler* case, for example, McLachlin J. in her dissenting judgment conceded that the phrase "and any matters related thereto" appearing in the *Competition Tribunal Act* would be unnecessary if its only function were to confer ancillary powers on the Tribunal. However, in her view,

> one must approach such general phrases against the background that they are commonly used in many statutes, not to confer unmentioned powers, but to ensure that the powers clearly given be exercised without undue restraint. It is true, as Gonthier J. points out, that ancillary powers can be inferred and need not be set out. *Yet the reality is that statutes commonly do set them out, if only in the hope of avoiding arguments seeking to unduly restrict the effective exercise of expressly conferred powers....* Given the relatively common use of phrases like "and all [or any] matters related thereto" in legislative drafting, I do not find [Mr. Justice Gonthier's] argument persuasive.[48]
>
> [Author's emphasis]

When there is reason to believe that the tautologous words were deliberately included in the legislation, the presumption is rebutted.

THE PRESUMPTION OF CONSISTENT EXPRESSION

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the

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46 *Ibid.*; see also *Zaidan Group Ltd. v. London (City)*, [1990] O.J. No. 33, 64 D.L.R. (4th) 514 (Ont. C.A.); affd [1991] S.C.J. No. 92, [1991] 3 S.C.R. 593 (S.C.C.); *Clarke v. Clarke*, [1990] S.C.J. No. 97, [1990] 2 S.C.R. 795, at 16 (S.C.C.); *Firestone Canada Inc. v. Ontario (Pension Commission)*, [1990] O.J. No. 1377, 74 O.R. (2d) 325, at 339 (Ont. H.C.J.); revd [1990] O.J. No. 2316, 1 O.R. (3d) 122 (Ont. C.A.).

47 See, for example, *R. v. Hinchey*, [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at para. 55 (S.C.C.): " ...the additional words are not intended to add to the meaning of benefit, but to prevent the meaning ... from being restricted."

48 *Supra* note 41, at 435.

same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it makes sense to infer that where a different form of expression is used, a different meaning is intended.

The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.

Same words, same meaning. In *R. v. Zeolkowski*, Sopinka J. wrote: "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."[49] Reliance on this principle is illustrated in the majority judgment of the Supreme Court of Canada in *Thomson v. Canada (Deputy Minister of Agriculture)*.[50] The issue there was whether a Deputy Minister of the federal government could deny security clearance to a person, contrary to the recommendation made by the Security Intelligence Review Committee after reviewing the person's file. The governing provision was s. 52(2) of the *Canadian Security Intelligence Act* which provided that on completion of its investigation, the Review Committee shall provide the Minister "with a report containing any recommendations that the Committee considers appropriate". The majority held that the ordinary meaning of the word "recommendations" is advice or counsel and that mere advice or counsel is not binding on the Minister. However, Cory J. added:

> There is another basis for concluding that "recommendations" should be given its usual meaning in s. 52(2).
>
> The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act. Section 52(1) directs the Committee to provide the Minister and Director of CSIS with a report ... and any "recommendations" that the Committee considers appropriate....
>
> It would be obviously inappropriate to interpret "recommendations" in s. 52(1) as a binding decision. This is so, since it would result in the Committee encroaching on the management powers of CSIS. Clearly, in s. 52(1) "recommendations" has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word "recommendations" in the subsequent subsection of the same section to receive a different interpretation. The word must have the same meaning in both sections.[51]

The reasoning of Cory J. is exemplary. He first notes that elsewhere in the legislation the word or expression to be interpreted has a single clear meaning;

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49 [1989] S.C.J. No. 50, [1989] 1 S.C.R. 1378, at 732 (S.C.C.).

50 [1992] S.C.J. No. 13, [1992] 1 S.C.R. 385 (S.C.C.).

51 *Ibid.*, at 243-44.

he then invokes the presumption of consistent expression to justify his conclusion that this meaning must prevail throughout. Finally, he points out that the presumption applies with particular force where the provisions in which the repeated words appear are close together or otherwise related. This way of resolving interpretation problems is often relied on in the cases.[52]

Different words, different meaning. Given the presumption of consistent expression, it is possible to infer from the use of different words or a different form of expression that a different meaning was intended. As Malone J.A. explains in *Peach Hill Management Ltd. v. Canada*:

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.[53]

This reasoning was relied on in several Supreme Court of Canada decisions interpreting the insanity defence provisions of the *Criminal Code*. Section 16(1) provides that a person is insane only if he or she is "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong". In *R. v. Schwartz*, Dickson J. argued that the word "wrong" must mean morally wrong and not illegal because elsewhere in the Code the term "unlawful" is used to express the idea of illegality; by using the word "wrong" the legislature must have meant to express a different idea.[54] In *R. v. Barnier*[55] the issue was whether the trial judge had erred in instructing the jury that the words "appreciating" and "knowing" in s. 16(2) mean the same thing. Estey J. wrote:

> One must, of course, commence the analysis of a statutory provision by seeking to attribute meaning to all the words used therein. Here Parliament has employed two different words in the critical portion of the definition, which words in effect established two tests or standards in determining the presence of insanity.... Under the primary canon of construction to which I have referred, "appreciating"

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52 See, for example, *Sero v. Canada*, [2004] F.C.J. No. 71, at paras. 35-36 (F.C.A.); *R. v. Knoblauch*, [2000] S.C.J. No. 59, [2000] 2 S.C.R. 780, at para. 85 (S.C.C.); *Canada v. Schwartz*, [1996] S.C.J. No. 15, [1996] 1 S.C.R. 254 (S.C.C.); *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85, at 123-24 (S.C.C.); *Henrietta Muir Edwards v. A.G. for Canada*, [1930] A.C. 124, at 124 (P.C.); *Wishing Star Fishing Co. v. "B.C. Baron" (The)*, [1987] F.C.J. No. 1149, 81 N.R. 309, at 313 (F.C.A.); *R. v. Budget Car Rentals (Toronto) Ltd.*, [1981] O.J. No. 2888, 20 C.R. (3d) 66, at 82 (Ont. C.A.).

53 [2000] F.C.J. No. 894, 257 N.R. 193, at para. 12 (F.C.A.).

54 [1976] S.C.J. No. 40, [1977] 1 S.C.R. 673, at 677-90 (S.C.C.), *per* Dickson J. dissenting; approved by Lamer C.J. for the majority of the Court in *R. v. Chaulk*, *supra* note 35, at 39-41. See also *Frank v. The Queen*, [1977] S.C.J. No. 42, [1978] 1 S.C.R. 95, at 101 (S.C.C.), *per* Dickson J.: "I do not think 'Indians of the Province' and 'Indians within the boundaries thereof' refer to the same group. The use of different language suggests different groups."; *Mitchell v. Peguis Indian Band*, *supra* note 52, at 123, *per* La Forest J.: "... whenever Parliament meant to include Her Majesty in right of a province, it was careful to make it clear by using explicit terms. In the absence of such specific indication, ... one would expect that an unqualified reference to 'Her Majesty' should be taken as limited to the federal Crown."

55 [1980] S.C.J. No. 33, [1980] 1 S.C.R. 1124 (S.C.C.).

> and "knowing" must be different, otherwise the Legislature would have employed one or the other only.[56]

As this passage from the *Barnier* case indicates, the presumption that using different words implies an intention to express different meanings is often reinforced by the presumption against tautology. In *R. v. Clark*,[57] for example, the issue was whether performing an indecent act in an illuminated room near an uncovered window violated s. 173(1)(a) of the *Criminal Code*. The relevant provisions were in the following terms:

> 150. In this Part,
>
> ...
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied;
>
> 173. (1) Every one who wilfully does an indecent act
>
> (a) in a public place in the presence of one or more persons,
>
> ...
>
> is guilty of an offence punishable on summary conviction.
>
> 174.(1) Every one who, without lawful excuse,
>
> (a) is nude in a public place, or
>
> (b) is nude and exposed to public view while on private property, ...
>
> is guilty of an offence punishable on summary conviction.

The Supreme Court of Canada held that although the indecent act in question was witnessed by two neighbours who were peeking through their windows into the accused's apartment, the act had not been done in a public place. In reaching this conclusion, Fish J. relied on both the presumption against tautology and the presumption of consistency:

> Section 174(1) makes it perfectly clear that the definition of "public place" in s. 150 of the *Criminal Code* was not meant to cover private places exposed to public view. Were it otherwise, s. 174(1)(*b*) would be entirely superfluous.
>
> Section 150 applies equally to s. 174(1) and s. 173(1)(*a*). If "public place" does not, for the purposes of s. 174(1), include private places exposed to public view, this must surely be the case as well for s. 173(1)(*a*). And I hasten to emphasize that ss. 173(1) and 174 of the *Criminal Code* were enacted in their present form *simultaneously*, as ss. 158 and 159, when the present *Code* was revised and enacted as S.C. 1953-54, c. 51. Parliament could not have intended that identical

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56 *Ibid.*, at 1135-36. See also *Marche v. Halifax Insurance Co.*, [2005] S.C.J. No. 7, [2005] 1 S.C.R. 47, at paras. 93-94 (S.C.C.); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625, at paras. 134-35 (S.C.C.).

57 [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6 (S.C.C.).

CHAPTER 9

Consequential Analysis

INTRODUCTION

What counts as absurdity and what, if anything, courts should do in response to absurdity are questions that have a lengthy and vexed history in statutory interpretation. This chapter begins by briefly reviewing that history, focusing on the different answers that have been given to these questions and the justification for taking absurdity into account. It sets out a principle that purports to summarize current judicial practice.

The chapter next describes certain well-established categories of absurdity — defeating the purpose, irrational distinctions, contradictions and anomalies, inconvenience, interference with the administration of justice, and egregious violations of fairness or right reason.

The chapter ends by examining the ways avoiding absurdity is used to help resolve interpretation issues.

Relevance of consequences in interpretation. When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of individuals and communities for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purpose. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended. If adopting an interpretation would lead to absurdity, the courts may reject that interpretation in favour of a plausible alternative that avoids the absurdity. As O'Halloran J.A. explained in *Waugh v. Pedneault*:

> The Legislature cannot be presumed to act unreasonably or unjustly, for that would be acting against the public interest. The members of the Legislature are elected by the people to protect the public interest, and that means acting fairly and justly in all circumstances. Words used in enactments of the Legislature must be construed upon that premise. That is the real "intent" of the Legislature. That is why words in an Act of the Legislature are not restricted to what are sometimes called their "ordinary" or "literal" meaning, but are extended flexibly to in-

> clude the most reasonable meaning which can be extracted from the purpose and object of what is sought to be accomplished by the statute.[1]

This understanding has been affirmed on numerous occasions by the Supreme Court of Canada. In *Morgentaler v. The Queen*, Dickson J. wrote:

> We must give the sections a reasonable construction and try to make sense and not nonsense of the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities.[2]

In *R. v. McIntosh*, McLachlin J. wrote:

> While I agree ... that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear intention to the contrary, the courts must impute a rational intent to Parliament.[3]

In *Ontario v. Canadian Pacific Ltd.*, Gonthier J. wrote:

> Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results.[4]

In *Re Rizzo and Rizzo Shoes Ltd.*, Iacobucci J. wrote:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.[5]

Propositions comprising consequential analysis. The modern understanding of the "golden rule" or the presumption against absurdity includes the following propositions.

(1) It is presumed that the legislature does not intend its legislation to have absurd consequences.

(2) Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.

(3) Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.

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1 [1948] B.C.J. No. 1, [1949] 1 W.W.R. 14, at 15 (B.C.C.A.).

2 [1975] S.C.J. No. 48, [1976] 1 S.C.R. 616, at 676 (S.C.C.).

3 [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686, at 722 (S.C.C.), from the dissenting judgment of McLachlin, La Forest, L'Heureux-Dubé and Gonthier JJ.

4 [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031, at para. 65 (S.C.C.). See also *Marche v. Halifax Insurance Co.*, [2005] S.C.J. No. 7, [2005] 1 S.C.R. 47, at para. 84 (S.C.C.), where Bastarache J. dissenting says: "We must presume that the legislature ... provided for [statutory] conditions [in insurance contracts] which are just and reasonable for both the insured and the insurer."

5 [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at 43 (S.C.C.).

(4) The more compelling the absurdity, the greater the departure from ordinary meaning that is tolerated.

Evolution of the presumption against absurdity. Judicial concern with the consequences of legislation is a constant in statutory interpretation, although at different times it has been expressed in different ways. In the era of equitable construction,[6] the courts focused primarily on positive consequences. To ensure the realization of the intended consequences of legislation, judges adopted interpretations that suppressed the mischief, promoted the remedy, cured underinclusive language and defeated avoidance measures.[7]

In the eighteenth century, using the technique of presumed intent, the courts focused primarily on the negative consequences that might result from the application of legislation, such as interference with private rights or a curtailing of basic freedoms. By presuming the legislature intended to avoid these undesirable consequences, but conceding that the presumption could be rebutted, the courts ensured acceptable outcomes while at the same time deferring to the legislative will.[8]

In the nineteenth and twentieth centuries the judicial concern for consequences took the form of the so-called golden rule. It permitted courts to depart from the ordinary meaning of the words used in legislation in order to avoid absurdity. As explained by Lord Wensleydale in *Grey v. Pearson*:

> [T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.[9]

One problem with the golden rule is that it developed in response to the plain meaning rule and it shares the fundamental assumption on which that rule is based, namely, the only reliable or legitimate evidence of legislative intent is the meaning of the legislative text. This assumption is inconsistent with the modern principle, which insists that legislative intent must be inferred from reading a text in light of its total context, including assumptions about reasonableness, fairness, rule of law and the like.

Questions raised by the presumption against absurdity. Although the presumption against absurdity has been invoked on innumerable occasions, its implications are far from clear. From the beginning the courts have struggled with the following questions.

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6 Equitable construction is discussed *supra*, Chapter 8, at pp. 256-57.

7 Presumed intent is described in Chapter 16.

8 See *Heydon's Case*, (1584), 3 Co. Rep. 7a, 76 E.R. 637.

9 (1857), 6 H.L. Cas. 61, at 106, 10 E.R. 1216, at 1234.

TAB 11

Hansard Excerpts re *Energy Consumer Protection Act*

Hansard: December 8, 2009

ENERGY CONSUMER
PROTECTION ACT, 2009 /
LOI DE 2009 SUR LA PROTECTION
DES CONSOMMATEURS D'ÉNERGIE

Mr. Phillips moved first reading of the following bill:

Bill 235, An Act to enact the Energy Consumer Protection Act, 2009 and to amend other Acts / Projet de loi 235, Loi édictant la Loi de 2009 sur la protection des consommateurs d'énergie et modifiant d'autres lois.

The Speaker (Hon. Steve Peters): Is it the pleasure of the House that the motion carry?

All those in favour will say "aye."

All those opposed will say "nay."

In my opinion, the ayes have it.

Call in the members. This will be a five-minute bell.

The division bells rang from 1559 to 1604.

The Speaker (Hon. Steve Peters): All those in favour will rise one at a time and be recorded by the Clerk.

Ayes

Aggelonitis, Sophia	Hardeman, Ernie	Naqvi, Yasir
Albanese, Laura	Hoskins, Eric	O'Toole, John
Arthurs, Wayne	Jaczek, Helena	Orazietti, David
Bailey, Robert	Jeffrey, Linda	Ouellette, Jerry J.
Balkissoon, Bas	Johnson, Rick	Pendergast, Leeanna
Barrett, Toby	Jones, Sylvia	Phillips, Gerry
Bartolucci, Rick	Kular, Kuldip	Prue, Michael
Bentley, Christopher	Kwinter, Monte	Qaadri, Shafiq
Berardinetti, Lorenzo	Lalonde, Jean-Marc	Ramal, Khalil
Bisson, Gilles	Leal, Jeff	Ramsay, David
Broten, Laurel C.	Levac, Dave	Rinaldi, Lou
Caplan, David	MacLeod, Lisa	Runciman, Robert W.
	Mangat, Amrit	

Chan, Michael	Martiniuk, Gerry	Ruprecht, Tony
Colle, Mike	Mauro, Bill	Sandals, Liz
Crozier, Bruce	McMeekin, Ted	Savoline, Joyce
Dhillon, Vic	Meilleur, Madeleine	Shurman, Peter
Dickson, Joe	Miller, Norm	Smith, Monique
Dombrowsky, Leona	Miller, Paul	Sorbara, Greg
Duguid, Brad	Milloy, John	Tabuns, Peter
Duncan, Dwight	Mitchell, Carol	Van Bommel, Maria
Flynn, Kevin Daniel	Munro, Julia	Yakabuski, John
Gravelle, Michael		Zimmer, David

The Speaker (Hon. Steve Peters): Those opposed?

The Clerk of the Assembly (Ms. Deborah Deller): The ayes are 66; the nays are 0.

The Speaker (Hon. Steve Peters): I declare the motion carried.

First reading agreed to.

The Speaker (Hon. Steve Peters): The minister for a short statement.

Hon. Gerry Phillips: I'll make my comments under ministers' statements.

VISITORS

The Speaker (Hon. Steve Peters): I want to take this opportunity to welcome some guests of mine from my riding in the Speaker's gallery: Dean Paddon, Brian Bolt, Bob Ketchum and Barry Fry. Gentlemen, welcome to Queen's Park today.

Mr. Gilles Bisson: On a point of order, Mr. Speaker: Let me transgress, seeing that the Speaker led the way. I'd like to introduce Larry O'Connor, a former member of the assembly who's here with us right now.

MOTIONS

PRIVATE MEMBERS' PUBLIC BUSINESS

Hon. Monique M. Smith: I believe we have unanimous consent—maybe I'll say that again for the member from Renfrew–Nipissing–Pembroke; he sometimes has a slight hearing problem—to put forward a motion without notice regarding private members' public business.

The Speaker (Hon. Steve Peters): Agreed? Agreed.

Hon. Monique M. Smith: I move that, notwithstanding standing order 98(g), notice for ballot items 58, 59, 60, 62 and 63 be waived.

The Speaker (Hon. Steve Peters): Is it the pleasure of the House that the motion carry? Carried.

Motion agreed to.

STATEMENTS BY THE MINISTRY
AND RESPONSES

CONSUMER PROTECTION

Hon. Gerry Phillips: I rise to introduce the Energy Consumer Protection Act, 2009. This act has a simple, yet vital, objective, and that's to empower consumers, to protect their interests and, above all, to ensure fairness and transparency in Ontario's energy marketplace.

There are few obligations that government must take more seriously than the protection of consumers against unfair, misleading or simply confusing retailing practices. At a time like this, that responsibility is felt all the more acutely as families struggle to make every dollar stretch in the face of a challenging global economy.

The proposed legislation builds on the government's record of action with respect to consumer protection and transparent disclosure in a number of other sectors. Today, we take similar action with respect to Ontario's energy market while also setting out fair and reasonable operating conditions for affected businesses.

The legislation contains three main elements. First, it introduces tough new measures to crack down on unacceptable practices by some electricity retailers and gas marketers in order to protect consumers. Second, it strengthens protection for residents of multi-unit rental residential buildings where suite metering is being considered. Third, it bolsters the opportunity to protect electricity and gas consumers with respect to security deposits and disconnects.

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Let me focus for a moment further on the first of these priorities. Many of us have experienced the offer of a contract from electricity retailers or gas marketers. Some of these companies employ salespeople who go door to door offering multi-year fixed-rate contracts. Unfortunately, and too frequently, promises are made about cheaper long-term energy prices, and salespeople pressure consumers and customers for a quick deal on their doorstep.

The sale of fixed-rate energy contracts has been a business in Ontario since 1997 for natural gas and on the electricity side since 2002. The companies offer something that a number of consumers do choose, but we have all heard stories from our constituents, friends, or family members who felt pressured, confused or misled. Each week, the Ontario Energy Board, or the OEB, logs between 100 and 150 consumer complaints about the practices of energy retailers. It is time to bring abusive practices to a stop, for the good of both consumers and the reputation of the industry.

In this respect, I want to recognize the member from Timiskaming–Cochrane, David Ramsay, who was among the first of us to urge action on this issue with his private member's bill. The legislation introduced today captures the spirit of his proposals and takes decisive action in a variety of ways. It would require far greater disclosure on the part of electricity retailers and gas marketers, including providing plain language disclosure about key contract terms. It would also require an explicit and standardized format for showing consumers the difference they would pay on their monthly bill when contracting with an electricity retailer or gas marketer when compared to staying with their utility. It would also set out clear rules to allow contracts to be cancelled under specified conditions and set maximums on cancellation fees.

It would oblige retailers to seek independent third party verification from the consumer before the contract would be considered final. Finally, it would allow the government to establish new regulatory and training standards for salespeople. And importantly, it creates legal liabilities for directors and officers of electricity retailing and gas marketing companies.

The second set of measures supports the government's goal of encouraging conservation by enabling the government to ensure that all new multi-residential units are suite-metered. It would also establish a framework to enable consumers in existing multi-residential apartment buildings to take direct control of their energy costs and empower them to conserve. Suite-metering technology will allow each tenant to pay directly for their own energy use. In the case of existing tenants, such a change in the tenancy agreement would require explicit written consent of the tenant.

The proposed legislation would enable establishing the framework for changes that would ensure fair rent reduction for these tenants. It would also enable the development of minimum energy-efficiency guidelines for suite-metered rental residential buildings.

Finally, the legislation would build on existing rules and practices to create new requirements aimed at ensuring fair treatment with respect to security deposits and disconnections in the electricity market and extends this more robust approach for application to natural gas and sub-metered customers as well.

This legislation is needed. It builds on the McGuinty government's record of action with respect to consumer protection and transparent disclosure. It's fair and it is progressive. It protects consumers and strengthens our energy market in Ontario, and I would urge all members to support the Energy Consumer Protection Act.

…

CONSUMER PROTECTION

Mr. John Yakabuski: I want to respond to the bill being presented by the Minister of Energy today. You know, when you listen to his first couple of paragraphs, who's going argue with that, about the need and the importance of empowering and protecting consumers? We're all in 100% agreement with that.

What I am concerned about, or one of the things that I'm concerned about, is that the former Minister of Energy promised a piece of legislation back in the summertime that would be brought in this fall, and here we are near the end of the session, when this will certainly not be debated in this House before Christmas, and the minister is introducing a bill to protect consumers.

He talked about David Ramsay, the member for Timiskaming–Cochrane, who introduced, earlier this year, Bill 131. If they would have piggybacked or worked with that, I think we could have already had some results with respect to consumer protection with regard to how they are treated by energy retailers.

We know there needs to be some protection and some changes. The exposé that we saw on CBC's Marketplace earlier this year was a wake-up call to anybody who does not think that there were shenanigans and things going on in that business that need to be addressed, and Mr. Ramsay's bill partially would have done that.

The other thing they are doing in this bill is bringing in other issues like the sub-metering issue and the security deposit issue. Ironically, we just had a bill that we're supposed to be debating this week, possibly, from the member from Essex, dealing with that security deposit issue. So you have to wonder where the ministry is on all of these kinds of balls they've got juggling in the air here at the same time, whether it's private members' or government legislation.

There's no question at all that we want to see significant changes and improvements. The situation we have today is not acceptable. I look forward to a briefing from the minister's staff, possibly tomorrow or Thursday. Hopefully, when we get this bill in the Legislature, as soon as possible, we can all work together to ensure that at the end of the day, what we present to the consumers of this province and what we enact as legislation is going to truly protect them from nefarious practices and ensure that what is happening is transparent, is fair, and that it protects consumers.

CONSUMER PROTECTION

Mr. Peter Tabuns: I rise to address the proposed Energy Consumer Protection Act, 2009.

To the Minister of Energy: There's no question that people in this province are being abused by energy marketers. Interestingly, my mother, who is 80, has had a number of times when energy marketers have come to her door trying to get her bill so they can get all of the account information off of it. She's fended them off, but a number of her friends, also in their 80s, have not been able to fend them off, and have been stuck with huge bills. So I think action against people who are doing this energy marketing with no particular scruples is required.

I'm not sure that what is in this bill is adequate for the problem that's at hand. In fact, I would go further. A private member's bill was introduced recently which would have prohibited door-to-door energy marketing, and, frankly, I can see the utility in that.

I look forward to going through the bill in greater detail, but I say to this House and to the minister that this area is one that I think we're all bedevilled with. We all have our constituency offices flooded with people who are calling and coming in because they're getting a raw deal.

When it comes to the whole question of sub-metering in multiple-unit buildings, again, I would look forward to reading in greater detail what's presented to us. I have to say that in many instances people live in buildings now that are not adequately insulated, don't have proper windows, and essentially are just boxes that heat flows out of, or that cold flows out of in the summer. In those situations where sub-metering is installed, I can only say it's a huge transfer of burden, responsibility and headache from a landlord to a tenant.

I understand from a quick glance through that there are some measures that may address that satisfactorily. I look forward to having the time to going through and making sure that, in fact, what's here will do what the people of this province deserve to have done.

Hansard: December 10, 2009

ENERGY CONSUMER
PROTECTION ACT, 2009 /
LOI DE 2009 SUR LA PROTECTION
DES CONSOMMATEURS D'ÉNERGIE

Mr. Phillips moved second reading of the following bill:

Bill 235, An Act to enact the Energy Consumer Protection Act, 2009 and to amend other Acts / Projet de loi 235, Loi édictant la Loi de 2009 sur la protection des consommateurs d'énergie et modifiant d'autres lois.

The Speaker (Hon. Steve Peters): Debate?

Hon. Gerry Phillips: I should inform the House that I plan to share my time with the member from Ancaster–Dundas–Flamborough–Westdale, my good friend the Minister of Consumer Services.

I look forward to the debate here on the bill and I look forward to it no doubt going to committee. I think it's fair to say that this is a bill that has the interest of every member in the Legislature.

For the public's knowledge, it deals really with three areas. The one that I found has the most public interest is dealing with what are called energy retailers. These are companies that sell contracts for natural gas or contracts for electricity. The second part of the bill deals with what we call sub-metering in multiresidential buildings, which means allowing tenants in a multiresidential rental building to have electricity metered for their own apartment and paid separately. We deal with that issue. And thirdly, the issue around setting some standards on when utilities can require security deposits and what we call disconnect policies, when they can turn off the electricity or the gas.

As I say, I think every member in the Legislature—I think I probably heard from every member of our caucus on this bill, and I think that's probably true for the opposition as well. This is an area that we get a lot of comments from our constituents on, and this bill is designed to address the issues that each of the members are dealing with.

I want to thank my colleague from Timiskaming–Cochrane, Dave Ramsay. The member started working on this a couple of years ago, really; he had a private member's bill that highlighted the issue. So he has been among the leaders here, and I want to thank him. He deserves a lot of credit for where we stand now, although I would say he's not alone in terms of this being an important issue for us in the Legislature to deal with.

It's very important that the public have clear rules of conduct when they're dealing with these retailers, that they have a right to expect honest, straightforward business practices. They have a right to expect that when abuses occur they will be dealt with severely. There is an obligation for us to create an environment where business can operate, but equally where consumers are treated fairly. I believe this legislation strikes that balance.

I look forward to the debate here. I look forward to suggestions on improvements, because at the end of the day, as they say, I'm determined that the consumer will have the appropriate level of confidence, that they understand what they are dealing with and they are making an informed decision in the proper environment. The legislation firstly deals with making sure the consumer has every opportunity to understand the offer they are being presented with; I'll talk in some more detail about that later. But it's fair to say that understanding the electricity market is not easy. We have to make it easy for people to understand what they're buying. We have to make sure that the retailers understand they've got a clear obligation to present their offers clearly and fairly.

Not everybody may be aware, but these fixed energy contracts have been around for some time. Maybe the best analogy I can give is that these fixed energy contracts are sort of like buying a fixed-rate mortgage. You know how most of us have a debate about whether we want a variable or a fixed-rate mortgage. These contracts essentially allow consumers to buy at a fixed rate. Typically, our utilities have a variable rate; the electricity price changes over time.

The contracts in gas have been around since 1997, so a little more than 10 years. In 2002, the same business model was introduced here in Ontario for electricity, where consumers can buy at a fixed rate over a fixed period of time. So it has been around for some time, and a considerable number of people have signed up for them. However—we're all aware of this, I believe—the Ontario Energy Board, which has the responsibility for regulating these retailers, gets between 100 and 150 consumer complaints every week about energy retailers. Over the past three years—and my colleague the Minister of Consumer Services would tell us—typically this issue ends up in the top 10 of the consumer grievances that he deals with. So there's a clear need to act, and we are acting with this legislation. The act contains measures to ensure that legitimate businesses are permitted and illegitimate behaviours are subject to severe crackdown. So, that's the energy retailing side, and I'll get into a little more detail in a moment.

The second part of it is that it strengthens the protection for residents of multi-unit rental residential buildings where suite metering is in place or being introduced. What this means is that we're anxious in this province, working very hard on energy conservation, trying to find ways for people to use less electricity, less natural gas, less gasoline in their cars; wherever we can cut down on energy use, we're anxious to do that.

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Experience has shown that in a rental apartment, the use of electricity drops by 20% to 25% if you are paying for your own electricity. It kind of makes sense that if you turn up the heat a little too much or you are overusing your air conditioner, you would recognize that and you'd see that if you cut that down, you would save money. We are determined to move to helping people in this province make those informed decisions. We are moving to something we call smart metering across the province, which allows people to have what's called time-of-use pricing, where the price of electricity is less in off-peak hours, so we can get people to use it then and we require fewer electricity generating plants.

It's a good idea for people to have the ability to control their own electricity use. However, in existing buildings it's equally important that tenants have some protection against the sort of arbitrary use of this. I think we are striking that balance—and I'll get into more detail later—when a building is going to be suite metered: Individual tenants will have the choice either to go on individual billing or to stay where they are. I think that protects the rights of existing tenants, ensures transparency and will help us along the way to this culture of conservation we often talk about.

The third area of this piece of legislation clarifies circumstances for consumer security deposits and disconnections. We want to make sure there's a standard in this across the province. Businesses have the freedom to require security deposits when warranted. We want to make sure that when the service is left unpaid for an extended period of time, disconnection is a reasonable response, but there should be objective and standard practices guiding such measures, particularly ensuring fair treatment of consumers who are vulnerable, such as those for whom energy disconnections are not an option: individuals with particular health or income challenges.

I'll go now to talking in some detail about the part of the legislation that deals with energy retailers. The first part ends what I call unfair consumer practices. I get a lot of comments, not just from members of the Legislature but from other people, about the practices of door-to-door salespeople. There is a concern that they don't, in all cases, identify who they are, or if they say who they are, they are misleading. In fact, we've had instances where people look like they're from the government—they have a trillium logo that they're carrying around—and the consumer doesn't know who they're dealing with. They will essentially leave the impression that they have the right to look at your bill and whatnot.

We have to find a way that door-to-door salespeople are properly regulated; that when they appear at the door they are clearly identified—this legislation calls for that—and that you know you are not dealing with your local utility and you are not dealing with the government of Ontario but you are dealing with a particular company. They will be required to make an oral disclosure of who they are.

Importantly, we will ensure that the companies are held accountable for their salespeople. The salespeople must be licensed. That is not the case right now; the retailers are licensed but not the salespeople. The companies are going to be held accountable for behaviour at the door. Too often we've heard examples where the company will say, "Well, that salesperson certainly wasn't following company orders. We'll get rid of them." Often these people are contract employees; essentially, they are commissioned salespeople.

I believe the legislation gives us the tools to ensure that door-to-door salespeople practise fair consumer practices. This will be the subject of some debate. There is the concern: Can we hold them accountable? I believe we can, particularly with the part of the legislation that holds the companies and the directors responsible for the actions of their salespeople at the door. That's a very important part of this legislation: All of us will have to be satisfied that this legislation will be able to hold those door-to-door salespeople accountable. I would also add that the legislation applies to online sales and phone sales. But we seem to have the highest number of complaints door to door.

The second part of the legislation—and this is crucial for me—is to make sure that people have the information to make an informed decision when they are being asked to sign a contract. Essentially, as I said in my earlier remarks, what the consumer is buying is a fixed price over a period of time. That essentially is what it is. The company will say, "We will sell you electricity for this rate over this period of time," three or four years. But there has to be a way, and there will be a way, and the legislation contemplates having a way, that people have a clear understanding of what that is.

We have another sub-issue that we are dealing with and must deal with in this, and that's called the provincial benefit or the global adjustment. That's jargon for—the electricity price has two elements in it. It's very confusing to the consumer. We have to fix that in here, and we have to fix it in the non-retail area as well. It's very difficult for the consumer to understand. But I'm determined that people will understand what they're buying.

I will say that I looked at what British Columbia does in the natural gas area, and there it's crystal clear. They simply say, "Here's the price you're paying for a measurement of natural gas," and then, "These companies are offering a one-year, a three-year, or a five-year fixed rate on natural gas at this." It gives the consumer essentially the same information you have when you're making a decision on a mortgage, where you can understand: Is it variable or fixed, over what period of time, and what's the interest rate?

We have to find a way, and we will, and the legislation gives us the opportunity to do that, so that when the consumer is being asked to sign the contract, they will understand, firstly, who they're dealing with, that it's not the utility; it's a company. They'll understand, if they don't sign it, the consequences. The consequences are, you stay with what you're doing. So I would stay with my local utility.

Then, the third part of it is to understand what they're buying and how it compares to what they've been paying. Part of it, by the way, is that the contracts will be text-based. So even if you're dealing on the phone, before the contract is valid you have to sign a hard copy of it.

A piece of legislation where there's still flexibility—well, there's flexibility everywhere, because we're going to amend it, but where we will be looking for advice in the committee is, who is authorized to sign the contract? There are essentially only going to be two choices. Is it the account holder, or the account holder and spouse? There's a debate around that. But we are going to dramatically narrow who can sign the contract, so that we don't find inappropriate people signing the contract.

The third part of dealing with the concerns of the consumer is the feeling that you've been pressured into signing. You're often dealing with an expert salesperson at the door, and somehow or other you sign the contract. The legislation contemplates three opportunities for sober second thought. One is a 10-day cooling-off period, where you can just unilaterally not do it; cancel it.

Then, between 10 days and 60 days after you've signed the contract, we will have what is called third party verification. What this means is that the Ontario Energy Board, which has a responsibility for regulating this, will prepare a list of companies capable of doing this third party verification. One of the criteria would also be being able to do it in several languages, as appropriate. The retailer has to select, off that list, the company to do the verification, and they will do it from a prescribed script so that the consumer should feel confident that the companies that are doing this, selected by the Ontario Energy Board and monitored by the Ontario Energy Board, are not working for the retailer but are working on behalf of the public.

The third cooling-off period is that 30 days after you get your first bill, you can cancel it. This is the third area that we get a lot of comment on—"I didn't know what I was signing" etc.—and this will deal with that.

0920

The next area is unfair cancellation policies. Right now, natural gas contracts have an automatic renewal provision, which we are going to remove, but we're going to also deal with some of the practices that go on. I think many of us have found examples where a cheque is sent to a consumer, and they cash it, not being aware that a condition of cashing it is that you are renewing your contract. Well, we're going to deal with that, and that will not be acceptable.

We're going to prevent excessive fees and remove the fees altogether if you move into a rental building where you couldn't possibly use the contract. Strangely enough, actually, there are a lot of examples where people have signed two contracts. It's hard to believe, and we'll deal with that where the first contract is the one and the second wouldn't be.

The next problem I want to talk about is accountability—and I touched on this a little bit earlier—holding the companies accountable for the salespeople going to the door. We're going to require additional licensing conditions, including background checks. If you want to volunteer to be an assistant hockey coach, you need a background check. It seems to us that for somebody selling fairly expensive contracts door to door, the same sort of standards should apply. So we're determined to find the mechanisms to make sure that people who are selling door to door are accountable and monitored and the company is held responsible.

The last point I'd make on the retailer is to ensure that, as I said earlier, all costs are disclosed. We still have what's called a provincial benefit or a global adjustment that we must deal with so that consumers understand that when they are buying this product, everything is in on it.

My belief is that this legislation will deal with the major issues that we get on a daily basis. As I say, I look forward to the debate here and to suggestions from the Legislature at second reading and then input at the committee. I repeat: It's an issue of intense interest to virtually every member of the Legislature.

The second one I want to talk about is what's called suite metering. I mentioned earlier that the purpose of it is to find ways that people can conserve energy. This is pretty important to all of us. We have, in this province, quite substantial peaks in daily usage. You get, particularly in warm weather—in the province, our biggest-use days are the hot summer days. At one time, it was the cold winter days; now it's the hot summer days. You get these peaks through the day. If we can find a way to lower those peaks by 10% or 15%—because, obviously, you have to generate electricity for the peak—you need 10% or 15% less generation in the province, because many of these things run 24 hours a day, but you've got to have what's called peaking power.

So it's in all of our interests to find ways to conserve energy. That's what this suite metering is about: finding ways that people can control their own energy use and benefit from it. So the solution is that in all new residential buildings it will be mandatory to have individual suite metering. That makes sense to everyone, I think.

