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)

COMPENDIUM FOR ARGUMENT

GOWLING WLG (CANADA) LLP
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto, Ontario
M5X 1G5

Ian A. Mondrow (32382D)
Tel: 416-369-4670
ian.mondrow@gowlingwlg.com

INDEX

TAB 1

Transcript Volume 2, Excerpts

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0022** **EB-2017-0223**	**Active Energy Inc.**

VOLUME:	**2**	
DATE:	**December 8, 2017**	
BEFORE:	**Christine Long**	**Presiding Member**
	Cathy Spoel	**Member**
	Michael Janigan	**Member**

the type of customers who need ECPA protections, or are these the type of sophisticated business consumers that are savvy enough to operate without ECPA protections."

Mr. Stedman, can you comment on Mr. Safayeni's characterization?

MR. STEDMAN: Yeah, I do not agree that customers that are above 150,000 kilowatt-hours need ECPA protection.

Let me start with farmers. When you are dealing with customers that are those farmers that are below 150,000 kilowatt-hours, you are talking about farms that basically have one or two buildings, they may have a few acres, a couple of cows, horses, or what have you. That's what you are talking about when you are dealing with that size of low-volume consumer.

When you are dealing with customers that are larger, above 150,000 to anywhere to 600 and 700,000 kilowatt-hours in the instance of farms, you are talking about operations. You are talking about farms that have -- tobacco, for example; that could be one to two million pounds of tobacco. You're talking about livestock, like chickens, 100, 150,000 chickens that are being produced, you have a lot of acreage, you also obviously need a lot of employees to help you with the operations that are there.

These customers, these farms, are very sophisticated people. They have to buy -- procure a lot of different products for their animals and for their farms. They obviously have to enter into a lot of negotiations in

regards to that procurement and negotiations in regards to selling their products. So these are very sophisticated buyers out there.

On the other three points here, mechanics, you are not talking about a, you know, a two-bay store that you see going down the street; you're talking about multiple locations. The same with bowling alleys. I don't know why there is a reference to Chinese restaurants, but we do have a lot of restaurants.

You are talking about not just one building, one restaurant, one bowling alley, you are talking about multiple locations, two, seven, ten type of locations. You are talking about these business owners that are very sophisticated. Again, they are buying products, they are buying food for their products. They have to employ a lot of employees to wait tables and cook and so forth. And they are business-savvy, because they have expanded. They have moved -- we are not talking about one restaurant or one bowling alley. Again, we are talking numerous establishments, so that is why they are much more business-savvy when you are dealing with them.

When you deal with sophisticated customers like this, they have a certain demand and expectation from you. They expect to be consulted. So they don't want a door-knocker. They don't want somebody like that. They want somebody to come in, experience, take them through what the business is doing.

Our consultants that we deal with have to be working

at that level. They are not trained to do just sales, they are trained to understand the market and how the market is traded in the business.

So they go in and do consulting with these people, they take them through their portfolio, they work through their budget, they work through their risk management programs that they may or may not have.

A lot of these deals are done not in one meeting. There could be numerous meetings. It could take months to close a deal.

There's also the -- when you are dealing with these people, they are also looking at getting a wholesale price. They don't go on to somewhere like the Energy Shop site and sign up at 3.6 cents a kilowatt hour. They are going to come to you and ask you to get a wholesale price that are being offered out there in the marketplace to people like TD Banks and that type of -- they know the economics of scale of what they have, and they expect that size, that pricing.

They also expect to get products out there that basically you can't get under a normal low-volume consumer. They want products that are off-peak, on-peak type products. They want to have the ability to sign a portion of their portfolio.

So they are very sophisticated, and they want to be able to sign something like that with us. They also want to be able to negotiate terms and conditions. They go into the details about renewals and credit and so forth, and

they want to have the ability to do that.

So these are very sophisticated people that we deal with above 150,000 kilowatt-hours.

MR. MONDROW: Thank you, Mr. Stedman.

Mr. Waddick, I'd like you to look a little further down, the same page of the transcript, and my notes say, starting at line 23 -- this is still Mr. Safayeni's opening statement. And I want to read in a couple lines and ask for your comments.

Mr. Safayeni says:

> "Those kind of sophisticated corporate customers with dozens or hundreds of locations are a fraction of the types of customers that we see in the contracts in this case. They are the exception, they are not the rule."

Can you comment on that, please?

MR. WADDICK: Yeah, I would like just to make a couple of comments on that. First of all, I guess if you just look at the math of the statement, the 101 customers that we are talking about today have about an average of ten utility accounts per customer. But I would like to address a couple of the implications that are being made in that statement. One of them is certainly the implication that if a customer does not have dozens or hundreds of accounts that they are somehow not sophisticated.

As Mr. Stedman has just talked about, that's not the case. They are sophisticated purchasers. We're dealing with the senior people there, negotiating these contracts

TAB 2

Schmidt v. Ontario

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 3

Canada Information Commissioner v. Canada Minister of National Defence

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

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.

TAB 4

Energy Consumer Protection Act, Excerpt

Français

Energy Consumer Protection Act, 2010

S.O. 2010, CHAPTER 8

Consolidation Period: From June 6, 2011 to the e-Laws currency date.

Last amendment: 2011, c. 9, Sched. 27, s. 24.

Skip Table of Contents

CONTENTS

PART I
GENERAL

Definitions and powers of Minister

Definitions

1. (1) In this Act,

"Board" means the Ontario Energy Board; ("Commission")

"distribution system" has the same meaning as in section 3 of the *Ontario Energy Board Act, 1998*; ("réseau de distribution")

"distributor" has the same meaning as in section 3 of the *Ontario Energy Board Act, 1998*; ("distributeur")

"gas" has the same meaning as in section 3 of the *Ontario Energy Board Act, 1998*; ("gaz")

"gas distributor" has the same meaning as in section 3 of the *Ontario Energy Board Act, 1998*, and "distribute" and "distribution" when used in relation to gas have corresponding meanings; ("distributeur de gaz", "distribuer", "distribution")

"Minister" means the Minister of Energy or such other member of the Executive Council as may be assigned the administration of this Act under the *Executive Council Act*; ("ministre")

"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; ("personne")

"prescribed" means prescribed by regulation made under this Act; ("prescrit")

"regulations" means the regulations made under this Act. ("règlements") 2010, c. 8, s. 1 (1); 2011, c. 9, Sched. 27, s. 24 (1).

Powers of Minister

(2) The Minister may,

(a) disseminate information for the purpose of educating and advising energy consumers; and

(b) provide information to energy consumers about the use of alternate dispute resolution techniques as a means of resolving disputes arising out of contracts for the supply of energy and other related transactions. 2010, c. 8, s. 1 (2).

Delegation of powers

(3) The Minister may delegate in writing any of his or her powers under subsection (2) to the Deputy Minister of Energy or to any persons employed in a specified capacity in the Ministry. 2010, c. 8, s. 1 (3); 2011, c. 9, Sched. 27, s. 24 (2).

Same

(4) The Deputy Minister of Energy may in writing delegate any of the powers delegated to the Deputy Minister by the Minister under subsection (3) to any person employed in a specified capacity in the Ministry. 2010, c. 8, s. 1 (4); 2011, c. 9, Sched. 27, s. 24 (3).

Powers and duties of Board re energy consumers

(5) Nothing in this Act abrogates or derogates from the powers and duties of the Ontario Energy Board as they apply in respect of energy consumers as provided under the *Ontario Energy Board Act, 1998*. 2010, c. 8, s. 1 (5).

Definition, energy consumer

(6) For the purposes of subsections (2) and (5),

"energy consumer" means a consumer as defined in section 2 and a consumer as defined in section 31. 2010, c. 8, s. 1 (6).

PART II
ELECTRICITY RETAILING AND GAS MARKETING

Definitions

2. In this Part,

"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; ("consommateur")

"contract" means an agreement between a consumer and a retailer for the provision of electricity or an agreement between a consumer and a gas marketer for the provision of gas; ("contrat")

"electronic signature" has the same meaning as in subsection 1 (1) of the *Electronic Commerce Act, 2000*; ("signature électronique")

"gas marketer" means a person who,

(a) sells or offers to sell gas to a consumer,

(b) acts as the agent or broker for a seller of gas to a consumer, or

(c) acts or offers to act as the agent or broker of a consumer in the purchase of gas,

and "gas marketing" has a corresponding meaning; ("agent de commercialisation de gaz", "commercialisation de gaz")

"retail", with respect to electricity, means,

(a) to sell or offer to sell electricity to a consumer,

(b) to act as agent or broker for a retailer with respect to the sale or offering for sale of electricity, or

(c) to act or offer to act as an agent or broker for a consumer with respect to the sale or offering for sale of electricity,

and "retailing" has a corresponding meaning; ("vendre au détail", "vente au détail")

"retailer" means a person who retails electricity, but does not include a distributor, a suite meter provider or such other persons as may be prescribed; ("détaillant")

"salesperson" means,

(a) in respect of gas marketing, a person who, for the purpose of effecting sales of gas or entering into agency agreements with consumers, conducts gas marketing on behalf of a gas marketer or makes one or more representations to one or more consumers on behalf of a gas marketer, whether as an employee of the gas marketer or not, and

(b) in respect of the retailing of electricity, a person who, for the purpose of effecting sales of electricity or entering into agency agreements with consumers, conducts retailing of electricity on behalf of a retailer or makes one or more representations to one or more consumers on behalf of a retailer, whether as an employee of the retailer or not; ("vendeur")

"supplier" means a retailer or gas marketer; ("fournisseur")

"text-based" means text capable of being read by an individual and in such form, format or medium as may be prescribed, but does not include any form, format or medium that may be prescribed as excluded. ("textuel") 2010, c. 8, s. 2.

Application

3. (1) This Part applies to gas marketing and retailing of electricity to consumers. 2010, c. 8, s. 3 (1).

Contracts, other agreement or waivers to contrary

(2) This Part applies despite any contract, other agreement or waiver to the contrary. 2010, c. 8, s. 3 (2).

Limitation on effect of term requiring arbitration

(3) Without limiting the generality of subsection (2), any term or acknowledgment in a contract, other agreement or waiver that requires or has the effect of requiring that disputes arising out of the contract, agreement or waiver be submitted to arbitration is invalid in so far as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Part or otherwise available in law. 2010, c. 8, s. 3 (3).

Procedure to resolve disputes

(4) Despite subsections (2) and (3), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law. 2010, c. 8, s. 3 (4).

Settlements or decisions

(5) A settlement or decision that results from the procedure agreed to under subsection (4) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning a contract or agreement to which this Part does not apply. 2010, c. 8, s. 3 (5).

Non-application of *Arbitration Act, 1991*

(6) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (3) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration. 2010, c. 8, s. 3 (6).

Class proceedings

4. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a contract, other agreement or

TAB 5

Maynes v. British Columbia

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 6

Enforcement Team Opening Statement, Excerpt

I. Legislative Text is Ambiguous

25. The plain text of the Consumer Protection Regime does not address how to calculate the amount of electricity a person uses, for the purposes of assessing whether that person has crossed the Threshold.

26. Put differently, the text of the Consumer Protection Regime, taken alone, can be consistent with either the Aggregation Approach or the Location Approach. Both interpretations require adding in some clarifying words to the definition of "consumer" in section 2 of the ECPA (and the equivalent definition in section 1.2 of the Code). The hypothetical additional words are represented here in italics:

- "…a person who uses, for the person's own consumption ***at a single location***, electricity that the person did not generate…"; or
- "…a person who uses, for the person's own consumption ***aggregated across all locations***, electricity that the person did not generate…"

27. Absent such additional clarifying words, the definition in section 2 is equally capable of supporting either interpretation, and further analysis of the context and purpose is required to resolve the ambiguity.

28. But even if the Panel were to conclude that the text of the Consumer Protection Regime unambiguously favours the Aggregation Approach (which the OEB Enforcement Team does not accept), that is not the end of the matter. Again, the modern principle reminds us that context and purpose remain relevant considerations "regardless of whether the legislation is considered ambiguous."[13]

[13] Sullivan on Statutes (6th ed.) at pp. 7-8 (emphasis added), Brief, **Tab 4**.

TAB 7

R. v. McIntosh

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

Table of Authorities

Cases considered:

Per Lamer C.J.C. (Sopinka, Cory, Iacobucci and Major JJ. concurring)

Altrincham Electric Supply Ltd. v. Sale Urban District Council (1936), 154 L.T. 379 (H.L.) — *considered*

Estabrooks Pontiac Buick Ltd., Re (1982), 44 N.B.R. (2d) 201, 116 A.P.R. 201, 144 D.L.R. (3d) 21, 7 C.R.R. 46 (C.A.) — *considered*

Marcotte v. Canada (Deputy Attorney General), [1976] 1 S.C.R. 108, 19 C.C.C. (2d) 257, 3 N.R. 613, 51 D.L.R. (3d) 259 — *applied*

R. v. Baxter (1975), 33 C.R.N.S. 22, 27 C.C.C. (2d) 96 (Ont. C.A.) — *referred to*

R. v. Bolyantu (1975), 29 C.C.C. (2d) 174 (Ont. C.A.) — *referred to*

R. v. Chamberland (1988), 65 Alta. L.R. (2d) 175, 96 A.R. 1 (C.A.) — *referred to*

R. v. Merson (1983), 4 C.C.C. (3d) 251 (B.C. C.A.) — *referred to*

R. v. Nelson (1992), 13 C.R. (4th) 359, 71 C.C.C. (3d) 449, 8 O.R. (3d) 364, 54 O.A.C. 14 (C.A.) — *applied*

R. v. Stubbs (1988), 28 O.A.C. 14 (C.A.) — *applied*

Per McLachlin J. (dissenting) (La Forest, L'Heureux-Dubé and Gonthier JJ. concurring)

Marcotte v. Canada (Deputy Attorney General), [1976] 1 S.C.R. 108, 19 C.C.C. (2d) 257, 3 N.R. 613, 51 D.L.R. (3d) 259 — *considered*

R. v. Alkadri (1986), 70 A.R. 260, 29 C.C.C. (3d) 467 (C.A.) [leave to appeal to S.C.C. refused (1986), 29 C.C.C. (3d) 467n, 74 A.R. 320 (note), 72 N.R. 367 (note)] — *considered*

R. v. Bolyantu (1975), 29 C.C.C. (2d) 174 (Ont. C.A.) — *considered*

R. v. Deruelle, [1992] 2 S.C.R. 663, 15 C.R. (4th) 215, 38 M.V.R. (2d) 1, 139 N.R. 56, 75 C.C.C. (3d) 118, 94 D.L.R. (4th) 638, 114 N.S.R. (2d) 1, 313 A.P.R. 1 — *considered*

R. v. Merson (1983), 4 C.C.C. (3d) 251 (B.C. C.A.) — *considered*

R. v. Nelson (1992), 13 C.R. (4th) 359, 71 C.C.C. (3d) 449, 8 O.R. (3d) 364, 54 O.A.C. 14 (C.A.) — *referred to*

R. v. Squire (1975), 31 C.R.N.S. 314, 10 O.R. (2d) 40, 26 C.C.C. (2d) 219 (C.A.) [reversed [1977] 2 S.C.R. 13, 10 N.R. 25, 29 C.C.C. (2d) 497, 69 D.L.R. (3d) 312] — *considered*

R. v. Stubbs (1988), 28 O.A.C. 14 (C.A.) — *referred to*

R. v. Wigglesworth, [1987] 2 S.C.R. 541, 60 C.R. (3d) 193, [1988] 1 W.W.R. 193, 61 Sask. R. 105, 81 N.R. 161, 29 Admin. L.R. 294, 24 O.A.C. 321, 45 D.L.R. (4th) 235, 32 C.R.R. 219, 37 C.C.C. (3d) 385*considered*

R. v. Z. (D.A.), [1992] 2 S.C.R. 1025, 16 C.R. (4th) 133, 5 Alta. L.R. (3d) 1, 140 N.R. 327, 76 C.C.C. (3d) 97, 131 A.R. 1, 25 W.A.C. 1 — *considered*

Stock v. Frank Jones (Tipton) Ltd., [1978] 1 W.L.R. 231, [1978] 1 All E.R. 948 (H.L.) — *considered*

Sussex Peerage Case (1844), 11 Cl. & Fin. 85, 8 E.R. 1034 (H.L.) — *considered*

Statutes considered:

Crimes Act, 1961, (New Zealand), S.N.Z. 1961, No. 43 [re-en. S.N.Z. 1980, No.63] —

s. 48(2) [re-en. S.N.Z. 1980, No. 63, s. 2]

Criminal Code, 1892, The, S.C. 1892, c. 29 —

s. 45

s. 46

Criminal Code, R.S.C. 1906, c. 146 —

s. 53(1)

s. 53(2)

Criminal Code, R.S.C. 1927, c. 36 —

s. 53(1)

Criminal Code, S.C. 1953-54, c. 51 —

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 8

Wilson v. British Columbia

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,

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

TAB 9

Active Opening Statement, Excerpts

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

[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,

[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.

TAB 10

Hansard Excerpts

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.

TAB 11

Transcript Volume 2, Excerpts

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0022** **EB-2017-0223**	**Active Energy Inc.**

VOLUME:	**2**	
DATE:	**December 8, 2017**	
BEFORE:	**Christine Long**	**Presiding Member**
	Cathy Spoel	**Member**
	Michael Janigan	**Member**

for electricity in excess of 150,000 kilowatt-hours.

The other implication that's being made in that statement is that customers that do have dozens or hundreds of utility accounts are somehow a very small fraction of the customer base that we are talking about, and that's absolutely incorrect. You see these customers everywhere. They are a large part of this segment of customers that would be considered ECPA customers under the enforcement team's recommendation. These are the banks, as -- we have talked about the banks a lot, but it goes way beyond the banks. It's all the major retailers: the Bells, the Rogers, the Telus, the Shoppers Drug Marts; the property management companies, all of them, Brookfield, Cadillac Fairview, RioCan, the owner of this building; government organizations like the Beer Stores, the LCBOs. All these would be captured as ECPA customers under this interpretation.

The reason you don't see a lot more of those customers on this list of 101 is because we are competing against larger suppliers for that business, we are competing against the Bruce Powers of the world. It's very difficult for a company like Active to capture those larger-volume customers that I've just referred to when you are competing with someone like Bruce Power, and that's the only reason you don't see more of those customers on this list of 101.

MR. MONDROW: Mr. Waddick, I spoke with Ms. Armstrong about Active's customer, initials L.S.C., which is contract number 2 to the second notice of intention. I would like

tab 9.

MR. MONDROW: Yes.

MR. STEDMAN: I know I am picking an example here with many locations, but that's what we have. We have a lot of situations with a many locations. A verification call for this customer -- and we are talking about a customer that basically was the VP of controller who signed on behalf of 259 locations -- based on the verification script today, that would take anywhere from 25 to 27 hours to complete that call. I can't imagine doing that with a VP or controller of a company.