But in existing buildings, whether you move on to suite metering or not will be voluntary, and that's designed to give us an opportunity to phase this in. The problem right now is that there aren't good rules for individual billing in rental buildings. The proposed solutions in the legislation are to:

—require consent from sitting tenants;

—require the landlords to adjust the amount of rent paid to offset the electricity cost that would have been billed to the tenant; and

—give prospective new tenants the necessary information when they move in, because when they move in, they will be on their own suite meter.

Another problem is that the companies that actually install the metering—the individual apartment metering—are not subject to the same rules as the local distributing company. Here in Toronto our local distributing company is Toronto Hydro. They have firm rules from the Ontario Energy Board about individual or suite metering. But private companies can also do it without the same rules, and we are going to have the same rules for them as for the local distributing company. Why is that important? It's important that fees be regulated. It's important that there's confidence in the suite metering company, and that renters who are anxious about getting on individual metering are not inappropriately taken advantage of.

Another challenge is to make sure tenants don't move onto individual metering in highly inefficient buildings. We're going to require certain standards around the appliances in the individual-meter situations.

The last thing I'd touch on is the consumer security deposit and disconnects. There's quite a variety of rules around this across the province. The proposed solution here is that the OEB would regulate disconnection security deposits for both electricity and gas companies and look at alternatives to deposits, requiring specific standards for disconnects for vulnerable consumers, and requiring utilities to accept payment of security deposits over time. So it will give us an opportunity to have some standards around disconnects.

Back to what I find tends to be the main element of this piece of legislation, and that is, finding ways to regulate electricity and gas retailers. As I've said several times now—I've been the minister for four weeks and three days, but it has been a subject that many of my caucus and many of the opposition have talked to me about. It's one that we have to solve.

It is not a small purchase for people to make. It is not currently easy for people to understand, so I'm determined that this legislation—amended, if there are good ideas—will solve these problems. Problem number one is inappropriate pressure at the door, and maybe on the phone as well. When somebody knocks on your door, you will know who you're dealing with. They will be required to disclose who you're dealing with; you will be able to identify who you're dealing with. And importantly, we will find a way to hold the companies accountable for that. It no longer will be acceptable to say, "Well, they certainly weren't operating under our guidelines."

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The second part of it—and this is crucial—is that when people are being offered this contract, they clearly understand what they're buying. Right now, I dare say, many don't. Certainly, experience in my constituency office and in my colleague from Peterborough's constituency office is that we run into cases where people say, "I didn't know what I was buying." We probably all have family who have been involved in it, either not knowing what they're buying or being unable to find any way out of it.

We are determined to ensure that people understand what they're buying. To retailers who may say, "Well, it's pretty onerous on us to spell that out in all that detail and all that clarity," I'd say, "If the product you're selling doesn't stand up to the full light of disclosure, where people have complete understanding of what they're buying, then maybe the product has difficulty in being a sale." To me, almost the cornerstone of this is consumers understanding exactly what they're purchasing in a good price comparison. I looked at what is going on in BC with natural gas retailers, and that's the case.

The cooling-off period: Consumers have a chance for a little bit of sober second thought. That's why there's the 10-day cooling off period, which by the way is standard in a lot of other consumer legislation, I believe, very standard. Then there's what we call third party validation, where a company selected, screened and agreed upon by the Ontario Energy Board makes that call to people and they understand exactly what they have signed on for, and then a last opportunity once you get your bill. That, I believe, will be very helpful in weeding out inappropriate practices. As I say, I'm satisfied that this legislation will tackle those problems, and they have to.

On suite metering, individual metering: It's part of our plan to help people conserve energy. I mentioned before that we are moving to something called smart metering across the province; the public may have heard of that. Currently, or in the past, there was no capability to sort of measure your electricity use by hour. First, it was difficult for you to find a way to manage your own energy use. Secondly, there was no way that the utility could charge a different price

depending on the time of day. I just say again that if we can find ways to shift the use of electricity off those peaks, it is very beneficial to our electricity system, because you don't have to build electricity capacity to those high peaks.

What we're trying to do, and what we are doing, is encouraging people to do that by what is called time-of-use pricing, which means that the price in non-peak hours is lower than in peak hours. So if you're going to do your dishes, don't do them at 6 o'clock, do them at 10 o'clock at night. If you're going to do your laundry, don't do it at 6 o'clock, do it at 10 o'clock at night. We've even moved to help people automatically turn down their air conditioners through the day and then turn them back up at the appropriate time.

We are determined to find ways that people benefit and are encouraged to reduce their use during peak hours. By the way—I did not mention this earlier—part of dealing with the retailers will be to make sure they offer time-of-use pricing. We cannot let this retail area undermine what we're trying to do on energy conservation, so that will be required.

This is back to the second part of the legislation: the individual metering in buildings. I think it's a good balance, and it's always this balance between our very important objective of energy conservation—and that's the suite metering—and making sure that existing tenants are treated fairly. I choose to believe we've found that right balance, where if you're in an existing apartment, you have the option of moving on to suite metering, or not. If you move into an apartment that's already suite-metered, you would understand you're moving into that apartment on the basis that you will be individually billed for your electricity.

I believe we've struck the right balance, and it's a way that the province can move forward pretty aggressively on individual apartment and rental accommodation, but not treat tenants unfairly.

We begin second reading debate today. When the Legislature comes back in a few weeks, I assume we'll continue the second reading debate. My instincts are that there will be a fair bit of interest on the committee work on this as well.

At the end of the day, as they say, I look forward to a piece of legislation that is fair to the business community, fair to the retailers, but very importantly, that the public will say, "You know, that's what was needed. I understand now what I'm buying. I can now make an informed decision."

I dare say that for many of us, when we get this right, it will reduce the workload in some of our constituency offices, because I think all of us deal with people who feel that they have entered a contract that they would have preferred not to be in.

I'm satisfied that we've struck the right balance here. It's an important issue, and I look forward to the debate here in the Legislature and to finally have, when we finish it and if passed, as we always say—if passed—an act that will provide good protection for the consumer.

The Acting Speaker (Mr. Jim Wilson): Further debate?

Hon. Ted McMeekin: Following my colleague is a bit like dancing after Baryshnikov, but that having been said, we'll continue through. I want to begin by saying that as Minister of Consumer Services, it's indeed my pleasure to stand in support of this legislation, the Energy Consumer Protection Act, 2009, and to speak additionally of some of the benefits.

The very best political advice I ever received—I think I've shared this with some of you privately—was from the late, great Sterling Hunt, a farmer up in the Lynden area who, when I was running for mayor of the beloved municipality of Flamborough—which no longer exists, by the way, but that's another day—said, "Ted, tell them what's broke and how you're going to fix it." I think if we stop to think about it a bit, that's really what politics is all about, isn't it? Tell them what's broke and how you're going to fix it. It's about leaving the place a little bit better than you found it, about making a difference, about giving back, all those things that mom and dad used to talk to us about as we were growing up. Anyhow, that's the personal part I want to share.

On this legislation, it really is the kind of legislation that my ministry and the McGuinty government believe in very strongly: policies focused on helping to protect everyday working people, ordinary Ontarians, from unfair consumer

exploitation. It's the kind of role that Ontarians have come to expect of their government: to act clearly in defence of their right to be treated fairly, honestly and openly in the conduct of commercial affairs, to be treated as customers, not targets, and to be shielded from shady practices and sleight-of-hand salespeople.

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This is of particular importance during such challenging economic times as we're facing right now, as my colleague joins me—thank you. These are days when consumers are more likely to be looking for opportunities to save a few bucks. Unfortunately, such an environment is also where the unscrupulous try to make a fast buck at the expense of people, and that's not good; that's not right.

The act does not remove the right of private sector companies to carry out legitimate business activity. We don't want to do that. There should be no complaints from those business people who are running a clean operation and approaching customers in a spirit of openness. Indeed, I'm pleased to say that from a number of legitimate energy retailers, we've enjoyed positive consultations and dialogue. My wife and I are founding members of the Bullfrog movement, the clean, green energy movement; it's a good example of a private company that wants to do the right thing. So to all those Bullfrog users out there in Ontario, I say good morning and all the best. I say that to everybody, but particularly to the Bullfrog folk out there, who are making a statement every single day about clean energy and how they want to support things that move in that direction.

This act will, of course, be unwelcome to those whose business model relies on misinformation, unethical sales techniques and blatant misdirection. We want to go forth from this place with a very clear understanding that we're not here to support that kind of behaviour. This act will establish clear rules for businesses in the energy retailing industry, and that's important. It's important that we bring clarity and transparency to how consumers should be treated and how they ought to be able to expect that they'll be treated. Above all else, it places a pronounced focus on granting prospective customers the information and the knowledge necessary to let them make sound decisions. When all is said and done, an educated consumer is a wiser citizen and, I would argue, a better citizen—President John F. Kennedy in his famous address about consumer rights to Congress said that it also ensures that they're better citizens. An informed constituency making good decisions builds consumer confidence and all the positive things that necessarily flow from that. So I just want to get that on the record as well.

Of course, I would be remiss if I didn't take a moment to congratulate my colleague the Minister of Energy and Infrastructure on this important step. I had the good fortune to serve as Minister Phillips's parliamentary assistant and consider him a wonderful mentor. His introduction of legislation this morning is for me an affirmation of the kinds of things and the kinds of values that he and this government, in fact, have stood for in the past and will continue to stand for and fight for as we move forward.

I note with particular enthusiasm that this legislation will extend many of the protections that my ministry offers under the Consumer Protection Act, but it does so in a way that tackles the specific and growing needs of consumers in the large and very competitive energy field.

In the Ministry of Consumer Services, we're keenly aware of the need for action in this area. In fact, in the 2010 edition of our Smart Consumer Calendar, which I know many MPPs have and are very wise in getting distributed in their own riding, there's a whole section devoted to helping educate consumers about their rights with respect to buying energy. This new legislation of course delivers a vital set of reforms to complement all of the previous educational efforts and the ongoing educational efforts, so this is a helpful addition to that. Again, we want to be as helpful to consumers as we can.

As you've heard already from my colleague, the legislation has three principal thrusts. First, it takes decisive action to ensure energy retailing is conducted in a way that is transparent and fair to consumers, offering them exactly what they need in order to make informed choices. Second, it clearly strengthens consumer protections for those in multi-unit residential buildings, like high-rise apartment buildings, where smart metering and suite metering technology is being introduced. We know from research internationally that the time-of-use meters, taken as a whole and juxtaposed

against previous energy use, have resulted in an average of about a 23% energy conservation factor, and 23% energy savings is certainly something that I suspect everybody in this House would willingly embrace.

Mr. Frank Klees: Good luck.

Hon. Ted McMeekin: Maybe we can even do better than that, Frank. Who knows? Let's hope.

Third, this legislation establishes new standards for consumers facing disconnect or security deposit issues. In our MPP offices, we've all heard from time to time some of the horror stories involved in this particular area.

Each of these initiatives will improve the protection of Ontario consumers. That's fairly obvious. Each of these efforts and initiatives will also increase transparency and enhance information available to consumers. That's good. Each of these initiatives will create a fair environment for Ontario consumers, something that Ontario consumers deserve to expect, and we're adamant that we're going to deliver that fairness, that openness and that fair environment.

That said, I want to highlight the first and last measures in this act in particular, because these are items that speak specifically to correcting unfair consumer practices which, as you can imagine, as Minister of Consumer Services, are of considerable concern to myself, my ministry and, I suspect, likely all members of this House. As the Minister of Consumer Services, I have direct responsibility for a registry of consumer-based complaints placed by the public. I think my cabinet colleague the Minister of Energy and Infrastructure alluded to this, but let me reinforce for the record that energy retailers have consistently been in the top 10 complaints received by our ministry over the past three years. Each week, the Ontario Energy Board receives between 100 and 150 complaints about pressure sales tactics, contracts that are unclear or misleading, pricing deals that seem at odds with what is promised, and more. It's not a pleasant situation. Again, I think it's important to underscore that energy retailing is a legitimate business practice, provided the seller and the customer both understand the terms and conditions of the transaction.

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The Minister of Energy and Infrastructure, I thought quite helpfully, referenced that and compared it to one who negotiates a mortgage. You can negotiate a fixed rate or a variable rate. In some instances, there are some stories of people who have negotiated a fixed rate that has worked out to be, in the long run, quite favourable to them.

Again, I think it's important to underscore that energy retailing is a legitimate business; notwithstanding, consumers do need to make sure that they understand precisely what the terms and conditions of their contract would be.

That, by the way, is precisely what this legislation attempts to do. It's specifically and precisely what this legislation intends to do. In fact, the specific provisions allow for a number of specific improvements. For example, it would impose increased transparency and explicit disclosure on the part of electricity retailers and gas marketers, including providing plain-language disclosure about a number of key contract items. By the way, this would be done in a number of languages so that those whose mother tongue perhaps isn't English, who in some instances are perhaps more vulnerable, will be provided additional protections. I think that's good too, isn't it?

Ms. Leeanna Pendergast: Excellent.

Hon. Ted McMeekin: It would also ensure that each customer is given a standardized accounting on their doorstep, in an easy-to-read format, that will spell out explicitly to the purchaser the price of the energy contract that they are about to enter into, versus the price they currently pay with their existing utility. It would set out clear rules to allow consumers the ability to cancel their contracts under specified conditions, and it would set maximums on cancellation fees.

Again, my colleague the Minister of Energy and Infrastructure has referenced the 10-day cooling-off period, which is standard in the consumer protection business; the 30-day provision; the independent confirmation of the knowledge about the contract; as well as the ability to cancel a contract after the first payment if you discover, to your chagrin, that the terms aren't exactly what you thought they were. So there are all those protections. As we consult, perhaps additional protections might be built in.

We're absolutely determined to get this right. I think the Minister of Energy and Infrastructure has gone quite a ways to ensuring that this legislation is what we need in Ontario, and I know he's open to any enhancements of this legislation. That's just the nature of the man. He has always been open to getting something in place that works better for Ontario consumers. That has always been his modus operandi, and I'm pleased to say that's exactly how we work in the Ministry of Consumer Services as well. He has set a good example.

We'll continue to work hard to set out clear rules that allow consumers to cancel their contracts under those specified conditions and that set maximums on cancellation fees.

Ms. Leeanna Pendergast: Hear, hear.

Hon. Ted McMeekin: I know.

Ms. Leeanna Pendergast: Good stuff.

Hon. Ted McMeekin: You know, it's not always the most exciting stuff, but the day-to-day business of government doesn't have to be charismatic or what have you. It has to be solid. It has to be based on principles and good social policies about "Let's think of this together," telling them what's broke and how you're going to fix it. Right?

Ms. Leeanna Pendergast: Excellent.

Hon. Ted McMeekin: So after the initial contract has been signed, it would require retailers to go back and verify the consumer's attempt to freely enter into that contract, before any deal is considered done.

Finally, it would allow the government to establish new regulatory and training standards for salespeople and, importantly, create legal liability for directors and officers of the electricity retailing and gas marketing companies.

Mrs. Carol Mitchell: More good news.

Hon. Ted McMeekin: You're right: more good news. It is a good-news morning, isn't it? You know what? It has been a good-news week, actually. Isn't there a song about that?

Interjections.

Hon. Ted McMeekin: Well, Russia hasn't launched a satellite this morning, I don't think, so we won't go there.

These are not small matters. For anyone seeking to deliberately make a buck from unfair exploitation of consumers, we want you to know that we intend to force you to clean up your act. We're going to make you clean up your act. These measures will establish a new standard of and for transparency, disclosure and accountability that will surely discourage scam artists and charlatans. They tend to hang out together, the scam artists and the charlatans, right? It will create a series of penalties and remedies that will encourage businesses to act in the best interests of the consumer. Anybody here in this House who doesn't want to act in the best interests of consumers, raise your hand. No, nobody; I didn't think so.

Let me also take a moment to discuss the issue of security deposits and disconnections, for these too are areas that attract considerable complaint from the public, and understandably so. On the one hand, it is only natural that companies exercise due diligence in the extension of service to those with a checkered past paying their bills. I've been in business. You've got to guard yourself. Being an idealist doesn't mean you're naive, right? You have to protect yourself, and we want to make sure that legitimate businesses are protected as we're clamping down on those scam artists and charlatans who meet in the dark and plot nefarious deeds.

On the other hand, widespread and indiscriminate use of security deposits can become a barrier to accessing service, particularly for vulnerable consumers. We need to have a particular interest in and focus on defending the vulnerable, and this legislation clearly is intended to do exactly that. The challenge here is to ensure a common set of principles and rules. We will bring clarity to a practice that seems far too capricious for the tastes of many individual consumers.

The legislation will allow the OEB to establish transparent guidelines for when and how utilities employ security deposits to ensure that, to the greatest degree possible, utilities maintain their focus on honest-to-goodness credit risks and not just on turning another buck.

The same will be true of disconnections. New rules and clear, transparent measures will be established. Moreover, the legislation will prescribe what classes of consumers cannot be disconnected—I know we've all had those horror stories—subject to certain criteria. Again, the ambition here is to ensure fairness and consistent practice all across this great province of ours. Importantly, this legislation will ensure that such practices in the electricity market are extended to also capture the natural gas and suite-metered sectors.

In wrapping up, I appeal to my fellow members on all sides of this great Legislative Assembly, the people's place, the place where we have important debates and make important decisions that impact literally millions of Ontarians, from the eastern part of the province right through to the Windsor area, from that great urban municipality of Hamilton right up to the northern sections via Kitchener, and elsewhere. To all Ontarians, we want to give assurance that we're trying to do the right thing and that all members of this Legislative Assembly will in fact not only consider these measures now but do a speedy review and ensure a speedy passage of this important legislation.

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Mr. Frank Klees: Just deem that it was done.

Hon. Ted McMeekin: Well, some governments have worked that way in the past but we want to make sure we get it right. As the Premier is fond of saying, "None of us is as smart as all of us." So we're going to take our time to get it right, just as we have on other pieces of legislation that we've dealt with recently in this House.

Sound policies to protect consumers are surely a priority that we in this place can all agree upon regardless of partisan stripe. That's what's so wonderful about this place. When something makes sense we embrace it together and we move forward together to better serve—working together to serve the people of Ontario even better, right?

Mr. Frank Klees: Hallelujah. Amen.

Hon. Ted McMeekin: Amen, brother.

The problems to be corrected are not difficult to identify and the solutions are, I believe, we believe, equally apparent. This legislation builds on our province's proud record of strong consumer protection—

Applause.

Hon. Ted McMeekin: They say, "Never step on your applause"—record of strong consumer protection and permits fair commercial activity to unfold. Extending such principles to the energy sector is a logical, progressive and desirable move. Leadership is about doing the right thing. We believe this is the right thing, and our sincere hope is that we will find in this House an agreement, a certain and hopefully unanimous agreement, on this matter.

I thank you for your patience and I thank all the members of the Legislative Assembly for listening so attentively on this important issue. I want to say to the good people of Ontario who may be tuned in this morning that the Minister of Energy and Infrastructure and his team have gone out of their way. I've got to tell you they have worked around the clock, and my ministry has contributed in some small measure to the important legislation before us. It's good legislation. It's the right thing to do. Leadership is about doing the right thing, and all the members of this assembly, regardless of stripe, share the concern that we do the right thing.

Thank you for allowing us this time. As Barack Obama said, "We're not here to fear the future, but to shape it." Let's do so.

The Acting Speaker (Mr. Jim Wilson): Questions and comments?

Mr. John Yakabuski: Interesting. The Minister of Consumer Services talks about working around the clock. Well, you know, David Ramsay introduced a private member's bill that we were going to work with on this subject last year, a year ago. We had second reading a year ago. So it's been a very slow clock if they have been working on it.

Why they're introducing second reading today, the day we're exiting this House for winter recess, is clearly pure politics. They want to send out what they see as a positive Liberal political message for the holidays because they've had so many negative messages with the HST. I've got all the respect in the world for the Minister of Energy and Infrastructure, but to bring a second reading debate today, one hour of debate and then nothing for several weeks, a couple of months, perhaps, seems kind of strange to me.

He talked about a couple of things: sub-metering, or, as they've called it, suite metering. They've changed the term. I guess they want it to sound sweeter. The reality is that we told them in 2004 that they had to go with sub-metering if they wanted to get some gains on energy conservation. That's when we really needed it. Today we actually have a demand that is much lower than our supply, and that's because, when they talk about their lowering those peaks, they've managed to do a good job of lowering demand during those peaks by getting rid of 330,000 manufacturing jobs in the province of Ontario. That's what has gone on under their watch. So it's kind of rich that they're talking about that kind of thing now.

But in cabinet meetings, George Smitherman, before he was Minister of Energy, and Michael Bryant fought against sub-metering; otherwise, we would have had it in this province sooner. They fought against it because they didn't like the politics of it in their ridings.

The other thing about this bill is that it doesn't speak much about what they're actually going to do. It's very difficult to debate something when it's going to be done in regulation. We know the principles, and we support the principles, because we have to do something about unscrupulous energy retailers; they have to be stopped. But we need to know more about what tools we're actually going to use to do that.

The Acting Speaker (Mr. Jim Wilson): Further questions and comments?

Mr. Paul Miller: We're all in favour of protecting the consumer. The minister stood up and he did quite a theatrical presentation with all kinds of quotes and it was really a very good Hollywood-style presentation. I must credit him on his acting ability.

However, if he really wants to protect the consumer, then maybe he should look at the billing process, because, before I was in this House, I used to look at my bill, and you needed a Philadelphia lawyer to figure out all the charges that come from the middleman, which they created. They allowed middle producers in there that have transportation costs and storage costs and all these other things that the consumers don't really understand, and they sure don't spell it out. I'll tell you, they created a middleman, because I remember when it was just one utility. You'd pay the utility, you'd pay the gas bill to Union Gas, you'd pay Hamilton Hydro, and then they created this whole group of guys in the middle, squeezing the population for more. More bureaucratic levels were created, and that just costs more money to the consumers.

So when they stand up and say, "We're here to protect the consumer," well, they might not want to create all these bureaucratic levels that get more charges for people, whether it's gas, hydro, you name it, all these things that have been created. When you stand up and say, "We're for the people of Ontario, and we want to protect them," then really do it. Don't create all these other agencies and things that are charging the people of Ontario. That's what they don't talk about.

The Acting Speaker (Mr. Jim Wilson): Questions and comments?

Mr. Phil McNeely: I'd just like to clear up some of the information this morning. The middleman was brought in before 2003. This bill will clean up the mess that was left of not properly legislating these people.

In my experience as a member, I've received many complaints from my constituents about the practices used by some of the less scrupulous door-to-door energy salespeople. I've experienced that first-hand—not only once, but twice. Very plainly, this bill, if passed, will eliminate these practices from the marketplace, and this is extremely important to

ensure that seniors on fixed incomes and new Canadians, who perhaps do not have a strong command of the language, are not locked into bad contracts.

It will also allow individual units in apartment buildings to be metered for electricity individually, and this, again, is very important. This will allow those individual owners to control their own costs by lowering their energy use. I'm very much in favour of this measure. Shifting some of the responsibility to use less energy to tenants will help Ontarians to achieve greater greenhouse gas reductions, and we know that is very important, with the talks going on in Copenhagen this week and next.

As we know, conservation is not only good for the environment, but it's the most cost-effective way of cutting energy costs. It is an action that will help us achieve the goal of having 3.6 million customers on time-of-use pricing by 2011. By 2014, the goal is to reduce province-wide greenhouse gas emissions by 6% below the Kyoto-established levels of 1990.

Our Green Energy Act will help us to achieve these targets. Already, the feed-in tariff is being lauded as the best program of its kind in North America. It will lead to a renewable energy upsurge. In fact, green companies are already moving into Ontario. For example, Canadian Solar Inc., which was mentioned in this House yesterday, will be setting up a manufacturing plant. The Green Energy Act is truly a significant step toward building a thriving green economy in Ontario, and this bill we are debating today will only build on the significant achievements made so far.

The Acting Speaker (Mr. Jim Wilson): Further questions and comments?

Mr. Norm Miller: It's my pleasure to have the opportunity to respond to the minister with regard to Bill 235, An Act to enact the Energy Consumer Protection Act, 2009 and to amend other Acts.

Two minutes, of course, is not much time to hit all the aspects of the bill, but, you know, the minister said that there are 100 to 150 complaints a week with regard to energy retailers. I would say, from my own experience in the riding of Parry Sound–Muskoka, that, through my offices, I have had many complaints where seniors, in particular, are what I call preyed upon by pushy and forceful salespeople going door to door, and just never saying no—sometimes misleading as to the facts. More protection for those individuals is a good thing.

I'd say why not consider making door-to-door sales of anything illegal, because I think the great majority of people don't want to be disturbed at their house by a door-to-door salesperson. I'd be open to consideration of that. It would need fuller investigation for sure.

The minister talked about the provincial benefit. I've got a situation in my riding where a corporation, a manufacturer, signed a fixed-price contract. They say they were misled by the salesperson and didn't realize that the provincial benefit, in a time of low energy prices, actually becomes a cost of thousands of dollars a month to them, and they are quite concerned about that.

I would agree that it is very complicated. Suite metering, as the member from Renfrew–Nipissing–Pembroke pointed out, is something that we were pushing for many years ago. It allows individual meters for condos or apartments so that people understand and have an incentive to save electricity.

On the surface, this bill looks like something that, certainly, I would like to support. I hope there's no poison pill in it. I hope they take time and don't time-allocate this one, and actually listen to people to try to get this one right.

The Acting Speaker (Mr. Jim Wilson): Thank you. Two-minute response?

Hon. Gerry Phillips: Just to thank all of the members.

The member from Pembroke indicated—sort of a comment that we've got so much supply, we don't have to worry about conservation.

Mr. John Yakabuski: Oh, I did not indicate that.

Hon. Gerry Phillips: Well, you said conservation is not as important now.

I would just say to the public that this is always a challenge. We have to keep relentlessly pursuing conservation, even if supply is seemingly fine. They're somewhat unrelated. I wouldn't want anybody out there who is thinking of conservation to back off at all.

To the member from Hamilton East on the billing, I am determined that our bills become more understandable to the consumer. I don't disagree that it is somewhat difficult.

And earlier, I think about a week ago, to another question in here on the same issue that the member from Parry Sound raised, and that is the provincial benefit, or the—

Mr. John Yakabuski: Global adjustment.

Hon. Gerry Phillips: Global adjustment. Thank you very much. We have to find a way to clarify that.

I want to thank the member for Ottawa–Orléans. The day he arrived here, he was pursuing energy conservation. He was working on the building code, I remember. He's kind of made a career of this. And he was talking about it before many of us were as aware as he was. He's been relentless on this, and very knowledgeable, and I thank him.

To the member for Parry Sound, as I said earlier, we do have to find a way that our bills become clearer. He mentioned the number of complaints he has. He's probably not unique. We need to deal with that, and I believe this legislation does.

Second reading debate deemed adjourned.

The Acting Speaker (Mr. Jim Wilson): It being just about 10:15, this House stands in recess until 10:30, at which time we will have question period.

Hansard: February 16, 2010

ENERGY CONSUMER
PROTECTION ACT, 2010 /
LOI DE 2010 SUR LA PROTECTION
DES CONSOMMATEURS D'ÉNERGIE

Resuming the debate adjourned on December 10, 2009, on the motion for second reading of Bill 235, An Act to enact the Energy Consumer Protection Act, 2009 and to amend other Acts / Projet de loi 235, Loi édictant la Loi de 2009 sur la protection des consommateurs d'énergie et modifiant d'autres lois.

The Speaker (Hon. Steve Peters): Further debate?

Mr. John Yakabuski: It's a pleasure to join this debate this morning.

If I could begin by just taking a moment in this House to convey my congratulations to my former colleague, now a member of the Senate of Canada, the Honourable Bob Runciman. I'm certainly more than ecstatic that the Prime Minister chose Bob Runciman to represent this country in the Senate of Canada at this time, and I wish him, his wife, Jeannette, and his family all the best on this exciting new phase in his life. I'm looking forward to his good work continuing in the Senate, as he did for 29 years in this House as well. Mr. Speaker, thank you very much for that opportunity.

This morning, we're returning to second reading debate on Bill 235, an act respecting energy retailers: An Act to enact the Energy Consumer Protection Act, 2009 and to amend other Acts.

It's kind of passing strange the way this bill got here. You see, well over a year ago, the member for Timiskaming–Cochrane, Mr. Ramsay, introduced a private member's bill that had great support in the industry, and particularly from the Ontario Energy Association. The president of the OEA at that time, Shane Pospisil, who, as you know, Madam Speaker—we've just switched from Mister to Madam; we make that transition so quietly sometimes. Madam Speaker, as you will recall, as the president of the OEA, Mr. Pospisil was very active in trying to effect change in the energy retailing sector and was looking for ways to ensure that the sector was viable but also brought about something that was absolutely necessary, and that was better consumer protection to that sector. Now, Madam Speaker, you will recall that Mr. Pospisil was an assistant deputy minister to the Minister of Energy during the term of this government, so he had a great deal of experience on both sides of the issues—not only as the president and CEO of the Ontario Energy Association, but previously as the assistant deputy minister to Mr. Duncan on his first foray as energy minister.

I know it has been kind of a revolving door—energy ministers in this province. So it was George Smitherman, the former member for Toronto Centre and former Minister of Energy, who talked about bringing in legislation dealing with the energy retailers' side of the business but never actually did it. But that was not uncommon for George. He did a lot of talking but a lot less doing sometimes, unless it was something that he felt would further his interest in trying to be mayor of Toronto, which—so many of the things that are happening in the energy sector today were actually brought in because George knew they would be skewed as being very positive in the city of Toronto and help him along with his quest to be mayor.

What I am surprised with, quite frankly, is that the Premier is actually so complicit in this, in allowing the energy sector still to be used as George's private domain to put forth his own agenda and promote his own cause. But it has been a kind of revolving door in the ministry. I know that right now, this week, Brad Duguid is the Minister of Energy. We're not sure what will come next week, because our good friend, and a fine gentleman he is, Gerry Phillips briefly became the energy minister for the second time to fill a void, to fill a gap, with the resignation of George Smitherman. Of course, today, Brad Duguid is the one taking orders from the Premier's office as to what to do in the energy sector to make sure that the political stuff is being taken care of; not necessarily the needs of the energy sector, or the needs of the industry, or the needs of the consumers, but that the political needs of, particularly, George Smitherman and other members of the Liberal Party are being well served by the orders from the Premier's office to the Minister of Energy.

So we are curious as to what might happen next week. Will we have a new energy minister? We don't know that. We can't predict that, just as we couldn't necessarily have predicted Mr. Bilodeau's gold medal on Sunday in mogul skiing. Congratulations—Canada's first gold medal ever achieved on Canadian soil at the Olympics. So, Pierre Bilodeau, thank you very much—

Mr. Ted Arnott: Alexandre Bilodeau.

Mr. John Yakabuski: Alexandre Bilodeau, congratulations. Thank you very much.

That's why Ted is here; he's here to correct me, and it's wonderful to have him nearby because he'll always make sure that I'm getting the facts straight.

But congratulations; it was a great day for him and a great day for Canada. Everyone who was watching there Sunday was exceedingly and justifiably proud.

But just as that isn't easy to predict, it's not easy to predict where this government is going in the energy sector. One thing is certain: Look at the politics of the issue, and that's exactly where they'll be heading. They'll be heading down that road of what they can do to politically advance their cause, not necessarily what is necessary in the energy sector.

So you have to ask yourself—change was asked for, change was needed, changes were expected much sooner than this government ever did anything about it. Several years ago, it was clear that there was a problem with energy retailers in this province. There was a problem with whether or not consumers were being properly informed, properly treated, and if there was a problem, if they were given the proper opportunity to exit themselves from these energy contracts.

Myself, I might be at somewhat of an advantage—or disadvantage, depending how you look at it. As the energy critic, I probably get—and I'm not going to presuppose what anybody else in this House has go through their office—as many or more requests from consumers about concerns with energy contracts that they have signed at their home and at the door. It has made it clear to me, as I know it is clear to every member of this House—I know that there's not a single member of this House, I would be pretty confident in saying, who hasn't had some contact with a consumer who has a horror story to tell about an energy retailer or the representative—in fairness, the representative—of an energy retailer come to their door. In many cases, they can absolutely prove that there was a misrepresentation on the part of that agent. That's one of the things that absolutely something had to be done about; there was a clear environment out there where people were going to the door and saying things that they had no right to say or that were, in fact, completely untrue.

One of the things that this legislation—I don't want my friends across the way to think that I'm negative, because I am not a Negative Nelly; you know that. No, I want you to understand that we support the premise behind bringing forth legislation to protect consumers, because that has to be our highest priority.

The challenge is sometimes just getting it right. Sometimes they have a good idea here, but then you ask yourself, "If it was such a good idea on December 10, 2009, was it not just as good an idea in January 2009 or December 2008?" I can't remember exactly when David Ramsay brought in the private member's bill. Because I remember having conversations with—

Mr. Dave Levac: It was a good idea before that.

0910

Mr. John Yakabuski: It was a good idea before that. The member from Brant is absolutely right, and I know he's one of the guys who has raised this issue himself. He's probably had issues in his own riding with people bringing that to his attention. But, yes, it was a good issue before that, and you have to ask yourself, why did the Minister of Energy at the time, George Smitherman, take so long to react and bring in a piece of legislation?

I remember having conversations with the minister—because I was the energy critic, and still am—and saying, "What's happening here?" "Well, Yak, we're coming with something. We're coming," and then he actually made the public announcement before we left, before we shut down the House in June, that he'd have new legislation coming in September. Well, September came and went; the leaves turned colour. October came and went; Halloween passed. November came and went; Remembrance Day ceremonies were over. The only thing that changed is that George stepped down as the Minister of Energy to run for mayor of Toronto and left it to Gerry Phillips to bring forth this piece of legislation.

Now, there is clearly a need for the protection, but there are definitely some issues with this legislation as well. That's what our job is, as opposition, and you're going to hear this not only from us. I'm actually very pleased that the issue is being brought before the House early in this new—what do we call this? It's not a session. Whatever we call these things whenever we break.

Mr. Michael A. Brown: Maybe we should prorogue.

Mr. John Yakabuski: No, we're not prorogued. We're not prorogued yet, I say to the member from Algoma–Manitoulin. We're not prorogued yet; the Premier apparently wants to. But when we come back from a recess, a break.

I'm actually pleased that the government is moving quickly on this so that we can get this issue to committee and get this dealt with as quickly as possible, so that stakeholders in the industry also are aware of the commitment, not only of the government but of this entire legislative body, to bring forth legislation that will protect consumers from nefarious acts at the door. The sooner we get this dealt with in second reading debate, which we've resumed this morning, the sooner we get this to committee.

I've had the opportunity to meet in the intersession with some of those stakeholders and groups, who expressed some of their concerns. Some of their concerns strike me as legitimate. We have to ask ourselves sometimes, do we need a sledgehammer if a fly swatter will do? I'm not suggesting that this is a minor problem, not in the least, but some of the scope of this legislation goes beyond energy retailing and into—and I think this is something the members on the opposite side should be very worried about. I see the Minister of Training, Colleges and Universities listening carefully, because I know that these are things he would be concerned about. We're actually looking at ripping apart the mandate of the Ontario Energy Board in this piece of legislation. That is something that should concern us all.

You know, my friend from Peterborough, Mr. Leal, is more of a historian than I am, but I do believe it was the Davis government that brought in the Ontario Energy Board. My father would have been a member of that government. That was brought in to protect; its mandate was to protect the energy consumer in the province of Ontario. It took the politics out of the issue. It took the responsibility of running the Ministry of Energy and left it with the Minister of Energy and his or her ministry, but it took the issue of protecting the consumer—and sometimes that meant protecting the consumer from the Minister of Energy and the minister, and at that time Ontario Hydro, which had an essential monopoly—almost a monopoly—of power generation and distribution in the province of Ontario.

So what this piece of legislation does, in some ways—but if it does it in any way, it's something that we should be concerned about in all ways—is what it does to the Ontario Energy Board, because the establishment of that was done for very, very good reason: that the consumer had to be able to confidently know that there was a watchdog in place whose mandate was there to protect them. That has never gone away.

Now, what the Minister of Energy and the ministry have a responsibility to do is to ensure that the Ontario Energy Board actually has the arrows in its quiver, the tools in its arsenal, as they say, to effect that protection to consumers in the province of Ontario. It is not the job of the ministry to take that quiver and empty it so that the Ontario Energy Board becomes a mere shell of what it was intended to be, and those are concerns that have been raised to us in the Progressive Conservative caucus by stakeholders here in the province of Ontario about what this piece of legislation might be doing to the Ontario Energy Board.

If you want to ensure that there's protection—and we support the premise behind the legislation, absolutely. But I believe we can accomplish that without eviscerating the Ontario Energy Board itself. That's something that I think the government needs to take a real look at, and I'll get into more details about some of those concerns—more specifically, how that might impact the Ontario Energy Board and the business itself.

We have to remember that when you enact a piece of legislation, you cannot ensure everything. The only way to ensure that there would not be a problem in the sale of any product, be it electricity or gas at the door, be it a vacuum cleaner, be it a product that is sold over the Internet, be it a product that is sold in a retail establishment—the only way you could ever be absolutely, 100% certain that there would never be anything worrisome or of an illegal or a nefarious or unsavoury nature happening during one of those transactions is to make those transactions illegal.

I believe the member from Algoma–Manitoulin has actually brought forth a private member's bill that would make the sale of energy contracts at the door illegal, and I understand, to some degree, where he's coming from, but he also has to understand that if an energy contract should be illegal at the door, then perhaps selling anything at the door—some people might argue that selling anything at the door leaves so much grey area and has so little control in place as to effectively disinvolve any agency or the government from having any ability to protect the consumer at all.

But one thing that industry does have in place and is actively—and they have made their pitch. I know they met with David Ramsay over his private member's bill, and I know they met with George Smitherman when he was the Minister of Energy, and I know they met with myself as the critic, and I'm quite certain they would have met with the critic for the New Democratic Party as well.

0920

There were some undertakings offered by the industry that I think need to be at least looked at. They've raised some concerns with the bill about some of the effects that portions of this bill might have. If you're not going to go down the road of making the contracts illegal, which my friend from Algoma–Manitoulin would like to do—and I respect his views—then it seems kind of counterintuitive to create the environment that would actually push the people out of business anyway without having had some input into the legislation that governs them.

There are a number of issues that they have raised, and I'm not in a position to make a determination, based on what we do know, that this would be the right way to go, the somewhat right way to go, the not-so-right way to go or the wrong way to go. But I think that it's part of the process, and it's why I'm saying that it's a good thing that the government is bringing this bill forward early, in this first week back after the winter break, so that we can get some of the things dealt with, so that we can have some of these stakeholders join us at committee, so that we can hear from them with the myriad of concerns that they've raised with us and I know they have raised with members of the government caucus as well.

One of the concerns they have talked about, for example, is the third party verification. The way they put it is, if you have a third party verification, as one stakeholder said to me, that's all fine and good, but that will be 80 jobs immediately cut out of their company; 80 jobs will be cut from their payroll if you have that third party verification.

The other thing that they raised, for example, was a 30-day time to verify. There are a number of issues that could come into play, whether it's a billing cycle change, but also, whether that is a proper length of time versus any other industry. Their view was that the best way to get that contract verified was to have a verbal verification, reaffirmation within 10 days or after 10 days of signing the contract.

They also offered something that the government should think about, too: an opportunity for the buyer, the purchaser of the contract, to get out of it without any penalty after the first bill. They can then make their determination whether or not it's something they want.

What brought these contracts about in the first place was a desire for certainty. Back in the early part of last decade, there was a move to deregulate the electricity industry. At that time, energy contracts—and quite frankly, the side that has caused the most angst is the electricity side of it; not the gas side of it so much, but the electricity side of it. Back in the early 2000s there was a move by the then government to deregulate electricity prices. What happened was—the timing probably couldn't have been worse—it spawned the sale and the introduction of these energy contracts, because what some people wanted was certainty. They wanted to know, because there were all kinds of speculation at that time as to what could happen to electricity prices as the market became deregulated. A lot of people wanted certainty in their pricing, and an energy contract was supposed to bring that.

Then, in November 2002, after a summer of really difficult situations in the marketplace where prices skyrocketed, the government of the day made the decision that they would re-regulate prices. That rendered all of these contracts null and void, but the business was still out there signing contracts.

What we've got today—and I see my friends there chortling a little bit but not overly loud, kind of under their breath, because of the problems that beset the previous government. But what of today, when a person signs a contract because they want certainty and they get anything but? I'm not suggesting that that isn't one of the reasons, but the biggest reason that they have no certainty in the contract today is because of the absolute mess this government has made of the electricity sector.

On the IESO website, they call it a provincial benefit. Now, if you're one of these people who has purchased an electricity contract from an energy retailer, then that provincial benefit is anything but, because whatever the amount may be, whether it's seven cents, eight cents, 8.2 cents, whatever the rate may be that you purchased that electricity at for a five-year contract—it's usually a five-year contract—from the retailer, in Dalton McGuinty's electrical embarrassment you are now paying that provincial benefit on top of that contract price. This month, I believe the provincial benefit is 3.28 cents per kilowatt hour. So whatever you're paying that energy retailer, tack on another 3.28 cents because of the contracts that Dalton McGuinty has signed here in Ontario.

At one point in 2009—and I can't tell you exactly which month it was; I don't have that note with me—the provincial benefit, and take note of this, I say to the member from Algoma–Manitoulin, was 4.18 cents per kilowatt hour. That was at a time when the market price of electricity was below a cent per kilowatt hour, but what was Dalton McGuinty doing in Ontario? Here we were in Ontario in the summer of 2009, after he had killed some 200,000 manufacturing jobs in Ontario since 2005, with 146,000 net jobs lost last year. While the market price of electricity was at some times under a cent—sometimes it was below zero—we were actually spilling water at our hydraulic stations, letting it go by without spinning the turbines, because Dalton McGuinty had to allow whatever wind was out there into the system. So we were spilling water, renewable energy, past our dams because we couldn't use the power. If you understand how the electricity system works, you can't have more electricity being produced at any given time than is being used. It has to be an exact match. You can't just produce all the energy you want and hope that you've got a buyer for it—no. You can only produce what is being used. It has to be an exact match.

So what was happening? We were actually having water go by our dams, not turning the turbines. Water, which we can produce electricity out of at about two cents a kilowatt hour, was going by the turbines, letting all of the wind turbines go at 13.5 cents—or whatever contracts Dalton has signed secretly that we don't know about—and selling that power to the United States, because we were exporting it; we had too much. We were selling it to the United States at whatever the market price would be, which on some days was under a penny, some days it was two pennies, and some days it was actually a negative price.

0930

So you have to ask yourself, wouldn't you really want to try to fix this? Wouldn't you really want to be doing something in the energy sector to try to make it actually representative of what our needs are and what our abilities to produce are?

What does he do? He then signs a contract with Samsung in Korea—$437 million of free money to Samsung; just, "There you go. Good luck to your Olympic team." Some $437 million to create, purportedly, 1,440 jobs: That translates to $303,000 per job.

I don't have a crystal ball, but I'm pretty confident that if I went out there and canvassed the province of Ontario and went around to company XYZ and entrepreneur ABC and said, "Look, here's the deal: We're the government of Ontario"—assuming I was the government, and I know I'm not, before they remind me of that. "Listen, fellas, here's the deal: We'll give you $303,000 for every job you produce. We're here to create jobs. We want to create jobs in the province of Ontario. My name is Dalton McGuinty, and I am the job producer, the job creator."

Mr. Gilles Bisson: I don't think so. You got that wrong. He's not the job producer; he's the job killer.

Mr. John Yakabuski: Yes, but that's what I'm claiming to be—this is a claim. I want to just bring my friend from Timmins–James Bay into the mix here. This is just play-acting at this point.

"So here I am, folks. I'm going to give you $303,000 for every job you create." Well, I guarantee you there would be no limit to the number of jobs people would be willing to create at $303,000 a pop. They might be analyzing the cloud cover of the day and drawing pictures of it. It might be counting the number of stray cats that go by the bus stop at Yonge and Eglinton. I don't know what it might be, but they'll find a job for that person. At $303,000 a pop, they'll get themselves a job. They'll create a job. That's the job creation program that the Premier's using the Ministry of Energy for, and he's using your tax dollars—$437 million to Samsung.

Just slide her out there, folks, because, you see, people aren't paying attention sometimes. They only see the headlines in some of the newspapers that are quite friendly to the Liberal Party, as you know. I would never be one to criticize the media, but there are times when even the most objective observer would say that they seem to have taken the position that they need to be the cheerleader for the McGuinty government.

Mr. Jeff Leal: I think we got the endorsement of the Barry's Bay Bugle—

Mr. John Yakabuski: There is no Barry's Bay Bugle. It's the Barry's Bay This Week, I say to my friend from Peterborough. But I haven't seen the endorsement for your program in there at any time recently.

The agenda of the government is to try to promote their so-called energy plan. The cost of their energy plan will come back to haunt not only them but the public here in the province of Ontario.

Getting back to that provincial benefit, it's not only the person who signs an energy contract with an energy retailer that pays the price of that provincial benefit. This provincial benefit is basically, so we can put this into the package, the cost of those sweetheart deals that Dwight Duncan and George Smitherman have signed over the years with their friends in what they see as the answer, with the renewable energy contracts that are priced significantly higher than the market. These are the contracts that are so much higher than the market price of the product they are producing that that is the additional cost; that's part of what is calculated in the provincial benefit. So when you see the provincial benefit and it continues to rise, that is the cost of George Smitherman's Green Energy Act. That's part of it. It's going to continue to rise the more contracts they sign with foreign-based nationals like Samsung that offer no guarantees to Ontario, only guarantees of profit in Korea. That's quite a job creation program that he has embarked on. But he gets the headline he is looking for, and that makes him happy.

The provincial benefit not only affects people who sign a retail energy contract. All of these people who are major energy consumers—over 250,000 kilowatt hours a month—also are victims of the energy policy of this government. I say "victims," and I emphasize that, Madam Speaker. You see, when the economy was a little better—and the longer Dalton McGuinty has his fingers on the pulse, the farther in the past that better economy is going to be. But when the economy was better and the demand for electricity was higher, and therefore the market price of that electricity was higher, the provincial benefit, although it was very minuscule in nature, did actually amount to a benefit to those large consumers. What it meant then was that when the market price of electricity might have been 6.5 cents per kilowatt hour at any given time—because they pay the market price based on the hourly price, and it can be low at 2 in the morning when the demand is low, but it can be very high at 5 o'clock in the afternoon or 6 o'clock in the evening. It fluctuates on a continuous basis. When the market price was high, that provincial benefit would actually act to mitigate the cost for that major power consumer. So when the times were good, energy prices were high, but, as I say, the provincial benefit was very minuscule. So energy prices were high and the businessman and the producer, the manufacturer, took it on the chin because they paid a high market price for energy.

Then, when business got poorer and they had to lay off people and they were struggling just to keep their heads above water, electricity demand dropped because they were producing fewer products. When the electricity demand dropped, the price went down too. But just when that manufacturer was hoping that, "Oh, great. The price of electricity has gone down. Here it is today at"—we'll just say, for example, it's three cents a kilowatt hour. "Oh, that's great because, you know, two years ago it was 6.9 or 7.3," whatever. "This is fantastic. It's down to three cents a kilowatt hour." But then when they get their bill in that infamous month, I think it was August or something this past year, tack on 4.18 cents. Tack on another 4.18 cents for every kilowatt hour used, because that was the provincial benefit. I don't what dictionary the Ministry of Energy uses, but I'll tell you, when you're taking a provincial benefit of 4.18 cents per kilowatt

hour, it's time to get the salve out, because that's painful. That's painful. Every manufacturer, every major consumer in this province, was experiencing that this past summer.

Did you hear a word from this government about trying to address that? Not a word. No, because that didn't fit into the plan with trying to convince the people out there that we had an answer. Just sign more of these expensive contracts; send George Smitherman out there to sign more of these expensive contracts; negotiate behind closed doors with Samsung of Korea for more of these expensive contracts—a $437-million expensive contract—while our manufacturers were taking it on the chin, in the teeth. That's what was going on in the province of Ontario with this Ministry of Energy.

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We're talking about protecting consumers. That's the whole premise of this bill: protecting consumers. Good Lord, you have to ask yourself: What took so long for them to think of the consumer in this province? While the summer drifted on, dragged on, and job losses continued and escalated, where was the government? Planning a mayoralty race for the city of Toronto. Can you imagine that? That's what our Ministry of Energy was being used for, to catapult a former member, a former minister, into city hall.

Hon. Monique M. Smith: If you want to run for mayor of Barry's Bay, we'll help you. It's just an offer.

Mr. John Yakabuski: I would never use my position to advantage myself in that way, I say to the government House leader. She was offering to help me become mayor of Barry's Bay. I appreciate the offer but I'm going to decline because I feel that it would not be proper for me to use my office as a member of this Legislature to try to propel myself into another office. I say this to the government House leader, should I choose at some time to seek another office, I will declare that to this House well in advance, and if she's prepared to help me at that time, I will gracefully accept any help she's prepared to give me, but will not do so while working on behalf of the people of Renfrew–Nipissing–Pembroke in this Legislature.

Look, I've got great respect for George Smitherman, and we got along quite well as minister and critic, but I was really disappointed with the way he handled his exit from this place. I think it could have been done in a much greater and more fitting manner than to basically just try to pave the golden sidewalks down Bay Street to city hall from the Minister of Energy's tower. Where is the Ministry of Energy? I'm not even sure where it is. He never invited me over to his office for a meeting.

Hon. John Milloy: What kind of a critic are you?

Mr. John Yakabuski: Well, I don't have to know where the office is, I say to the Minister of Training, Colleges and Universities. It's not that important that I know where the office is, but I tell you, I know what the issues are, and this McGuinty government is failing to deal with the issues other than in the most political sense possible. That is what is truly regrettable here in the province of Ontario. There has to be a better way.

Getting back to the OEB, an agency whose very conception was based on the protection of the energy consumer, it's now being told, "You're not important any more. The Minister of Energy will take care of things." We know how the Minister of Energy took care of things and we know how the Minister of Energy will take care of things. The Minister of Energy tends to look after the Minister of Energy.

Now I'm not implying that the new Minister of Energy has his sights set on a mayoralty campaign, because they can't all run for mayor of Toronto; I know that. Well, we have one going for Ottawa, but he didn't have anything to do with energy.

Of course, you really have to ask yourself the motives when people jump. I can understand when people go from provincial politics to federal politics. It is a natural ascension. It's the senior House in the country, and it's a natural progression. When somebody indicates they are going to run for federal Parliament, I give them all the credit in the world, but they don't know when that election is going to be. But when you say you're going to run for mayor, you know when that election's going to be. It's already scheduled. There's nothing that can change it. There's not a falling of a government or a non-confidence vote or the Governor General or the Lieutenant Governor dissolving the Parliament of

the day. No, it's a predetermined date. So when you're sitting in this House and you say, "I'm going to quit to run for mayor," you've already quit, because everything you do from that day on is about your run for mayor, not to serve your constituents as MPP.

What should have happened in this House was that when Mr. Smitherman and Mr. Watson determined they were going to run for mayor, they shouldn't have just resigned their cabinet posts; they should have resigned their seats on the same day. Because once they declare they're running for mayor, they're running for an election that has been scheduled. That's what they're doing. Nobody is silly enough to believe that they're actually working as an MPP after that. Everything they do is to try to build their profile for the job they want, not the job they want out of. That's the thing that I think people shouldn't be using this Legislature for. I think that everyone who's thinking about these things in the future should question that action.

Anyway, we do have a lot to cover here and we are running painfully short of time. There are issues with this bill that we want to address on the part of the stakeholders as well.

I've had some opportunity to meet with a number of stakeholders and discuss what should or shouldn't be in this bill. One thing that we want to advise consumers—and I commend the government for bringing forth this legislation; we just have to get it right. This Legislature is doing the right thing by bringing in protective legislation. It can't do it outside the OEB; it has to work in concert with the OEB—

Mr. Jeff Leal: That's why we took our time to get it right.

Mr. John Yakabuski: To the member from Peterborough: I'll accept your version of that.

Listen, by getting it right, we'll actually produce something that is in the best interest of the consumer at the end of the day. The consumer has to be the number one priority, and we understand that.

I want consumers to remember one thing, and this is something that, in discussions I've had, in discussions that the OEA has had with the retailers and the stakeholders: If someone comes to your door and says they represent the utility, they're lying. They can't. They're representing a retailer. If they come to your door and they say, "We can save you money on your electricity bill," they can't say that. You cannot say that unless it is in fact the case. So if anybody comes to your door and makes statements like that, be wary. If you have any doubt in your mind whatsoever, do not sign that contract. In fact, if you have any doubt in your mind, don't sign any contract.

The consumer, who must be protected, must also be given the proper advice about protecting themselves. I understand, because my mother-in-law was one of the people who signed an electricity contract. Born in Lithuania, never worked off the farm or out of the house, never drove a car—she signed one of these contracts. She's 76 years old. She certainly didn't clearly understand what she was signing. Now, we were able to have that contract reversed. In fact, the company dealt with the agent, who not only misrepresented the product they were selling at the door but misrepresented the company they were supposed to be representing. That agent was dismissed. That's the kind of action that has to happen if a company is aware that they have a rogue agent out there.

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I want to make it clear that in my area, and in general, the problem exists more with the selling of electricity contracts than gas contracts because electricity is regulated. Even the industry itself has said it's questionable as to whether they can offer a five-year contract that offers much benefit to the consumer because there is a regulated price on the product that they're selling. It's not likely to suffer the vagaries of the marketplace like gas prices, which can fluctuate on an ongoing basis.

Anyway, that's something that the industry has to do as well, to ensure that when they have somebody working for them who doesn't play by the rules, who doesn't follow the law, who misrepresents people, they should be the first ones to get rid of them. They shouldn't have to be told to get rid of them. They should get rid of them.

That's one of the concerns they raised about the 30-day verification period. If we don't have a verification period for 30 days, how do we even identify which agents are the problem out there, which agents are causing the grief, which agents are doing things wrong? If we can have that reaffirmation of the contract on a more orderly, quick basis, we can actually identify the rogues quicker.

I'm not a policy analyst nor, as I say, do I have a crystal ball, but I think some of these things are issues that we need to look at in committee—not as an opposition, not as a government, not as a third party, but as three partisan members of this Legislature that all have a common goal in this place. I know my friend from Timmins–James Bay and I have talked about this. We often differ on things, but we share our views about the importance of protecting the consumers. I know my friends on the government side want to do that as well. We've got to ensure, when we get this bill to committee, that everything we are doing is not based on what is going to be to your political advantage in the government.

That sometimes is a hard thing to square because when you're in government and you get into 2010, when the election is in 2011, sometimes the only thing you can think about is getting re-elected. And sometimes the only thing we can think about is getting elected. So we have to caution ourselves and ensure that the goal is not about the politics of the issue but about what is right for consumers, what is right for energy users, what is right for jobs, what is right for workers, what is right for widows, what is right for single mothers—

Mr. Toby Barrett: Orphans.

Mr. John Yakabuski: For orphans, all of those people. You've got to make sure that the most vulnerable are being protected when you bring in a piece of legislation. Sometimes, and it has happened in the past with all governments, you bring in a piece of legislation and the result of it is that you actually harm the people you are trying to protect.

You remember that bill—was it 210 or whatever it was—Sandra Pupatello brought in when she was the Minister of Comsoc, Community and Social Services? She brought in that adoption law. Remember, she brought in that bill where you were going to open up the adoption records and reveal who was adopted and who wasn't? You remember when she brought in that law and she said, "We've got everything right here. We don't need to listen to the opposition. We don't need to listen to the people coming to committee"? What happened? You remember what happened, folks over there? I see the member from Etobicoke nodding his head. Yes, we remember what happened: She had to tear the whole damned thing up and fix it because she didn't get it right. She didn't listen. So what we need to do today, members on all sides of this House, is listen to the people on all sides of the issue. We've got to make sure that we get it right—the number one priority, as always.

The former Minister of Consumer Services there—I see him sitting there—was a great advocate for consumers. I know that, and I know he continues to be. He knows that protection of the people is priority number one—priority, people, protection.

It's three Ps, not the three Ps that you're sometimes doing with public buildings and that you chastised us for. Do you remember when you guys used to rip us because we were going to build the new Royal Ottawa Hospital in Ottawa, the mental health hospital, and we were going to use a public-private partnership? You guys said it was crazy, and then you do the same thing. You just put a different kind of bow around the hospital when you cut the ribbon. You describe it differently. We don't want that kind of stuff.

You see, that's the kind of stuff that the public is wary of and that they don't like. They don't like that kind of repackaging of the same stuff. What they want is an honest approach to consumer protection. We have the opportunity here with Bill 235 to do that.

It is an important time to remember what—

Mr. Bob Delaney: Where is Bob Runciman? We miss Bob.

Mr. John Yakabuski: My friend from Mississauga is wondering where Bob Runciman is. As I said when I opened up here today, Bob Runciman, one of the greatest people ever to serve in this chamber, is now serving in the upper

chamber of Canada as the honourable senator from Ontario. I'm very proud of that man. I'm very proud that he's there and thank him for the good work that he's done.

I know I shouldn't be paying any attention to those interjections, but when the name Bob Runciman is uttered in this chamber, I take notice. I take notice because he's one of the finest people ever to represent anybody in this chamber, and I'm very proud to have called him a friend and a mentor. When his name is mentioned, I will take notice.

Now, back to protection. I don't know when the government House leader—and she sometimes doesn't tell us things in a timely fashion, but for the most part we're trying to get along. We want to find out as quickly as possible when this bill might go to committee, because I'm anxious, and I anticipate with great—

Mr. Jeff Leal: Zeal.

Mr. John Yakabuski: Zeal and fervour—is it zeal because it rhymes with Leal? Is that why you say it? But I anticipate with great Leal—

Mr. Jeff Leal: Zeal.

Mr. John Yakabuski: And Leal—this coming forward at committee to hear what the industry, what consumers, what all of the people have to say about this bill so that at the end of the day we get it right.

I believe there's an opportunity: We can get it right. I believe we will get it right because you know what? We have to get it right. I'm not being aggressive here; you know that's not me. But I do want to warn you folks over there: Don't try to turn this into a political game. Don't try to turn this into some kind of a political game. You've been using the energy ministry, you've been using the energy sector, you've been using the industry and playing political games with it thus far. It's time to stop. It's time to stop and revert to why we're here.

I know that every one of you over there remembers what motivated you to become a member of this Legislature. I know what motivated you to put your name on that ballot, to run for a nomination if you had to run for one and to run for election. It was because you were committed to serving the constituents who were going to elect you. We cannot forget when we get here as a body, as a group, that owe that same commitment to the people of Ontario.

I'm looking forward to bringing this bill to committee, seeing every improvement that we can make to it happen and then proceeding with a piece of legislation that protects consumers in Ontario. I have many points that I can't get to at this point, but if we don't recess until 10:15, if they're prepared to let me go on, I'll go on. If not, we'll bring this up at a further time.

Don't forget the people.

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The Acting Speaker (Mrs. Julia Munro): Comments and questions?

Mr. Gilles Bisson: As my good friend Mr. Yakabuski, the member from Renfrew–Nipissing–Pembroke, was saying—we were just having this chat, in fact, as we walked in this morning—we often differ as far as outlooks on particular issues from party to party, but at the end of the day we're all here to serve. I agree with him on that. But I've got to say, listening to a debate about consumer protection for electricity consumers, to which the Liberals have offered a bill, and now we have the Conservatives debating on their lead, is a little bit much for me.

I take a look at what the effect is of what both the Tories started and the Liberals are now continuing when it comes to hydro policy and the negative effect it has had on our economy. In northern Ontario, we have lost in the tens of thousands of jobs, and one of the reasons is electricity prices. It happens to be that the industries we have in the north are huge consumers of electricity. In fact, paper mills, mines, smelters and refineries use an enormous amount of electricity by the very nature of what it is they have to do. A number of them have closed down, and one of the reasons they cite is the price of electricity. So to listen to my good friend the critic on energy for the Conservatives talk about

consumer protection on electricity, I've got to say it's a little bit hard for me to listen to, because I look at the faces of those people who have lost their jobs across the north as a result of electricity prices—one of the big reasons—and I look at what's happening at Xstrata today. It's not the only reason, but it's one of the contributing factors. It is hard to take.

Listening to a debate by Liberals and Conservatives on energy policy is a little bit like watching two people having a pillow fight in the same bedroom. You both agree at the end of the day on the ultimate means; you're just fighting for who's going to hang onto the pillow and whack who. That's what the debate is all about. I say, if we want to have a real debate about energy prices, let's do something in order to attack the price of electricity for both consumers and industrial users in this province, because if we don't, there are going to be a lot more job losses in this province.

The Acting Speaker (Mrs. Julia Munro): Comments and questions?

Mr. Dave Levac: I appreciate the opportunity to offer the member from Renfrew–Nipissing–Pembroke a few comments. I'll be very brief in answering some of the questions and comments he made about the bill because there wasn't an awful lot about the bill that he talked about specifically; he was more interested in scoring some political points against the former member from Toronto Centre–Rosedale. I'm more interested in talking about the bill.

The bill will be going to committee. There's an answer for the member right off the bat: The bill will be going to committee after second reading. We've been doing that since we've been elected. We've been bringing bills to committee and we do have an honest response from the people out there. There will be people who will be against the bill who will be coming to committee and making their points. Quite frankly, we're continuing the trend of making sure that bills come to committee, which will be done. I'll say it three times now. That's twice, now the third time: The bill will be going to committee.

The second thing that the member might want to know is that there will be some consultations. Later on this year, there will be some consultations on the draft regulations to ensure we get that part right, which has never been done on an ongoing basis from the previous government—and I'm glad you mentioned the record of the previous government. The record of the previous government got us to where we are today, and I'm glad you recognized that.

We are going to be moving to committee. We are going to be listening carefully. There are seven key points in the bill that I want the member to know that I'm sure he had in his notes somewhere, which he wanted to talk about. The salesperson's practices at the door are going to be confined, refined to the point where your mother-in-law would never have to go through that again. We're talking about the protection of the people at the door. We're going to put the rules and regulations in place that will ensure that we don't have the messes that each and every one of us has had to deal with at the door. There are six other points that I'll get into later in detail as the parliamentary assistant—

The Acting Speaker (Mrs. Julia Munro): Thank you.

Mr. Toby Barrett: The member for Renfrew–Nipissing–Pembroke gave us a tremendous amount of information this morning and also information about the bill we're debating, Bill 235, energy retailers. There's no question the past seven years have been uncertain for people who consume electricity, which is just about everybody in the province of Ontario. As MPPs, we get complaints about the people who come to the doors of some of our constituents and the contracts that they get talked into signing. It is difficult for people to get out of these contracts, although there are possibilities of rectifying some of these problems. But it has been seven years of what I consider lack of leadership in really dealing with the electricity file.

What people are concerned about is the cost. They're concerned about the price. It wasn't that long ago when we were in government that we locked in the price at something like 4.7 cents a kilowatt hour. We know that coal and water can produce electricity at much less than that, and both these commodities are underutilized right now. I think manufacturing, given the job losses, is probably using maybe half the electricity that they were at one time. As far as pulp and paper, the high cost of electricity put much of them out of business—they're not using any right now in much of northern Ontario.

You look at the cost of nuclear and natural gas. Wind is being subsidized at something like 14 to 17 cents a kilowatt hour; solar, up to 80 cents a kilowatt hour. If you're a member of the Samsung corporation, you're looking at a subsidy far beyond that. And I see no talk of subsidies yet for biomass, wood pellets or prairie grass.

The Acting Speaker (Mrs. Julia Munro): Comments and questions?

Mr. Bill Mauro: It's good to be back here in Toronto in the Legislature and have an opportunity to go on the record and offer my support on Bill 235, the Energy Consumer Protection Act, 2009, introduced by our government today and just beginning the second reading process. We're very excited about it.

I would suggest to those who are interested in this particular issue that I can probably offer comments that would be consistent with most members in the Legislature: that this is one issue, certainly in my riding association—not my riding association, I apologize, my constituency office; sometimes in my riding association it comes up as an issue—that has seized the staff in my constituency office since I was first elected in October 2003.

This idea of energy retailing at the door is still a relatively new phenomenon in the province, although not quite so new anymore. But certainly in my riding association and in my constituency office, my staff have been seized on a regular basis with dealing with this issue from people who have been the subject of energy retailers on a door-to-door basis. High-pressure tactics are sometimes, if not always, used in the retailing of these contracts, sometimes preying—I would say it's not an overstatement—on people who find themselves in the position of being alone, who don't have the supports necessary to make what is probably the right decision, leaving some people feeling very vulnerable and finding themselves having entered into contracts that they wish they would have been able to get out of.

I would commend one of my staffers, Sharla Knapton, in my constituency office in Thunder Bay–Atikokan, who has done a tremendous job on this file, and who has, in fact, helped a lot of people who have found themselves tied into these contracts to get out of these contracts after the fact. Obviously, this government bill is going to make it less likely that more people will find themselves in this situation in the future, so that the work of staff in constituency offices will not necessarily be required as much in the future.

It's a very good bill, and we're very happy to bring it forward and support it.

The Acting Speaker (Mrs. Julia Munro): The member has two minutes in which to respond.

Mr. John Yakabuski: I thank the members for Timmins–James Bay, Brant, Haldimand–Norfolk and Thunder Bay–Atikokan for their comments. It seems that we all agree on one point: We've all dealt with issues surrounding energy retailers in our ridings on more than one occasion.

To the member from Brant: The industry itself has indicated quite clearly that they want a best-practice-at-the-door part of this legislation to be enacted, so that they have the best practices with which to guide them when they are conducting themselves at the door. So when we get to committee, we can make sure that the best parts of the bill are retained, and if there are areas that can be improved upon, that we do exactly that. So I am looking forward to that part of it.

The one thing that I'm pleased with from the responses is that we all agree—whether they think I may have been partisan in any part of my address. In an hour you may slip out of the mode for a moment, here or there, and fail to address the exact bill, just because an hour is a long time. But certainly, what we saw here today was that there is a commitment on the part of all of us to work together to bring about better consumer protection for the energy consumer in Ontario.

With respect to my friend from Timmins–James Bay, pricing of the product is a big issue which he raised as well, which we think that the government can't forget as well.

This bill, as it is, is a good start. We have to work on it, we have to make it better and we have to make sure that all sides are being heard when we bring the final piece of legislation. Thank you.

Second reading debate deemed adjourned.

The Acting Speaker (Mrs. Julia Munro): Thank you. It being close to 10:15, this House stands recessed until 10:30.

The House recessed from 1010 to 1030.

Hansard: February 17, 2010

ENERGY CONSUMER
PROTECTION ACT, 2010 /
LOI DE 2010 SUR LA PROTECTION
DES CONSOMMATEURS D'ÉNERGIE

Resuming the debate adjourned on February 16, 2010 on the motion for second reading of Bill 235, An Act to enact the Energy Consumer Protection Act, 2010 and to amend other Acts / Projet de loi 235, Loi édictant la Loi de 2010 sur la protection des consommateurs d'énergie et modifiant d'autres lois.

The Speaker (Hon. Steve Peters): Further debate?

Mr. Peter Tabuns: Good morning. It's my privilege—maybe not my pleasure, but my privilege—to speak about this bill. We've had presentations now by government and the official opposition on the bill and its provisions for the people of this province.

I would like to say first off that the bill is based on a continuation of practices based on a conception of how we deal with energy and electricity in this province that I think, at its heart, is faulty. It tries to apply Band-Aids in a situation where far more profound change needs to happen.

I'll talk first about the smart meter section of the bill, and then go on to talk about the door-to-door energy marketing. They are tied together, they are problematic, and frankly, this bill needs substantial revision. I hope that revision will be apparent in the course of committee hearings, and I hope the government will be open to substantial amendment so that in fact the people of this province get a fair deal, get the kind of energy and electricity services they deserve at prices they can afford.

I want to talk first about the section on sub-meters for tenants. When you look at the bill, you'll find that the actual content of most of the tenant "protections" in Bill 235 will depend greatly on the attendant regulations. Now, we don't have those regulations; we don't know exactly what will be in them. So to a great extent, for those who are concerned with this particular piece of legislation, we don't know yet what you will or won't get when this bill is ultimately passed, as I expect this majority government will do.

The government has to actually ask the more profound question: Should it proceed with individual and smart metering in the multi-residential sector at all? I ask that question because there are a lot of different ways that one can come to grips with energy consumption, with conservation, with efficiency, dealing with the strategy that we have for energy overall. One broad tack that one can take is essentially throwing the burden on consumers and saying that they, in the end, will be the ones who will have to make all the necessary changes, make the necessary investments to reshape the way we deal with electricity. Frankly, I say that that is not a viable strategy. It's a painful strategy for those who have very low incomes, fixed incomes. But in terms of actually bringing about the change that's required, historically that is not the way things have happened.

I've had an opportunity in the last while to read books about technological transformations in other countries and in other spheres. If you look at the history of microprocessors, of the Internet, of commercial aviation, all very substantial technological and social changes, those changes weren't driven by driving up the cost of driving a car from one end of the country to the other; they weren't brought about by deciding that fax networks were inadequate. Those technological and social changes came about through investment by governments in strategic areas to substantially reshape the technical landscape, reshape the tools that were available to people and businesses, organizations, and it was that reshaping of the landscape that in fact brought about the development of the Internet, brought about

commercial aviation. We have not seen a revolution in technology that has come about because we go after low-income tenants who have difficulty paying for the heating or cooling of their apartments, and we've decided that they, in the end, are going to be the ones who have to carry the burden.

In the early 1990s I had the opportunity, the privilege, to serve on Toronto city council, and worked on the whole question of energy efficiency for the city, its office buildings, its commercial buildings, its institutional buildings. The reality that we found time after time after time was that when we tried to get large commercial buildings in the city of Toronto to invest in energy efficiency and conservation, they had a substantial structural stumbling block. That was that the landlords owned the buildings and were responsible for capital investment, and the tenants paid for the electricity, paid for the energy they consumed in their offices. Since they didn't have any control over the capital end of things, they weren't going to go around replacing their lighting; they weren't going to go around insulating the walls of their office buildings. What they did try to control was the demand for power for their desktop utilizations—their computers, their desk lights, things like that—not the core and really expensive costs of energy. So we found that this was in fact a huge obstacle. Those large buildings would invest in common-area changes, but weren't that interested in investing in areas where they never paid the energy bill—the electricity bill or the heating bill.

0910

We go to multi-storey apartment buildings. I've lived in multi-storey apartment buildings, and frankly it can be a pretty good way to live. But the reality is that most landlords who have concerns other than the immediate energy costs in their buildings don't spend a lot of time making sure that the outer envelope of the building—the walls, the windows—is as energy efficient as possible, and they don't spend a lot of time putting in high-efficiency appliances.

What we find here is a push for putting tenants on meters and leaving those tenants with units where the windows will leak heat in the winter and cool air in the summer. We'll find those tenants in buildings where the insulation in the walls is not adequate. We'll find them in buildings where it's hot on one side of the building, because of the way the building is positioned with regard to the sun, and cold on the other, with no investment in balancing energy flows from one side to the other.

If those landlords are completely freed from the cost of dealing with electricity, heating and cooling in those apartments, then their incentive to make those buildings energy efficient drops pretty close to zero. That's particularly the case at a time when there is a very low vacancy rate. They can then pass on all kinds of inconveniences to tenants with no concern that it's going to affect their bottom line. So if we want to make sure that apartment buildings all across Ontario are energy efficient and have the investment that's needed, moving the cost of energy from the landlords to the tenants is frankly a mistake.

Look at the consumption of energy in most homes: hot water, fridges, stoves, heating and air conditioning. Tenants don't bring their own stoves and fridges into these buildings. Hot water is generally supplied centrally. You may have a reduction in the length of time that people keep their televisions on, but it isn't going to change their whole approach to keeping their food cool in their refrigerator. Most people in apartment buildings don't have washers and dryers in their apartments; those are centralized.

So you are going to have some impact. My prediction is that for those people who live in buildings that are electrically heated, they, without the money to deal with the windows and the external skin of the building, the walls of the building, are going to cut back their heat so that they can afford electricity. In the summer, they're going to cut back on their air conditioning so that they can afford electricity. And I'll say to you, having lived in an apartment that was oriented so it got an awful lot of sun in the summer, that it would have been extraordinarily difficult to be comfortable without having an air conditioner on—I don't think we got much below 30 degrees centigrade in my apartment, even with an air conditioner.

What this bill does with regard to those tenants is take the whole burden of energy costs, puts it on their shoulders and removes the incentives for landlords to make the investments that are necessary. I frankly think that what's needed is a large-scale investment in energy efficiency and conservation in multiple-unit buildings, with financing and incentives provided by government. I think a feed-in tariff makes lots of sense to spark investment in renewable energy; in fact, I think it should be replacing conventional energy right across the spectrum in this province. But let's take a similar idea and see how much we can get out of apartment buildings by providing an investment and incentive program to drive down energy consumption. If in the end what's left to tenants is the energy they use for their televisions, their radios

and their desk lights, frankly, I would ask whether it would be worth the cost of installing and monitoring a meter, and billing for that on a monthly basis. I can't see the economic or the financial logic in doing that. It's logical if they're stuck with the heating and cooling costs—not fair, not efficient, not effective, but I understand why you could make that argument.