Even if the draft verification script was adopted, although it's been in draft for six years, almost six years, that would even still take 4 to 5 hours to complete that call. So that's a big hindrance to not only for the suppliers, but also for the customer themselves.

On a second note, products. When you deal with products for these customers, they want a variety. Like I described earlier, they want options to just take their peak loads, to just take a certain load that they have. They want flexibility, they want options, and terms and conditions, too; they want options around that.

Under ECPA rules, you can't do that. You can't compare against a utility's price for a peak, so there's no price comparisons and so forth.

But the biggest one that's a big hindrance for the marketplace and suppliers like ourselves, and Bruce Power and Direct Energy is really the cancellation rates. As you

know, the cancellation rates right now allow for a customer to basically cancel their contract after their second bill. That could be anywhere from 90 to 180 days where that customer can cancel their contract.

When you are talking about -- I know I am using big examples like TD, but when you deal with people like that, the ability for them to get out of their contract a day later is difficult. What it means is in order for somebody like ourselves or Bruce Power to be able to supply that, they'd have to add a wholesale price -- a premium price to it.

So because you are covering off risk, a supplier like ourselves has to go into the marketplace and hedge this. So you go out in the marketplace, and as you know, trading could swing within an hour, let alone minutes. Now what we are talking about is months -- three, six, seven months where they can still get out of a contract.

So what that translates to is higher prices for them, so they are not really getting wholesale prices. But it also translates to a supplier like ourselves not supplying them. So we wouldn't offer that type of product for these larger users that are above 150,000 kilowatt-hours.

MR. MONDROW: Thank you. Mr. Stedman, in that answer you referred to a draft verification script. I am not sure if you have there -- I just want to identify that. There is a document called the Ontario Energy Board enforcement team brief of witness statements. Do you have a copy of that up there?

TAB 12

Sullivan on the Construction of Statutes

Sullivan on the Construction of Statutes

Fifth Edition

by

Ruth Sullivan

Professor of Law
University of Ottawa

LexisNexis®

Sullivan on the Construction of Statutes
Fifth Edition by Ruth Sullivan

July 2008

Members of the LexisNexis Group worldwide

Canada	LexisNexis Canada Inc, 123 Commerce Valley Drive East, MARKHAM, Ontario
Australia	Butterworths, a Division of Reed International Books Australia Pty Ltd, CHATSWOOD, New South Wales
Austria	ARD Betriebsdienst and Verlag Orac, VIENNA
Czech Republic	Orac sro, PRAGUE
France	Éditions du Juris-Classeur SA, PARIS
Hong Kong	Butterworths Asia (Hong Kong), HONG KONG
Hungary	Hvg Orac, BUDAPEST
India	Butterworths India, NEW DELHI
Ireland	Butterworths (Ireland) Ltd, DUBLIN
Italy	Giuffré, MILAN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	Butterworths of New Zealand, WELLINGTON
Poland	Wydawnictwa Prawnicze PWN, WARSAW
Singapore	Butterworths Asia, SINGAPORE
South Africa	Butterworth Publishers (Pty) Ltd, DURBAN
Switzerland	Stämpfli Verlag AG, BERNE
United Kingdom	Butterworths Tolley, a Division of Reed Elsevier (UK), LONDON, WC2A
USA	LexisNexis, DAYTON, Ohio

Library and Archives Canada Cataloguing in Publication

Sullivan, Ruth, 1946-
Sullivan on the construction of statutes / Ruth Sullivan. — 5th ed.

Includes index.
Previous ed. published under title: Sullivan and Driedger on the construction of statues.
ISBN 978-0-433-45183-9

1. Law—Canada—Interpretation and construction. I. Title.

KE265.S84S95 2008 349.71 C2008-903901-7
KF425.S95 2008

Printed and bound in Canada.

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

---

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;

---

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"

---

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

---

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.

---

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.

---

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 13

Active Opening Statement, Excerpts

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 <u>at a particular location</u>.*

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

[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

[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.

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,

[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.

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

TAB 14

Transcript Excerpts

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0022** **EB-2017-0223**	**Active Energy Inc.**

VOLUME:	**1**	**REDACTED PUBLIC**
DATE:	**November 9, 2017**	
BEFORE:	**Christine Long**	**Presiding Member**
	Cathy Spoel	**Member**
	Michael Janigan	**Member**

2017-0223 is the EB number for the second notice, and it's contract number 2 under that EB number.

MS. ARMSTRONG: EB --

MR. MONDROW: 2017-0223. So in your ASF -- well, it's more towards the back of the contract tabs, but I will give you a minute to find that. So the numbers go up to 84 or 85 and then they start again. It's the second set of numbers.

MS. ARMSTRONG: The second?

MR. MONDROW: Yes, so contract number 2.

MS. ARMSTRONG: Okay. Yes.

MR. MONDROW: So L.S. is on the list, obviously, because the contract is in the package here.

MS. ARMSTRONG: Yes.

MR. MONDROW: And the other five customers are not on the list.

MS. ARMSTRONG: That's right.

MR. MONDROW: And the only difference we have just been through is that L.S. has more than one location and the other customers are condominiums with multiple units, multiple bills, but all at one municipal address. That's the only difference.

MS. ARMSTRONG: I believe that's correct. Oh, the contract is upside-down.

I am sorry, can you repeat your question?

MR. MONDROW: No, you answered the question. I think you agreed that the customer whose contract we are looking at is on the list, is in the group of 101 in respect of

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0022** **EB-2017-0223**	**Active Energy Inc.**

VOLUME:	**2**	
DATE:	**December 8, 2017**	
BEFORE:	**Christine Long**	**Presiding Member**
	Cathy Spoel	**Member**
	Michael Janigan	**Member**

to ask you to turn up that contract, please.

And Madam Chair, this is in Exhibit K1.2, which was marked yesterday. This is the ASF. And, again, this is contract number 2, but to the second notice of intention, so it's closer to the back of the batch.

And just let me know when you have that, please, Mr. Waddick.

MR. WADDICK: I have it.

MR. MONDROW: Thank you. So this was an example that, again, I discussed with Ms. Armstrong, of one of a number of condominiums where this customer was included on the list of 101 and the other condominiums that Board Staff looked at were not, and Ms. Armstrong and I discussed a little bit why that was.

I just wonder if you can describe, please, the physical locations covered by the account schedules to this contract.

MR. WADDICK: Sure. They are actually kitty-corner across an intersection from each other.

MR. MONDROW: Thank you. And when I talked to Ms. Armstrong on the first day I had asked her about the relevance of the OEB's "Consumers Come First" report which she had referred to in her further witness statement, and for some reason she started to talk about one particular contract of the 101, and that would be contract number 6, and this time from the first notice of intention, and I will ask you to turn that one up, please. And when you have that, if you could turn to schedule A of that

TAB 15

Transcript Excerpt and Energy Shop Letter

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0022** **EB-2017-0223**	**Active Energy Inc.**

VOLUME:	**1**	**REDACTED PUBLIC**
DATE:	**November 9, 2017**	
BEFORE:	**Christine Long**	**Presiding Member**
	Cathy Spoel	**Member**
	Michael Janigan	**Member**

MS. ARMSTRONG: No.

MR. MONDROW: Okay. And what about Money Mart? Are you familiar with that business, Money Mart?

MS. ARMSTRONG: I cannot speak to the business structure of Money Mart; I don't know.

MR. MONDROW: Sorry, you can't speak to the business structure of Money Mart?

MS. ARMSTRONG: Same with the Running Room. I don’t know if they are franchised, or if it’s one business. I wouldn’t know.

MR. MONDROW: Okay, let’s look at — and I am not suggesting the customers are in the materials here, but these are customer types I am talking about.

Let’s look at look at RBC Royal Bank. You are familiar with RBC Royal Bank?

MS. ARMSTRONG: Yes.

MR. MONDROW: Do you think the ECPA should apply to RBC Royal Bank as a matter of consumer protection?

MS. ARMSTRONG: Again, I think if you have to interpret it, you to interpret it along a certain line.

MR. MONDROW: I have heard that answer, but I have asked you a different question. Do you think this they are vulnerable customers? RBC Royal Bank, is that a vulnerable customer?

I understand you think that some of these customers will be caught because of the way this has to be applied. I am just asking whether you think that customer is in need of ECPA protection, RBC Royal Bank?

MS. ARMSTRONG: I can't speak to that.

MR. MONDROW: Really? You can't speak to -- you can't answer my question as to whether RBC Royal Bank, one of the biggest banks in the country, is a vulnerable energy consumer?

I understand your position on how the apply the ECPA. But you're honestly suggesting that they are potentially a vulnerable energy consumer?

MS. ARMSTRONG: I understand you have more sophisticated customers on this less and less sophisticated customers on this list. Again, if you have to go in and apply a standard, you have to apply the guidance the way we have it. I don't think you can pick and choose.

MR. MONDROW: I understand, and you're apology for that would be overstating it. But your concession and acceptance is that by applying the standard the way the enforcement team advocates, some big sophisticated businesses will be captured, right?

MS. ARMSTRONG: That's correct.

MR. MONDROW: And that's true with any standard you apply. Sometimes it will capture who it's intended to, and sometimes it won't.

MS. ARMSTRONG: Yes.

MR. MONDROW: Whether that's your standard or Active's standard.

MS. ARMSTRONG: Right.

MR. MONDROW: And your standard would capture RBC Royal Bank?

MS. ARMSTRONG: If that's on the list, yes.