Now, when you actually look at the direction that we have to take—obviously, I've said that if you go forward on this basis, you have to have a focus on conservation and demand management programs for landlords and tenants. You have to have education and social marketing targeted at landlords and tenants, to give landlords and tenants the information that they need to reduce usage. It doesn't help a lot if you impose a meter on tenants and don't assist them in actually making the smartest choices they can among the limited number of options that are available to them to deal with the increased costs that will be on their shoulders. Frankly, coming back to this, if you don't have a program that drives down energy consumption in buildings, then you will be causing a huge disservice to tenants and to the environment. I don't believe that the drive that this government currently has to install individual meters and smart meters in the residential tenancy sector is actually going to give you the results you think you're going to get.

But again, it is going to be very difficult for us in this chamber responsible for passing these laws to know what we actually pass, because the regulations upon which the real action is going to rest aren't before us. That's a huge problem. That's a great difficulty for us, to make rational decisions when we don't know what the regulations are that will follow on. If, in fact, the government is determined to go forward and install individual meters in residential units in multi-unit buildings around this province, then it should look at what tenant advocates are talking about when they look at this situation and when they talk about the implications of this bill going forward. They suggest a low-income rate assistance program must be implemented, because, to be honest with you, when you talk to a lot of tenants, when you talk to seniors who are living on CPP, a little old-age assistance, maybe some savings, their incomes are small; they are hard-pressed. And if you are actually going to go from the situation where in the past their rent included all of their electricity costs to a situation where they're going to get dinged, when they're going to have the whole cost of electricity for that building put on their shoulders without assistance, then the minimum that decency would require would be a low-income rate for those tenants so that they have some protection.

Tenant advocates—not just me—suggest a publicly funded, multi-residential conservation program to support energy retrofits in the multi-residential rental sector. Again, that's a minimum. If you're going to put this burden on tenants and take landlords out of the picture, then you have a responsibility to protect as many of those tenants as you possibly can. That means that you should, in fact, be putting in place the funding, putting in place the program to drive down energy consumption in those buildings. Tenant advocates recommend that the onus of proceeding with these projects is placed on landlords to apply to the Landlord and Tenant Board for permission to install suite meters, subject to their meeting stringent requirements. The burden shouldn't be placed on tenants to apply for rent decreases after the fact.

0920

I'm currently working with tenants in my riding at 25 and 80 Cosburn Avenue; we're dealing with a rent increase. I've been going door to door with tenant representatives talking to the current tenants about the rent increase and the impact it's going to have on their lives. I have to say, the reality is that tenants, like the rest of the population, have a lot on their plate at any given time. They are not property managers. They are not political organizers. They are not campaigners. They are people trying to live regular lives, lives in which going around and organizing politically is not something that's required.

The idea that in fact these tenants would have to fight for a rent decrease is completely unfair—completely unfair. If, in fact, this is going to go forward, it's going to have to be on the landlord's shoulders to actually put together the case, to provide the notification of rent decreases in advance and at least level the field between tenants and landlords in this kind of issue.

Now, there are concerns about the ongoing affordability of rental stock, and that draws us into the larger question of the electricity strategy of this government. I think the electricity strategy of this government is a crude and ineffective one. First of all, this is a government that has perpetuated the privatization of the electricity system that was started under the Mike Harris regime. That, in and of itself, speaks to higher electricity costs because the reality is that any operator is going to have to make sure that a cut of their operation goes to paying a profit. There is going to be duplication of administration. There are going to be all the problems that we see with the private health care insurance

system in the United States, which we have avoided in Canada through having a single-payer, publicly owned central insurance system.

That's the first mistake that this government is making with the electricity system. It didn't turn its back on the Mike Harris regime. In fact, it continues on a slow-motion basis to chop off pieces and pieces and pieces of the electricity system. Just before Christmas there were news reports about the hiring of Goldman Sachs and CIBC World Markets to look at large-scale sell-off, privatization, leasing—we don't know the mechanism yet of our electricity system, Hydro One and OPG. That is a massive mistake.

When we discussed the Green Energy Act—and a feed-in tariff has been a useful tool in a variety of countries—the government would not allow OPG to participate in the feed-in tariff. It doesn't have any problems with the Korea Electric Power Corp., controlled by the South Korean government, coming into this province and being the lead partner in a consortium to build renewable power. Apparently foreign publicly owned companies can participate in the renewables market in Ontario, just not Ontario-based publicly owned power companies.

So the first substantial error in the electricity strategy of the Liberals is to continue the electricity strategy of Mike Harris. That's the first problem. The second problem is that instead of actually looking at the electricity system and taking the advice from a variety of people who have good analytical ability, like the Pembina Institute, David Suzuki Foundation, David Suzuki personally, and investing in a very substantial way in energy efficiency and conservation to dramatically drive down consumption of electricity in Ontario, this government instead has had a policy of building gas-fired power plant after gas-fired power plant; very expensive power, hostage to natural gas prices; a strategy that means that transmission and distribution lines have to be built. So it isn't just a question of generation cost, but of all of the things that go with centralized power generation. And then this government decides that it has to stay stuck to its nuclear option.

It was interesting yesterday to hear the presentation by the Minister of Energy and Infrastructure talking about going forward with the refurbishment at Darlington and keeping the Pickering B plant going. The reality is that an ongoing commitment to nuclear locks us into high prices, overruns and delays. It means ultimately that the tenants who will be stuck with these meters are going to be paying more for electricity than they should.

Hon. James J. Bradley: I thought environmentalists liked higher prices.

Mr. Peter Tabuns: I find it interesting that some people will argue that high prices are a good strategy, and I want to address that because I think it's a very interesting argument.

Hon. James J. Bradley: Didn't you used to say that?

Mr. Peter Tabuns: No, I want to address that. The simple reality is that the transformation that takes place technologically in a variety of sectors takes place because new technologies are introduced that either allow for substantial change in the way things are done, allowing for productivity gains, or drive down costs. So the steam engine, when it was introduced, allowed substantial reductions in the cost of operating mines. That's why it spread rapidly. The introduction of microchips: Their spread went quite radically and quite quickly because they allowed the very rapid processing of information—initially very costly, becoming a very cheap way to process information.

In fact, I think that's the strategy that's needed: an investment in energy and conservation efficiency and investment in development of renewable technologies, so that efficiency, conservation and renewables become cheaper than conventional alternatives. A high-priced strategy simply to pay for the dying technology of the 20th century is not an intelligent strategy. It doesn't result in the investment that has to happen. In fact, it locks us into technologies that don't have a future, won't provide us with jobs and, frankly, cut off the money that's needed to invest in the future. That's where we have to go. Electricity costs increasing due to the strategies of the Liberals with regard to the electricity sector, that's part of the future. That's part of the future for tenants.

Under the current system of vacancy decontrol, there's no reason to think that shifting the responsibility to tenants to pay electricity bills will result in lower rents, particularly upon vacancy. Why wouldn't landlords take advantage of the opportunities that are presented to them? They don't run charities. I've met some very capable, intelligent, far-thinking landlords who have a 10-year or 20-year perspective on their building, but they are driven by the necessity of

maximizing their profit, either in the short or the long term. They are not going to be maximizing that by driving down their rents. Thus, they won't be driving down their rents. This burden of cost is being put on the shoulders of tenants, and that's a mistake. It won't give us the energy efficiency and the environmental advantage that we need.

Tenants will face possible rent hikes due to landlord applications for rent increases because of retrofit work. This will affect the ongoing affordability of rental stock, particularly in large urban centres. Landlords need to recover the costs of investments that they make in buildings, but they also, in the rents that they charge tenants, need to reflect the savings that they are given when they make those investments. It can't all be the tenants paying for capital improvements and the landlords reaping all the savings. I've said this before and I'll repeat: Many tenants will be forced to pay for electricity service directly, without any control over factors which could reduce electricity bills. They aren't going to go out and buy new Energy Star fridges or high-efficiency stoves; they're not the ones who are going to be replacing the hot water heaters in their buildings. This bill is not going to address those issues.

0930

Most of the Bill 235 suite-metering protections apply only to sitting tenants. This means that over time, a smaller and smaller proportion of tenants overall will have any protection, because as you move into a unit as a new tenant, you're stuck. You're simply going to have to carry that particular burden; you aren't going to have a choice.

It is not clear at this point, and it needs to be made very clear, what the landlord's obligations concerning necessary retrofits are. Those obligations would likely only extend to current sitting tenants. This means that tenants will face potentially higher bills due to factors entirely within the landlord's control, which in turn will affect tenants' ability to pay their rent.

Those are substantial problems with this bill. Those problems need to be addressed. This bill is going to go to committee. It's going to hear from tenants; I'm sure it will hear from landlords. It needs to adopt a strategy that will actually make an energy difference in those buildings and not simply put the burden—put the cost—on the shoulders of tenants. That has to happen.

Part of the thinking in doing what is being brought before us is the focus of suite metering on sending "price signals" to tenant households to reduce their discretionary energy use. It would be interesting to see if there are studies showing that that does make a difference. I've talked to people who tell me, "I'm not going to turn my fridge off during the day"—the fridge being a very large consumer of electricity—"because I have a higher electricity bill." If people need to be cool because it's 35 degrees or higher outside, they're going to turn on their air conditioning, particularly if they're ill or elderly and need protection from very high heat.

I want to note that over 30% of Ontario's tenant households live at or below the poverty line. Any increase in shelter costs, including those costs associated with utilities, has a disproportionate impact on these low-income households. What we have before us on the individual meter, the smart meter application for tenants, is highly problematic. It needs to be amended based on what we hear from the public when we go into hearings on this.

I want to talk now about the question of energy retailers. You know, there are a lot of different approaches one can take here. If you go back and look at old headlines—here is a headline I found interesting on June 20, 2003: "Direct Energy Marketing Ltd. and Ontario Energy Savings Corp. Fined for Fraud." They were fined "a total of $232,000 after some of their agents apparently forged signatures on 31 consumer contracts, the Ontario Energy Board said today. Direct Energy was fined $7,500 for each of the 21 switched consumers, and Ontario Energy Savings Corp. was fined the same amount for 10 switched customers. The Ontario Energy Board said it had determined the signatures on 31 contracts were forgeries and not those of customers. Both companies are entitled to a hearing before the board on the decision. The board said it has notified police of its findings."

Now, I have to say that I don't see too many of those headlines. But what I do see, Speaker, and what you, as a member of provincial Parliament, may hear from your constituency office, is complaints about energy marketers going around. The complaints that I hear are primarily from the elderly and from people for whom English is not their first language, people who see someone at the door wearing a uniform and think that person comes from the local power utility, think that in fact this person has some authority to ask them for their power bill. I have to say, the experience in my office is that regularly we are dealing with seniors and people who are relatively recent immigrants who are getting

done in by these marketers, people who are signing contracts and coming into our office with bills that are completely outrageous.

I talked to my mother, who has had energy marketers at her door who demanded to see her hydro bill. She's pretty energetic, so she had no difficulty telling them they would be better off moving down the street. But a number of her friends who are later on in their 80s have difficulty dealing with those energy marketers; sometimes think that they've cancelled contracts with energy marketing firms and find that in fact no cancellation ever took place; that the electricity bill they get, which has shocked them, is still being routed through one of those energy marketers they thought they had gotten rid of.

We've had trouble for most of this decade, and every so often governments say, "Well, we need to do something about energy marketers." I actually think what would make the most sense, except for the sale of renewable power, would be to end these energy marketing operations for gas and electricity because I don't see the advantage to customers. If you're buying electricity in Ontario, there's one system that makes electricity and sells it: through Hydro One. There is no way to get big advantages. You've got people who are playing on the system and making money as a salesperson—not even as a middleman. They ride on the back of the middleman, which is the local distribution company. They're the middleman between the Ontario system and the consumer. They try to insert themselves in there and make money off people who may not know how the system works. They take advantage of them.

On the gas marketing side, you've got your local Enbridge or Union Gas gas distribution company. These companies, these retailers may buy gas in Alberta; they may not. I don't know. I just know that people, in their experience, are getting bills that they don't like and can't seem to get out of.

I had an experience with a local retailer close to my constituency office, whose bookkeeper in error threw out the last notice from one of the energy marketing companies, and the notice was, "If you don't respond to this, we're renewing your contract." That local retailer, I think, had very sharp words with his bookkeeper—a bookkeeper he's worked with for a long time—but the bookkeeper assumed that the energy marketer was like a normal business when in fact, no, this was a company whose function was to make money off people by trying to shepherd away a group that didn't fully understand what was going on with energy markets.

I don't see any utility in this province of having an industry based on taking advantage of people's lack of knowledge of energy so they can make a buck; I don't see the utility. I see the usefulness in having gas companies and electricity companies delivering energy to people's homes, having them regulated and preferably owned by the public, but I don't see where these brokers, who are a layer on top of legitimate energy businesses, have any real function.

0940

The one exception I can see is companies like Bullfrog, which take contracts with people and pay a premium to get renewable power invested in this province. I can see the logic of that. They sell over the Internet. They don't have door-to-door, as far as I know; they don't have telemarketing. I don't see a problem with that. People who are fairly sophisticated about energy can go in, pay the premium and get the investment they want. But most people don't want to pay a premium; they want to get a bargain. They can't get a bargain. What they get is a sales job.

I think this bill should go substantially further in terms of moving us away from this deregulation of energy sales, this whole idea of retail-level sales of gas and electricity futures, and actually go back to a system that's stable where people know what they're dealing with.

If you pass this legislation, you need to make sure that customers are protected from hidden contract costs, excessive cancellation fees, negative-option contract renewals and other unfair industry practices. There may well be an argument that this bill does that, although my understanding is that there's a lot of stuff still to be answered in the regulations. Those of us voting on this may well not have the answers that we need printed on the paper in front of us. There needs to be greater fairness and transparency for consumers through rate comparisons, plain-language contract disclosure, enhanced rights to cancel contracts, and a new licensing and training regime.

I have to ask, though: I don't know why these firms would continue to exist on that basis. Who's going to buy if they know what they're getting? Maybe somebody. Maybe they'll find another way around it. But if you get rid of all the flim-

flammery that is a major part of this operation, I have no idea why these firms would continue other than the idea that perhaps in the regulations there will be benefits provided that will make life much easier for them than the words that are set out in the act itself.

When it comes to these energy marketers, it will make a lot of sense for this government to make it as tough as possible for any of them to operate—if they're not willing to just get rid of them outright—and make it difficult enough that they cannot make money through any dishonest practice. "Dishonesty" is a word that can be applied very broadly. It doesn't necessarily mean criminal dishonesty. There are people who can weave a cloud of words around your head that distract you, that move you to think that what you're getting is very different from what's really on the table. I would say that if the government is not willing to move forward to get rid of this particularly wasteful and useless practice, it should make it as tough as possible for it to actually happen, so that those companies and those practices will wither away.

I want to talk last about security-deposit waivers for low-income consumers. The people who advocate for low-income households have been advocating for mandatory exemptions for low-income households from consumer security deposit requirements, which can adversely impact or even exclude those households from accessing and maintaining gas or electricity service. The OEB, in the past, proposed code amendments that would have prohibited electricity distributors from requesting a security deposit from certain eligible low-income customers and would have allowed other eligible low-income customers to pay a security deposit in more affordable instalment payments over a period of at least 12 months.

Under Bill 235, the bill before us today, there's regulation-making authority to set security deposit criteria for gas and electricity distributors for prescribed consumers or a member of a prescribed class of consumers. We'd recommend that priority be given to issuing a regulation that provides for mandatory exemptions from gas and electricity security deposit requirements for low-income consumers. Currently, electricity distributors have the discretionary authority to waive security deposit requirements for a customer or future customer. To date, the OEB has not codified security deposit rules for gas distributors, who also have the discretion to waive security deposit requirements.

It's also suggested that there be a winter disconnect moratorium for low-income consumers. Unaffordable home energy bills leading to disconnection of utility services pose serious public health and safety risks for low-income households. In the Ontario Energy Board stakeholder consultation on low-income energy consumer issues, it was recommended to the board that it should protect against weather-induced illness and death by establishing mandatory disconnection moratoria for the heating and cooling seasons. Disconnection of utility service is particularly devastating—no surprise—for infants, the elderly and those who are ill or disabled. The OEB didn't include a winter disconnection moratorium in its comments on these issues. Many have been advised that the board had said it lacked legal authority to do so, since the Electricity Act, 1998, says that electricity distributors have the statutory right to disconnect for overdue payment.

Under Bill 235 there are provisions for regulations that would prohibit electricity and gas service shutoffs to a consumer or a member of a class of consumers. It's recommended that priority be given to issuing a regulation which would ban the disconnection of electricity or gas service to low-income households and households where infants, persons over 65 years of age or those seriously ill, medically fragile, reside during the period of November 1 to May 1. This winter or heating season disconnection moratorium should also cover the use of a load limiter or other device that limits or interrupts electricity service in any way. The government should be looking at disconnections in the cooling season as well.

It's not a bad idea to look again at the delivery of electricity services in this province and the way that it's done, but the way this bill approaches it is very limited. It relies on a process of putting the burden on consumers and on tenants instead of making the changes at a province-wide level to get rid of the unnecessary marketing of gas and electricity. It puts the burden on tenants for dealing with the energy efficiency of apartment buildings, when in fact they don't have the money or the authority to do what has to be done to be effective. So my hope is that in the course of committee hearings and debate, this bill will be substantially amended.

Thank you.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. Phil McNeely: It's nice to be back here in this new year, 2010.

I must say that the presentation by the member from Toronto–Danforth was very comprehensive and I just don't know, in two minutes, where to respond. But I think I will go to the area that a lot of the issues were brought around: consultation. This will be going to committee and there will be consultations. I think that's extremely important because something so new and so different certainly involves that.

0950

Energy conservation became a big part of it with tenants, and their inability to do very much about the energy efficiency of their units, because that is not within their control. This is recognized by the government, it's recognized in the bill, and it's going to be recognized very much in the regulations. If tenants are going to be paying their own energy bills, then they have to have access to the best appliances, and the building form, which they can't control, has to be changed, has to be upgraded energy-wise by the landlords. So these issues will be front and foremost on this.

This government is very much concerned with energy conservation. I presented on behalf of the minister a few months ago on conservation, showing that the growth in the next 20 years for energy in this province would be from energy conservation. A great deal of dollars have been invested, something like $150 million, in this province alone in home energy retrofits—so I think these will be addressed.

I'm very pleased to hear all the issues that were brought forward this morning.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. Robert Bailey: I also would like to speak to the bill and commend the member for his remarks.

This is a big issue in my riding. My office is continually presented with a number of people, not only seniors, who are talking about the door-to-door marketing and how they're being taken advantage of. It has taken an inordinate amount of time in my office, and I'm sure a number of other members have the same issue.

I certainly look forward to further debate on this when it goes to committee. Anything we can do to advance this cause and to take the onus off the individuals, seniors and low-income people who are being taken advantage of by these door-to-door marketers, I applaud. I look forward to further debate and commend the member.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. Howard Hampton: I want to thank my colleague from Toronto–Danforth for delineating not only where this bill falls far short of what is needed, but also for describing in detail some of the challenges that need to be met and are obviously not going to be met by this bill.

The fact of the matter is, there is widespread fraud, deceit, manipulation, if not just outright lying, taking place by energy retailers and their marketing squads across this province. In many cases the deceit, the manipulation, the fraud and the lying is aimed at some of the most vulnerable people in our society: outright acts of intimidation with respect to seniors. I think it behooves every one of us in this Legislature to ensure that this kind of conduct absolutely does not continue in the future. I thank my colleague from Toronto–Danforth for pointing out just how serious the problem is.

Most of what is offered in this bill is, "Well, maybe something might happen in the regulations." That's clearly not good enough.

On the issue of tenants: Let's face it, we have literally millions of people who live in apartment buildings and have no control over whether the apartment building is appropriately insulated, whether the windows are energy-efficient, whether any of the appliances are energy-efficient, yet there is no strategy to deal with this other than forcing up the electricity rate of those tenants.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mrs. Maria Van Bommel: I also want to take an opportunity to speak on Bill 235, the Energy Consumer Protection Act. I was listening to the conversation and the debate that has come forward so far. I hear very much about what's happening in constituency offices, and it certainly happens in mine as well.

Before I was an MPP, I worked for the Ontario Federation of Agriculture. This is a long-standing problem, and it was brought to my attention by farmers, who, in an effort to save during some financially difficult times, were probably easily enticed by promises of savings and would sign on to these contracts.

There were very similar types of strategies as have already been described. People would show up at the door and purport to be there on behalf of Ontario Hydro, which is the supplier for most of rural Ontario, and then demand—not ask, but demand—to see hydro bills, and then sometimes there was forgery. People weren't given an opportunity to take the information and go through it carefully; they were told they had to sign now or it wasn't going to happen.

They ended up signing and had the 24 hours to think about it and read the contract after the individual was gone, and found that they had signed on for something—they really caught them in a contract they weren't ready to deal with. Then they would come to the federation of agriculture and ask for our help. Very often, we had a difficult time getting these companies to go back and cancel those contracts. It was an extremely difficult thing to do.

But I also have to say—I heard the member talk about eliminating all these retailers—that I do know that for some people there truly are savings.

The Deputy Speaker (Mr. Bruce Crozier): The member for Toronto–Danforth, you have up to two minutes to respond.

Mr. Peter Tabuns: I want to thank all those who spoke: the members from Ottawa–Orléans, Sarnia–Lambton, Kenora–Rainy River and Lambton–Kent–Middlesex.

Two points: In terms of the energy-efficiency requirements for buildings in which individual metering is going to take place, if one is going to put those requirements in place, I would say that those buildings have to be brought up to a very high standard before the landlord could apply for metering. Even there I have deep concerns, because this government does not enforce its building code with regard to energy efficiency.

When we heard testimony about the Green Energy Act, we had credible presentations on the lack of enforcement, and the simple reality, even when you look around this city, is seeing buildings that are designed such that there's no way they are actually going to have substantial reductions in heat loss. So right off the top, I have questions about this government's commitment to credibility on energy-efficiency issues.

Then there's the question of whether landlords should actually be allowed to go to sub-metering before they've actually made all the investments. Frankly, if they've made all those energy-efficiency investments, I'm not sure whether installation of a meter could justify itself either environmentally or economically; you're just not talking about that much energy that's left to meter.

When it comes to energy retailers, I would be very interested in seeing whether anyone has actually saved any money. My experience—and this is talking to a wide variety of constituents who have taken a bath on it—is that they simply get a bad deal thrust upon them.

The Deputy Speaker (Mr. Bruce Crozier): Further debate?

Mr. Dave Levac: I appreciate the opportunity to engage in the discussion of Bill 235, the Energy Consumer Protection Act, 2010. I want to start by acknowledging the previous member's leadoff for the NDP. The member from Toronto–Danforth has come with a few ideas that I felt were worthy of presentation.

As I have done in the past, I have carriage of this bill as parliamentary assistant to the Minister of Energy and Infrastructure. I want to tell him that staff are here to take notes, and the presentations inside this House, those of consultations and those that will be taking place in committee, as well as the consultation later on in the year for the

regulatory stream that will be designed, will all be taken into consideration. Input will be evaluated and analyzed, as we've done in the past, to try to make the bill the best it can be.

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I also remind members of this House that I have yet to see, over the 10 or 12 years I've been here, a perfect piece of legislation being written; that we haven't gone back in the past and pulled bills out. In some cases I recall seeing a bill that hadn't been touched since 1960 that we've gone back to review and analyze.

So to create a picture that absolutely this piece of legislation will be the be-all and end-all of energy efficiency and consumer protection is not correct, except to say that the input he gave us—I took some notes and he made some good points about apartment retrofitting, the efficiency there. He also made some interesting points that, in a regulatory review, I will be taking to heart and seeing if there's something we can do about the security deposit waiver points that he made in the regulatory stream, and also the winter disconnect.

I know that landlords can't do winter disconnect, but the utility can. That is what, I believe, he's making reference to. I believe that in those recommendations that came from consultation, it can be addressed in the regulatory stream. So he made some good points that I believe are worthy of consideration, discussion and further debate. There are probably other sides to the story. Some people forget to say that there are some logical reasons why other things don't get removed and we'll try to find all of those things and bring them to the front.

Now, as for the bill itself, let me review the seven points that I believe on the consumer protection side we should be taking into some deep consideration. Regarding the retailers, I want to bring those points out as to what those problems are that have been acutely defined, not only by each member in this place when they have to deal with this at a constituency level, but also for the government, the ministry, landlords, tenants and homeowners themselves.

The salesperson practices I'll use as bullet number one. When I say that, I'm sure everyone can conjure up a concept of what those practices are that some of those salespersons have perpetrated on the consumer at the door. In this legislation, we are now going to encase in law, if this bill is passed, the immediate verbal disclosure and ID badges, salesperson training and other standards. So this person who is going to be coming to your door must verbally identify themselves as to who they are and must carry an ID badge that is approved. They must go through salesperson training and other standards that have to be met before they're allowed to come to the door. That's number one. That starts on eliminating some of those who have used ID badges that imply they're with somebody else. They have even used the Ontario logo on their little badges, implying that they're from the government of Ontario. Of course, as has been pointed out by other speakers here and other people who have experienced this, that's fraud. We're going to put an end to that.

The consumers don't have the information they need to decide at the door, and a lot of it has to do with the language barrier, which has been pointed out. We are going to instruct that plain language in the contract disclosure statement must be available in several languages. We are going to attempt to ensure that those who do not have English or French as their first language will be given communication of their contract disclosure in the languages they're familiar with. This, again, will start eliminating some of those issues that have come up. People identify that language is a barrier and they try to take advantage of it by selling them something and they don't even know what they're signing.

Verbal contracts: sometimes and usually over the phone, contracts not with an account holder. We've heard stories where somebody answers the phone and says "yes" to a bunch of stuff, and they are not even the contract holder in the household. They simply, by phone, are able to get this contract renewed. There are text-based contracts and signatures required now. Only the utility account holder or others specified by regulation, which we will discuss in the future, can sign energy retailer contracts for a household. So there's another bullet clearly delineating that there was a problem, and here's the solution to that problem. Or the consumer feels pressured into signing a contract—high-pressure sales.

We are going to use three possible cancellation processes. One we already have in place, but we're going to put these in as an emphasis to ensure that high-pressure sales are not going to be able to be used to get that contract. Those cancellation alternatives are, presently, the 10-day cooling-off period, so if you sign that contract at the door, you've got 10 days to decide, "I don't want it." You institute that within 10 days, and the contract is null and void.

Upon third party verification within 10 to 60 days of signing the contract: That means that this contract, once signed at the door, will be sent to a third party for verification. The people who are responsible for that third party verification will contact the home within 10 to 60 days and say, “Did you sign this contract? Is it what you want to do? Have you had an opportunity to review what it is that you’re signing?” “Yes, I have. I don’t want it.” “Thank you very much. Within 10 to 60 days, the contract will be cancelled according to our regulatory stream.”

Finally, we have a 30-day cancellation after receipt of the first bill. Between the 10 days of the initial contract cooling-off period, the 10 to 60 days of the third party verification that the contract was signed and then even after that, when you get your first bill, you have 30 days to cancel.

That is probably the most important part of this for anyone who believes that they have been duped into signing a bill under pressure. We’ve relieved that pressure valve for the consumer to ensure that they’ve got that much time and those three options to apply to ensure that that contract at the door is null and void.

The fifth bullet is unfair cancellation policies and fees and automatic renewals for gas contracts. That’s the other end of this. If I finally find out that—you know what?—I want to slip out of this, and I want to end it, we’re going to end the unfair policies, practices and fees and the automatic renewal game that gets played.

I’ll give an example, and I’m sure the member from Toronto–Danforth witnessed this one in his riding. Somebody gets a cheque for $50. If you cash this cheque, it’s automatically renewed. They’re giving you a $50 cheque, and I’m sure he understands that for some people, $50 is a lot of money. If they get this cheque, and it’s legitimate, they look at it, they go to the bank, and they say, “Is this real?” The teller says, “Yes, it’s real.” “Oh, I want the $50.” The fine print says, “If you cash this cheque, your contract is renewed.” Here’s what we’re going to do: We’re going to prevent these cancellation fees and, in some instances, any fees, such as when people move or accidentally sign a second contract eliminating the negative option renewals.

Quite frankly, what we’ve decided to do is say, “That’s not acceptable. You’re playing on people’s need for that $50. You’re playing on people’s inability to put the moving piece together.” I go to move, and then all of a sudden, I’ve got an automatic renewal on this. It’s not going to happen. We’re going to get rid of that particular practice.

The sixth bullet, the electricity retailer, the gas marketer accountability: Additional licensing conditions for retailers, including individual salesperson training and background checks, will be instituted in the legislation and an assurance fund to assist in covering potential losses for consumers. OEB will randomly audit retailers, and we’re going to improve officer and director accountability.

Here’s the second wave that took place. They hired these people on the side. They weren’t actually employees; they were contract employees. They were young students, in a lot of cases. They were saying, “By contract, you get paid.” Do I understand that for the consumer, this was a bad practice? Absolutely. Do I understand it was a bad practice for the student trying to make money? No, it’s their own moral compass that had to be taking place, because that’s where some of them were using some of those really nasty tactics, where they would say, “Can I see your gas bill? I’ve got this badge. I need to see your gas bill.” Then they’d take the number down, and they’d simply write the contract out, fake a signature and send it in. But we’re now going to make the owners responsible for the practices of those salespeople. That is one of the doors we’re going to shut as well.

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It’s important for us to understand that these bullets that I’m going through are identifying the problems that were taking place and, on the other side of it, going over what the legislation is going to change to ensure that that practice stops.

Finally, fixed contracts don’t clearly disclose all the costs or offer products promoting conservation. What happens is, they’re putting these contracts together and they’re implying through their actions that the contract is not as expensive as it appears. So you’ve got this fairly cheap-looking contract and then, all of a sudden, you peel the onion back, layer by layer, to see that you get a fee for this or a charge for that and, quite frankly, it turns out to be even more than what they’re presently paying for.

The energy retailers will be required to clearly show all charges and time-of-use products that can be required. So again, another door closed with this piece of legislation.

I think what's happening here is that we're taking the steps that every one of us has experienced, I'm betting. I would even bet on this one: that every single one of us has had that complaint about a contract that has been foisted upon them at the door. And the horror stories just got worse and worse and worse. Quite frankly, it's one of those things where—I've got one for you. Here's another thing they did. The one that got me the most was that $50 cheque. I've got to tell you that whoever figured that scam out played that one to the hilt, knowing darn well that any of us don't mind 50 bucks. To have that $50 thrown at us, "and by the way, the fine print says that if you take this $50 and cash it, your contract is renewed"—that one was a beauty. We can all tell stories about others.

I wanted to make sure that I went through in as much detail as possible those solutions that are going to be found in the legislation to assure people that, yes, we've figured this out.

This didn't take place yesterday. This was happening as soon as the deregulation took place and the legislation was passed, I think back in—I'm looking at the member across to see if he can confirm this—1998, when the first regulatory stream came through.

Mr. Peter Tabuns: That sounds right.

Mr. Dave Levac: I think it was in 1998 or 1999, one of those years, when this deregulation took place and the legislation was written so that this could happen. So we've had a long time to get this fixed. I want to assure the members that the intent of this legislation is to ensure that we take the bullets that we've described today of what was going on and show you what those proposed changes are going to be and offer the opportunity to get it right.

I look forward to committee. I hope that all of those who are interested in finding out if this is enough and that this is covered off in terms of door-to-door sales—I'm looking forward to other recommendations and suggestions.

The member from Toronto–Danforth said, "Just ban the practice altogether." That's a legitimate option. There are other options we should consider, and if we're going to look at these and think this is the way to go, I think we should be looking at any other doors we could close to ensure that this doesn't happen. I think we should enter into a really honest debate about trying to figure out the best we could do.

I wanted to make sure that those options were covered off and explained, and I believe that's there.

The other part of this is that there was some concern raised about regulations. The regulations will not simply just be hoisted upon this piece of legislation. The commitment that the minister and the government made was that we will be consulting on the regulatory stream. We will make it an open consultation, with input from the stakeholders and the consumers on how those regulations will be defined and written.

The member from Toronto–Danforth brought up the two areas that I indicated to him immediately—and I will reinforce that. I believe that those two pieces that he brought up within the regulation stream will get discussed. I will take this—not only from your discussion—to the minister myself regarding the winter-disconnect concern that he raised and the security deposit waiver piece that has been discussed, and it has been produced by other organizations, particularly those that are looking at low-income people living in poverty. I believe he has brought points to the table that are deserving of discussion, and I will commit to him that I will do so.

Suite metering—I've only got a few minutes left, Speaker, but I'll bow to your preference. I believe there's about three minutes left, and I'll try to do that as quickly—

Interjection.

Mr. Dave Levac: I see the digit telling me exactly what I've got, so I will stop there and indicate to him that I will be participating in the bill, the committee and the consultation on the structuring of our regulation stream.

I want to thank the minister for this opportunity to carry the bill. I want to thank the members for their input and commit to them that I will pay good attention to all the debate that's going on in the House.

Second reading debate deemed adjourned.

The Deputy Speaker (Mr. Bruce Crozier): Pursuant to standing order 8, this House is in recess until 10:30 of the clock.

The House recessed from 1016 to 1030.

Hansard: February 24, 2010

ENERGY CONSUMER
PROTECTION ACT, 2010 /
LOI DE 2010 SUR LA PROTECTION
DES CONSOMMATEURS D'ÉNERGIE

Resuming the debate adjourned on February 17, 2010, on the motion for second reading of Bill 235, An Act to enact the Energy Consumer Protection Act, 2010 and to amend other Acts / Projet de loi 235, Loi édictant la Loi de 2010 sur la protection des consommateurs d'énergie et modifiant d'autres lois.

The Speaker (Hon. Steve Peters): Further debate?

Mr. Dave Levac: Speaker, I was at the tail end of my 20 minutes, and I believe I've got about three or four minutes left. I wanted to do a little bit of a wrap-up by reviewing the issues that I brought before the House in regard to Bill 235, the Energy Consumer Protection Act, 2010.

What we talked about were the seven key problems that were identified by the public for the retailers, which were: salespersons' practices at the door—consumers don't have the information they need to decide because of language barriers; verbal contracts, usually by phone; contracts not with an account holder; consumers feeling pressured into signing a contract at the door—pressure tactics; unfair cancellation policies and fees; automatic renewal of gas contracts; electricity retailers and gas marketers not having accountability because they put third party collectors in there, and we need to have them culpable for their actions. Fixed contracts don't clearly disclose all the costs or offer products promoting conservation.

Those kinds of issues during that particular section of the bill were explained both by the minister and by myself. We now move to suite metering, which allows us to identify some of the problems there, which were: no framework to install suite metering in rental apartment buildings, no rules for individual billing in rental apartment buildings, and the like. The other one is regarding deposits and disconnections, which was important, and that is that gas and electricity companies work under different rules regarding invoices, disconnecting and security charges, which this bill will address.

The bill will not cover all the issues that I'm sure the opposition and others, including ourselves, would want to discuss. It's not the kind of bill that is somewhat of an omnibus bill, but as I indicated, I as parliamentary assistant have an extreme willingness to listen to concerns and to the issues. I reinforce one more time that we will definitely be going into committee and having the stakeholders and the public at large make presentations. One more point that I made clear to the opposition when they asked was that we will definitely be doing a consultation when we deal with the regulatory stream that accompanies the bill.

I do look forward to further debate, further discussion, further issues that need to be raised. And as parliamentary assistant to the previous minister, I make the same commitment today; that is, I will engage in a listening exercise and make sure that if good ideas will help us make it a better bill, I will be encouraging all staff to participate in that activity to ensure that we do protect consumers in a bill where we say we are trying to protect the consumer.

Having said that, I will wait for the responses from the opposition and from my members, and look forward to continuation of the debate.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. John O'Toole: I'm very pleased to respond to this important bill. The member from Brant, as I recall, summarized some of his concerns. I do want to acknowledge that I hope to have the opportunity to speak on this this morning. There are so many people on our side of the House who are here and want to speak—well, one of them is actually leaving now.

One of the things, the sub-metering, does become an issue. When you get into the apartments, many of which are not efficient, the actual discretionary use—discretionary use at time—is very important. A lot of them are seniors—not all but a lot. A lot have income—not all; I don't like to generalize with any particular group. A lot are often in a situation where they don't have a lot of control.

The real treachery of the smart meter itself is that it is really not a smart meter. I see Phil here. He's an engineer; he knows. A smart meter would allow you to remotely turn on and off appliances such as hot water heaters or air conditioners. That's a smart meter. This is actually a time-of-use meter. It's a disguise, because—and people of Ontario should pay attention here—they're actually raising the price of electricity. When you use electricity on-peak, you're going to pay twice as much for it. They're saying you should use it off-peak. If you don't have full control with timers and other devices to switch the load usage, you're going to be paying more.

So what I can tell you is that, for sure, this bill does the right thing with respect to retailers knocking on your door and demanding certain information—some of it you should not give them, by the way. It's going to put an end to and solve that. But the poison pill here is the smart meter issue itself. I'm in support of the bill, because it takes care of the issue of people knocking on your door and causing you headaches, but at the same time there's always a poison pill in every piece of legislation

The Deputy Speaker (Mr. Bruce Crozier): The member for Trinity–Spadina.

Mr. Rosario Marchese: I'm looking forward to hearing the comments from the member for Durham, because his comments around sub-metering appear to make sense to me—I'm not sure what the government has to say about that. But he's got 20 minutes coming up soon, and I find that commentary interesting.

All I wanted to say to the member from Brant is that I really appreciate when a parliamentary assistant says, "I will be listening to what deputants have to say, and what opposition parties have to say, with a view to making changes or lobbying for change, if necessary." I find that very useful to hear. Generally, very few changes are made in committee by the governing party; that's just the way it has been historically. But I find it encouraging when a parliamentary assistant says, "I want to listen to good ideas, and if they're good ideas, I want to lobby for those kinds of changes." That is good.

The member from Oakville, in two committees I was at, did make an effort as well on some issues, I have to admit. On others he was a bit reluctant, and I understand that; his minister was even more reluctant than he.

But when members make an effort—that is, the parliamentary assistants—to hear the arguments and then to carry those arguments to the minister, saying, "There were good arguments to be made. Why can't we do that?" that's the most you can expect of them. I just wanted to thank the member from Brant for saying that.

0910

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. Phil McNeely: Being from Ottawa–Orléans, primarily a bedroom community of single-family homes, the energy retailers are the big issue in our area. I'm very pleased that this bill is coming forward, because we received, as did all members, a lot of complaints about practices which were not acceptable.

Parts of the process will be information brochures and Ontario Energy Board telephone service in 21 languages, key information required in large font on the first page of the contract, explanatory information on energy bills and improved safeguards for customers. Contract signatures must be text-based and not simply provided over the phone; a third party is to contact the customer to ensure contracts were wilfully entered into. A standard script will be required for contracts, verifications and renewals. Automatic renewals will not be permitted, and there will be enhanced cancellation policies and capped charges. There will be higher standards for the industry. All employees who deal with the public will be required to meet training standards. The OEB will appoint a director to ensure companies abide by the act. The OEB will provide reports to the minister on enforcement action.

All these, when they come into effect, will protect the people at the door. I mean, the stories—we've all heard them—about signing contracts with two different companies, the pressure tactics, asking for your energy bill, looking as if they were there from the government sometimes—all these things will be controlled in the new act and will protect the homeowners.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments? The member for Oakville, you were standing for that?

Mr. Kevin Daniel Flynn: I will pass.

The Deputy Speaker (Mr. Bruce Crozier): Minister of Revenue.

Hon. John Wilkinson: I want to thank my friend from Oakville for that indulgence. I wanted to come into this House because I've received something and I have a particular issue around energy retailers, where I've received a letter personally from a company called Bond Street Collections Inc., and they tell me that I owe a bill to a company called Just Energy Ontario LP, formerly Ontario Energy Savings LP. They're telling me that I owe them money, plus interest, and that they're going to send me to a collection agency. They say, "If you just pay this amount"—a company that I have never signed a contract with—"we'll waive the interest and the fees." And then conveniently, at the bottom, they're asking me to jot down the name on my utility invoice, the address, the utility provider and my utility account number. And it says, "Average rate during your contractual period: 39.3" square metres or something, and to lock in now at a price, to sign and date it, on a little thing they can detach.

This has got to stop. I'm waiting for the energy retailers to come to this place—I understand they're having a reception—because I want to talk to them about this. I've never signed a contract with this company, I have never had anybody send me to a collection company and I find this to be particularly misleading.

There is a need for a reform in this province of these practices and we are going to protect the consumers in this province, because this stuff has got to stop. I want to thank the Minister of Energy and Infrastructure for bringing this bill in. If there is anything in this House that everyone is going to vote for unanimously, it's going to be about this reform, because this reform is well overdue. Put them on notice that this stuff is going to stop, because our constituents, our consumers, are fed up with this. That's why we brought this bill in and I hope we all vote for it. I'm sure we will.

The Deputy Speaker (Mr. Bruce Crozier): The member for Brant, you have up to two minutes to respond.

Mr. Dave Levac: After that, I'm sure that everyone will stand up and vote in favour of the bill, for sure.

I want to thank the member from Durham, obviously, and the member from Trinity–Spadina for his kind words. I hope he keeps my feet to the fire with my commitment to him and to the rest of this House. The member from Ottawa–Orléans has a very strong background on this portfolio, and I thank him for his comments, and obviously the Minister of Revenue, for revving me up and making sure that we get that bill passed.

I do have a couple of quick comments, and I do look forward to the member from Durham's—I think he has negotiated the opportunity to speak. I'm getting the nod that he has finally been given the okay. I do want to correct one thing that he did say, and I hope he would acknowledge that we need to have that correction out there. We're not doubling the cost during peak time; that's the set price. We're giving a reduction in price when you do the off-peak time for energy use. I'm sure he would not want to inflame the seniors out there, thinking that we are going to double their cost; that's

not correct. What we are going to do is set the price, and then, if you use off-time energy, you get a cost reduction. That's the hope of this.

I do look forward to his comments on the so-called poison pill part of the bill. I don't characterize it that way. I suggest to him very respectfully that this is a new way of doing things. It offers us an opportunity to learn how to conserve energy and gives us assistance in doing so, for those who are able.

One of the things I know that the member from Trinity–Spadina and his colleagues in the NDP mentioned was apartments and the condition they are in. There are going to be some other retrofit programs outside of this piece of legislation that encourage people to fix their apartment buildings so that we can find savings there, too.

I look forward to the continuation of the debate and I thank all the members for participating in this particular part.

The Deputy Speaker (Mr. Bruce Crozier): Further debate?

Mr. Paul Miller: They did give him a chance.

Mr. John O'Toole: Someone has to make sure there's a voice here to be contributing to this important bill.

I should put on the record right away that our critic, Mr. Yakabuski, has made it very clear that substantively we are in support of the bill. I guess we could end it there and adjourn until 10:30, but I'm going to use the time to represent my constituents in the riding of Durham and raise just some of the small questions.

Yes, the smart meter—the time-of-use meter—is in this bill, under the sub-metering. Sub-metering refers to apartment buildings, some of which today have one big meter. Electricity comes into the building and the charges incurred on that meter will be spread amongst the 10 or 20 or 100 units in the building. That's basically how it works. The discretionary problem that is there is that the tenant is a price taker. The landlord, by the Tenant Protection Act, has some ability to spread these costs over each unit. But one unit could have the windows open and the oven on, or be heating the apartment with the oven, and yet the one that is trying to be conscious of the environment and is conserving would have to pay. So it's a good idea, probably, to sub-meter.

But there may be investments required by the landlord. I hope they can pass those on to the tenants as part of the rent increases, and they will, because that's a provision that they apply to the Assessment Review Board, I think it is, and the board can approve those rate increases, which could be improving the efficiency and the safety and those kinds of provisions within the apartment.

Often—and I'm not going to characterize all the landlords as being from the past; I think that some of them are quite good. They're investments, by the way. They have to take care of the building to the extent that it's an investment for them that should generate some sort of return. But they often have very poor insulation, often have very poor windows, often don't have the most efficient appliances—those kinds of things. So even if the appliances, say, are supplied, they're probably the cheapest ones you can get. They're not Energy Star rated, probably. Hopefully, I'm not generalizing too much here. But that means that the tenant is going to be disadvantaged because of the windows and the insulation and inefficient things.

Now, here's the real thing for general consumers in Ontario. If you look at your electricity bill, which is what this is really about at the end of the day—we do want to get rid of these retailers, these people knocking on the door and infringing on your privacy etc.—that's for sure. But at the end of the day, this is really a more serious debate about energy itself and the cost of it.

0920

I want to commend Andrea Horwath, the leader of the NDP, who raised a very, very good question yesterday, and that was with respect to the HST. I know that the Minister of Revenue—the minister of increasing taxes—is here this morning, and he will probably respond to it in his two minutes, but we've done some calculations. If you are using, say, $100 worth of electricity, you're going to be paying $8 more. Let's say it's only $100 a week for your utilities. Okay,

that's going to be $8 a week. Stay with me here. How many weeks in a year? Fifty two. Eight times 52 is four hundred and some dollars—$416. That's just one thing.

Let's say you commute to work, or let's say you have to have physiotherapy once a week: 8% on every one of those expenditures. Let's say that your expenditures, on a monthly basis—let's just be civilized here—are $1,000. That's 8% on $1,000 for these discretionary expenditures, including electricity, natural gas, physiotherapy—you name it. Ms. Horwath raised it: It's going to cost $225 a year for electricity and natural gas.

Now, the minister is probably going to say, "You're going to get $300 back." Well, that's also income-tested. If you have income over $80,000, they claw it back.

Hon. John Wilkinson: And then you get your income tax cut.

Mr. John O'Toole: Oh, yes, then you get your income tax cut. Well, it actually increases your income. No, it's not taxable, I'm led to believe.

But I want to stay on line. Here's the key: All of us want clean, safe, reliable energy. There's no question of that—we all want that—and we want it to be affordable as well. I believe that electricity is an essential commodity. It's not discretionary consumption like cable television; it's an essential commodity.

The discretionary use of energy is another shell game. Conservation is when you don't use electricity—you don't dry your clothes using electricity. That's conservation. When you choose to use a timer so that your dryer goes on in the middle of the night when electricity is cheaper, that's not conservation; that's load shifting. Conservation is when you don't use it. That's conserving it; that's real conservation. In other words, getting a clothesline and putting clothes outside is conservation.

My point here is that if you look at a normal couple, let's say a senior couple, it isn't that much; it's roughly 1,000 kilowatt hours a month of electricity. That's a generalization, but it's roughly that amount. The discretionary amount, according to technical reports, is about 8% of usage. That means turning the light off and not using the air conditioning, or a ventilator, if you happen to have a problem.

If you have electric heat, you're euchred, and most of these apartments with sub-metering have electric heat. You can't be turning that on and off because it's 3 o'clock in the afternoon and rates are very high—it's not quite double, but it's higher. At 3 o'clock in the morning, electricity will be quite cheap. So you have to look at the fairness of this issue.

I'm respectfully suggesting that you're going to use less electricity—I'm all for conservation, by the way—and you're going to be paying more. What the minister is going to say to you is, "Look, we can tell you how to save on your electricity bill. Look at your smart meter. Go to your computer. You'll be able to see a profile of usage and it will show you"—I'm sure there will be little subroutines on the program to show you that if you use your dishwasher and your clothes dryer at night or off-peak times, you could save money.

They're going to say to you, once you get these smart meters up and running, "Look, if you want to save, get some timers and shift that load to off-peak so it's cheaper." So it's your fault that you're using all this energy to cook your meals, have your shower in the morning and in the evening, bathe the children and wash your clothes. Busy families out working all day and coming home have no discretion. They have to cook the food, heat the house and maintain their personal hygiene etc. I don't think there's very much discretionary use.

As I said before, we see the devil is in the detail—not specifically this bill. I want to put this on the record. There's no question that we want to see significant changes and improvements, and I think the bill attempts to achieve that. The bill is long overdue. In fact, the bill was promised in 2008-09.

I want to give Dave Ramsay, the member from Timiskaming–Cochrane—he used to be the Minister of Natural Resources. He's not a minister anymore. I don't know about that, either. He brought in a bill, and his bill would have easily improved things. The government has copied his bill. It says here—a similar bill last year that the government

could have worked in, instead of choosing to let it die on the order paper, in favour of a government bill. So he actually had the same bill, and they've copied it, but didn't give him credit for it. I don't understand that.

We're largely supportive. I think it's important that there is training and oversight for these retail salespeople. I think that's good. The training and the whole marketing of it, I think, should be left to the retailers, meaning the local distribution companies, whether it's Hydro One or Meridian or Toronto Hydro. I think they would have a marketing plan there to give people some marketing choices. I think that would be good.

Direct Energy is generally in support of the bill. That's good to hear. They note that because the electricity prices are regulated by the province—and this is important because, really, the Ontario Energy Board regulates the price—these retailers are sort of hedging against future price changes. But the most part of the bill is not regulated by these retailers—the debt retirement charge, the delivery charge and the line loss charge. Those are three charges in the bill that many of the consumers don't look at.

Line loss is when the dispatcher, OPG, shoots out electricity across the grid—they fire out one kilowatt of energy, they get paid for it, but by the time it gets to your house, there's only half left. There's a 10% to 15% line loss on electricity. That's the line loss charge. You'll see a charge on your bill: It's 0.00123 or 0.00145 or something like that. The consumer is actually paying it. To get this electricity to you, they had to dispatch more energy than you actually use, so you have to pay for it. That makes sense, I guess.

The other one is the debt retirement charge, and it's called the provincial benefit. Now that's really an important issue. For small business that has gone into setting up conservation and load management within their facility—there's one in my riding. I'll mention the name. It's Bowmanville. It's a foundry, and they have smelters that are electrical. They set up their whole operation to be off-peak so that they'd get a lower distribution rate. Now that they've done all this and put in some modernization and tooling and stuff like that, their provincial benefit charge has gone up. In fact, I've written to Mr. Duguid, who—prior to that, I think it was George Smitherman. There have been so many different Ministers of Energy over there. I think they should put Mr. Wilkinson in that job, because he has been a pretty good minister. He's done a great job of selling the HST.

Mr. Gerry Martiniuk: And it's hard to sell.

Mr. John O'Toole: You can't sell that. That's like trying to push a rope uphill.

Mr. Jean-Marc Lalonde: He's telling the truth.

Mr. John O'Toole: I'm not buying it. That's one thing we're not buying on this side. It's a shell game.

Interjections.

Mr. John O'Toole: Mr. Speaker, perhaps you could—they're yelling at me now.

Interjection.

Mr. John O'Toole: Often that just ignites the flames, so you want to be quiet on that one.

I think the stranded debt issue is something that many consumers ask all of us. There's the Ontario electricity financing authority—look on the public accounts, look online, look in the budget. If you look under that, you'll see that the total amount of debt owed by what was the old Ontario Hydro is around $17 billion. It's going down, but—each of us pay 0.07 cents per kilowatt hour of debt retirement charge. On your bill, you'll see it. That's what it's for. My question to the Minister of Energy, and perhaps his parliamentary assistant in the response could tell us, is when is that debt going to be paid?

0930

It's just another tax. Where did it come from? I'm wandering around here a bit. This is very important. If you want the history of this, Mr. Speaker—you've been here longer than I have—you would know that the NDP, when it was under Bob Rae, got into trouble on electricity—a lot of trouble. Energy went to about 12 cents a kilowatt hour. They finally froze it. Once they froze it, costs kept going up and they created a great amount of debt.

There was a lot of debt created when they built the nuclear plants. What happened is that they looked at—

Hon. John Wilkinson: It was all spent in your riding.

Mr. John O'Toole: Do you know who did the report? It was Donald Macdonald, Pierre Elliott Trudeau's finance commissioner. That's who did the report—great guy. He did a great report; it was called the MacDonald commission. What he did is he looked at the amount of assets that old Ontario Hydro had and the amount of liabilities it had. What it did is, it apportioned a certain amount of assets—

Hon. John Wilkinson: In Durham region.

Mr. John O'Toole: Generating facilities generally—Niagara Falls and some of the coal and gas and other fossil fuel plants—and then they said, "You can take on a certain amount of debt." Then they took the transmission, which used to be part of it, and made it Hydro One. They allocated a certain amount of capital and a certain amount of debt to Hydro One, and that's why this debt retirement charge is left over. It was stranded debt that no one could pay. The assets would not support the amount of debt, and it was just poorly managed until we got in there and tried to sort this out. I think it's being worked on. I'd say the government is following our advice quite well.

Interjections.

Mr. John O'Toole: Well, they haven't changed a thing. Have they deamalgamated Toronto? I don't think so. You guys haven't changed as much as you think.

But I do believe this: We've all agreed to getting rid of these retailers at the front door. In my final—I might seek more time here because I'm not going to have enough time to finish all my arguments.

I know the Minister of Revenue mentioned a specific case, and I do sympathize. It's just energy that he—he should check some of his BlackBerry records or maybe phone records. Maybe he got a call from a retailer on his BlackBerry and accepted the call. As such, that would be the first step in a contract, a contractual relationship where someone phones you, you answer the phone and say, "Yes." It could be implied that you've actually accepted the dialogue, that you're somehow engaged here.

I would say that these collection agencies are another whole deal, but I'm happy to say that they have increased the claims limit in Small Claims Court. Some of this stuff should be settled in civil court, I believe—some of these untoward agencies.

There are a couple of other things here, because I have read the bill, actually. It's in the section here that I'm talking about: "The bill amends the Ontario Energy Board Act, 1998." That's section 3 here. It's in the section under the explanatory notes. Here is what it says: "The minister may issue cabinet approved directives to the board in relation to retailing of gas and electricity and the board shall implement the directives."

Let's face it; let's be clear here: The Minister of Energy is running it. In fact, Mr. Duguid is running it on behalf of the Premier, because they know that energy, whether it's oil—read the books on peak oil. Prices are going up. They're not going down; they are going up. I'm forecasting now—if you look at Bill 150, the Green Energy Act, I'm surprised people in Ontario aren't catching on to this stuff. Here's what they're doing. I like the sound of wind energy. I like—well, no, I don't; it's a low-decibel noise. Solar energy: They're paying these generators 80 cents a kilowatt hour. Wait a minute. How can you pay someone 80 cents to generate it and the consumer is only paying five cents? What's going on here? What's the average price of electricity? It's about five and a half cents per kilowatt hour. How can you pay for wind energy at 20 cents a kilowatt hour under a standard offer under Bill 150, on a feed-in tariff? They call it a FIT.

Hon. John Wilkinson: Thirteen cents.

Mr. John O'Toole: Let's say it's 15 cents. How can you pay them 15 cents and be charging the consumer five cents? That's not fair. In fact, no, you should pay the price for what it is. I'm all for it, but we'll find out how many people want to buy 80-cent energy.

They always refer to Denmark. Do you know what the average price of energy in Denmark is? Thirty-four cents a kilowatt hour. So no wonder people conserve. They can't afford it. That's why they're conserving.

I think there's a lot of good in this bill and it's the first step to getting it right, but I'll tell you, be prepared. The consumers of Ontario, I put to you now: Solar power is about 50 cents a kilowatt hour; wind is about 15 cents a kilowatt hour. These contracts are going to be honoured. They're standard offer contracts. They're outside the grid price, and you're paying for it in the taxes. We're doing things in Ontario that I don't think are fair to the consumer because, as I said, electricity is a non-discretionary consumption. In other words, you have to eat to live and all those things take energy. So you're going to pay more and you're going to use less.

This bill only helps the guy knocking on your door bothering you to sign a contract. Why are people wanting to sign these contracts? Because they find the price of energy exorbitant. I can't blame all of that on the Premier, but I'd like to. There's a time and a place but I'm waiting to see if anyone has a response to this. I've run out of time to make any more substantive arguments.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. Rosario Marchese: I just want to say how touched I have been by the remarks made by the member of Durham. His concern for tenants is good and I think it's due to political corrections. You know how there are market corrections in the system? Political corrections are equally good. When you're moved away from government and are in opposition, you learn so much more. You learn to worry about people, as the member from Durham is expressing his concern for tenants, and this is good. That's what I call political correction. How long the political correction takes is hard to say, but in some cases it takes a long time.

But I could see how much learning there is in many of the members of the Conservative Party. Remember, and I will speak to this briefly as I speak next, that this is the party that deregulated the market. Of course, the Liberals are continuing with that deregulated market and are trying to correct it seven and a half years later, and to the extent that this little correction is coming, it's a good thing. But mostly, this was to simply say thanks to the member of Durham for worrying about many of the tenants.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. Kevin Daniel Flynn: It's a pleasure to rise in support of Bill 235. I think when you see a bill like this, the Energy Consumer Protection Act, you realize that it's not a philosophical bill; it very much is a sort of operational bill that's going to protect—it's a practical bill. It's going to help people in their homes. It's going to help ordinary and everyday individuals deal with what has become an increasing problem.

I think those problems have been outlined quite well by the previous speakers, but certainly you've seen in the past three years that retailers of energy have cracked the top 10 list of consumer complaints that are currently received by the Ministry of Consumer Services, and there's a number of problems that go along with that. Those problems include salespersons' practices; there's a lack of consumer information; there are some language barriers that need to be overcome. Often they try to do the business over the phone, obviously, and it's a verbal contract that ends up being entered into. That's just not good enough for this type of an arrangement. Consumers often feel pressured into signing these agreements.

So for all these problems that have been brought forward by people over the years, we have solutions that are contained in this bill. If this bill receives the support of the House, consumers in Ontario will receive the protection they need. That also extends into things like suite metering, into consumer security deposits, into disconnection fees as well, so all the everyday issues that ordinary Ontarians face when they deal with an energy retailer over the changing electricity market are going to be included in this bill, with the intent of protecting the consumer. That's what I was

trying to say at the start, that it appears this bill is going to receive support from the House. I think that's a good thing, because I think consumer protection crosses party lines. This bill deserves the support of all members.

0940

The Deputy Speaker (Mr. Bruce Crozier): The member for Wellington–Halton Hills.

Mr. Ted Arnott: I want to commend my colleague the member for Durham for speaking this morning on short notice and expounding eloquently on the subject that he did, on Bill 235. Certainly it is our intention to support this bill in principle.

The member, in his comments, talked about wind energy, and I wanted to inform the House of a proposal for a wind farm in the Belwood area of my riding, proposed by Inver Energy Canada. They're proposing to build between 25 and 35 wind turbines, and of course they are seeking approval under the process set out by the Green Energy Act, which is a bill that I actually voted against.

I had a meeting with some of my constituents on Friday, people who are in the vicinity of this area, in Centre Wellington, and people in East Garafraxa township, who are very, very concerned about this proposal and concerned about the health impacts. I think it's fair to say that we don't have a complete and full understanding of what the health impacts might be. Certainly the government seems to be interested in studying that subject. I would suggest that they would be prudent not to proceed with the massive expansion of wind energy without a full and complete understanding of what the potential health impacts might be.

I also received an e-mail from one of my constituents and I'd like to inform the House of it. It's from Janet Vallery, and it reads as follows: "Under the Liberal Green Energy Act the government has eliminated public process to participate in approvals. Companies applying for wind farms only require approval from REA"—renewable energy approval—"at the Ministry of the Environment and Ontario Power Authority. This is not a democratic public process and threatens all rural communities who happen to be located in a wind area. I would go further to say the Liberals have now made Ontario rural families second-class citizens with no property rights."

She goes on to say that the people in the area are meeting with local politicians, who are currently moving forward: "We've requested Centre Wellington and Wellington county council [to] sign the moratorium against wind farm development."

I want to encourage the members of the Legislature to think about those issues and respond accordingly.

The Deputy Speaker (Mr. Bruce Crozier): The member for Haliburton–Kawartha Lakes–Brock.

Mr. Rick Johnson: It's a pleasure to rise this morning and make some comments here. The member from Trinity–Spadina spoke eloquently about it, as well as the member from Wellington–Halton Hills, and of course my friend from Durham.

The intent of this bill, as we all know, is to protect consumers from unfair practices of gas marketers and energy retailers. My office has received a number of contacts from consumers and residents in my riding of Haliburton–Kawartha Lakes–Brock who have signed contracts and basically been taken advantage of.

I think we are trying to strike a fair balance between protecting consumers' rights and allowing businesses the opportunity to provide consumers with energy options. If passed, this legislation will empower our consumers. We look forward to further consultations with our residents on this. It's taken a bold step for our government to step up to the plate on this issue and make sure that the issues are properly addressed. It's all about protecting the consumer when they come to the door.

Regarding the smart meters, when it comes in for apartment buildings and everyone, it's really going to allow us to look at where we use our energy, how we use our energy, and to use it smartly. I'm hopeful, in my house, that, first off, the kids will shower at a different time of the day, which will cut down on the use of the water tank and the energy used. I

think it will lead to conservation, and anything we can do to help preserve our electrical use and energy consumption will be a good thing.

Thank you for the opportunity to speak

The Deputy Speaker (Mr. Bruce Crozier): Thank you. The member for Durham, you have up to two minutes to respond.

Mr. John O'Toole: I want to thank the members who responded, from Trinity–Spadina, Oakville, Wellington–Halton Hills and Haliburton–Kawartha Lakes–Brock. And, yes, I think we're all onside on this.

I want to put on the record here an e-mail, which I think is in the public domain, from two of my constituents, Peter and Christine Box:

"As an apartment dweller in your constituency I am interested in the above subject insomuch as how it will affect me financially once the proposed legislation is implemented.

"The legislation seems to concentrate more on the time of use rather than the efficiency of use and when you are in an apartment with no dishwasher and no washer/dryer I can't see where timing can have any great effect.

"Most of the use of hydro in an apartment is determined by the landlord insomuch as he supplies the stove/fridge/water heater and at the lowest cost/least efficient.

"He also controls the efficiency of the windows, doors and insulation. Where is the benefit to the tenant.…

"I see in one of the government sites there is a list of foreseeable problems and possible solutions.

"One of them addresses some of these problems and the solution suggested is to make landlords comply with certain standards on windows and suites….

"(1) What are 'certain standards'?

"(2) If the landlord is made to comply and spend money upgrading can they not then turn around and complain they have been forced to spend money," which will affect my rent itself? My rent will be increased.

"I trust you will look into this and provide"—I have written to Mr. Duguid, the minister on this, and I think it's worthy to look at income consistency. If you look at the implementation of the HST, it's another 8% on essential consumption. In British Columbia, which is also implementing the HST, they're not applying the HST on gasoline. I'm encouraging the ministry to look at people with fragile incomes in this fragile economy. We each have a social and a collective responsibility to be making sure we're not leaving people behind in this very tough economy.

We'll be supporting the bill, but let's not assume that smart meters are smart; they're time-of-use meters.

The Deputy Speaker (Mr. Bruce Crozier): Further debate?

Mr. Rosario Marchese: I'm happy to speak to Bill 235, and I want to say it is timely. It's about time. After seven years of complaints that we have all heard in our ridings about energy retailers who often come around to your door with misleading information that entraps people into contracts they simply, in the end, cannot afford, I say, it's time.

Every MPP in this Legislature comes with a story, a horror story, including the Minister of Energy, where he reads a case that has happened to him. It's instructive how it can happen to anyone. Errors can happen to anyone and misleading information can be given to anybody. People can buy into contracts that are not right. It happens to many people, but particularly to the most vulnerable in Ontario.

Seniors are particularly fragile and can be easily tempted into buying into a contract that they think is going to save them a few dollars. People who don't understand the language can be easily taken in by misleading information from energy salespeople who come to your door, telling you you're going to save money, and in the end, you don't.

The stories are many. We've had this ever since the market was deregulated many, many years ago by the Conservative government. So this is timely because, if nothing else, it's going to help some people for sure.

But I've got to tell you, there are many people in Ontario like myself who long for the good old days of Consumers' Gas. Many, many people in my riding and others who I know long for the good old days of Consumers' Gas, when they could call just one number and get the service that they desperately needed. They would come and the repairs would happen. The reliability of service was there; the charges were predictable, affordable and reasonable. That ended many, many years ago when my friends to the right of my right decided that deregulation was the way to go and they had to emulate Alberta, their close cousins politically, who had deregulated the market. They too felt that the time was right to put hydro on the spot market, which we have been suffering through for many, many years. I'm telling you, there are a whole lot of people who are looking forward to the day when government will have the power, the fortitude to come back and say, "We're going to re-regulate the market and bring back the good old days of Consumers' Gas."

0950

While some of these measures seem to be helpful and seem to be going in the right direction, nothing short of re-regulation could solve the problem—nothing short. I am one of those old soldiers that wishes that we could go back to those good old days. If truth be told, I'm sure there are many Liberal MPPs who would probably say the same thing but dare not because they can't, including many of the Conservative Party who probably feel the same way but cannot because, ideologically, to do so would be to go against the current leader and the former leader of the Conservative Party.

But we don't have that luxury. We don't have the freedom or the pleasure to be able to say, "We're going to go in this direction. Let's push in that direction." Unfortunately, what we're stuck with is a government who says, "We're going to take some corrective actions to help the consumer because we've been hearing from them for the last 10 years and we've got to do something." So it's better than nothing.

They are going to bring in some protections. For those who feel pressured into signing a contract, the bill proposes three alternatives: a 10-day cooling-off period; upon third party verification within 10 to 60 days of signing the contract; and 30 days after the receipt of the first bill. This is better than what we had before. It's very useful to bring in something that is a little more effective than what we have.

Whether that will solve the problem for those who have literacy issues in the home, for those who don't realize that the new law is there, that they have different measures to grab at as a way of helping them, and whether it will help the majority of citizens who will not have a clue about the changes of the law, I don't know. It will help middle-class professionals who have access to the Web, who are able to use Google and get this information within minutes. It will help those who have the literacy to be able to get that information. This is true, and that is good. But I still maintain that the majority of people will not have a clue about the changes to the law that are being proposed, that are likely to pass, and will continue to suffer the problems that they will face at the door.

They will add additional licensing conditions for retailers—will that help? I don't know—including individual salesperson training and background checks. Okay, they're going to have a background check. I'm not sure what that will determine, what the particular elements of that will be, how it will be able to spot a miscreant, a bad salesperson who they're going to be able to figure out by their training shouldn't be there. I don't know how they're going to be able to do that, but that's what they propose.

An insurance fund to assist in covering potential losses for consumers—very useful.

The Ontario Energy Board will randomly audit retailers—better than nothing. It's better than not to audit retailers at all. Anything is better than what we had, so even a random audit is something more than what we will have had in the past.

Improved officer and director accountability: That's to be determined by regulation. We don't know what that means.

Unfair cancellation policies and fees, automatic renewals for gas contracts: The government proposes that it will prevent excessive cancellation fees or, in some instances, any fees such as when people move or accidentally sign a second contract, and they will eliminate negative option renewals. That is good. But much of what they say by way of what they're proposing is going to be in regulation, and we'll have to see what they propose in regulation to determine whether or not what they recommend is, indeed, going to be effective.

So on the whole issue of marketers, any effort to stop misleading sales of energy contracts at the door, in my view, is going to be a positive step in the right direction. But I look forward to deputations coming to committee; I really do. I'm looking forward to the Advocacy Centre for Tenants and other groups, such as the Advocacy Centre for Tenants Ontario. There are many different groups that will be representing tenants, which I think will bring to the table a lot of concerns that the government may not have yet heard, and if they haven't heard them, hopefully they will have their ears open to the suggestions as a way of improving this.

There are questions of submetering that we have. I believe that the Advocacy Centre for Tenants and the other group that I mentioned, the Advocacy Centre for Tenants Ontario, have raised concerns. I want to raise a couple, and they relate to submetering.

The sub-metering protections only happen to sitting tenants. Those who are willing to have them, presumably they understand what they're getting into and presumably it's something they want. But because of vacancy decontrol, it means that the people who are coming into the apartment have no control whatsoever about what they're getting into. In fact, vacancy decontrol often means that if that person was paying that much rent, as soon as you leave, when the new person comes in, the landlord can charge what they want. That's what vacancy decontrol is all about, and it's going to hurt them. It has been hurting a lot of tenants ever since the law was changed by the Tories and continued by the Liberals. As it relates to the protections, the new people coming in will not have any say whatsoever. That's something that I suspect people that are coming to depute will speak to. I think that is a concern. How the government intends to deal with that is beyond me. My suspicion is that they don't intend to deal with it, but we'll wait and see.

Landlords' obligations concerning necessary retrofits are not clear at the present. Those obligations would likely only extend to current sitting tenants. This means that tenants will potentially face higher fees due to factors entirely within the landlords' control, which in turn will affect the tenants' ability to pay.

There are other concerns that tenants have. Tenants still pay for common-area energy use in their rent. They have no control over reduction of energy use in common areas. I don't believe that the government has thought about the implications of that. How are they dealing with common areas? Common areas are beyond the control of individual tenants but they're still going to be paying. This particular bill does not deal with common areas and does not deal with the effects this will have on tenants and their ability to pay.

Load-shifting, something that the member from Durham was talking about, typically involves using appliances such as dishwashers, washers and dryers during mid- or off-peak pricing periods. The problem is that most tenants do not have these appliances in their suites, and so they have absolutely no control.

It's instructive, because the member from Durham was reading a letter in his last two minutes in which a tenant was talking about how many of the things that affect the hydro prices are not within their control. The lady or the man that sent that letter was talking about, "We don't control the quality of the windows. We don't control the quality of the doors. We don't control insulation—no insulation or bad insulation. We don't control, indeed, the appliances" that I just mentioned.

So this will affect tenants in a serious way. And while the government says that the landlords are required to meet certain energy efficiency standards for appliances in suites, we don't know what that means because that has yet to be determined by regulation. Unless we have a sense of what that is going to be, we don't know how tenants are going to be affected.

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The most dramatic thing for me, which I think the member from Durham was getting at as well, is that over 30% of Ontario tenant households live at or below the poverty line, so any increase in shelter costs, including those costs associated with utilities, has a disproportionate impact on these low-income households. This is a serious matter.

Homeowners earn, I believe, twice the amount of money than those who live in private rental housing. The majority of people barely make ends meet. Some struggle. So when the government says, "We're going to introduce a harmonized sales tax," that harmonized sales tax is going to add an extra $225 a year for tenants. It may not sound like much to those who earn over $100,000, but tenants who live in private rental households, who only earn $30,000, $35,000, $40,000, are going to be seriously affected by that extra $225 they're going to have to pay because of the introduction of the harmonized sales tax.

We raised that question yesterday. We went through the freedom-of-information request to try to ask how much it's going to cost people for the additional 8% retail sales tax on utilities. It took eight long months to get that information—eight long months, as if somehow there was a great deal of secrecy attached to it. The government did its very best to delay and obstruct the opposition parties from getting that information. Eight long months—I don't get it.

If you're proud of your harmonized tax, just go out and defend it. Continue to defend it. Be aggressive about it. If the members of the opposition want the information, why take so long to give it to them? There is no overriding privacy interest. If you're proud of your harmonized sales tax, be aggressive, go out and defend everything. Don't obstruct the opposition parties as you've been doing for years and months when they are requesting to get that information.

We also made a request to find out how much it will cost drivers, with the additional harmonized sales tax, for gasoline. We can't get that information. For some reason, with this particular government there's a great deal of privacy. Why so much privacy on the issue? I just don't get it. This additional cost is going to hurt.

We talked about two major issues that I am convinced are going to make for instructive deputations. One is whether or not we're cracking down sufficiently on energy retailers, and whether or not the government is interested in re-regulating the market. It is my profound hope that deputations that will come forward are going to be calling for bringing back Consumers' Gas, having one regulator of the market, one provider of hydro as opposed to the many different providers of a deregulated market that the Conservatives brought in many years ago. That will be one question.

The other question is, what kinds of regulations are we likely to see this government introduce that are going to bring the protections that the Ontario Energy Board said we need to bring in to protect tenants, particularly those who are most vulnerable; and, third, the issues of sub-metering and how that will affect many of the tenants who live in private rental households, and how that will affect particularly those who are most vulnerable.

I look forward to the hearings. I look forward to the member from Brant being sincere, as he said he will be, in his comments about how responsive he will be to the deputants. Hopefully, he will be true to his word because I suspect a lot of advocacy groups are going to come forward, stating a lot of concerns that they will have, and if they haven't yet heard them, that they will consider them at the time of the hearings.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. Dave Levac: The member from Trinity–Spadina has left me with a small challenge, and I'll take that challenge up: to confirm one more time that indeed, as his concerns have been laid out, I've made that commitment to him and to the House. I've made that commitment in the past and I believe I have a record that fulfills that whenever I was a parliamentary assistant. I believe I have a spotless record when it comes to amendments. We did find some amendments and we did work with the opposition when I was the parliamentary assistant previous. We did find ways to make the bill better, and that would be my intent. So I recommit myself for a third time to the minister—to the member from Trinity–Spadina—

Mr. Rosario Marchese: I don't mind being a minister.

Mr. Dave Levac: You don't want to be a minister.

But let me comment quickly on the aspect of the bill that the member talks about. He does speak about specifics that can be done inside, and will be done with other aspects of other ministries, actually, regarding the building code and upkeep of the tenants' facilities. There are opportunities for us to use federal and provincial programs that are already in existence to upgrade an awful lot of the areas of apartment buildings and single-family dwellings to do that.

We are in a culture of conservation regarding energy. We are learning how to conserve energy and we are starting programs and have programs that are always in existence, that continue to get us to a better place when it comes to using energy. I don't think there's anyone in the House that will not agree that Canada, just as much as Ontario, has been well known for not being very good at conserving energy. We are getting much better but we've got a long way to go. So this is one of those areas in which I believe we are finding commonality.

The last comment to you is that this is a consumer protection bill, that's what we're trying to accomplish, and I'm sure that we're going to be able to reach that.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. John O'Toole: It's always interesting and challenging to reply to the minister—or the member, rather, from Trinity–Spadina—

Mr. Dave Levac: We all want him to be a minister.