MR. MONDROW: But it's not your position that RBC Royal Bank is in need of that protection. It would just be caught by the standard.

MS. ARMSTRONG: That's right, and I think there would be a very small percentage of the total that would be captured by our approach. On the other side, if the Board were to adopt your approach, I think more vulnerable consumers or unsophisticated consumers would be left out.

MR. SAFAYENI: Sorry, I am going to interrupt here. We keep hearing about RBC Royal Bank. If there is a statement about the consumption of RBC Royal Bank across different locations in the record, I am not aware of it. I don’t think it's fair to ask this witness in the air whether it would apply or not. We don't know what the consumption at different locations is.

I get the point my friend is trying to make, but the specific example --

MS. LONG: I get your point, Mr. Safayeni, and I get Mr. Mondrow’s point. I think we can move on from RBC; I think the point has been made.

MR. MONDROW: Thank you, Madam Chair, I appreciate that.

You'd agree with me, Ms. Armstrong, that the Consumers Come First report didn't survey and didn't consider those sorts of larger customers that we have been talking about, the millions of kilowatt-hours multi-branches common corporate owner type customer. That's not what the -- I

energyshop®

The Registered Trademark of M3 & W INC.

October 24, 2017

Michael Stedman, President & COO
ACTIVE ENERGY INC.
390 Brant Street, Suite 402
Burlington Ontario, Canada L7R 4J4

Dear Michael:

Re: Active Energy Inc. OEB Compliance Proceeding: Multi-location Customers.

This letter is provided to confirm our recent conversation, during which I indicated to you that:

- I have been personally active in the energy business in Ontario for 25 years.
- I am aware of many Ontario energy brokers who work with, and Ontario energy suppliers who enter into supply arrangements with, multi-location customers, whose operations include one or more locations that consume below the Ontario energy consumer protection legislation consumption threshold. One large scale example of this that I've witnessed was an electricity supply deal in 2014 for one of the big Canadian banks with 650 small volume locations plus a few larger locations in Ontario across 80 LDC's.
- These types of customers are generally considered by those in the sector to be non-low volume customers when the aggregate consumption of the customer across all of their locations exceeds the legislated low-volume thresholds.
- It would be impractical, and unnecessary given the level of sophistication of these large multi-location business customers, to apply the detailed legislated energy consumer protections required for true low-volume (residential and small business) customers.

Thanks for bringing me up to speed on the status of the OEB compliance proceeding instituted against you, and sharing Active's position on interpretation and application of the low-volume customer thresholds. I agree with the logic and practicality of that position. This is a matter of significant concern to all of us in the industry.

Sincerely,

Gregg Scott
President
M3 & W INC operating as Energyshop

TAB 16

Richard v. Time Inc.

2012 SCC 8
Supreme Court of Canada

Richard v. Time Inc.

2012 CarswellQue 1218, 2012 CarswellQue 1219, 2012 SCC 8, [2012] 1 S.C.R. 265, [2012] S.C.J. No. 8, 211 A.C.W.S. (3d) 321, 342 D.L.R. (4th) 1, 427 N.R. 203, J.E. 2012-469

Jean-Marc Richard, Appellant and Time Inc. and Time Consumer Marketing Inc., Respondents

Abella J., Charron J., Cromwell J., Deschamps J., Fish J., LeBel J., McLachlin C.J.C.

Heard: January 18, 2011
Judgment: February 28, 2012
Docket: 33554

Proceedings: reversed in part *Richard v. Time Inc.* (2009), 2009 QCCA 2378, 2009 CarswellQue 12570, [2010] R.J.Q. 3 (C.A. Que.); reversed *Richard v. Time Inc.* (2007), 2007 CarswellQue 6654, 2007 QCCS 3390, 2007 QCCS 7870, [2007] R.J.Q. 2008, Cohen J.C.S. (C.S. Que.)

Counsel: Hubert Sibre, Annie Claude Beauchemin, Jean-Yves Fortin, for Appellant
Pascale Cloutier, Fadi Amine, for Respondents

Subject: Corporate and Commercial; Civil Practice and Procedure; Contracts

Headnote

Commercial law --- Trade and commerce — Consumer protection — Misleading advertising — Untrue statements — Miscellaneous issues

Consumer received letter suggesting that he had won cash prize of US$833,337, provided he returned winning entry in time — Mailing also contained reply coupon and return envelope on which official rules of sweepstakes appeared in small print — Reply coupon also offered consumer possibility of subscribing to magazine — Convinced that he was about to receive promised amount, consumer immediately returned reply coupon — However, consumer never received expected cheque, as document mailed to him was merely invitation to participate in sweepstakes — Consumer brought motion seeking compensatory and punitive damages — Given general impression conveyed by document, trial judge found that document contravened Consumer Protection Act — Trial judge stated that commercial representation which could mislead credulous and inexperienced consumer was prohibited under Act — She ordered publishers to pay $1,000 to consumer in moral damages and, because publishers had sent similar letters to large number of consumers in Quebec and in English only, ordered publishers to pay additional $100,000 in punitive damages — Publishers appealed — Court of Appeal found that there were no false or misleading representations, as any consumer "with an average level of intelligence, scepticism and curiosity" would not have been misled by document — Court of Appeal allowed appeal and set aside award of compensatory and punitive damages — Consumer appealed — Appeal allowed in part — Court should describe general impression that representation was likely to convey and determine whether that general impression was true to reality — General impression test should be applied from perspective of credulous and inexperienced consumer, not consumer with average level of intelligence, scepticism and curiosity — Here, after reading document, general impression was that consumer had won grand prize and had only to return reply coupon to initiate claim process — Thus, trial judge did not err in finding that document was misleading — Not only did document contain misleading representations but it also failed to clearly indicate contest rules — Therefore, conduct of publishers constituted civil fault that triggered their extracontractual liability.

Commercial law --- Trade and commerce — Consumer protection — Misleading advertising — Untrue statements — Penalties

Consumer received letter suggesting that he had won cash prize of US$833,337, provided he returned winning entry in time — Mailing also contained reply coupon and return envelope on which official rules of sweepstakes appeared in small print — Reply coupon also offered consumer possibility of subscribing to magazine — Convinced that he was about to receive promised amount, consumer immediately returned reply coupon — However, consumer never received expected cheque, as document mailed to him was merely invitation to participate in sweepstakes — Consumer brought motion seeking compensatory and punitive damages — Given general impression conveyed by document, trial judge found that document contravened Consumer Protection Act — Trial judge stated that commercial representation which could mislead credulous and inexperienced consumer was prohibited under Act — She ordered publishers to pay $1,000 to consumer in moral damages and, because publishers had sent similar letters to large number of consumers in Quebec and in English only, ordered publishers to pay additional $100,000 in punitive damages — Publishers appealed — Court of Appeal found that there were no false or misleading representations, as any consumer "with an average level of intelligence, scepticism and curiosity" would not have been misled by document — Court of Appeal allowed appeal and set aside award of compensatory and punitive damages — Consumer appealed — Appeal allowed in part — Section 272 of Act provides that civil sanctions are available if merchant or manufacturer fails to fulfil obligation imposed on him by Act — In Quebec civil law, failure to fulfil obligation not to do something can trigger civil liability in same way as failure to fulfil obligation to do something — Therefore, civil sanction for prohibited practices was available under Act and consumer had choice to claim contractual remedies, compensatory damages and punitive damages or to claim just one of those remedies.

Commercial law --- Trade and commerce — Consumer protection — Misleading advertising — Untrue statements — Practice and procedure

Consumer received letter suggesting that he had won cash prize of US$833,337, provided he returned winning entry in time — Mailing also contained reply coupon and return envelope on which official rules of sweepstakes appeared in small print — Reply coupon also offered consumer possibility of subscribing to magazine — Convinced that he was about to receive promised amount, consumer immediately returned reply coupon — However, consumer never received expected cheque, as document mailed to him was merely invitation to participate in sweepstakes — Consumer brought motion seeking compensatory and punitive damages — Given general impression conveyed by document, trial judge found that document contravened Consumer Protection Act — Trial judge stated that commercial representation which could mislead credulous and inexperienced consumer was prohibited under Act — She ordered publishers to pay $1,000 to consumer in moral damages and, because publishers had sent similar letters to large number of consumers in Quebec and in English only, ordered publishers to pay additional $100,000 in punitive damages — Publishers appealed — Court of Appeal found that there were no false or misleading representations, as any consumer "with an average level of intelligence, scepticism and curiosity" would not have been misled by document — Court of Appeal allowed appeal and set aside award of compensatory and punitive damages — Consumer appealed — Appeal allowed in part — At very least, parties entered into contract for subscription to magazine — Contract for magazine subscription is contract to which Act applied — Therefore, consumer had interest required to take action against publishers and his action was properly brought.

Civil practice and procedure --- Parties — Standing

Consumer received letter suggesting that he had won cash prize of US$833,337, provided he returned winning entry in time — Mailing also contained reply coupon and return envelope on which official rules of sweepstakes appeared in small print — Reply coupon also offered consumer possibility of subscribing to magazine — Convinced that he was about to receive promised amount, consumer immediately returned reply coupon — However, consumer never received expected cheque, as document mailed to him was merely invitation to participate in sweepstakes — Consumer brought motion seeking compensatory and punitive damages — Given general impression conveyed by document, trial judge found that document contravened Consumer Protection Act — Trial judge stated that commercial representation which could mislead credulous and inexperienced consumer was prohibited under Act — She ordered publishers to pay $1,000 to consumer in moral damages and, because publishers had sent similar letters to large number of consumers in Quebec and in English only, ordered publishers to pay additional $100,000 in punitive damages — Publishers appealed — Court of Appeal found that there were no false or misleading representations, as any consumer "with an average level of intelligence, scepticism and curiosity" would not have been misled by document — Court of Appeal allowed appeal and

set aside award of compensatory and punitive damages — Consumer appealed — Appeal allowed in part — At very least, parties entered into contract for subscription to magazine — Contract for magazine subscription is contract to which Act applied — Therefore, consumer had interest required to take action against publishers and his action was properly brought.