Mr. John O'Toole: —who used to be a minister and now doesn't want to be a minister; there's too much responsibility that goes with it. Because when he was in government, that's when they implemented the social contract, something they didn't want to do but had to do. I always admire the eloquence of his remarks.

But we are on the record of being in support of this Bill 235 with respect to the provisions of the retailers coming and knocking on your door, wanting to see your bill and charge you more. What we have concerns with—and I raised it on behalf of my constituent and the member from Trinity–Spadina referenced it, and I'd be happy to share this e-mail with him from my constituent who is concerned about the sub-metering provisions in this Bill 235—and that's to deal with the smart meters.

Again, I want to repeat they are not smart meters, they are time-of-use meters and they allow the utility to bill you three different rates: on-peak, off-peak and high-peak. These rates, if you pay about five cents a kilowatt hour now, at the top of peak you're going to pay almost 10 cents. The energy costs are going to double. The question was raised yesterday by your leader, Andrea Horwath, about the implications of the HST on electricity. It's going to cost $225 a year, per person, more in HST for natural gas and electricity. When you look at this thing and you factor in the smart meter and the time-of-use provisions under the regulations, I put to you and to Mr. Levac from Brant, who is an excellent member, that to the people on fixed incomes who often live in apartments or in less—

The Deputy Speaker (Mr. Bruce Crozier): Thank you. Questions and comments?

Mr. Khalil Ramal: I listened to the member from Trinity–Spadina for roughly 18 minutes. He spoke about many different elements about energy consumption in the province of Ontario and raised many different concerns, and rightly so, I guess, as he's in the position to raise questions. I think we as a government—I listened to the PA for the minister, the member from Brant, speak about the process.

You know, all the bills, all recommendations proposed in this place take a chance and go to committee, and those committees travel the province of Ontario. We listen to many stakeholders, consumers and many people to give us advice and raise their concerns in order to enhance the bill and make it a good bill.

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The most important thing in this bill talks about consumer protections, because all of us from across the province of Ontario heard about the stories. Every riding, every constituency office, received many different complaints from constituents about people knocking on their door, signing a contract, and they cannot get out of this contract. So many

different parts and elements of this contract are hidden and they don't understand. They're stuck with the contract, and in the end, if they want to get out of it, they pay a high price.

That's why this bill came, to protect those consumers across the province of Ontario: to make the act and make those contracts very simple, using simple language so that people can understand it, and also get the chance, if they don't understand it the first time, to get out of the contract within 10 to 60 days or 30 days after paying the first bill.

It's very important to focus on the issues which this bill is trying to do in the province to create some kind of protection mechanism for the people across the province of Ontario who were victims in the past of many different people knocking on their doors and forcing them to sign a contract they don't want.

The Deputy Speaker (Mr. Bruce Crozier): Questions and comments?

Mr. Jean-Marc Lalonde: I was listening to the member for Trinity–Spadina. I'm sure he's well aware that this bill is for the protection of our consumers. At the present time, we know all those retailers that are knocking on doors are not really telling the truth to the consumers. I had, just this morning here, because people must be watching the debate, this lady Nathalie who is writing me, sending me a note saying that I have to call her back., She signed a contract at 7.99 cents. She did the calculation. It comes up to over 11 cents a kilowatt hour. This is the approach they are using. They are trying to convince people that they will be paying less money when they sign a contract. That is completely, completely false. Every one of them—I get at least one call a day from people who have signed contracts, and I'm able to work with most of them to get them cancelled because they are not telling the truth to the people. Very often they sign the contract for them, so they're forging the signature. Myself, they told me that I had signed for my company. I immediately called a lawyer. The lawyer told me, "You've got to see the police." I got the OPP to investigate that. We had 23 of those in my area that forged the signature.

I'd just like to go back to what my friend from Durham was saying. It's true: We have a debt of over around $17 billion at the present time. But let me tell you, why do we have that debt? At one time, December 2002, we were paying $1.33 per kilowatt hour and the government was charging the people 4.3 cents.

The Deputy Speaker (Mr. Bruce Crozier): The member for Trinity–Spadina has up to two minutes to respond.

Mr. Rosario Marchese: I want to thank the members from Brant and Durham for referring to me as a minister. I'm looking forward to that, actually, in the next election. It would be something that I could handle. Twenty years later it would be a lot easier than it was.

Second point: The members from London–Fanshawe and Glengarry–Prescott–Russell make a strong case for re-regulating the market. I agree. I think you probably liked the system as we had it when you were in government many, many years ago and when we were in government in 1990. We had one provider of the service, Consumers' Gas. I think that is the argument I made earlier and that I believe you're trying to make as well: The abuses have happened so frequently against consumers for so long that something has to be done. Whether or not the suggestions you are making in this bill are adequate to curb the abuses by retailers remains to be seen, but that action has to be taken is a must, and I agree with that.

That's why I put to you, are you interested in re-regulating the market? Because that would be the ultimate way of solving it; that's what I put to you. But I'm not sure I heard any of the Liberal members speak to that particular issue at all. You stand up and say, "We need to help the consumers"—and I agree with that, of course, but I put the ultimate test to you: What about re-regulation?

By the way, member from Glengarry–Prescott–Russell, the debt that we have on energy has to do with nuclear. You'll remember Darlington: It cost us $15 billion or $16 billion. We're still paying for that today. That's why we have that debt, not because of any other reason.

Interjection.

Mr. Rosario Marchese: Yes, it's true. I wanted to remind you of that.

Second reading debate deemed adjourned.

The Deputy Speaker (Mr. Bruce Crozier): This House is in recess until 10:30 of the clock.

Hansard: April 13, 2010

ENERGY CONSUMER
PROTECTION ACT, 2010 /
LOI DE 2010 SUR LA PROTECTION
DES CONSOMMATEURS D'ÉNERGIE

Mr. Duguid moved third reading of the following bill:

Bill 235, An Act to enact the Energy Consumer Protection Act, 2010 and to amend other Acts / Projet de loi 235, Loi édictant la Loi de 2010 sur la protection des consommateurs d'énergie et modifiant d'autres lois.

The Speaker (Hon. Steve Peters): Debate?

Applause.

Hon. Brad Duguid: Thank you to the member for Brant for his support. I'll be sharing my time with the member for Brant. Maybe that's why he's clapping right now. He's trying to get me to go a little quicker.

I rise to speak today on what is a very important bill to consumers across this province, the Energy Consumer Protection Act, 2010. But before I move forward with my comments, I want to acknowledge the contribution made to this legislation by the Honourable Gerry Phillips, who was the minister when the legislation was originally introduced, I believe, in December.

We all know Mr. Phillips as a very honourable member in this House, a well-liked, very non-partisan member, measured in his thinking and really talented in finding the balance required in coming forward with good public policy. I think that Mr. Phillips is respected by all members of the House and by the media—by just about everybody in this business—for his long and very distinguished service in this place and as a minister in both the Peterson government in the 1980s and the McGuinty government over the last couple of terms. I want to thank him for his work on this bill. I want to thank him for all of the work that he has contributed. It's my honour to carry forward the bill that he originally introduced as the Minister of Energy and Infrastructure today.

As I said, this bill was originally introduced this past December. It captured the attention of many when it was introduced. Many members of this Legislature have been very engaged by this piece of legislation and many of our constituents have expressed their views on this legislation as well. I'm very proud of the work, to date, that we've brought to this effort. In fact, I think it illustrates the very vital role that this government can play and that all governments play in improving the lives of people in this province. I'm confident that we've arrived at a piece of legislation that strikes the right balance between creating an environment where business can operate openly and one in which consumers are protected and treated fairly. Really, that pretty much sums up what this bill is all about.

I'd like to acknowledge as well David Ramsay, the member from Timiskaming–Cochrane, whose private member's bill highlighted the issue of consumer fairness in the energy retailing sector. He's another distinguished member in this Legislature and another member who is liked by all members of this House. I thank him for his vision early on in bringing forward that private member's bill: another example of how working on and introducing private member's bills—although sometimes it may seem like a long, drawn-out process and sometimes those bills don't in themselves see fruition or the light of day—can sometimes ultimately have a big impact on public policy. Mr. Ramsay deserves much credit from consumers who will benefit from this new legislation, and gratitude from this government for his contribution.

I'd also like to thank Ted McMeekin, the member from Ancaster–Dundas–Flamborough–Westdale, who is here in the Legislature with us today. Last year, as Minister of Consumer Services, he was instrumental in shaping the consumer protections at the heart of this proposed act. Again, we have another member who is not highly partisan in nature, a member who knows how to strike a balance and work with all people on all sides of the Legislature, a distinguished member from the Hamilton area. It's always a pleasure to work with him. He deserves credit for much of what is before us today as well.

Finally, I want to thank the Standing Committee on General Government, all members from all parties, which recently examined this bill and provided insightful and valuable input to strengthen the bill's effectiveness. Your questions and input—by "your" I mean the members of this committee—have helped to clarify the policy intent of this proposed legislation, and many of the proposed amendments that flowed from the work that the committee did have served to improve the legislation. On behalf of Ontario energy consumers, I really want to thank the committee members for their diligent work.

I want to acknowledge the work as well—and we often don't do this in this Legislature—of the critics on this particular piece of legislation. Parliamentary Assistant Levac has indicated that both Peter Tabuns, the critic and member from Toronto–Danforth, and John Yakabuski, the Conservative member from Renfrew–Nipissing–Pembroke who served as critic, both worked very well on this bill. While I don't expect that all members of the House agreed on every aspect of this bill and there was good debate at committee on amendments, potential amendments and different aspects and provisions of the bill, I think that the critics and all members from all sides really recognize that this is a good piece of legislation in the interests of Ontarians and, in a very non-partisan way, have moved forward.

I don't know whether the opposition members will be supporting this bill in the end. Maybe we'll get an inclination today; maybe we won't know until third reading actually takes place. I see the critic Mr. Tabuns nodding his head yes, and I think that's good news. I think it speaks well of the collegial work that the committee was able to accomplish. We really do appreciate the support from Mr. Tabuns on this and the good contribution that he and his colleagues have made to this particular piece of legislation.

1610

I want to speak a little bit about the objective of this legislation, which is really quite simple: to empower consumers, to protect their interests and to ensure that Ontario's energy market is fair and transparent.

Our proposed legislation does this in three main ways. First, it includes measures to crack down on the unacceptable practices of some—and I say some, not all—electricity retailers and gas marketers. Each week, the Ontario Energy Board averages between 100 and 150 consumer complaints about the practices of gas marketers and electricity retailers. That's worth repeating: That's 100 to 150 complaints that the Ontario Energy Board averages every single week. That's a lot of complaints. It means that there is an issue here, an issue that had to be dealt with and an issue that the committee and our government had to tackle.

We've all heard the stories. We've heard them from constituents, about how difficult it can be to understand the energy market. I recognize that as the Minister of Energy and Infrastructure who has been in the job for two months. It's a whole new world out there. It's a whole new set of languages. There are acronyms all over the place. This is a complex energy sector that we work in, and it is difficult for consumers, I think, to understand the energy market.

The pressure that has been exerted by some electricity retailers and gas marketers is a problem. It has been a problem in the past as well. They call and turn up at the door, offering multi-year, fixed-rate contracts for energy. It's that pressure that consumers sometimes find themselves under that may well have led, at times, to consumers making decisions that may not have been in their best interests, or they may have been making decisions when all the information wasn't before them. Some of us have probably experienced some of those experiences ourselves.

This proposed legislation would help consumers deal with that pressure by enabling new requirements, regulations and training standards that would root out unprofessional behaviour. It would also make the energy market easier to understand by ensuring that consumers have every opportunity to fully understand what they're buying.

I think that's the key. It's a free market out there and people have the opportunity to do business. They have the opportunity to market their products and their services. I don't think anybody in this Legislature would have a qualm with that, but it's important that consumers have the ability to understand what it is that they're buying when they are making these kind of purchases.

This would include requirements for the use of plain language to explain the key terms of energy contracts to help consumers more easily understand what they're buying, at what cost and over what period of time—really, what they're committing to do—as well as new regulatory power that would help extend and clarify the conditions under which contracts can be cancelled.

In short, this proposed legislation makes sure that the consumer has every opportunity to understand the offers they're being presented with and to make sure that retailers understand that they are obligated to present their offers clearly and fairly. I think it's reasonable. I think that's fair. I think it's something that consumers would expect, and I think that's one of the reasons why all members of this Legislature are providing some level of support to the approach.

Secondly, this proposed legislation sets out clear rules and strengthens protections for people who live in multi-unit residential buildings where suite metering is possible. This is metering and billing each individual unit individually for electricity. This is something that has been somewhat of a bone of contention for a very long time in the energy conservation world. It's something that we've been trying to strike the balance in for a very long time.

This suite metering has the potential to contribute to the overall drive to build a lasting conservation movement in this province, and that's something I think all of us in this Legislature would support. I think that's something that's very important, because this isn't just about passing laws; this is about allowing our generation of Ontarians to seize this opportunity to build a better future for our kids and our grandkids. This conservation movement, and it is a movement, is something that each and every one of us should be enthusiastic about. When I say each and every one of us, I don't just mean members of the government or members of this Legislature; I mean each and every Ontarian has to seize this opportunity to make life better for our kids and grandkids. If we do not seize this conservation opportunity, we will not be passing them a planet that has clean air and a clean environment for them to have the same quality of life that we've enjoyed in our lives.

This is something that's very, very important, because experience has shown that if you live in a multi-unit residential building, your electricity use will drop by 12% to 22% if you are paying for your own electricity. What that means for the people listening out there is that if you have your own individual apartment unit and you're being charged unit-by-unit on the usage that you're incurring yourself, it provides an extra incentive to you as an individual to try to conserve. It also provides an opportunity for you as an individual to try to save some money by taking advantage of some of the conservation opportunities that exist. There's no question, for instance, that if you turn up your air conditioner a little too much, you're going to see the effect of that on your electricity bill, so it absolutely makes sense for people who have the ability to control their own electricity use, whether they live in residences they own or residences they rent, and in so doing, to benefit directly from their own conservation efforts. However, in rental situations, it's important as well that tenants in existing buildings know there are clear rules and protections around the introduction of suite metering. It's only fair.

I believe that this proposed legislation, again, strikes the right balance between protecting the rights of tenants, ensuring transparency and contributing to the culture of energy conservation we are building. In the case of existing tenants, a change in the tenancy agreement to shift responsibility for energy from a landlord to a tenant would, under the bill, require the tenant's explicit consent. This proposed legislation would ensure fair rent reductions when tenants take on energy bills, and it would also support the development of minimum energy efficiency guidelines for suite-

metered rental apartment buildings, further ensuring that tenants are able to conserve. We need to ensure that we're providing Ontario tenants with access to the tools that can help them lower their electricity use.

If passed, this legislation would ensure that a smooth transition occurs as suite metering becomes the norm in multi-residential buildings cross Ontario. It would enable Ontarians who live in these buildings to make informed decisions about their electricity use and to participate more fully in the conservation movement we're building in this province.

The third and final area of this proposed legislation provides clear authority to the Ontario Energy Board and regulatory power for the government, if it desires, to implement standards with regard to how gas and electricity utilities, including sub-metering companies, set their rules for consumer security deposits and disconnections. Currently, there's quite a variety of different policies used by various energy companies across the province. If passed, this legislation would provide the opportunity to create standard practices. This proposed legislation would allow particular attention to be paid to vulnerable consumers such as those with health and income challenges.

After much debate, discussion and consultation, I believe we have arrived at a piece of legislation that is absolutely fair and balanced. It is fair to the business community, it is fair to the retailers and marketers, and it is fair to the consumer.

If passed, this legislation would create the conditions that will insist that the seller clearly present what they're selling, and it will create the conditions necessary to help the buyer understand what they're purchasing. It's that simple. It will create conditions that will protect Ontario tenants and give them the opportunity to participate in greater energy conservation, and it will create the conditions necessary to help protect Ontario's most vulnerable consumers.

This proposed act is a thoughtful, integrated, comprehensive approach to balancing the rights of consumers with the rights of business to do good business. It ensures fairness and commonality of treatment. It works to eliminate subjectivity and opportunities for exploitation.

Thanks to the input and fine work of many members of this Legislature, of policy experts and of all industry stakeholders, I believe we have arrived at a piece of legislation of which each and every one of us can be proud: a balanced bill that respects the rights of all, protects the most vulnerable, creates a welcoming atmosphere for a legitimate business to operate and supports our broad goals of supporting a generational shift toward greater energy conservation.

1620

I'm very proud to be standing in this Legislature today to speak in support of Bill 235. I believe this legislation is absolutely required. It protects consumers and strengthens Ontario's energy market. It builds on the McGuinty government's record of action with respect to consumer protection and transparent disclosure. I'm very proud to be part of a government that continues to act in the best interests of Ontarians and consumers, and I'd urge all members to support the proposed Energy Consumer Protection Act.

I've had the privilege of working in the world of politics for over 25 years, and I've been elected for 16 or 17 years at different levels of government. I find that one of the privileges of this office is that on many occasions you learn as you go; you learn new things almost every day. I've got to admit that when this legislation first came forward in this Legislature, as introduced by my colleague Gerry Phillips, I kind of had to take a look at it and say: "What is the purpose of retailers in the market? Do they serve a useful place in the energy market? What are they really accomplishing for consumers? Should we be more draconian in moving forward on this legislation? Should we be allowing them to operate at all?"

Well, I think one of the things you do in this business is learn as you go, and that may have been the reaction of many of us on all sides of the House when we heard that 100 to 150 complaints every week are being lodged as a result of some of the practices of some of these retailing companies. But at the end of the day, not all of these companies are

engaged in practices that are not in the interests of consumers. Not each and every one of them is engaged in those practices. In fact, many of them are employing thousands of Ontarians in jobs that would otherwise not be here in this province.

The other thing is that some consumers feel more comfortable having a fixed rate, just like in mortgages. Some consumers, when planning their mortgage, might want a fixed-rate mortgage for one reason or another. I think the key is to ensure that consumers know what they're getting into, know what their choices are, have an opportunity at the appropriate times to be able to remove themselves from those contracts, when appropriate, in particular when the business practices in getting them to sign on to these programs may not be completely above board.

I think we've struck that balance, and I think we have all learned, as we have gone through this legislation, about the importance of and the complexities in our energy sector. We'll continue to learn as we go.

I think the other good thing to note for consumers is that we may not be done yet. If this legislation passes in this Legislature—if the will of the Legislature is to see this legislation pass, and I hope it is—we'll have a good opportunity to make this work. I think energy retailers will have ample opportunity to make this work, continue to do good, above board business and continue to allow consumers to have the protections they need. But we'll be watching carefully, and if this legislation doesn't prove to be everything we believe it will be, maybe other action will be necessary. At this point in time I'm absolutely confident that we've struck the proper balance that's going to protect consumers and ensure that tenants have the protection they need—this is a long-awaited piece of legislation for tenants.

I want again to thank all the members of the committee from all sides of the House. I want to thank my parliamentary assistant, who has shepherded this very complex piece of legislation. He's done a very able job of shepherding it through the committee system and getting consensus around the principles in this bill.

Madam Speaker, I'm now going to pass the floor over to the member from Brant, who will continue this conversation.

The Acting Speaker (Mrs. Julia Munro): The Chair recognizes the member from Brant.

Mr. Dave Levac: I appreciate the opportunity, on third reading, to have an opportunity during this lead to have some of my thoughts shared with the House and, in particular, with the opposition critics for whom I have nothing but praise with regard to the path we took during this process.

But I will start by saying that some will hold the opinion that this bill does not accomplish what we are saying it does. There will be some who will hold the opinion—and I don't vehemently disagree; I just simply disagree—that the way it was presented to us was as a prediction as opposed to an angered fit, and I respect that. What the opposition member did talk about was his experience and his understanding of how this bill would have an impact on renters and people on fixed and low incomes. I don't subscribe to that because I think there are other factors that are going to be taking place outside of the bill that would, I honestly believe, not have the impact that he's predicting. I look forward to his rationale and his logic behind that, but I don't subscribe to it.

I also think that some will hold the opinion that the bill doesn't have enough teeth, and I don't subscribe to that, either. The minister made it clear that his intention is to use this as the first round of legislation that provides the companies an opportunity to change some of the behaviours that some of the companies were employing, and I guess the shot over the bow is if this doesn't do it, other things could. So that's out there and I think that it deserves to be understood.

At the heart of this proposed legislation, the Energy Consumer Protection Act, 2010, is the desire to help Ontario's energy consumers become better informed and, most importantly, to ensure that they are better protected, because there has been some lack of information that has not come. The second thing is there also have been some actions and activities that took place that the average consumer at the door should not tolerate, and governments have a role to play in making sure that that doesn't happen.

I'd also like to take this opportunity to echo the sentiments of the Minister of Energy and Infrastructure by again acknowledging the work of the standing committee and thanking all of the members for the questions and insights they've brought to the table, stakeholders from the consumer protection groups, tenant protection groups, individuals, retailers and others who contributed to the debate. I felt that all of the positions were clear. There were a few positions that I felt somewhat—a warning shot over the bow is that we have other things to do and we'll take other courses if we have to. But I would respectfully suggest to those individuals that this type of legislation is always part and parcel of how we work here, and we do have reams of individuals who are talented, skilled and trained at the legal level and also at the government policy level who work very hard, and I thank them for it.

This important bill has indeed benefited greatly from the committee process, which I do consider a privilege to have participated in. I've always made the commitment in this place to try to do the best I possibly can in finding consensus and finding the right piece of legislation to land on.

We heard some thought-provoking deputations from stakeholders who raised a number of interesting areas for discussion and debate. I believe that that was the important aspect of committee work and I felt very engaged by some of the organizations and individuals that did step forward. I must say that I was interested in the dialogue, the recommendations and the positions that some people took.

We listened carefully, and we did carefully analyze the concerns and the issues that were brought up. There were copious meetings that were held after the hearings to digest that information that I asked on a couple of occasions in front of committee to make sure that staff heard what those deputations were all about. We tried to see where we could improve what I felt was already a pretty good piece of legislation, and I dealt with the opposition in a respectful manner that tried to incorporate some of the concerns that they were raising. I repeat again that that was not always going to end up being the case, but we're going to find out, if this Legislature sees fit to pass the legislation and if it comes into act, whether or not the dire predictions of some are going to come true.

I would suggest to you respectfully that there is a piece of this that we're going to do in regulation, and I made mention of that a couple of times. There's going to be some shopping and some touring and some consultation of the regulation stream that's going to go along with this.

If, indeed, after a review—which I'll bring up in a moment—takes place and some of the concerns that have been raised that we have not, to their opinion, dealt with shall surface, it will provide us with an opportunity to provide changes in our regulations and also provide us with an opportunity to introduce amendments to the act in order to clean up what they believed was a problem, if it indeed does appear.

1630

I felt it was an open and honest debate about the issues. I am very highly complimentary of all the people that we dealt with. I felt no threat of discord other than a difference of opinion, which I think is a good way to deal in this place.

I particularly wanted to acknowledge the pragmatic and respectful way in which the committee approached the important work, along with both opposition critics who used the same approach. I thought they were both pragmatic, I thought they were logical and I thought they presented their cases in a reasonable way. Indeed, I can say to them that their concerns were considered and did result in some of the amendments that did come forward, along with some of the technical ones that both the ministerial staff and the lawyer that we had participated in.

I said then—even before that—and I say now that there are very few obligations that are more central in the role of government and legislators than protecting consumers and individuals who can't protect themselves, and more importantly the entire population of Ontario. When government steps forward to form these types of regulatory streams, it's very important for them to understand that the attempt is being made to ensure (1) that they are safe, first and foremost; (2) that their consumer habits are protected; and (3) that they don't fall prey to people who do not follow the regulatory stream.

This was echoed by all members of the committee and all parties. I thank them for that. There wasn't one person who did not stand on the principle of protecting the consumers and making sure that they're cared for. The public has a right to be protected against predatory, misleading or simply confusing retail practices. The public has the right to expect honest and straightforward business dealings, which, by the way, the most populous parts of our business do.

The public has the right to know when abuses occur and that they will be dealt with. We believe that the proposed legislation would do that in many ways. This includes measures that would ensure electricity retailers and gas marketers can operate their businesses in a fair and transparent way. This isn't about a hammer on business. It's to make sure that we do work with those partners.

By the way, they did offer some opportunities to dialogue with us and showed us examples of things that they've personally, proactively implemented to ensure that their customers understood what they were doing; that the reputations of those companies had been tarnished and they were working towards improving them.

It focuses on ensuring consumers have access to easy-to-understand information. As simple as that sounds, that seemed to have been one of the larger complaints that was coming forward from some of our consumers. They just didn't understand the complexity and the mind-numbing information that was being twisted and turned to get them to sign up. The information will help them make more informed decisions. Whether it's to stay with their local utility, or sign an energy contract with an electricity retailer or a gas marketer, that's fair game. I think that that's a fair way to approach this.

This bill also provides regulatory authority to address concerns regarding cancellation practices and fees. We heard stories of different ways in which some companies were really kind of pounding it to the consumer for cancelling, and also the fees that they had to pay for doing certain things that the company didn't want them to do—practices for which I'm sure that there probably isn't a member in this house who hasn't had that issue dealt with at their riding offices.

If passed, the legislation would include measures to ensure that tenants in units where suite metering is being introduced are fairly treated.

The bill, if passed, would provide clear authority to the Ontario Energy Board and regulatory authority for the government, if desired, to implement standards that would guide gas and electricity utilities, including sub-metering companies, in setting their rules for consumer security deposits and disconnections. During that time frame, what that's going to allow us to do is to put some certainty in what those people can assume in terms of what their consumer security deposits are going to be and the disconnections. Clearly, that starts to wrap up some of the concerns that were being expressed simply by saying that you can get them in another way: "If I can't get them this way, then I'll get them on the security deposits and the disconnects," and we're tying that knot up.

Today, I would also like to highlight some important amendments that were brought forward during the committee process that did provide us with an opportunity to make the legislation, I believe, even better, amendments which would ensure that the protection of Ontario's energy consumers was still further enhanced.

As the minister reminded us earlier, part of the bill deals with the practices of energy retailers and marketers. The first obligation is to ensure that consumers have every chance to fully understand what they're buying at the door. Unfortunately, sometimes, we've heard, again, promises of being made cheaper, long-term energy prices, and sometimes we've even heard that customers feel pressured to make a quick decision at a door or on the phone. That has already had impacts across North America, from various types of legislation that have cooling-off periods and all kinds of protections for consumers. We've heard stories about salespeople who don't clearly identify themselves or, what's even worse, whom they're representing.

The bill goes a long way to remedy these problems. The first part of the bill, if passed, would allow the government or the Ontario Energy Board to require door-to-door salespeople to clearly identify who they are, whom they work for, and

even whom they do not work for. In some cases, we've heard stories of cutting out a picture of a trillium, putting it on a badge with their name, and saying they work for the government. That in itself is a little mischievous at best.

Through new regulations, the bill would establish training standards to root out unprofessional behaviour. We did hear deputation that some companies have already instituted that, and good for them; power to them; thanks to them. What they're doing is identifying a problem that we've identified here. We're taking some steps to entrench that, and they've already started to do some of the things themselves. So I think that they deserve a few pats on back for doing that.

This proposed legislation would also ensure that companies are held to account for their salespeople. Another trick we heard was that they did third party hiring, put them to the side, put their hands up when the complaint came in, and said, "They don't work for us; they're working independently." I know that all of us have said, "That's got to stop," so we're going to make them responsible for who comes to the door representing them. Regardless of whether they're working door-to-door, by phone or online, they're hired by that company, however they do it, and they're responsible.

If passed, Bill 235 would allow the government to require additional licensing conditions, including background checks for salespeople. That one in itself is very important, because of other possibilities that those types of people can come to your door, they can case the place, they can look for children, and they can do all kinds of things. I think companies don't want those kinds of people at their door representing them, so I know that they're embracing this kind of background-check opportunity on an ongoing basis.

If passed, the bill could allow requirements for retailers and marketers to use better language to explain the key sections of their contract, so that consumers can easily understand what they're buying over that length of time and how much it would cost: all of the kinds of questions that should be legitimately asked by the companies and responded to. It could allow the Ontario Energy Board to require retailers and marketers to use forms that will ensure that all of the costs are disclosed, so that the consumer can understand the difference between what they would pay each month if they stayed with their local utility or switched to a retailer, comparing apples and apples: information on a form that shows clearly that if they sign the contract, they know that they're comparing what they're presently paying for a utility or what they would pay for the retailer.

The first important proposed amendment I'd like to highlight today focuses on the portion of the bill that deals with third party verification. Although they didn't get the entire ask—and I know that the critic for the Progressive Conservative Party brought this to our attention—they got half of the thing, so I know that there are probably going to be some concerns about third party verification. We did try to deal with that.

I would suggest, very respectfully, that this half was as important as the other half, and that is: We are now going to have rules that would enable the retailers and marketers to directly provide the service of third party verification so that it ensures that the customer has the opportunity to consider and confirm the contract before it becomes enforceable. So third party verification will be in-house: That means that the companies who did present to us and said, "You're going to make us go and hire somebody else"—we could be hearing telephone calls from India. So we want the retailers to know that that verification is going to be done by them if they choose. We believe that third party verification, in and of itself, is an important aspect, but because they brought it to our attention, we listened to it and made that part of the amendment.

This amendment would have a dual effect of enhancing consumer protection and making the industry more accountable to the OEB, because the Ontario Energy Board would not have jurisdiction over an out-of-province, out-of-country third party verifier.

1640

Mr. Ted McMeekin: This fixes that.

Mr. Dave Levac: We fixed that by doing it this way. I'm sure that the dual effect of that amendment was brought on not only by the industry, but it was supported, I would point out, by both opposition parties, because they saw the value in the consumer protection end of it.

This is just one powerful example of how the work of the committee was done, to hone the proposed legislation to be more precise, easier to follow, and keenly focused on protecting the interests of the consumer while still allowing business to operate in a fair and transparent manner.

That was the other discussion that was pretty healthy, to ensure that we didn't shut an industry down. There are thousands of people who would be employed during this process, and if we can get that component right, and we have that service provided in a way that the consumers can accept and be protected, I think the industry is well served, as much as it needed a wakeup call or the changes that we're proposing in this piece of legislation. Because I would respectfully suggest to you that it's at the higher end of complaints that all of the members would hear in their constituency offices, particularly during a season in which renewals are necessary.

We want to keenly focus on protecting those interests, and having this business practice done in a transparent manner that the industry is actually accepting.

The second amendment I'd like to mention today wisely acknowledges the speedy pace of change in Ontario's energy market landscape. What we're talking about is an amendment that would provide the government with the authority to require the Ontario Energy Board to review the portion of the bill that deals with electricity retailers and gas marketers after three years.

What we're saying, and I was saying this earlier, is that after three years, even though there are predictions that the bill will cause an awful lot of discourse, a full review by the OEB will take place, and whatever regulatory streams need to be adjusted, tweaked, changed or modified could take place during that time. This would provide the government with the authority for the Ontario Energy Board to do just that: to ensure that the appropriate regulatory and legislative framework is in place to protect the consumer. That sentence confirms what the bill is trying to do.

Additional proposed measures could be introduced after the review. This says that in the three-year time frame while this is being implemented, that review takes place and then other regulatory streams can be introduced to tighten up, to shore up, anything that has kind of poked its head through that is not good for consumer protection.

I'm looking over to my colleague across the way, the critic, who's going to speak next, and I would ask him if he's ready. Is he going to be ready? Okay, thank you.

This amendment sends the message that we will continue to be vigilant.

Interjection.

Mr. Dave Levac: He asked, as a favour. He's—

Interjection.

Mr. Dave Levac: Oh, I know that. He's ever ready, for sure.

To stay focused: The amendment sends the message that we will continue to be vigilant. It provides an important chance for review and re-examination and allows those in the service of the public an opportunity to continue to act in its best interest.

This is not going to be “pass a piece of legislation and let it collect dust” or “let it die and wither.” We’re going to be proactive and re-evaluate this.

My belief is that the proposed legislation will go quite a far way toward fulfilling the vital obligation, which is to protect Ontario’s energy consumers. While ensuring sound business practices, we can ensure that consumers are protected. We can do both.

I was very pleased to be able to participate as the standing committee examined the bill. I appreciate the confidence that the minister has shown in my capacity to help us with legislation and the dialogue that took place. I deeply appreciate that opportunity.

I proudly and sincerely thank and acknowledge the work of the ministry staff, who worked tirelessly.

Interjections.

Mr. Dave Levac: While the heckling was going on, I want to repeat that so that I’m sure the members opposite would agree with me.

I proudly and sincerely thank and acknowledge the work of ministry staff who, day after day in this place, help all of us and work tirelessly to ensure that we write the best pieces of legislation that we possibly can.

I was impressed with the fine questions and the keen eye of the committee members who brought this very important piece of legislation to life.

I’m very thankful for the input from the stakeholders and for some of their proactive responses to major identified consumer problems. They do deserve some credit for standing up and identifying that they’ve got a problem and saying they’re going to work toward improving it. It’s their job now, I’d respectfully suggest, to ensure that it gets done right; to make sure that the consumers who, at the door, were feeling they were not being listened to—now we all are listening to them, and I’m sure we can work together to ensure that that happens again. I believe that, working together, we have developed a bill that will help benefit Ontario and the hard-working men and women who call it their home.

I’ve made a commitment in my public service to try to write the best possible legislation. I stand very proudly in the Legislature to say that I believe we have made a really good attempt at this particular piece of legislation, the Energy Consumer Protection Act, 2010.

Again, I want to compliment all of the members of the committee for the hard work they’ve done. I look forward to the comments they’ll make on third reading. I look forward to the regulatory stream that’s going to come on board and the consultation that the government has made a commitment to do to continue writing this piece of legislation for the protection of the Ontario consumer.

The Acting Speaker (Mrs. Julia Munro): Questions and comments?

Mr. John O’Toole: I’m very happy to have listened since last December, when Minister Phillips introduced this—and the work done by the new minister, Mr. Duguid, and the comments made most recently by the member from Brant.

We on this side would be agreeable to anything that improves conditions for the people of Ontario, especially in the retailer section on energy. It provokes a lot of larger questions on the whole energy file, but I’m going to stick, with my comments, to the bill, with respect to our critic Mr. Yakabuski, who’ll be speaking next.

There's some controversy on the sub-metering issue and the bill-averaging part, but the only thing that's really for certain is that regardless of who's selling the energy to you, the issue broadly is that it's going to cost more. Electricity is probably going to double in the next two to three years. They'll probably hold it off until after 2011. If you look at the article by Jan Carr, who is the head of the Ontario Power Authority—he submitted a couple of articles in the paper last week—I think the signals are there. They're all talking about the smart meter. Well, we still haven't heard the rest of the story on the smart meter. You, the consumer, are going to pay on your monthly bill for the smart meter. You're going to pay a rental charge on the smart meter. And it's not a smart meter, it's a time-of-use meter. So there's a lot more going on here.

I think there's a lot of noise on the surface, but subtly, they're doing something here that's correct: protecting the consumer. When someone knocks on your door and asks you to sign a contract, you have some protections. You have a cooling-off period, a couple of them, which I think are important. So they've done some things right here, but at the end of the day their energy policies are simply going to cost you more. Be prepared.

We support this particular bill, but what we don't support is their whole Bill 150 approach to you paying more and using—

The Acting Speaker (Mrs. Julia Munro): Thank you. The member for Toronto–Danforth.

Mr. Peter Tabuns: I had an opportunity to listen to the minister and the parliamentary assistant. I will say that, in fact, it's true that I felt the committee worked on this bill in a fairly businesslike way. Not every debate has to be a nasty debate. But I have to say that there are fundamental problems with the approach of the government to the energy question and there are fundamental problems with this bill in both of its halves, both in terms of dealing with energy retailers and in dealing with sub-meters.

I want to deal first with the retailers, and this is something I'll expand on when I get to do my leadoff. Saying that we should protect the energy retailers, the marketers, because they employ thousands of people is the same argument that one could make for the private health care systems that existed in this province and this country before medicare came in. Yes, you can employ a lot of people doing things that duplicate work, that do not advance the green energy agenda—or even a simply businesslike energy agenda—and yes, you can say that if you change things they won't be working there. I would say that if you have thousands of people working, it would make far more sense to have them employed assessing households to see how they can reduce their energy consumption, administering a large-scale program of energy efficiency and conservation, and giving people the education they need to operate their buildings—their homes—more effectively. Selling retail energy is not advancing the wealth of this society; it is putting on a layer of sales and administration that is a waste of our social capital, our common wealth. That is a mistake.

1650

The Acting Speaker (Mrs. Julia Munro): The member for Chatham–Kent–Essex.

Mr. Pat Hoy: I'm pleased to rise and make some remarks on what has been said to date on Bill 235, which deals with electricity retailers and gas marketers. I think that many members in this House, if not all, have experienced some of the negative sides of that particular dealing—electricity retailers and gas marketers—so the government is trying to bring forth an action plan with respect to consumer protection in this regard, and transparent disclosure in a number of sectors.

The bill as it is now, at third reading, did go before the Standing Committee on General Government. The government proceeded to have public hearings of participating stakeholders with the other two parties along with us, at about the end of March 2010. Then there was a review of that information, it was voted on and motions for amendments were made. So we have an amended version back before the House for all three parties to scrutinize.

I know that in my riding we had many, many circumstances where people simply did not understand or perhaps were not given a full explanation of what they had purchased in terms of either electricity or natural gas, and in some cases had bought one of these utilities and did not realize at all that they had bought the other utility. I think we've gone a long way toward making sure that contracts are in plain language and that people fully understand what they are purchasing. This will be good for the community at large.

I'm pleased to have made a little bit of a comment here, and I'm sure many of us in this House are pleased with this bill.

The Acting Speaker (Mrs. Julia Munro): Further comments and questions?

Mr. Steve Clark: It's a pleasure for me to provide some comments as well on Bill 235. I must say that when I joined the Legislative Assembly and was assigned to a committee, I certainly didn't think that my first experience with a committee would be the clause-by-clause review of Bill 235.

It was quite an eye-opener for me, as a new member, to sit in committee. I was so glad that the veteran member from Renfrew–Nipissing–Pembroke was there to guide me through the process. I have to tell you that the parliamentary assistant did a wonderful job going through the many amendments, and I appreciated the banter from the member for Renfrew–Nipissing–Pembroke.

I was a bit disappointed. As a new member, I was hoping that maybe some of our amendments would get passed. But I certainly realized how that four-hour span went, and it was a nice eye-opener for me in my first foray into committee politics.

As many of you know, I worked in a constituency office for my predecessor, Senator Runciman.

Applause.

Mr. Steve Clark: Thank you. I'm glad for that.

I knew this was an issue. I dealt with many folks who were extremely concerned about energy retailers. I know that the issue of energy costs, and things like smart meters and the fact that electricity costs would be going up because of the HST, were big concerns for many of my constituents during the by-election. I know that many of them are still looking for relief with the HST coming on July 1, and they want a government that will listen to them.

In terms of the retailers, certainly I know that in many circles this bill has been long overdue. From our perspective, the much-learned member from Renfrew–Nipissing–Pembroke will be speaking—

The Acting Speaker (Mrs. Julia Munro): Thank you. The member from Brant has two minutes to respond.

Mr. Dave Levac: I always start with saying thank you. Thank you to the members from Durham, Toronto–Danforth, Chatham–Kent–Essex and Leeds–Grenville for their comments. I will leave it to that to say that my anticipation for the bill's specifics was received by Her Majesty's loyal opposition in terms of consumer protection. I appreciate those comments. The rest of the comments that come are always expected in terms of, "but we don't like your government because you don't do things right." I think they understand that we got this piece right, and I appreciate deeply that they have made those comments.

The member from Chatham–Kent–Essex said it really well when he said that it's an action plan for consumer protection. Quite frankly, in credit to the critic, he made that statement several times during the deputations. I think the people of Ontario are going to appreciate the type of legislation we're putting forward here.

The member from Leeds–Grenville, yes, needs a quick little reminder of how that works. If he did recall, my conversation with the critic was that you had a piece of legislation amendment in there that actually got tied into two or three that we already contemplated, and because of the nature of how it works, ours was said first, and yours had almost the same language, so we basically deferred every time a new piece of legislation came up. We hit the spots that we both agreed upon, and I made a point of that. If you check Hansard, you will see that.

The good news is that I think we're going to be able to get a piece of legislation out there that is going to be seen as protecting the consumer, and that's what this is about. As for the rest of the argument about how bad our energy policy is or the HST and everything else, we didn't talk about that. We didn't debate that, but I know we're going to hear about it. I do want to know that this bill is going to be protected.

As far as the NDP is concerned, they put it on record that they're not supporting the bill, but I—

The Acting Speaker (Mrs. Julia Munro): Thank you very much. Further debate?

Mr. John Yakabuski: I appreciate the opportunity to speak again to Bill 235. I've been encouraged by the member from Brant to get all my negatives out of the way early, but I only have an hour, and all of my negatives could never be dealt with in an hour. I say that not only speaking about this bill, but just my own negatives. I have that many faults, and it would take a long time to list them all.

The member for Brant did say, "We got this bill right." Well, I cannot agree with the member from Brant when he says, "We got this bill right." What I can concede, and I have said: Is the energy consumer better off today or will be better off when this legislation is passed than before this legislation was tabled? Absolutely. Absolutely, the energy consumer, the customer at the door, is going to be better off. We've been encouraging the government to bring forth legislation that would do just that.

We're going back now a year and a half, anyway, or more. I'm trying to think of when David Ramsay first brought forth his private member's bill. At the same time, we were actually having meetings with the Ontario Energy Association. Shane Pospisil was the CEO at that time, and they were working very strongly to try to bring forward reforms to the retail contract sector so that there would be some improvements, because anybody who is going to stand and say that there weren't a whole lot of problems would be dreaming in Technicolor, because there were. I appreciate the comments.

Before I drift on into my other self, I do want to thank the minister for the kind words that he said earlier about all of the participants, all of the people who worked on this bill and all of the participants in the debate and all of the participants in committee when we went through amendments to the bill itself. We appreciate the kind words that were said about ourselves and Mr. Tabuns, the representative from the third party, the New Democrats, as well, and, of course, Mr. Levac and the other members of the government on the committee. I don't know if he's a member of the committee, but I know he's the parliamentary assistant to the minister as well, so he would probably be as well versed in this bill as anyone in the House.

1700

Now, getting back to where I said, "Did they get it right?"—well, not exactly. There were a couple of things where we felt they could have made some improvements, some changes, and they respectfully declined. We accept that. I did have an opportunity to have a discussion prior to clause-by-clause with Mr. Levac, and I think substantively we're looking for the same thing. We're maybe going to get there by a different route, but what they see as being in the best interests of the consumer from a protection point of view—I respectfully disagree on a couple of occasions.

One of those occasions was—and I say this with the greatest of sincerity; it's what I believe—what the government had in the original piece of legislation, and substantially that's what we have today, the circumstance where, if the energy retailer is at the door, they agree to a contract with the consumer, and then it has to be verified by a third party, but

between 10 and 60 days—if I have it correctly. I'm actually relying on the parliamentary assistant to nod or shake his head if he thinks I'm going the wrong way, and then I'll actually look at the notes, if I have to. Essentially that's the part of the bill that says they have to get third party verification after 10 days but before 60 days.

We're certainly in a better position than we are today, but what our position was, we felt that getting that third party verification immediately would actually be better. My explanation for that is such: We're having a debate about where, if we buy something and then somebody wants to know what was said—this is a third party verifier now. They want to know what was said, and the suggestion was made and the undertaking was made by the industry that the seller at the door would then have to leave the premises and a third party verifier would then ask those questions. These would have been the key questions: Did the representative claim he was with the utility? If the answer is yes, the contract is void. Did the representative promise that you would save money? If the answer is yes, out the door. He's not coming back. The contract's null and void.

Some of those would have been the key—and there would have been a script that the government could have prescribed, ensuring that every consumer was asked the same questions in the same way and in the same time frame.

The reason we wanted this done as quickly as possible is that if you're searching for details, your best memory is as soon as the event took place. As soon as the event took place, you are likely to be the most clear about the minute details of the conversation.

What would still apply is the contract law that says that you still have 10 days without having to justify or establish any reasons. Simply by contract law, within 10 days you can get out of it anyway. That would still apply. Even if that was verified at the door, you still have 10 days, and the reason we have that 10 days is—for example, I'll tell you a personal situation.

My mother-in-law, 76 years old, doesn't speak the best of English. She was born in Lithuania, has never worked off the land, has never had a driver's licence, lives in a little apartment in Eganville. She purchased one of these energy contracts. Now, as it turns out, she didn't talk to me within 10 days. It actually got processed, but we did get it cancelled because she certainly didn't understand the terms of it, and we were able to—but I must say, the company that was involved was very quick to respond to my call, so we had that contract terminated. But in a lot of cases they'll have the opportunity to talk to a son, daughter, son-in-law, brother, nephew or whatever and ask them, "What do you think about this electricity contract that I signed?" And that third party, being a relative or friend, may say to them, "No, I don't think that's a good idea, Mom," or Aunt May or whatever the case may be—"I don't think that's a good idea." You still have those 10 days to say, "No, thank you. I appreciate you coming by, but this ain't gonna be for me." So you still have that option that has nothing to do with the amendment that we proposed. One of the points of the amendments is to try to avoid problems, and the best way, we believed, to avoid problems was to deal with them as quickly as possible so that the circumstances were freshest in everybody's minds.

The other thing that we felt it would do was it would expose the rogue agent, the rebel, the person who was being dishonest at the door and was making statements that could not be justified or, in fact, were untrue. And the best way to do that, of course, is to have the earliest recollection of the contact with that particular agent.

I can tell you that as the energy critic, I probably have as much involvement in this as anyone, because I even have members of my own caucus who will call me and say, "Look, we've got a problem in such-and-such a town with this contract. We'd like to see what you can do to get that adjusted, reversed or whatever." I've probably contacted these companies as much as or more than anybody. We know the minister is not going to be calling them, because he's busier than I am. But I do have a contract with them, and I can tell you that if there's a rogue out there, they want to know about it, and the best way to find out about it is to have that information available as quickly as possible. Nobody's pretending anymore that there's not trouble out there or there wasn't trouble out there. Every one of those companies that is out there now recognizes that they're under the microscope, and they should be, because the paramount purpose of this bill—and we do commend the government for bringing this legislation forward; we certainly encourage them to do so—the paramount reason for bringing forth this bill is to offer better consumer protection.

Let me back up just a little bit because I do want to make sure we get those things in. As I was talking about David Ramsay and Shane Pospisil—it was back, I think, in December 2008 that David Ramsay brought forth some reforms in a private member's bill, and it got the conversation really going with regard to what reforms could be brought forward. What was disappointing was that nothing came forward in all of the time—and we had many, many chats with Minister Smitherman when he was the minister, and asked him—on repeated occasions I would walk across the aisle and say, "George, when are we going ahead with reform in the retail electricity retailers sector?" "Well, Yak, we're working on it," and never did he actually bring forth the bill. Gerry Phillips brought forth the bill when he was the energy minister, and then it was up to Minister Duguid to finish the job.

I had many things to say with David Ramsay at the time, and we certainly thanked him on more than one occasion, including in debate during his private member's bill, which I spoke to at that time, for bringing this issue forward into this House.

There's nobody out there who doesn't have tales of problems at the door on the retail contract side of the business. Probably what was the coup de grâce, as they say, or the final straw, was the exposé that was done, I think on CBC Marketplace, where they actually had some footage of improper actions on the part of a representative. I think it encouraged everyone to be more proactive in bringing forth legislation that would actually improve the situation.

1710

So that was one of the amendments, just to restate that, and that was the time frame in which you would have to verify the contract. So we did disagree on that.

There were, I believe, 107 amendments to the bill, most of them technical, which does speak to the fact that at the end of the day, what you really have to ask yourself—there must have been an awful push to get something on paper in a hurry. Because when you make 107 amendments, most of them technical, clearly some things were not considered or left out. Many of these amendments are with the Electricity Act, are amendments to other acts that I guess are required to give this bill the authority to make it function.

Now I want to change gears a little bit—and I know the member for Brant will really start paying attention.

Mr. Dave Levac: You're impugning my motive. I always pay attention.

Mr. John Yakabuski: He does.

Interjection.

Mr. John Yakabuski: Oh my God, the member for Mississauga is here.

Well, I think we can certainly stay on the subject. There's no problem there, Madam Speaker.

The name of the act: An Act to enact the Energy Consumer Protection Act, 2010, and to amend other Acts. So what we're talking about here is consumer protection. And you can't talk about Bill 235 without talking about the whole electricity sector, because it is part of the big picture. If you're going to protect consumers at the door, you also have to talk about the price they're paying for electricity in general.

One of the big sections of that bill in these electricity contracts is what is referred to as the global adjustment. Some people call it the global adjustment, and others call it the provincial benefit. I think the government likes the term "global adjustment" these days, more than the term "provincial benefit." Let me tell you why. Currently, in the month of April 2010, that global adjustment has reached an all-time high of 4.57 cents per kilowatt hour. What that means is that for every kilowatt hour you use, there's a global adjustment to that price of 4.57 cents. If the price of electricity, which is

relatively low these days—and I didn't look at it specifically today, but I think we can safely, based on what it has been for the last year, say that the market price of electricity is probably around 3.2 or 3.3 cents. But on top of that price, as a result of the energy policies of this government, 4.57 cents are being tacked on. Some people see it and some people don't. If you're an electricity consumer who uses in business more than 250,000 kilowatt hours of electricity per month, then right on your bill you will be paying that provincial benefit or, as they like to call it, the "global adjustment." I know the minister likes to use the term "global adjustment," because how can you tell somebody it's going to cost you 4.57 cents a kilowatt hour and call it a benefit? It's very difficult. It's certainly hard to accept for the person who's paying it.

Each one of those consumers is paying that. But also, if you've signed an electricity contract—and we'll just say for the sake of argument that that electricity contract is at 7.5 cents a kilowatt hour. One of the reasons people sign electricity contracts is because they want certainty. They know that the price will be 7.5 cents a kilowatt hour, or eight or whatever it is, for the duration of the contract. But unbeknownst to most people signing those contracts, the provincial benefit also gets tacked onto those contracts. If your contract was at eight cents, this month you would be paying 12.57 cents a kilowatt hour—and that's just for the electricity. That does not include the delivery; that does not include the debt retirement or the taxes. That's just for the electricity—

Mr. Peter Shurman: The HST is coming.

Mr. John Yakabuski: Plus the HST that's going to come July 1.

Interjections.

Mr. John Yakabuski: I see members on the other side sighing because they're wondering how their constituents are going to pay for their power bills. They are wondering how their own constituents in rural Ontario are going to pay for those bills.

Mr. Dave Levac: We're wondering when you're going to talk about the consumer protection act.

Mr. John Yakabuski: The member for Brant is always encouraging me, and I appreciate that, because I tend not to use all my time; I just speak for a little bit and then pass it on to others. But he is encouraging me to keep going, to press on.

This provincial benefit is going to start to be reflected—if you've got a bill from Hydro One, you don't notice it because there are so many Hydro One customers out there that it's being equalized across that they're not seeing it, but it's about to start happening. It's about to start having an effect on your hydro bill, if you pay Toronto Hydro or another public utility in the town or the city that you live in or if you pay your bills through Hydro One. This month, it's an all-time high: 4.57 cents a kilowatt hour.

Only the electricity contract sector has to specify that amount on the bill. There's a separate line item for the provincial benefit on their bill. If that remains the case, I would suspect that the electricity contract marketers are going to be out of business anyway, because the consumer in no way is going to be able to pay those kinds of rates.

Why are those rates so high? Because just a few years ago, that provincial benefit was actually a provincial benefit. The way it worked was, that same major user that I'm talking about, which uses 250,000 kilowatt hours of electricity per month, was actually seeing their bill reduced by the provincial benefit because it was a negative number. Prices were higher then because the economy was rolling better and there was a higher demand for electricity. Let's just say for the sake of argument that on any given day, the price of electricity was six cents. If that provincial benefit was a penny, they were dropping it down to an actual cost of five cents. Today—let's just say for the sake of argument it's 3.5 cents, and you tack on another 4.57 cents; now you're talking about a little over eight cents for that same kilowatt hour of electricity. You wonder why businesses—

Interjection.

1720

Mr. John Yakabuski: Large users, Jean-Marc, 250,000 kilowatt hours a month, pay the provincial benefit—absolutely. So does everybody else. They just don't see it in their bill. What is the genesis of that, and what is causing that to go so high? Well, it is all those contracts the government is signing.

When the government doesn't like to be associated with something, they say, "No, no, no. That's the OPA, the Ontario Power Authority, that is signing those contracts with all these generators." But if the government is doing something that they figure the people like, all of a sudden it's the Minister of Energy making the announcement. I guess that's politics.

But that provincial benefit is going to keep rising, because it is a result of all the contracts they're signing at 80 cents a kilowatt hour, the contracts at 44 cents a kilowatt hour, the contracts at 13.5 cents for on-ground wind and the contracts at 19 cents for offshore wind. The current price of electricity in the province is 5.8 cents a kilowatt hour, up to 6.7 after your first 1,000 hours—it may have changed to 750 hours because of the time of year; we're moving out of the heating season. All those sweetheart energy deals they're signing with developers—

Interjection.

Mr. John Yakabuski: We didn't sign any of them, Jean-Marc. All those sweetheart energy deals they're signing with developers making all kinds of profits: Why do you think people are lining up—lining up—to sign an energy contract with OPA under FIT, the feed-in tariff program? Because they know they are going to make a barrel full of money. For all those who think these people are building these giant wind farms because they're saving the world, don't believe it. They're doing it because they are fully chasing one thing, the almighty dollar. They're going to make a lot of money, and you're going to pay a lot of money.

Interestingly enough, I suggest that some members on the other side of the House should read a recent article called "A Rational Framework for Electricity Policy." It pretty well questions everything the current government is doing. It was in the recent Engineering Dimensions magazine. Do you know who wrote it?

Mr. Peter Shurman: Brad Duguid.

Mr. John Yakabuski: No, it wasn't Brad Duguid. But it was Jan Carr, who is an expert in the energy field and was the first CEO of OPA. Jan Carr wrote that article, and he pretty well questions everything this government is doing with regard to electricity policy and where it's going to drive us. Maybe it would be an interesting thing for the minister to read. "A Rational Framework for Electricity Policy" talks about the rush to renewables. I could read the article, but I only have 33 minutes left, and I don't know if I've got time. But I might refer to some parts of it.

There's another one done by Puica Nitu, P.Eng. It's called Wind Power: A Cautionary Tale. It talks a little bit about the experience in Germany and Spain, and how they are challenged now because of their rush to build so many wind turbines, which has caused them to have to build all kinds of backup sources of power because what a lot of people don't realize, Madam Speaker—I know you do, but a lot of people don't—is that the wind is not controlled by a switch.

Ms. M. Aileen Carroll: No?

Mr. John Yakabuski: That's right, Aileen. It's not controlled by a switch. You can't go over to the electrical panel and say, "Up you go, switch. Blow, wind, blow." No. The good Lord controls the wind, as he does the sun. So what happens is that on those days that the wind isn't blowing, we have to have something available in the system to provide the power that is absent because of the effects of the weather.

When you build that wind and you sign a contract for 20 years with a developer that's making a whole lot of money, you also have to build something else. And what are they building to back it up? They're building natural gas. But you see, now we start to ask ourselves, what was the whole rationale for them to say we're getting out of coal? Because they wanted to cut back on the CO_2emissions. But if you stop building coal or using coal—nobody's building coal, but they are building, believe it or not, coal plants in Germany. The reason they're building coal plants is that they have to have something to back up the wind, and so they're building coal plants. They're building coal plants in China, opening a coal plant in China, every five days.

What the plan here is—they say they're replacing coal with wind. Well, that is absolutely wrong. They're not replacing coal with wind because you can't replace coal with wind. You can't replace a consistent, dispatchable form of electricity generation with one that is inherently intermittent. The Premier himself said in this House, "You can't depend on wind. Wind is not reliable." Those are his words, not mine. So what are they doing? They're building gas plants to replace the coal. But before anybody says, "Oh, that's the answer," it is somewhat duplicitous to say that you're closing coal plants to reduce CO_2 emissions, and replace them with gas plants, which have about half the CO_2emissions of a coal plant. But that's when it's burned here in Ontario. What they're not telling us about is the amount of CO_2 that is the life cycle of getting that gas here to Ontario, because when that gas is taken out of the ground out west, all the sulphur is processed out of it. It's stored in piles out in Alberta. You can go see them. But it takes massive amounts of CO_2 to generate the power to remove the sulphur from that natural gas before they ship it here.

For them to say that they're doing this and reducing natural gas, people have to be cautioned that that is not the case. They should be sceptical about anything they're saying about reducing CO_2emissions by building wind turbines and replacing coal with natural gas because it simply doesn't compute.

About 90% of the CO_2 in this province is produced from transportation anyhow, so unless they're going to do something about transportation, unless we're all going to be driving electric cars, which we know is not going to happen because even the new trains they're building—they're buying diesel trains instead of electric. They speak out of both sides of their mouths when they talk about reducing CO_2 and protecting the environment. That has been consistently—the only consistency with regard to them there is the fact that they are totally inconsistent in their messaging and what they are actually doing.

But where are they going to get the power? You see, if you want to start talking about the amount you have to replace, we have in the system roughly about 6,500 megawatts of coal. That would require 13,000 wind turbines dispersed across the province, if the wind turbines ran all the time or could be called upon whenever you wanted them. But because they only work about 20% of the time—that's the average. Germany has about 27,000 megawatts of wind in its system. The latest figures for the efficiency of Germany's wind fleet is it runs at between 18% and 19%. So if we give ours 20%, instead of 13,000, you would need 65,000 wind turbines to replace those coal plants, because they only work 20% of the time.

1730

Now we have to start talking about the 3,000 megawatts of nuclear that they're shutting down in this province in 2020, because the remaining units at Pickering A have not been refurbished and all of Pickering B is not going to be refurbished. Now that's 3,000 megawatts of nuclear power that is baseload power and runs all the time. Except when it's down for maintenance, it runs full out. It's not dispatchable power: We don't call on more or less, like the gas pedal in your car. You run them, and you run them full out.

In 2020, those plants are going down forever. That's 3,000 megawatts. We talked about 6,500 megawatts: That's another 3,000 megawatts that are going out of our system. But in the interim period—

Mr. Lou Rinaldi: That's good.

Mr. John Yakabuski: The member from Northumberland–Quinte West says, “That’s good.” I guess he’s going to tell us where we’re going to get all the power. I’m sure he’s got the solutions for it. Yes, I’d like to see what he’s going to be saying a few years from now.

You see, before 2020 comes, we’ve also got to face the facts about what’s happening at Darlington nuclear and Bruce nuclear. The units at Bruce range in age from, I believe, about 1976 to 1987. Those six units at Bruce have to be refurbished. All four units at Darlington have to be refurbished. We’ve got to rebuild those units if we’re going to have reliable power. They’re reaching the age where they will no longer be operable without refurbishment.

You have this overlap, because you can’t refurbish a nuclear plant—it’s not like Wile E. Coyote on Bugs Bunny: Just add water, and you’ve got an instant Acme nuclear plant or something like that. No, if you’re going to refurbish a nuclear plant, you’re talking at least two years—at least two years. Now you start looking at the dates, and we’ve got to start refurbishing those nuclear plants by 2016 at the latest.

In addition to the ones that you’re taking out of circulation permanently and the coal that they say they’re going to shut down by 2014, now you look at those nuclear plants, and you’ve got to start refurbishing them. You can’t do them one at a time, because you don’t have time. If you tried to do them one at a time, two years, two years and two years, we’ve got 10 that have to be refurbished. That’s a 20-year program. They’re not going to last that long without refurbishment.

Now you have to start talking about overlapping at least two nuclear reactors at any given time. If you’re taking two at Bruce out of circulation, that’s two that produce nominally 750 megawatts apiece. If you’re taking out two at Darlington, you’re taking out two units that produce almost 900 megawatts apiece. Now you’ve got two at Darlington out—that’s 1,800 additional megawatts gone—two at Bruce, 1,500. If you’ve got a combination of the two, well, you can do the math.

Where is the reliable power going to come from to power the economy of this province in five years, in 10 years, in 15 years if the only thing that these guys want to build is because it’s very, very politically popular? People believe, “Oh, yes. Well, they’re doing the right thing. They’re building all kinds of green power.” But you also have a responsibility to respect the bedrock principles of Ontario’s electricity history. The way that our economy became successful and the best economy in this country and one of the strongest economies in the world was that it was built on an abundant supply of reliable, affordable electricity. Electricity drove our standard of living. It drove our economic success. You can’t separate electricity from economics in this province. When you start to do that, you threaten not only the electricity supply but you threaten the economy.

That’s what they’re doing with this pretending exercise that they call the Green Energy Act. They want everybody to believe that somehow they’re going to save the world with the Green Energy Act here in Ontario.

Mr. Lou Rinaldi: It’s a start, John.

Mr. John Yakabuski: Everyone who wants to do the math will know that you can’t have it both ways, I say to Lou over there, who says, “It’s a start.” Here’s the energy minister one day talking about how the contracts they signed are going to make a huge difference in the electricity supply in Ontario. Then, shortly after that, when people start asking the Premier, “What does that mean to the price?”—because all of these sources that you’re citing here now are very expensive, from roughly 13.5 cents to 80.2 cents. They asked the Premier, “What are we going to do about the price? What about the price?” The Premier says, “It’s not going to have that big an impact on the price because we’re not really producing that much.” I guess, depending upon your audience, you tell the people who want to hear you say that you’re changing the world—you’re telling them that that’s exactly what you’re doing, but then you’re telling the other people, “No, we’re really not doing that much because it won’t have that big an effect on price.”

You can’t have it both ways. You can’t fill your supply box with expensive sources and not change the price dramatically, and if you’re not changing the price dramatically, it’s because you aren’t making much of a difference.

What you're doing continuously here is overselling the impact that the new generation is going to have and underselling or understating the impact that this is going to have on the price of electricity in the province of Ontario. I don't know how many times I have asked in this House for the government to just come clean and be totally honest about their electricity policy.

I remember when this government was elected; oh, yes, I remember when this government was elected. I never slept a wink that night, and I always thought it was because I was elected that night, but no, it was because this government was elected. I remember when this government said that they were going to depoliticize the electricity sector, the energy sector. Never—and that is the one thing that you're consistently hearing from stakeholders in this sector. It is a little different with Minister Duguid because he's not quite so aggressive as the previous minister. I don't mean Gerry Phillips; you couldn't find a nicer guy than Gerry Phillips.

1740

The Acting Speaker (Mrs. Julia Munro): I'd ask the speaker not to make personal references to other members.

Mr. John Yakabuski: As I said, the former minister, Gerry Phillips. Yes, the former minister, Gerry Phillips; I think that's all right, isn't it, Madam Speaker? Because the new minister is Brad Duguid. But it was the previous minister, George Smitherman, whom the sector had the most trouble with because they found him to be "somewhat aggressive," would be the term. But the one thing that they consistently say is that the politicization of this sector has never been deeper.

All you've got to do is look back to when Dwight Duncan was the Minister of Energy and he brought in Bill 100 and created the OPA. What he said was that this was going to be a virtual agency. We know what the OPA is today; it's a hugely expensive, bureaucratic buffer for the government. As I said earlier, the government uses the OPA for its own purposes. When it wants to be the hero, it shoves the OPA aside and goes out and does the talking and makes all the announcements. When it is a little nervous about how people might react, you can rest assured it's going to be a spokesperson from the OPA, and the government will let them take the slings and arrows and then decide whether they're going to respond or make statements themselves or not.

The OEB, Ontario Energy Board, which was brought in by the Progressive Conservative government under Bill Davis, was put here for one reason, and that was to protect the energy consumer in the province of Ontario—not politically; not in a partisan way. Their whole mandate was to protect the energy consumer. When you talk to people in the energy sector today, they are shocked at how the OEB has been neutered, gutted, eviscerated. You could use any number of adjectives to describe what this government has done to the OEB. It has made it a weaker agency at the very time when it should be stronger and more vibrant and powerful than ever. Why have they done that? Because they want politics to rule the day. They want politics to be the issue. They want politics to determine what energy policies will be brought forward by the government.

I'm looking at the clock, and I am running—

Hon. Monique M. Smith: Are you running out of steam?

Mr. John Yakabuski: No, no. I could go on forever, but I didn't realize what the time on the clock was, to be honest with you. I was only looking at that clock. So I am going to wind up here in a minute or two.

Let's go back to Bill 235. I want to reiterate what I said earlier about the importance of bringing in better protection for the retail electricity consumer with respect to being offered contracts here in the province of Ontario. I do agree with the government that bringing in this legislation was the right thing to do. We didn't agree with all of the parts of the legislation. We do believe there should have been some other amendments that we had put forward. However, as my friend Steve Clark, the member from Leeds–Grenville, said earlier, none of our amendments were accepted, but we're used to that.

At the end of the day on this particular occasion, as I said, is the consumer better off because of this legislation than they were before? We believe, in our party, the PC Party of Ontario—our leader Tim Hudak and our caucus believe that this bill will help to protect the energy consumer. We could talk about many aspects of the bill, but I am going to say that that's it for now and pass this on to someone else.

The Acting Speaker (Mrs. Julia Munro): Questions and comments?

Mr. Peter Tabuns: Given the time, I will have an opportunity perhaps to give some introductory remarks to my leadoff later.

I wanted to speak to the parliamentary assistant and all those present here about the fundamental concerns I have with the bill. I have to say that if this bill addressed the retail marketing industry and brought in some further protections, although I don't think they're adequate, I wouldn't vote against them. I would say that the more that's brought in, the less likely that this industry will flourish in the future. But the concern I have most fundamentally with the bill relates to submetering.

My concern is that the way things are structured—as units become vacant, meters will be installed—will fundamentally change the incentives that landlords have to invest in energy efficiency and conservation. They will put tenants in a situation where they will be dealing with energy costs but don't have the legal right to change the building that they're in, nor do they have the financial wherewithal to do that. The way tenants will be hit as they go forward with the installation of submeters means that tenants, 30% of whom are low-income or at the poverty line, will be faced with higher costs than they have had to deal with in the past and a reduced standard of living.

There will be other points that I will touch on, but for those reasons alone this move forward on submetering is a step backward environmentally and socially in this province. For that reason, just so that the parliamentary assistant and others are clear, I don't believe this bill should be supported.

The Acting Speaker (Mrs. Julia Munro): Questions and comments?

Mr. Dave Levac: I know that the critic for the opposition wants to hear very clearly my comments about his leadoff speech. Of the 51 minutes that he used—I have it down to the second, but I'm not going to insult him by making it down to the second about how much time was actually spent on the bill.

I will make a comment on the comments that he made about the bill and third party verification. There are three ways in which we're going to be able to protect the consumer: the 10-day cooling-off period, the third party verification that happens between 10 and 60 days and the first bill. Thirty days after you get your first bill, you can still cancel. So the 10-day cooling-off period is one, the 10-day to 60-day third party verification is the other. We changed it with an amendment by making it in-house, and the standard questions that he's talking about will still take place. Those standard questions that he's talking about—"Did they misrepresent themselves as an agent of"—are going to be established by the OEB and given to the in-house provider. So that argument that he made about it having to be on the spot does not stand the test.

He talked about the rogues who are out there, that we didn't know that the rogues are out there. I'm sorry; the industry knew that the rogues were out there.

The company is doing its own review: The assumption that the bill is not the be-all and end-all is that the companies are going to be doing their own as well. I think good business practices will be taking place as a result of what the government is proposing.

1750

Inside of the bill that he's making this kind of conversation about—I'm trying to stay focused on the bill—I think I've taken care of his concerns. The one thing I will agree with him 100% on, and I'm glad that I think I'm hearing they're going to support it, is, will they be better off? Yes.

The Acting Speaker (Mrs. Julia Munro): The member for Thornhill.

Mr. Peter Shurman: It's a pleasure to add my voice for a couple of minutes to what my colleague from Renfrew–Nipissing–Pembroke had to say in a veritable compendium of information about the supply of electricity to people in Ontario. He talked about nuclear, he talked about coal and he talked about the feed-in tariffs. He went all over the road, and I think that's a reflection—and I say this to the government side—of the energy policy that, really, nobody on this side, much less the people of Ontario, can really discern as something that has any focus.

If you read the popular press—not what I am saying or any members from over here are saying, but the popular press, people who are commentators, pundits who are looking into this and doing the investigation—what we're seeing is what I'm saying and what my friend from Renfrew–Nipissing–Pembroke is saying, and that is, there's no reliability to much of what's being proposed and much of what is being put into law. What Ontarians want, clearly, is reliable power at an affordable price. At this point, it's very difficult to say with any certainty that that's what they're going to get.

If you take a look at just one thing that I've been looking at over the course of the past six months, it's the feed-in tariff and the model that was used for Ontario to establish this under the Green Energy Act—which was touted as absolutely phenomenal by the one-time minister who proposed the Green Energy Act—and that is Spain, where the feed-in tariff model has been used for about a dozen years now. What's been found—and there are reports that document this; it's not because I say so—is that for every job that was created under this model, two have been lost. That, unfortunately, is what Ontarians have to look forward to, that and about four line items that are going on the bottom of their energy bill for an unpredictable cost of energy going forward. That's why we're losing business.

The Acting Speaker (Mrs. Julia Munro): Further comments?

Mr. Jean-Marc Lalonde: First of all, I was listening very carefully to the member for Renfrew–Nipissing–Pembroke. Bill 235 is all about consumer protection. I wish the member would have been here in 2002. He would have seen what his government had done at the time. Today, we are stuck with the costs of upgrading all the generating stations.

But I've lived the experience of dealing with those people, those retailers. At least two to three times per week, I get the consumers coming down to my office. It's unbelievable, the approach those retailers are taking. They tell people that they will pay less for their electricity, which is completely false.

Let me tell you, just because I'm short of time, if I go back to 2002, at that time the previous government had paid up to $1.33 per kilowatt hour that we had to buy. When we say that they froze the price at 4.3 cents per kilowatt hour, we were buying it at $1.33 a kilowatt hour. Is that good management? I don't think so.

Today, we want to protect of all our consumers. This is why this bill is here. I hope everyone on both sides of the House will support this bill, because it is for our consumers.

The Acting Speaker (Mrs. Julia Munro): Further debate.

Mr. Dave Levac: On a point of order, Madam Speaker: I seek unanimous consent to give the member from Bruce–Grey–Owen Sound the two minutes that were lost by the absence of the member from Renfrew–Nipissing–Pembroke, so that the two minutes can be allotted to wrap up the debate of the member.

I would seek unanimous consent for that.

The Acting Speaker (Mrs. Julia Munro): I heard a no.

The member for Toronto–Danforth.

Interjection: Who would say no?

Mr. Peter Tabuns: I don't know who would say no to you, Mr. Member from Bruce–Grey, but someone did.

Madam Speaker, thank you for this opportunity to start my leadoff on Bill 235, the Energy Consumer Protection Act. As you're well aware, this act addresses two main areas. It addresses the regulation of the sales process and the contracts between energy retailers and the public. This act also regulates the installation and operation of hydro sub-meters in apartment buildings.

On these two main issues, this bill falls short of the need to protect the public. It falls short of the need to protect the public interest, and beyond that, on the second main issue, sub-meters in apartment buildings, it undermines future energy efficiency investment and it puts tenants, particularly those who are poor or elderly, in an extraordinarily difficult position.

I want to start first with the experience of my constituents and of others who've had to deal with energy retailers. Jean-Marc Lalonde was just speaking about his experience in his riding of people who have been told that their electricity bill would be cut if they signed on to these contracts. That is what my constituents have been told. When I have gone into my riding, gone to households that have had energy salespeople come to their door, what they have understood, time after time, is that they're being sold a discount on electricity or gas bills. That's the story that they hear.

When we started this debate in this Legislature, I received emails from my constituents and from people outside my riding with their stories of what they had been told at the door, the experience they had of high-pressure sales and the experience they had of, in one case, finding that they had been signed up to a company and had never signed any documentation to take on a contract with that company. They actually brought in the documents to me showing the signature on a contract with one of these marketers, and I had them show me their other documentation ID to show me that the signature they produced was not the signature that was on that contract.

What we have are very aggressive companies going through this province on a regular basis, household by household, trying to sell these services. People are being taken advantage of. People are signing on to contracts that are giving them very high electricity prices. Frankly, they're sick of it.

I have an email here from a person who wrote in about their experience with these contracts. This person is talking about Universal Energy, and I'll talk more about them in a minute. Universal, in their contract, has this language: "Universal reserves the right to transfer the consumer to standard supply service at any time during the term of this agreement at Universal's sole discretion. Universal is not responsible for any direct or indirect economic or consequential losses caused to you, however caused."

In other words, they come to your door saying, "We're going to give you a fixed price, we're going to cut your costs, and we're going to give you the security of knowing that the price won't go up in the future." But in fact, right in the contract, Universal can cut their relationship with you at any time. You don't have recourse against them. If they find that it's inconvenient or unprofitable to continue to keep their side of the bargain, they can cut you loose and you're cast back into what they consider an abyss. They've given themselves a very neat legal loophole to get out of any contract that isn't making a lot of money for them. That is not a contract that anyone can have any respect for.