Remedies --- Damages — Exemplary, punitive and aggravated damages — Grounds for awarding exemplary, punitive and aggravated damages — Fraud

Consumer received letter suggesting that he had won cash prize of US$833,337, provided he returned winning entry in time — Mailing also contained reply coupon and return envelope on which official rules of sweepstakes appeared in small print — Reply coupon also offered consumer the possibility of subscribing to magazine — Convinced that he was about to receive promised amount, consumer immediately returned reply coupon — However, consumer never received expected cheque, as document mailed to him was merely invitation to participate in sweepstakes — Consumer brought motion seeking compensatory and punitive damages — Given general impression conveyed by document, trial judge found that document contravened Consumer Protection Act — Trial judge stated that commercial representation which could mislead credulous and inexperienced consumer was prohibited under Act — She ordered publishers to pay $1,000 to consumer in moral damages and, because publishers had sent similar letters to large number of consumers in Quebec and in English only, ordered publishers to pay additional $100,000 in punitive damages — Publishers appealed — Court of Appeal found that there were no false or misleading representations, as any consumer "with an average level of intelligence, scepticism and curiosity" would not have been misled by document — Court of Appeal allowed appeal and set aside award of compensatory and punitive damages — Consumer appealed — Appeal allowed in part — While there was no reason to interfere with trial judge's award for moral damages, amount awarded for punitive damages should be varied — First, trial judge erred in considering language issue when assessing appropriate quantum of punitive damages — Second, impact on consumer of fault committed by publishers was quite limited — Third, consumer's attitude should also be taken into consideration — Therefore, amount of $15,000 sufficed to fulfil preventive purpose of punitive damages, underlined gravity of violations of Act and properly sanctioned conduct of publishers.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — General principles

Consumer received letter suggesting that he had won cash prize of US$833,337, provided he returned winning entry in time — Mailing also contained reply coupon and return envelope on which official rules of sweepstakes appeared in small print — Reply coupon also offered consumer the possibility of subscribing to magazine — Convinced that he was about to receive promised amount, consumer immediately returned reply coupon — However, consumer never received expected cheque, as document mailed to him was merely invitation to participate in sweepstakes — Consumer brought motion seeking compensatory and punitive damages — Given general impression conveyed by document, trial judge found that document contravened Consumer Protection Act — Trial judge stated that commercial representation which could mislead credulous and inexperienced consumer was prohibited under Act — She ordered publishers to pay $1,000 to consumer in moral damages and, because publishers had sent similar letters to large number of consumers in Quebec and in English only, ordered publishers to pay additional $100,000 in punitive damages — She also ordered publishers to pay part of consumer's judicial and extrajudicial costs, including fees paid to his attorneys — Publishers appealed — Court of Appeal found that there were no false or misleading representations, as any consumer "with an average level of intelligence, scepticism and curiosity" would not have been misled by document — Court of Appeal allowed appeal and set aside award of compensatory and punitive damages — Consumer appealed — Appeal allowed in part — Costs in Superior Court and Court of Appeal should be taxed in accordance with tariffs applicable in those courts — However, consumer should have his costs in Supreme Court of Canada on solicitor and client basis because of importance of issues of law he raised.

Droit commercial --- Échange et commerce — Protection du consommateur — Publicité trompeuse — Déclarations fausses — Questions diverses

Consommateur a reçu une lettre laissant croire qu'il avait gagné un grand prix au montant de 833 337 $US, à condition qu'il retourne par voie du courrier le bon de participation gagnant — Envoi postal contenait aussi un coupon-réponse ainsi qu'une enveloppe de retour sur laquelle les règles officielles du concours étaient imprimées en petits caractères — Coupon-réponse offrait également au consommateur la possibilité de s'abonner à une revue — Convaincu qu'il était

sur le point de toucher la somme promise, le consommateur a aussitôt retourné le coupon-réponse — Consommateur n'a toutefois jamais reçu le chèque espéré puisque le document qui lui avait été envoyé par courrier était simplement une invitation à participer au concours — Consommateur a déposé une requête visant à obtenir des dommages-intérêts compensatoires et punitifs — Considérant l'impression générale que dégageait le document, la juge de première instance a conclu que le document contrevenait à la Loi sur la protection du consommateur — Juge de première instance a noté qu'une représentation commerciale qui risquait d'induire un consommateur crédule et inexpérimenté en erreur était interdite en vertu de la Loi — Elle a ordonné aux éditeurs de payer 1 000 $ au consommateur en dommages-intérêts moraux et, parce que les éditeurs avaient fait parvenir des lettres similaires à un grand nombre de consommateurs au Québec et en anglais uniquement, a ordonné aux éditeurs de payer une somme additionnelle de 100 000 $ en dommages-intérêts punitifs — Éditeurs ont interjeté appel — Cour d'appel a conclu qu'il n'y avait pas de représentations fausses ou trompeuses puisque tout consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux » n'aurait pas été induit en erreur par le document — Cour d'appel a accueilli l'appel et a annulé l'octroi des dommages-intérêts compensatoires et punitifs — Consommateur a formé un pourvoi — Pourvoi accueilli en partie — Il fallait décrire l'impression générale qui était susceptible de se dégager de la représentation et déterminer si cette impression générale était conforme à la réalité — Critère de l'impression générale devrait être appliqué dans la perspective d'un consommateur crédule et inexpérimenté et non d'un consommateur moyennement intelligent, moyennement sceptique et moyennement curieux — En l'espèce, après avoir lu le document, l'impression générale était que le consommateur avait gagné le grand prix et qu'il n'avait qu'à retourner le coupon-réponse pour que la procédure de réclamation puisse s'enclencher — Ainsi, la juge de première instance n'a pas commis d'erreur en concluant que le document était trompeur — Non seulement le document contenait-il des représentations trompeuses, mais, de plus, il n'indiquait pas clairement les règles du concours — Par conséquent, le comportement des éditeurs constituait une faute civile entraînant leur responsabilité extracontractuelle.

Droit commercial --- Échange et commerce — Protection du consommateur — Publicité trompeuse — Déclarations fausses — Pénalités

Consommateur a reçu une lettre laissant croire qu'il avait gagné un grand prix au montant de 833 337 $US, à condition qu'il retourne par voie du courrier le bon de participation gagnant — Envoi postal contenait aussi un coupon-réponse ainsi qu'une enveloppe de retour sur laquelle les règles officielles du concours étaient imprimées en petits caractères — Coupon-réponse offrait également au consommateur la possibilité de s'abonner à une revue — Convaincu qu'il était sur le point de toucher la somme promise, le consommateur a aussitôt retourné le coupon-réponse — Consommateur n'a toutefois jamais reçu le chèque espéré puisque le document qui lui avait été envoyé par courrier était simplement une invitation à participer au concours — Consommateur a déposé une requête visant à obtenir des dommages-intérêts compensatoires et punitifs — Considérant l'impression générale que dégageait le document, la juge de première instance a conclu que le document contrevenait à la Loi sur la protection du consommateur — Juge de première instance a noté qu'une représentation commerciale qui risquait d'induire un consommateur crédule et inexpérimenté en erreur était interdite en vertu de la Loi — Elle a ordonné aux éditeurs de payer 1 000 $ au consommateur en dommages-intérêts moraux et, parce que les éditeurs avaient fait parvenir des lettres similaires à un grand nombre de consommateurs au Québec et en anglais uniquement, a ordonné aux éditeurs de payer une somme additionnelle de 100 000 $ en dommages-intérêts punitifs — Éditeurs ont interjeté appel — Cour d'appel a conclu qu'il n'y avait pas de représentations fausses ou trompeuses puisque tout consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux » n'aurait pas été induit en erreur par le document — Cour d'appel a accueilli l'appel et a annulé l'octroi des dommages-intérêts compensatoires et punitifs — Consommateur a formé un pourvoi — Pourvoi accueilli en partie — Article 272 de la Loi prévoit des sanctions civiles si un commerçant ou un fabricant manque à une obligation que lui impose la Loi — En droit civil québécois, le manquement à une obligation de ne pas faire peut engendrer la responsabilité civile de son auteur au même titre que la violation d'une obligation de faire — Par conséquent, l'existence de pratiques interdites donnait ouverture à des sanctions civiles en vertu de la Loi et le consommateur avait le choix de demander à la fois des réparations contractuelles, des dommages-intérêts compensatoires et des dommages-intérêts punitifs ou, au contraire, de ne réclamer que l'une de ces mesures.