You should be aware that Universal Energy recently had to go through a hearing at the OEB, the Ontario Energy Board, for renewal of its gas licence. Instead of being given a five-year renewal, they were given a two-year renewal, with a fair number of conditions. I want to just read to you some of the commentary in the staff report about Universal Energy:

“In board staff’s first submission on this application, board staff expressed concern regarding Universal’s past conduct. As noted in the first submission, the board published a notice of intention to make an order for an administrative penalty on two occasions—December 22, 2008 and April 23, 2009. The notices indicated a series of infractions which included making false, misleading or deceptive statements to consumers and switching a customer’s supply without the customer’s explicit authorization.”

Third reading debate deemed adjourned.

The Acting Speaker (Mrs. Julia Munro): It being 6 of the clock, this House stands adjourned until 9 a.m. tomorrow.

The House adjourned at 1801.

ENERGY CONSUMER
PROTECTION ACT, 2010 /
LOI DE 2010 SUR LA PROTECTION
DES CONSOMMATEURS D’ÉNERGIE

Resuming the debate adjourned on April 13, 2010, on the motion for third reading of Bill 235, An Act to enact the Energy Consumer Protection Act, 2010 and to amend other Acts / Projet de loi 235, Loi édictant la Loi de 2010 sur la protection des consommateurs d’énergie et modifiant d’autres lois.

The Speaker (Hon. Steve Peters): Further debate?

Mr. Peter Tabuns: I’ll just pick up where I left off when I started my lead last week. Although I think that some of the measures in the first half of this bill that deal with energy retailers are useful—too limited, in my opinion, but useful—the second part of this bill, which deals with sub-metering and smart meters for multi-unit residential, is a profoundly problematic piece of legislation and, I think, is a move backward in terms of what has to happen in this province.

That change will substantially reduce the financial incentives for landlords to invest in energy efficiency in their multi-unit buildings. It will become an impediment, a barrier, to actually dealing with environmental and energy issues. That’s a substantial problem.

Secondly, because it sets up the framework for moving the cost of energy in apartment units to tenants, it means that those who in the future will be responsible for energy costs will be the people who don’t have the legal right to actually modify the building that they live in, nor will they have the financial resources to make the changes that are necessary.

Lastly, it will make life much more difficult for tenants. Over 30% of Ontario’s tenants now live at or below the poverty line. They are not in a situation where they can take substantial increases in their cost of living. They are in a situation where this government should be protecting their interests and making sure that their lives and their housing are affordable. Those are the main arguments.

Let’s split the bill into two pieces. The first piece deals with energy retailers. When the minister introduced the bill, he said that he was dealing with 100 to 150 complaints per week about energy marketers, energy retailers. He talked about the pressure that’s applied to customers, to the general public. I for one have no difficulty in agreeing with the minister on that. Absolutely, that is the case. I have constituents coming in to me, talking about how they have been pressed hard at the door to hand over their bill so that a retailer, a salesperson, can get the account number. Once they have that account number, the games can begin.

People in their 70s and 80s; new Canadians whose grasp of English may be limited; people who have come to me who have had kids running around, pressed for time, with an energy retailer at the door pushing them hard to turn over a bill—people who are, because of distraction or age or lack of language ability, vulnerable to high-pressure sales techniques—are the people who are getting hit by these companies.

Others have been hit historically by the automatic renewal. A business quite close to my constituency office came to see me a few years ago because that business's bookkeeper had gotten a notice from the company saying, "Your contract is about to expire;" and then further down in the letter, "If you don't get in touch with us, the contract will automatically be renewed for five years." The bookkeeper made a mistake. He wasn't used to contracts that renewed themselves in that fashion. He threw the letter out. The local business person was re-signed up against his will and was paying dramatically more for the gas in his office than I was paying in my constituency office.

These are companies that make their money by skimming off the top of people in this province. These are companies that make it very difficult to get out and charge people a lot of money to get out of these contracts, yet, as I will touch on later, make sure that their interests are well protected in their arrangements with consumers.

The core of this retail marketing of gas and electricity doesn't make sense for this province. It simply imposes a layer of bureaucracy on the energy consumers of this province that doesn't make their lives better, doesn't make energy more affordable and, in the end, undermines the well-being of our economy. There is no advantage to people paying for these contracts.

0910

We don't have the numbers before us today on the profits that are made by these retailers of electricity and gas, but it's hard for me to imagine that it's not a very lucrative business. I can tell you, from talking anecdotally to a former salesperson who was going door to door selling these contracts, that he made $100 for each person he signed up. So if you're out there now watching the Legislature and you've signed one of these contracts, right off the top you have to pay $100 that goes to that salesperson. That doesn't help you. It doesn't help you with your energy bill.

I was in London, Ontario, about a month ago and passed the office of Summitt Energy. They had a sign out front saying, "Jobs on offer. Make $52,000 per year." I look at the numbers: at $100 a contract, 10 contracts a week is $1,000. That's two contracts a day for a five-day work week; I'm sure it's doable. There are people out there making $40,000 to $50,000 a year selling these contracts. But in the end, do they provide any value to this society? Do they actually increase our wealth? No. What they do is skim off this society. That's what is going on. It doesn't build the common wealth of this province.

When the minister first made his comments, he said that thousands of people are employed in these retailing operations, and he's right; there's no doubt about it. But I have to say that thousands, tens of thousands, hundreds of thousands could be employed putting in place energy-efficiency measures for homes, apartment buildings and commercial buildings. In fact, a study that was done a year ago showed that a million construction workers would be needed to retrofit houses right across Canada. It would generate a million person-years of employment. There, you actually create something that is worthwhile for society. You're not just buying and selling. Buying and selling is a good thing, but you're not doing it solely as a way of extracting money from the population.

The minister's argument would have been just as strong in the United States or here in Canada when we were dealing with the private health insurance industry. Before medicare came in, before we had single-payer insurance, we had large competing bureaucracies selling health insurance. One could say, "Why shut down those large competing bureaucracies? People are employed." In the end, you make a decision to have a one-payer system so that you aren't wasting money. That's what we're doing here now. We are taking the labour of many thousands of people and using it unproductively, instead of actually reducing energy consumption the way we need to.

I have to say that I can see some value for people who want to pay a premium to ensure there is an investment made in green power. I might argue for a change in the business model, but I wouldn't block someone from actually making that contribution to society so that we accelerate the technological change, the transformation we have to go through. I can see that exception. But after that, this retailing of gas and electricity by these energy marketers is a waste of our society's wealth and time. However, getting rid of that practice is not what is on the table. What is on the table is a

series of measures meant to further protect consumers from an irrational system. It's meant to protect people from excess.

As I said in my opening remarks, there is no doubt: I've talked to seniors who have been pushed very hard at their doors by salespeople who will not take no for an answer. As you probably have, Speaker—in fact, since you've been here a number of years, I have no doubt that you've done this—I have gone door to door through my riding, talked to a wide variety of people and encountered many people who are vulnerable, who are living in their homes, who are in a situation where their ability to fully grasp what is going on around them is more limited than it used to be and who are vulnerable to high-pressure salespeople who come to their doors.

I referred to a salesperson that I talked to earlier who made $100 each time he sold one of these retail contracts. Well, the other thing that person had to say to me was that he learned very quickly that if he spent half an hour explaining to people how these contracts worked, no one would buy. They would just say, "No, thanks. Now I understand. You're asking me to pay this big premium so that I won't have a volatile energy price some time in the future. I'm willing to pay a lower price now and take my chances later." He said, "Don't do that. Don't spend half an hour talking to people. They won't buy. Just get them to sign."

I've talked to my constituents who have asked those people at the door, "Who are you? Are you"—in this case—"from Toronto Hydro?" In Hamilton, "Are you from the local utility?" And they say, "No, we're the people who provide the power to the utilities." From the testimony we got in committee, these retailers buy their electricity from generators, and that is the source of the power they're paying for in the system. They don't supply the power to the local utilities. That is not true.

In the course of clause-by-clause debate, I moved that we stop this door-to-door sales process. I have to say that, in practical terms, this would mean these companies could market on the Internet, they could do telemarketing, they could set up booths at shopping malls—all kinds of things like that. But their ability to get at the vulnerable and to get at their utility bills, take them and take down the numbers would be eliminated.

The failure to pass that amendment is a substantial problem, because I believe that the bulk of this business relies on high-pressure sales to the vulnerable and to those who are at a disadvantage. And if these companies continue to sell door to door, even with what is put in place, you can expect that we will continue to get an ongoing litany of complaints about abuses.

In this case, strangely enough, I hope I'm wrong. I hope it's successful. I hope I have misread it. The reality is that if these safeguards are effective, most of these companies will not be able to function, because they live on high-pressure sales. If the government is wrong and these companies continue their high-pressure tactics, we'll be back here debating this again, because the people of this province don't want to have to deal with con artists.

I use the phrase "con artists" because people do get conned. My guess is that there are people out there who are selling this who are straightforward. But there are a lot of con artists, and that means that they get done in. They will be looking for a way around whatever rule has been put forward, and that will cause substantial problems for all of us.

I want to just read this into the record from an official notice—a media release—of the Ontario Energy Board, April 1, 2010: "OEB Imposes Conditions on Renewal of Universal Energy Gas Marketer Licence." You should know that Universal Energy, now owned by Just Energy, is a company whose marketing practices were such that the Ontario Energy Board wouldn't give them a five-year renewal of their licence; it gave them a two-year renewal of their licence. There were a lot of complaints about their operations—justified complaints, apparently. So you out there who are watching this debate should remember the name Universal Energy/Just Energy. This company is one that has been put on watch by the Ontario Energy Board.

In the course of the hearings about these companies, we had a presentation by Councillor Maurice McMillan, ward 2, from the city of Orillia. He had Orillia Power do an analysis of the cost to consumers of being on the RPP, regulated power plan; the power provided by Orillia Power, the local utility; and the power that was purchased through one of these retailers. I'm not going to go through all the lines, but the bottom line is that it cost substantially more—$75 more—for those on the retail marketing company's system. They got stuck with a higher power bill. That's the reality. For those of you who have a retailer at the door, remember this: You will be paying more. You will take a hit. This is something that is going on in this province, is not curbed in the way that it needs to be curbed and, frankly, is a problem that I think will come back to this Legislature.

All that said, generally speaking, I'd vote for measures to limit these retailers more. If this bill was only to do with those retailers, I'd vote for it reluctantly but vote for it and press for stronger measures.

The more problematic part of the bill has to do with sub-metering in apartment buildings. Most of the protections that are supposed to be in this bill are dependent on the regulations. Those haven't been drafted, so it's very difficult for those who want to criticize the bill to actually fully know what's on the table, what will be there to actually protect tenants or not protect tenants. The reality, in my opinion, is that the government should not proceed with sub-metering in multi-residential apartment buildings, and I'll talk to the economic and environmental rationale for that. They should not proceed with smart metering in these multi-unit buildings.

I believe that conservation and demand management programs for landlords and tenants are what's really needed if we're going to deal with energy consumption in multi-unit buildings. Insulation programs; solar heating and hot water programs that are cost-competitive with electricity and gas; and education and social marketing, targeted at landlords and tenants, are the kinds of programs that are needed to actually make a difference.

The current government initiative to expand smart metering into the multi-unit residential sector won't meet the overall energy conservations goals that this province requires. Given that the government seems to be going forward with it—it still has regulations to write—it should be seriously considering a low-income rate assistance program, a publicly funded multi-residential conservation program and placing an onus on the landlords to apply to the Landlord and Tenant Board for permission to install suite meters, subject to meeting stringent requirements. The burden shouldn't be placed on tenants to apply for rent decreases after the fact.

The larger context that we're dealing with when it comes to electricity prices is that this Liberal government has made substantial mistakes in its decisions around energy policy. As much as it talks about the Green Energy Act, an act that I voted for, the bulk of what it's investing in is nuclear power and gas-fired power. Those are very expensive options. Investment in those options also means increased investment in transmission lines, a very expensive option.

Not just tenants but homeowners are having to deal with higher and higher bills because decisions have been made around electricity investment, hydro investment, that are not the least-cost, environmentally sound options, but in fact very expensive options that are not helpful to the environment.

Under the current system of vacancy decontrol, there's no reason to believe that shifting the burden of costs from landlords to tenants will result in lower rents, particularly when you have a vacancy. When a unit is vacant, no tenant has to be asked their permission to have a meter put in. You can expect that those meters will be put in each and every time that a unit is vacated. The future tenants will have to deal with the consequences of that.

Tenants could face rent hikes due to landlord applications for above-guideline increases for retrofit work. That will affect the ongoing affordability of rental stock, particularly in large urban centres. Tenants will be forced to pay for electricity service directly, without any control over the factors which could reduce bills, such as the quality of appliances or the building envelope.

I've had the opportunity to be a property manager. I've dealt with buildings that were very old; I've dealt with buildings that were fairly modern. The reality is that two thirds of people's energy costs relate to heating and cooling on the one side—temperature conditioning—and hot water. That's two thirds of the cost. If you are in a building that is

inadequately insulated, that is leaky, has a lot of cold air flowing in in the winter or cool air flowing out in the summer, then you are going to have substantial problems with keeping yourself comfortable in that unit. If you are in a high-rise building and you don't have either the legal authority or the money to put in proper double- or triple-glazed windows, if you don't have the money to put in place the insulation that is required—and frankly, you couldn't do it; legally, you don't have the right—then your ability to influence two thirds of your energy bill is not there. You are stuck.

What this bill assumes is that every unit is identical, every unit has the same services, every unit has the same kinds of walls and windows, and it's just simply a question of tenants behaving badly or behaving well. But that is not the reality. Landlords control the factors which have the greatest impact on the actual temperature in units. Landlords decide what kind of appliances—stoves and refrigerators—they put into units. I know in this bill there's mention of setting the energy standard for those appliances. Will it be set at the highest current standard and adjusted as those standards rise? I want to see that, and I want to know if it will be enforced, because there is a huge problem with lack of enforcement.

The way your building is oriented will determine whether you are very hot in the summer, or cool; very cold in the winter, or warmer. I've lived in a high-rise in this city on Broadview Avenue that had a north-south orientation. The units on the west face getting the west sun in midsummer were incredibly hot. In winter, they were the warmer units. Units on both sides of the building had the same single-pane glazing that leaked air around the frames.

Under this legislation, tenants in buildings where there is a substantial temperature difference from one side of the building to the other are all going to get hit with the cost of the energy and will have no ability to correct the fundamental problems, and the landlords will no longer have an incentive to act because the bulk of the energy costs will be out of their hands, will not be a concern for them. And frankly, if they were to act, they wouldn't be able to reap the savings. So this in fact undermines the incentive for landlords to act and puts us in a situation in these buildings where we are going to have far more problems in the future getting action. These multi-unit buildings in Ontario, many of which were built in the 1960s and 1970s, are what an energy analyst friend of mine called energy pigs. They were built relatively inexpensively. They radiate a lot of heat. They were not built to conserve energy.

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So when Mayor Miller of Toronto came forward with his plan for modernizing apartment buildings around Toronto and did a calculation of the energy savings that it would generate, his numbers were very big. The energy savings would pay for the retrofits. That program will be far less attractive to landlords under this regime.

I want to speak briefly about findings in the United States on these matters. The housing and urban development department in the United States did a study a few years ago looking at the impact of different measures on energy consumption in their buildings. That study found that at core, having the tenants pay for their electricity and heating didn't change the amount of energy consumed in those buildings. So a publicly owned piece of housing stock in one city, where the tenants paid all their energy costs, and a publicly owned building in another city, where the owner paid all the energy costs, had pretty much the same energy consumption.

What they found when they did their analysis was that the big difference was between multiple-unit dwellings and single-family dwellings—a big difference there. Far less energy is consumed in a multi-unit building because you've got buildings that have units around them. If you've got neighbours on either side of you and above and below, you're not going to be radiating energy out. You've got your energy radiating out into other units.

They looked at the age of buildings. The older a building was, the more it leaked energy and the more the energy costs went up.

So if we put in meters for these tenants, those who live in old buildings will get hit hard; those in new buildings, much less hard. But it is not going to solve the fundamental problem, and that's what came up in that study as well: You need to invest in actually making the buildings energy efficient if you want to cut their operating costs, their energy costs. That's the key and that's the centre of it.

The other thing I want to speak to is the reality that this initiative now opens tenants up to having smart meters installed. There are a few things that I want to touch on here. On January 7 in the Toronto Sun, Jonathan Jenkins reported: "Meters Prove Not So Smart," talking about the installation and the operation of smart meters in Toronto by Toronto Hydro. He writes: "They promised smart would be cheap, but so far it's proving more expensive.

"Most Toronto Hydro customers who've been on smart meters and time-of-use pricing the longest have actually seen an increase of up to $3 per month.

"The cost of the meter itself also adds an extra $3-$4 a month to local utility bills."

That's important, because there is a mass initiative to move forward on these meters, and frankly, they are not going to give the kinds of savings that the government has trumpeted. I have some other notes that I'll cite on that. But what it will mean for tenants is they're going to have more difficulties in making ends meet.

In the course of the clause-by-clause debate, I actually sat down, called Toronto Hydro, looked at the bills of tenants. When you do the calculation—Toronto Hydro says it costs about $3 to $4 a month to run a meter. The meters cost $500 installed. I did a very rough calculation, saying 5% interest over 10 years to amortize the meters, so $1 to $2. So it was about 5 bucks a month for that new sub-meter in an apartment building that a tenant will have to pay.

If a tenant isn't paying for their heating and hot water on their electricity bill, their bill is in the $30- to $36-a-month range. Well, $6 is about 15% of the value of that electricity bill. They would have to save a lot of electricity just to pay for the meter itself—the meter and the monitoring of that meter. In the end, the tenants would get virtually no benefit and, frankly, only one third of the electricity cost in that apartment would be accessible to the tenants' ability to reduce their costs. They're imposing this cost on tenants with very little potential that the tenant will actually be able to do anything but pay for the meter.

I'll go back to smart meters. Jonathan Jenkins reports:

"Toronto Hydro found the actual difference in smart meter bills—up or down—is quite small.

"For 72% who saw their bills rise, the average monthly increase was 90 cents.

"For the roughly 27% who saw decreases, the average was 29 cents per month."

Why is that? Why is it that people aren't saving a fortune when they get to do these things, when they get to shift their bills around?

I took an opportunity to print off Toronto Hydro's graph showing what people pay in what segments of the day. For the winter rates, the peak times, when you pay most, are 7 to 11 in the morning and 5 to 9 at night. I have to say to you, if you get up at 7 in the morning and you have a shower, if you have electric hot water; if you make toast and, if it's winter, you make some hot cereal, you have a coffee, then it is very difficult for you to avoid having an increased electricity cost. If you, as I do, turn the heat down overnight and you turn it up when you get up in the morning, something that has been recommended for a long time, then you get hit in that peak period. That's a situation where people's choices are relatively limited—they want to have a hot breakfast; they want to be warm; they want to have the lights on when they wake up—so they're going to get hit with that peak period.

Then from 5 to 9: You get home, say, between 5 and 6 in the evening, you have dinner to make and you've got kids who come home. Are you going to keep the lights off in mid-winter when it's dark? Are you not going to have the radio or television on? Are you not going to cook? The reality is that people are being hit with costs at their peak time of need for electricity. This isn't a time when everyone is sleeping; this is when they live their lives at home. They don't actually find themselves in a position where they can cut an awful lot of their activities, which is why, and I'll go on to this in another study, people don't save a lot on these meters, because their fundamental demands and needs come up at these peak times. That's of consequence.

The other peak period is in the summer, and that's from noon until 5 p.m. I can actually see where people who go to work during the day can turn down their air conditioning and turn it up again when they come home at night. But I have to say to you, Speaker—and others in this House may have had this experience if they've dealt with people who are at home with their kids through the day—if you're at home with two toddlers through the day, you're not going to have the house cold in the winter and you're not going to have it really hot in the summer. If you've got two or three kids in the house, you're going to look after them, and you're going to take a hit on your hydro costs. If you're a senior and your health requires that you keep your temperature at something that's comfortable, then you know what? You're going to be in the house and you're going to turn on that air conditioner even though you're paying peak price.

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The term in economists' language is "elasticity." People don't have a lot of options for moving away from those costs. They absorb them, they take a hit, which is why these meters don't save an awful lot, although the amount of money that we put into them is somewhere in the range—since I've heard two ranges, I'll quote both—of $600 million to $1 billion. That's a lot of money to spend on something where people's options are fairly limited. For $600 million to $1 billion, you can do an awful lot of energy efficiency in this province. You can use that kind of money to lease high-efficiency appliances, to lease solar hot water heaters, to actually finance an awful lot of changes that would cut people's living costs. But instead we've spent $600 million to $1 billion on the meters whose impact is relatively small because the options people have at the times when they're getting hit are so limited.

This Liberal government had a study done by a fairly well-respected company, Navigant. They did a study in—it looks like 2007—on smart meters and the impact of those on residential load. Remember, we are spending $600 million to $1 billion, and their calculation was that the reduction in demand would be about 300 megawatts from peak. I have to tell you, for energy efficiency that's a very expensive investment. That is an extremely expensive investment. For a program that touches every household in this province, that is a very low rate of return. That isn't what we want to see. And yet tenants will be exposed to that in its full glory, and they will struggle with those bills. And like many members is this House, I suspect that we all will be dealing with the phone calls and the emails of people who are dealing with energy bills that are problematic.

A report I have here called Advanced Metering Infrastructure—Implications for Residential Customers in New Jersey, produced for the New Jersey Department of Public Advocate, is an important study. It's an out-of-Ontario study looking at the impact of smart meters in other jurisdictions. Are they economic? Are they useful? Are they producing savings greater than the cost of generating power? Because really, for most energy efficiency measures, that's cheaper than the combined cost of distribution and generation. So when you do energy efficiency, it's to avoid the cost of generation and new distribution and transmission lines.

Their experience, and this is their review of utilities making filings to regulatory bodies in the United States, is that "The AMI filings"—we use the term smart meters—"of utilities in other states, and the studies prepared by New Jersey EDCs"—electricity distribution companies—"indicate the total cost of AMI. measured as the net present value of revenue requirements over 15 years, would be greater than the NPV of forecast savings in utility operating costs over the same period." Breaking that down, smart meters are more expensive than generation and distribution. That is a very expensive energy efficiency measure—very expensive.

They say that “utilities who invest in AMI”—smart meters—“will eventually file for an increase in the distribution service rates in order to recover that shortfall.” In other words, unlike almost all other energy efficiency measures that are popular and have been promoted by utilities around North America, this is one where it’s costing more than generation and distribution. This is an expensive option, and yet we’ve gone into it whole hog and we’re about to extend it to tenants who will not be that grateful for this particular tender of mercy visited upon them.

They talk about the experience in the test programs for these smart meters and say that the expected reductions are based on three major assumptions: reduction in peak use for participating customers; percentage of customers who will voluntarily participate; and long-term persistence of the reductions per participating customer. They note that many of the people who took part in the initial trials were given appreciation payments, and thus there is a skewing of the numbers that would come out of that. They say that because these meters have only been in for a few years, it is very difficult to say whether people would actually keep to the changes that were projected.

Their conclusion: “Utility investments in AMI,” or smart meters, as we say, “are not the least-cost approach to reducing the annual energy use of residential customers in New Jersey, or the bills and air emissions associated with that annual energy use.” Well, do you know what? I think they’re right. It seems to be the experience with Toronto Hydro so far. In their recommendation to the regulatory bodies, they say, “Are there alternatives to smart meters?” They say yes: “Other utilities have invested in load control and supporting infrastructure for only those circuits where such investments are clearly cost-effective.”

In this province, all the time we have situations where systems and distribution lines are overloaded. You have a choice: You can run another power line over somebody’s property, or you can invest at the end point in reducing demand. There are those in this House who have rights of way on their property, who understand exactly what I’m talking about. It is cheaper for us to look at the system and pick out the areas where strategically we get the best bang for our buck. That isn’t what we have here. That is not what is being visited upon the tenants of this province.

In the end, we have before us a bill that advances a strategy that will be very costly to tenants. We have a strategy that will undermine the financial incentive for landlords to invest in energy efficiency in their buildings. We have a setup for higher electricity bills all around, without the advantage to society or individuals that we need to have from every investment we make. We’re a rich society, but we’re not a society that can afford to throw away $600 million to $1 billion on these kinds of investments. I am going to urge people, even though there are some useful things in the first half of this bill, to vote against the bill because of the substantial weaknesses, the retrograde reality of the second half of the bill.

The Acting Speaker (Mr. Jim Wilson): Questions and comments?

Mr. Dave Levac: Contrary to my comments before we started, I did pay attention to the member from Toronto–Danforth. I always listen to the member from Toronto–Danforth in his delivery of speeches in this House. I want to thank him for his blunt response to the bill and his participation in the committee.

There are so many things I could go over; let me do it very quickly. The retailers, the suite metering and the deposits and disconnects: There are going to be three ways to cancel contracts: there’s the 10-day cooling-off period; there’s the third-party verification within 10 and 60 days; and there are 30 days—a full 30 days—after receiving your first bill that you are allowed to cancel the contract. We believe we’ve found a balance when it comes to retailing at the door. The member believes that we should be banning it altogether. That is not an option that did not get considered. That’s a double negative, so let me put it this way: It was considered, and the agencies know that. We think we’ve found a balance to make sure that that gets cleaned up. If it doesn’t, there are other options, and the member is right: we will evaluate that.

What we’re also doing is clearly defining the few issues. Deposits and disconnecting: We’re defining that when the salesperson is at the door, they immediately must verbally identify themselves and disclose who they are and who they’re working for; they need ID badges; they also need training and standards that the industry must provide; and

plain language in contracts, in various languages. So we're looking at all of the avenues that we can correct to make sure that those people at the door are protected as consumers, and all members from all sides of the House agreed that consumer protection was the issue.

Accountability of retailers and the OEB random audits of the retailers: There is going to be even more expectation that they improve.

Regulations in writing: The consultations on the regulation-writing is taking place next year within the year, and we hope we can cover off an awful lot of the issues the member is concerned about.

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The Acting Speaker (Mr. Jim Wilson): Further questions and comments?

Mr. Paul Miller: I'd just like to commend the member from Danforth. He did his homework and obviously sits on the committee and had a lot of good input.

I must say that there are a lot of good things in the bill, and any kind of bill like this was long overdue. The consumer abuse that was going on out there was a real tragedy. But as my fellow member stated, it doesn't go quite far enough. Some of the things in the bill maybe have a negative impact for people who, like he stated, are staying at home at peak times with kids in the winter and summer, and will be utilizing their equipment during those hours. I don't think it will be beneficial to stay-at-home moms and the elderly. They will be at home all day long a lot of times, and some of them are house-bound. As you get older, some people require a little more heat. The system is not quite what it was and you require a little more warmth. I know that when my grandparents got older, they liked it a little warmer. It was almost like a steam bath when I went in their house sometimes. It was pretty warm. So I can imagine, or I don't want to imagine, what their hydro bill will be like or their utility costs, because I think it'll be—it's not as if our seniors don't have enough to deal with, with their fixed incomes, and I think this will be just an additional burden for them.

I don't think this has been thought out well enough. I think there are certain groups in our society that will benefit from it, and there are many groups that won't. I think that more input from the public and user groups would have been a good thing to do. So I can safely say that we will probably not be supporting it because it doesn't go far enough.

The Acting Speaker (Mr. Jim Wilson): Further questions and comments?

Seeing none, the honourable member for Toronto–Danforth has up to two minutes for his response.

Mr. Peter Tabuns: Thanks to the members for Brant and Hamilton East–Stoney Creek for listening and for commenting.

I appreciate that, in fact, consideration was given to shutting down the door-to-door sales by these retailers, but I'm sorry that you didn't come to the conclusion that you were going to do it. I think it would have been a very good step.

I want to say to you, Speaker, that this should be a very clear message to the energy retailers that they are starting to build a political consensus in this province that we are not happy with their operations and that if this comes to the House the next time, there is a very good chance that they will be dispatched, because there is only so much abuse that the public can take. They take a fair amount. It takes a lot to rile them. They have a lot on their minds, but having people come to their doors, aggressively harassing them for their utility bill, and in some cases—and we know it's true because companies have been charged and convicted—actually having signatures forged for contracts.

It's clear that the Ontario Energy Board was not happy with Universal Energy when they gave them a limited renewal, not five years or two years. It's clear that these sorts of practices are hugely problematic both for us as legislators but

for the citizens of this province who deserve far better than this. I hope, although I don't believe, that these measures substantially curtail those abuses.

When it comes to tenants, I don't believe that what's in this bill and the direction that's being taken are going to help the environment. That's a huge problem. Beyond that, it will hurt tenants, and for that reason alone we won't be supporting this bill.

The Acting Speaker (Mr. Jim Wilson): Further debate?

Mr. Robert Bailey: I'm pleased to rise and join the debate today on Bill 235, an act respecting energy retailers, An Act to enact the Energy Consumer Protection Act, 2010 and to amend other Acts.

Since I was first elected in 2007, I have received countless visits and phone calls from my constituents regarding energy retailers. Many of these retailers will be affected by this bill. In fact, my constituency office in Sarnia is often spending hours out of their day assisting the people of Sarnia–Lambton in regard to energy contracts they have signed at their home and at the door.

Recently, I wrote a column that appeared in one of our local weekly periodicals. It was titled, "Do You Know Who's Knocking at Your Door?" In it, I listed a number of issues that are concerns in Sarnia–Lambton. I won't go into them today. Many of the members in this House have heard me speak about them—I won't say ad nauseam but at length from time to time. I won't say what they are. They don't have anything to do with this energy bill.

"But, each week"—I'm quoting myself here—"without fail, my office in Sarnia receives your phone calls, letters and visits in regard to the occasional dodgy business practices and, frankly, unfair contracts which have been signed with door-to-door energy retailers.

"Many of us know these 'energy retailers' as their agents have knocked at our doors and asked to see our energy bills, almost always promising a better deal. I have heard many accounts from constituents who were under the false impressions that these agents arrived at their door representing these local energy utilities, such as Union Gas or Bluewater Power," which was not the case.

"These energy retailers promise 'flat-rate plans' and 'price protection' which will stabilize" my constituents' "energy rates for a specific period; however, they are not always such a good deal." In fact, it was often found after the fact when these constituents would present themselves at my office, that they had in fact been "locked into three-or-five year plans at rates which would force them to pay up to twice as much as they would have been charged by the standard local utility! Moreover, what they don't tell you is that if you to cancel the contract, you could be penalized with a cancellation fee of up to $1,500 or more."

Our office worked with a number of these constituents to reverse these contracts and remedy these situations. That's why I am pleased to rise today after many years of pushing this government to act. The government has finally agreed to introduce a bill which will significantly change how energy retailers do business in this province.

Though this bill is more than two years' overdue, it would prohibit many of the current unfair practices taking place. It would simplify the wording in energy contracts and set down firm rules regarding your ability to cancel contracts with retailers, and it's about time.

In fact, I'm confident when I say that I know there's not a single member of this House who hasn't had some contact with a consumer who has a horror story to tell about an energy retailer or representative of an energy retailer who has come to their door and, thereafter, constituents have come to their office. In fact, in many cases, they can absolutely prove that there was misrepresentation on the part of that agent, which makes it quite clear that it is about time that something was done about this. Whenever there is an environment in sales where people are going to the door and

are clearly misrepresenting themselves by saying things that they have no right to say or promising things that are completely untrue, it must be stopped.

However, at the same time, while I do support the reasons behind bringing forth this legislation to protect consumers, I'm a little concerned about the way it's being done. In fact, from what I recall, this bill seems awfully similar to a private member's bill brought forth by the member for—David Ramsay—

Mr. Jeff Leal: Great member.

Mr. Robert Bailey: Yeah, a great member—in November 2008. Timiskaming—the member for Timiskaming. I apologize.

So I ask, if this government believes protecting consumers is a good idea today, why wasn't it a good idea in November 2008? It's just a thought.

As my caucus colleague our energy critic previously stated, the exposé that was presented on CBC's Marketplace early in 2009 was obviously a wake-up call for this government and for anybody who didn't think there were problems going on in the energy retailing business. These problems needed to be addressed, and I believe that Mr. Ramsay's bill would have partially done that over a year ago, so I think they're a little late to the game.

My question is, why did the Minister of Energy—at that time, Minister Smitherman—take so long to react and bring in a piece of obviously good legislation that should have been done a long time ago?

Now, there's clearly a need for this protection, but there are definitely some issues with this legislation as well. The member for Timiskaming's bill would have prohibited retailers from entering into contracts with consumers other than those whose names appear on a bill. It would have required the retailer to provide a written copy of the contract and a reaffirmation letter with specific required information, including the price to be paid to the retailer versus the utility. It should also state clearly the terms of the contract and other relevant information.

The bill also made it quite clear that he had reached out not only to us but to members of the third party and to industry representatives like the Ontario Energy Association and discovered many ways to improve the bill. I am worried that in the drafting of this bill the same consultations have not been done. Moreover, I worry about the place that the Ontario Energy Board has been put in with this bill. If you want to ensure that there's protection—and I support the premise behind the legislation absolutely—why has the Ontario Energy Board been pushed to the back burner? We already have an Ontario Energy Board which could have been given more teeth for enforcement, but instead it seems that this bill largely avoids working with them.

What I can agree with is this: Will the energy consumer be better off at the end of the day when this legislation is passed than before? Absolutely. Absolutely, the energy consumer, the customer at the door, my constituent, your constituent is going to be better off. We've been encouraging the government to bring forth such legislation that would do just that, but at the same time, my concerns with the positioning of the Ontario Energy Board and the government's seeming lack of consultation with the major players involved in this industry still stand. Again I ask, if this government believes that protecting consumers is a good idea today, in April 2010, why wasn't it a good idea in November 2008?

By the time this bill is implemented, I would ask the members watching today and the audience to ask yourselves how many consumers and constituents of ours would have been protected over the last year and a half if the government had acted in the autumn of 2008 rather than sitting on their hands for over a year.

Thank you again for the opportunity to rise and speak in support of this bill.

The Acting Speaker (Mr. Jim Wilson): Questions and comments? Further debate?

Seeing none, Mr. Duguid has moved third reading of Bill 235. Is it the pleasure of the House that the motion carry? Carried.

Interjections.

The Acting Speaker (Mr. Jim Wilson): I didn't hear the no. I'm sorry.

Be it resolved that the bill do now pass and be entitled as in the motion.

Third reading agreed to.

The Acting Speaker (Mr. Jim Wilson): Orders of the day?

Hon. Gerry Phillips: No further business.

The Acting Speaker (Mr. Jim Wilson): There being no further business, this House stands in recess until 10:30, at which time we will have question period.

The House recessed from 1003 to 1030.

Hansard: May 18, 2010

ROYAL ASSENT /
SANCTION ROYALE

The Speaker (Hon. Steve Peters): I beg to inform the House that in the name of Her Majesty the Queen, His Honour the Administrator was pleased to assent to certain bills in his office.

The Deputy Clerk (Mr. Todd Decker): The following are the titles of bills to which His Honour did assent:

Bill 16, An Act to implement 2010 Budget measures and to enact or amend various Acts / Projet de loi 16, Loi mettant en oeuvre certaines mesures énoncées dans le Budget de 2010 et édictant ou modifiant diverses lois.

Bill 17, An Act to authorize the expenditure of certain amounts for the fiscal year ending March 31, 2010 / Projet de loi 17, Loi autorisant l'utilisation de certaines sommes pour l'exercice se terminant le 31 mars 2010.

Bill 19, An Act to proclaim Vimy Ridge Day / Projet de loi 19, Loi proclamant le Jour de la bataille de Vimy.

Bill 24, An Act to proclaim Franco-Ontarian Day / Projet de loi 24, Loi proclamant le Jour des Franco-Ontariens et des Franco-Ontariennes.

Bill 50, An Act to amend the Members' Integrity Act, 1994 / Projet de loi 50, Loi modifiant la Loi de 1994 sur l'intégrité des députés.

Bill 158, An Act to repeal and replace the statutes governing The Certified General Accountants Association of Ontario, the Certified Management Accountants of Ontario and The Institute of Chartered Accountants of Ontario / Projet de loi 158, Loi visant à abroger et à remplacer les lois régissant l'Association des comptables généraux accrédités de l'Ontario, les Comptables en management accrédités de l'Ontario et l'Institut des comptables agréés de l'Ontario.

Bill 231, An Act to amend the Election Act and the Election Finances Act / Projet de loi 231, Loi modifiant la Loi électorale et la Loi sur le financement des élections.

Bill 235, An Act to enact the Energy Consumer Protection Act, 2010 and to amend other Acts / Projet de loi 235, Loi édictant la Loi de 2010 sur la protection des consommateurs d'énergie et modifiant d'autres lois.

Bill 236, An Act to amend the Pension Benefits Act / Projet de loi 236, Loi modifiant la Loi sur les régimes de retraite.

Bill 242, An Act to amend the Education Act and certain other Acts in relation to early childhood educators, junior kindergarten and kindergarten, extended day programs and certain other matters / Projet de loi 242, Loi modifiant la Loi sur l'éducation et d'autres lois en ce qui concerne les éducateurs de la petite enfance, la maternelle et le jardin d'enfants, les programmes de jour prolongé et d'autres questions.