Droit commercial --- Échange et commerce — Protection du consommateur — Publicité trompeuse — Déclarations fausses — Procédure

Consommateur a reçu une lettre laissant croire qu'il avait gagné un grand prix au montant de 833 337 $US, à condition qu'il retourne par voie du courrier le bon de participation gagnant — Envoi postal contenait aussi un coupon-réponse ainsi qu'une enveloppe de retour sur laquelle les règles officielles du concours étaient imprimées en petits caractères — Coupon-réponse offrait également au consommateur la possibilité de s'abonner à une revue — Convaincu qu'il était sur le point de toucher la somme promise, le consommateur a aussitôt retourné le coupon-réponse — Consommateur n'a toutefois jamais reçu le chèque espéré puisque le document qui lui avait été envoyé par courrier était simplement une invitation à participer au concours — Consommateur a déposé une requête visant à obtenir des dommages-intérêts compensatoires et punitifs — Considérant l'impression générale que dégageait le document, la juge de première instance a conclu que le document contrevenait à la Loi sur la protection du consommateur — Juge de première instance a noté qu'une représentation commerciale qui risquait d'induire un consommateur crédule et inexpérimenté en erreur était interdite en vertu de la Loi — Elle a ordonné aux éditeurs de payer 1 000 $ au consommateur en dommages-intérêts moraux et, parce que les éditeurs avaient fait parvenir des lettres similaires à un grand nombre de consommateurs au Québec et en anglais uniquement, a ordonné aux éditeurs de payer une somme additionnelle de 100 000 $ en dommages-intérêts punitifs — Éditeurs ont interjeté appel — Cour d'appel a conclu qu'il n'y avait pas de représentations fausses ou trompeuses puisque tout consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux » n'aurait pas été induit en erreur par le document — Cour d'appel a accueilli l'appel et a annulé l'octroi des dommages-intérêts compensatoires et punitifs — Consommateur a formé un pourvoi — Pourvoi accueilli en partie — Il s'est au moins conclu un contrat d'abonnement à la revue — Contrat d'abonnement à une revue est un contrat régi par la Loi — Par conséquent, le consommateur avait l'intérêt requis pour prendre action contre les éditeurs et sa demande en justice a été régulièrement formée.

Procédure civile --- Parties — Intérêt pour agir

Consommateur a reçu une lettre laissant croire qu'il avait gagné un grand prix au montant de 833 337 $US, à condition qu'il retourne par voie du courrier le bon de participation gagnant — Envoi postal contenait aussi un coupon-réponse ainsi qu'une enveloppe de retour sur laquelle les règles officielles du concours étaient imprimées en petits caractères — Coupon-réponse offrait également au consommateur la possibilité de s'abonner à une revue — Convaincu qu'il était sur le point de toucher la somme promise, le consommateur a aussitôt retourné le coupon-réponse — Consommateur n'a toutefois jamais reçu le chèque espéré puisque le document qui lui avait été envoyé par courrier était simplement une invitation à participer au concours — Consommateur a déposé une requête visant à obtenir des dommages-intérêts compensatoires et punitifs — Considérant l'impression générale que dégageait le document, la juge de première instance a conclu que le document contrevenait à la Loi sur la protection du consommateur — Juge de première instance a noté qu'une représentation commerciale qui risquait d'induire un consommateur crédule et inexpérimenté en erreur était interdite en vertu de la Loi — Elle a ordonné aux éditeurs de payer 1 000 $ au consommateur en dommages-intérêts moraux et, parce que les éditeurs avaient fait parvenir des lettres similaires à un grand nombre de consommateurs au Québec et en anglais uniquement, a ordonné aux éditeurs de payer une somme additionnelle de 100 000 $ en dommages-intérêts punitifs — Éditeurs ont interjeté appel — Cour d'appel a conclu qu'il n'y avait pas de représentations fausses ou trompeuses puisque tout consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux » n'aurait pas été induit en erreur par le document — Cour d'appel a accueilli l'appel et a annulé l'octroi des dommages-intérêts compensatoires et punitifs — Consommateur a formé un pourvoi — Pourvoi accueilli en partie — Il s'est au moins conclu un contrat d'abonnement à la revue — Contrat d'abonnement à une revue est un contrat régi par la Loi — Par conséquent, le consommateur avait l'intérêt requis pour prendre action contre les éditeurs et sa demande en justice a été régulièrement formée.

Réparations --- Dommages-intérêts — Dommages-intérêts exemplaires, punitifs et majorés — Motifs d'accorder des dommages-intérêts exemplaires, punitifs et majorés — Fraude

Consommateur a reçu une lettre laissant croire qu'il avait gagné un grand prix au montant de 833 337 $US, à condition qu'il retourne par voie du courrier le bon de participation gagnant — Envoi postal contenait aussi un coupon-réponse ainsi qu'une enveloppe de retour sur laquelle les règles officielles du concours étaient imprimées en petits caractères — Coupon-réponse offrait également au consommateur la possibilité de s'abonner à une revue — Convaincu qu'il était sur le point de toucher la somme promise, le consommateur a aussitôt retourné le coupon-réponse — Consommateur n'a toutefois jamais reçu le chèque espéré puisque le document qui lui avait été envoyé par courrier était simplement

une invitation à participer au concours — Consommateur a déposé une requête visant à obtenir des dommages-intérêts compensatoires et punitifs — Considérant l'impression générale que dégageait le document, la juge de première instance a conclu que le document contrevenait à la Loi sur la protection du consommateur — Juge de première instance a noté qu'une représentation commerciale qui risquait d'induire un consommateur crédule et inexpérimenté en erreur était interdite en vertu de la Loi — Elle a ordonné aux éditeurs de payer 1 000 $ au consommateur en dommages-intérêts moraux et, parce que les éditeurs avaient fait parvenir des lettres similaires à un grand nombre de consommateurs au Québec et en anglais uniquement, a ordonné aux éditeurs de payer une somme additionnelle de 100 000 $ en dommages-intérêts punitifs — Éditeurs ont interjeté appel — Cour d'appel a conclu qu'il n'y avait pas de représentations fausses ou trompeuses puisque tout consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux » n'aurait pas été induit en erreur par le document — Cour d'appel a accueilli l'appel et a annulé l'octroi des dommages-intérêts compensatoires et punitifs — Consommateur a formé un pourvoi — Pourvoi accueilli en partie — Bien qu'il n'y avait aucune raison d'intervenir dans la décision de la juge de première instance d'accorder des dommages-intérêts moraux, le montant accordé au titre des dommages-intérêts punitifs devrait être revu — D'abord, la juge de première instance a commis une erreur en prenant en considération la question relative à la langue lorsqu'elle a procédé à l'évaluation du quantum des dommages-intérêts punitifs — Deuxièmement, les conséquences de la faute commise par les éditeurs sur le consommateur étaient plutôt limitées — Troisièmement, l'attitude du consommateur devrait également être prise en considération — Par conséquent, un montant de l'ordre de 15 000 $ suffisait pour assurer la fonction préventive des dommages-intérêts punitifs, soulignait la gravité des violations de la Loi et sanctionnait la conduite des éditeurs de manière adéquate.

Procédure civile --- Frais — Ordonnances particulières en matière de frais — Frais sur une base avocat-client — Principes généraux

Consommateur a reçu une lettre laissant croire qu'il avait gagné un grand prix au montant de 833 337 $US, à condition qu'il retourne par voie du courrier le bon de participation gagnant — Envoi postal contenait aussi un coupon-réponse ainsi qu'une enveloppe de retour sur laquelle les règles officielles du concours étaient imprimées en petits caractères — Coupon-réponse offrait également au consommateur la possibilité de s'abonner à une revue — Convaincu qu'il était sur le point de toucher la somme promise, le consommateur a aussitôt retourné le coupon-réponse — Consommateur n'a toutefois jamais reçu le chèque espéré puisque le document qui lui avait été envoyé par courrier était simplement une invitation à participer au concours — Consommateur a déposé une requête visant à obtenir des dommages-intérêts compensatoires et punitifs — Considérant l'impression générale que dégageait le document, la juge de première instance a conclu que le document contrevenait à la Loi sur la protection du consommateur — Juge de première instance a noté qu'une représentation commerciale qui risquait d'induire un consommateur crédule et inexpérimenté en erreur était interdite en vertu de la Loi — Elle a ordonné aux éditeurs de payer 1 000 $ au consommateur en dommages-intérêts moraux et, parce que les éditeurs avaient fait parvenir des lettres similaires à un grand nombre de consommateurs au Québec et en anglais uniquement, a ordonné aux éditeurs de payer une somme additionnelle de 100 000 $ en dommages-intérêts punitifs — Éditeurs ont interjeté appel — Elle a également ordonné aux éditeurs de payer une partie des frais judiciaires et extrajudiciaires du consommateur, y compris les honoraires payés à ses avocats — Éditeurs ont interjeté appel — Cour d'appel a conclu qu'il n'y avait pas de représentations fausses ou trompeuses puisque tout consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux » n'aurait pas été induit en erreur par le document — Cour d'appel a accueilli l'appel et a annulé l'octroi des dommages-intérêts compensatoires et punitifs — Consommateur a formé un pourvoi — Pourvoi accueilli en partie — Dépens devraient être taxés devant la Cour supérieure et la Cour d'appel conformément aux tarifs applicables devant ces tribunaux — Toutefois, des dépens sur la base avocat-client ont été accordés au consommateur, à la Cour suprême du Canada, en raison de l'importance des questions de droit qu'il a soulevées.

The consumer received a letter suggesting that he had won a cash prize of US$833,337, provided he returned the winning entry in time and correctly answered a skill-testing question. The back side of the letter informed the consumer that he would qualify for a $100,000 bonus prize if he validated his entry within five days. The mailing also contained a reply coupon and a return envelope on which the official rules of the sweepstakes appeared in small print. The reply coupon also offered the consumer the possibility of subscribing to a magazine. Convinced that he was about to receive the promised amount, the consumer immediately returned the reply coupon. However, the consumer never received the

expected cheque and a representative of the magazine's publishers confirmed that he would not be receiving a cheque, because the document mailed to him was merely an invitation to participate in a sweepstakes. The consumer brought a motion asking the Superior Court to declare that he was the winner of the cash prize and order the publishers to pay him the cash prize or, alternatively, to order the publishers to pay compensatory and punitive damages.

The trial judge first found that the parties had not entered into a contract and she accordingly refused to order payment of the prize. However, given the general impression conveyed by the document, the fact that its signer did not even exist and the failure to indicate clearly that the recipient might not be the grand prize winner, the trial judge found that the document contravened the Consumer Protection Act. The trial judge stated that a commercial representation which, as was the case here, could mislead a credulous and inexperienced consumer was prohibited under the Act. She ordered the publishers to pay $1,000 to the consumer in moral damages and, because the publishers had sent similar letters to a large number of consumers in Quebec and in English only, ordered the publishers to pay an additional $100,000 in punitive damages. She also ordered the publishers to pay part of the consumer's judicial and extrajudicial costs, including the fees paid to his attorneys. The publishers appealed.

The Court of Appeal found that the publishers' failure to indicate clearly in the document that the recipient might not be the grand prize winner was not a violation of the Act. It also found that the use of a fictitious person as the signer of the document did not have the potential to mislead consumers about the merchant's identity. Finally, the Court of Appeal found that there were no false or misleading representations, as any consumer "with an average level of intelligence, scepticism and curiosity" would not have been misled by the document. The Court of Appeal allowed the appeal and set aside the award of compensatory and punitive damages. The consumer appealed.

Held: The appeal was allowed in part.

Per LeBel, Cromwell JJ. (McLachlin C.J.C., Deschamps, Fish, Abella, Charron JJ. concurring): It was necessary to consider the general impression given by the representation and, where appropriate, the literal meaning of the words used in it. Accordingly, the court should describe the general impression that the representation was likely to convey and determine whether that general impression was true to reality. The general impression test should be applied from the perspective of a credulous and inexperienced consumer, not a consumer with an average level of intelligence, scepticism and curiosity. Here, after reading the document, the general impression was that the consumer had won the grand prize and had only to return the reply coupon to initiate the claim process. Thus, the trial judge did not err in finding that the document was misleading. Not only did the document contain misleading representations, within the meaning of the Act, but it also failed to clearly indicate the contest rules. Therefore, the conduct of the publishers constituted a civil fault that triggered their extracontractual liability.

The purpose of the Act is to purge business practices in order to protect consumers as fully as possible. Section 272 of the Act provides that civil sanctions are available if the merchant or the manufacturer fails to fulfil an obligation imposed on him by the Act. In Quebec civil law, the failure to fulfil an obligation not to do something can trigger civil liability in the same way as the failure to fulfil an obligation to do something. Therefore, a civil sanction for prohibited practices was available under the Act and consumers who exercised the recourse provided for in s. 272 of the Act could choose to claim contractual remedies, compensatory damages and punitive damages or to claim just one of those remedies.

Participating in the sweepstakes and subscribing to the magazine were not two separate undertakings. One depended on the other. At the very least, the parties entered into a contract for a subscription to the magazine. A contract for a magazine subscription is a contract to which the Act applied. Therefore, the consumer had the interest required to take action against the publishers and his action was properly brought.

While there was no reason to interfere with the trial judge's award for moral damages, the amount awarded for punitive damages should be varied. First, the trial judge erred in considering the language issue when assessing the appropriate quantum of punitive damages. Second, the impact on the consumer of the fault committed by the publishers was quite limited. Third, the consumer's attitude should also be taken into consideration. Although the publishers took no corrective action, which in itself was an aggravating factor, an amount of $15,000 sufficed to fulfil the preventive purpose of punitive damages, underlined the gravity of the violations of the Act and properly sanctioned the conduct of the publishers.

Costs in the Superior Court and the Court of Appeal should be taxed in accordance with the tariffs applicable in those courts. However, the consumer should have his costs in the Supreme Court of Canada on a solicitor and client basis because of the importance of the issues of law he raised.

Le consommateur a reçu une lettre laissant croire qu'il avait gagné un grand prix au montant de 833 337 $US, à condition qu'il retourne par voie du courrier le bon de participation gagnant et réponde correctement à une question de connaissance générale. Au verso, la lettre indiquait que le consommateur serait admissible à un prix additionnel de 100 000 $ s'il validait son inscription à l'intérieur d'un délai de cinq jours. L'envoi postal contenait aussi un coupon-réponse ainsi qu'une enveloppe de retour sur laquelle les règles officielles du concours étaient imprimées en petits caractères. Le coupon-réponse offrait également au consommateur la possibilité de s'abonner à une revue. Convaincu qu'il était sur le point de toucher la somme promise, le consommateur a aussitôt retourné le coupon-réponse. Le consommateur n'a toutefois jamais reçu le chèque espéré et un représentant des éditeurs de la revue a confirmé qu'il ne recevrait pas de chèque puisque le document qui lui avait été envoyé par courrier était simplement une invitation à participer au concours. Le consommateur a déposé une requête demandant à la Cour supérieure de déclarer qu'il était le gagnant du grand prix et d'ordonner aux éditeurs de lui payer le prix en argent ou, à titre subsidiaire, d'ordonner aux éditeurs de payer des dommages-intérêts compensatoires et punitifs.

La juge de première instance a d'abord conclu qu'aucun contrat n'était survenu entre les parties et a conséquemment refusé d'ordonner le paiement du prix. En revanche, considérant l'impression générale qui se dégageait du document, le fait que le signataire n'existait pas et l'omission d'indiquer clairement que le destinataire de la lettre pourrait ne pas être le gagnant du grand prix, la juge de première instance a conclu que le document contrevenait à la Loi sur la protection du consommateur. La juge de première instance a noté qu'une représentation commerciale qui, comme dans le cas présent, risquait d'induire un consommateur crédule et inexpérimenté en erreur était interdite en vertu de la Loi. Elle a ordonné aux éditeurs de payer 1 000 $ au consommateur en dommages-intérêts moraux et, parce que les éditeurs avaient fait parvenir des lettres similaires à un grand nombre de consommateurs au Québec et en anglais uniquement, a ordonné aux éditeurs de payer une somme additionnelle de 100 000,00 $ en dommages-intérêts punitifs. Elle a également ordonné aux éditeurs de payer une partie des frais judiciaires et extrajudiciaires du consommateur, y compris les honoraires payés à ses avocats. Les éditeurs ont interjeté appel.

La Cour d'appel a conclu que l'omission des éditeurs d'indiquer clairement dans le document que le destinataire de la lettre pourrait ne pas être le gagnant du grand prix ne constituait pas une violation de la Loi. Elle a également conclu que l'utilisation d'une personne fictive n'était pas susceptible de tromper les consommateurs sur l'identité du commerçant. Enfin, la Cour d'appel a conclu qu'il n'y avait pas de représentations fausses ou trompeuses puisque tout consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux » n'aurait pas été induit en erreur par le document. La Cour d'appel a accueilli l'appel et a annulé l'octroi des dommages-intérêts compensatoires et punitifs. Le consommateur a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli en partie.

LeBel, Cromwell, JJ. (McLachlin, J.C.C., Deschamps, Fish, Abella, Charron, JJ., souscrivant à leur opinion) : Il était nécessaire de prendre en considération l'impression générale laissée par la représentation et, s'il y a lieu, le sens littéral des termes qui y étaient employés. Aussi, il fallait décrire l'impression générale qui était susceptible de se dégager de la représentation et déterminer si cette impression générale était conforme à la réalité. Le critère de l'impression générale devrait être appliqué dans la perspective d'un consommateur crédule et inexpérimenté et non d'un consommateur moyennement intelligent, moyennement sceptique et moyennement curieux. En l'espèce, après avoir lu le document, l'impression générale était que le consommateur avait gagné le grand prix et qu'il n'avait qu'à retourner le coupon-réponse pour que la procédure de réclamation puisse s'enclencher. Ainsi, la juge de première instance n'a pas commis d'erreur en concluant que le document était trompeur. Non seulement le document contenait-il des représentations trompeuses, au sens de la Loi, mais, de plus, il n'indiquait pas clairement les règles du concours. Par conséquent, le comportement des éditeurs constituait une faute civile entraînant leur responsabilité extracontractuelle.

La Loi vise à assainir les pratiques commerciales afin de protéger le consommateur le plus adéquatement possible. L'article 272 de la Loi prévoit des sanctions civiles si un commerçant ou un fabricant manque à une obligation que lui impose la Loi. En droit civil québécois, le manquement à une obligation de ne pas faire peut engendrer la responsabilité civile de son auteur au même titre que la violation d'une obligation de faire. Par conséquent, l'existence de pratiques

interdites donnait ouverture à des sanctions civiles en vertu de la Loi et les consommateurs qui exerçaient un recours prévu par l'art. 272 de la Loi avaient le choix de demander à la fois des réparations contractuelles, des dommages-intérêts compensatoires et des dommages-intérêts punitifs ou, au contraire, de ne réclamer que l'une de ces mesures.

La participation au concours et l'abonnement à la revue ne constituaient pas des engagements distincts. Les deux engagements étaient liés. À tout le moins, il s'est au moins conclu un contrat d'abonnement à la revue. Un contrat d'abonnement à une revue est un contrat régi par la Loi. Par conséquent, le consommateur avait l'intérêt requis pour prendre action contre les éditeurs et sa demande en justice a été régulièrement formée.

Bien qu'il n'y avait aucune raison d'intervenir dans la décision de la juge de première instance d'accorder des dommages-intérêts moraux, le montant accordé au titre des dommages-intérêts punitifs devrait être revu. D'abord, la juge de première instance a commis une erreur en prenant en considération la question relative à la langue lorsqu'elle a procédé à l'évaluation du quantum des dommages-intérêts punitifs. Deuxièmement, les conséquences de la faute commise par les éditeurs sur le consommateur étaient plutôt limitées. Troisièmement, l'attitude du consommateur devrait également être prise en considération. Bien que les éditeurs n'ont entrepris aucune mesure pour corriger la situation, ce qui en soi était un facteur aggravant, un montant de l'ordre de 15 000 $ suffisait pour assurer la fonction préventive des dommages-intérêts punitifs, soulignait la gravité des violations de la Loi et sanctionnait la conduite des éditeurs de manière adéquate.

Les dépens devraient être taxés devant la Cour supérieure et la Cour d'appel conformément aux tarifs applicables devant ces tribunaux. Toutefois, des dépens sur la base avocat-client ont été accordés au consommateur, à la Cour suprême du Canada, en raison de l'importance des questions de droit qu'il a soulevées.

Table of Authorities

Cases considered:

Adams v. Amex Bank of Canada (2009), 2009 QCCS 2695, 2009 CarswellQue 6873, [2009] R.J.Q. 1746 (C.S. Que.) — referred to

ADISQ c. Genex Communications inc. (2009), 71 C.C.L.T. (3d) 211, 2009 CarswellQue 11790, 2009 QCCA 2201, [2009] R.J.Q. 2743, [2009] R.R.A. 961 (C.A. Que.) — referred to

Assoc. coopérative d'économie familiale du Sud-Ouest de Montréal c. Arrangements alternatifs de crédit du Québec inc. (1993), 1993 CarswellQue 1944, [1994] R.J.Q. 114 (C.S. Que.) — referred to

Ata v. 9118-8169 Québec inc. (2006), [2006] R.J.Q. 1883, 2006 QCCS 3777, 2006 CarswellQue 5931 (C.S. Que.) — referred to

Augustus v. Gosset (1996), (sub nom. *Augustus c. Montréal (Communauté urbaine)*) [1996] R.R.A. 915, 1996 CarswellQue 914, 1996 CarswellQue 915, 202 N.R. 241, [1996] 3 S.C.R. 268, 138 D.L.R. (4th) 617, 34 C.C.L.T. (2d) 111 (S.C.C.) — referred to

Banque de Montréal c. Boissonneault (1988), 18 Q.A.C. 137, [1988] R.J.Q. 2622, 1988 CarswellQue 282 (C.A. Que.) — referred to

Beauchamp c. Relais Toyota Inc. (1995), [1995] R.J.Q. 741 (C.A. Que.) — considered

Boisclair c. Québec (Procureur général) (2001), 2001 CarswellQue 2693, (sub nom. *Québec (Procureur général) c. Boisclair*) [2001] R.J.Q. 2449, (sub nom. *Québec (Procureur général) c. Boisclair*) [2001] R.R.A. 877 (C.A. Que.) — referred to

Centre d'économie en chauffage Turcotte inc. c. Ferland (2003), 2003 CarswellQue 2963 (C.A. Que.) — referred to

Champagne c. Toitures Couture & Associés inc. (2002), 2002 CarswellQue 2469, [2002] R.J.Q. 2863 (C.S. Que.) — followed

Chartier c. Meubles Léon ltée (2003), 2003 CarswellQue 195 (C.S. Que.) — referred to

Chrysler Canada ltée c. Poulin (September 23, 1988), Doc. C.A. Montréal 500-09-001083-880 (C.A. Que.)

Darveau c. 9034-9770 Québec inc. (Piscine Sansouci inc.) (2005), 2005 CarswellQue 9986 (C.Q.) — referred to

de Montigny c. Brossard (Succession) (2010), 78 C.C.L.T. (3d) 1, (sub nom. *de Montigny v. Brossard (Succession)*) [2010] 3 S.C.R. 64, (sub nom. *de Montigny v. Brossard (Succession)*) 408 N.R. 80, 325 D.L.R. (4th) 577, 62 E.T.R. (3d) 161, 2010 SCC 51, 2010 CarswellQue 11312, 2010 CarswellQue 11313 (S.C.C.) — followed

F.E.E.S.P. c. Béliveau St-Jacques (1996), 1996 CarswellQue 624, 1996 CarswellQue 625, (sub nom. *St-Jacques v. F.E.E.S.P.*) 198 N.R. 1, (sub nom. *St-Jacques v. F.E.E.S.P.*) 36 C.R.R. (2d) 189, (sub nom. *Béliveau St-Jacques v. F.E.E.S.P.*) 136 D.L.R. (4th) 129, (sub nom. *Béliveau St-Jacques v. F.E.E.S.P.*) 96 C.L.L.C. 230-034, (sub nom.

Béliveau St-Jacques v. F.E.E.S.P.) [1996] 2 S.C.R. 345, *(*sub nom. *Béliveau St-Jacques v. F.E.E.S.P.)* [1996] R.R.A. 537 (S.C.C.) — considered

Fondation québécoise du cancer c. Patenaude (2006), 2006 QCCA 1554, [2007] R.R.A. 5, 2006 CarswellQue 10255 (C.A. Que.) — referred to

Gastonguay c. Entreprises D. L. paysagiste (2004), 2004 CarswellQue 2493 (C.Q.) — referred to

Hill v. Church of Scientology of Toronto (1995), 25 C.C.L.T. (2d) 89, 184 N.R. 1, *(*sub nom. *Manning v. Hill)* 126 D.L.R. (4th) 129, 24 O.R. (3d) 865 (note), 84 O.A.C. 1, [1995] 2 S.C.R. 1130, 1995 CarswellOnt 396, 1995 CarswellOnt 534, *(*sub nom. *Hill v. Church of Scientology)* 30 C.R.R. (2d) 189, 1995 SCC 67 (S.C.C.) — distinguished

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Jabraian c. Trévi fabrication inc. (2005), 2005 CarswellQue 1827 (C.Q.) — referred to

Kingsway Financial Services Inc. c. 118997 Canada inc. (1999), 1999 CarswellQue 3927 (C.A. Que.) — referred to

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.) — referred to

Lafontaine c. Source d'eau Val-d'Or inc. (November 20, 2001), Doc. C.Q. Abitibi 615-02-000477-969 (C.Q.) — referred to

Lambert c. Minerve Canada, cie de transport aérien inc. (1998), [1998] R.J.Q. 1740, 1998 CarswellQue 585 (C.A. Que.) — referred to

Landry c. Quesnel (2002), [2002] R.J.Q. 80, 2002 CarswellQue 63 (C.A. Que.) — referred to

Macara c. 2845-4288 Québec inc. (2004), [2004] R.J.Q. 2637, 2004 CarswellQue 2331 (C.A. Que.) — referred to

Marcotte c. Banque de Montréal (2009), 2009 CarswellQue 6515, 2009 QCCS 2764 (C.S. Que.) — referred to

Marcotte c. Fédération des caisses Desjardins du Québec (2009), 2009 CarswellQue 14191, 2009 QCCS 2743 (C.S. Que.) — referred to

Martin c. Rénovations métropolitaines (Québec) ltée (2006), 2006 CarswellQue 2087, 2006 QCCQ 1760 (C.Q.) — referred to

Masterpiece Inc. v. Alavida Lifestyles Inc. (2011), 332 D.L.R. (4th) 1, 416 N.R. 307, [2011] 2 S.C.R. 387, 2011 SCC 27, 2011 CarswellNat 1613, 2011 CarswellNat 1614, 92 C.P.R. (4th) 361 (S.C.C.) — referred to

Mathurin c. 3086-9069 Québec inc. (2003), 2003 CarswellQue 3698 (C.S. Que.) — referred to

Mattel U.S.A. Inc. v. 3894207 Canada Inc. (2006), 2006 CarswellNat 1400, 2006 CarswellNat 1401, 49 C.P.R. (4th) 321, *(*sub nom. *Mattel Inc. v. 3894207 Canada Inc.)* 348 N.R. 340, *(*sub nom. *Mattel Inc. v. 3894207 Canada Inc.)* 268 D.L.R. (4th) 424, 2006 SCC 22, *(*sub nom. *Mattel Inc. v. 3894207 Canada Inc.)* [2006] 1 S.C.R. 772, 53 Admin. L.R. (4th) 1 (S.C.C.) — considered

McCullock Finney c. Barreau (Québec) (2004), 24 C.C.L.T. (3d) 1, *(*sub nom. *McCullock Finney v. Barreau (Québec))* 240 D.L.R. (4th) 410, *(*sub nom. *Finney v. Barreau du Québec)* 2004 SCC 36, 2004 CarswellQue 1337, 2004 CarswellQue 1338, *(*sub nom. *McCullock Finney v. Barreau du Québec)* 321 N.R. 361, [2004] 2 S.C.R. 17, 16 Admin. L.R. (4th) 165, [2004] R.R.A. 713 (S.C.C.) — referred to

Nichols c. Toyota Drummondville (1982) Inc. (1995), [1995] R.J.Q. 746 (C.A. Que.) — followed

Option Consommateurs c. Brick Warehouse (2011), 2011 QCCS 569, 2011 CarswellQue 1343 (C.S. Que.) — referred to

Option Consommateurs c. Service aux marchands détaillants ltée (Household Finance) (2006), 2006 CarswellQue 8944, 2006 QCCA 1319 (C.A. Que.) — referred to

Prebushewski v. Dodge City Auto (1984) Ltd. (2005), 2005 SCC 28, 2005 CarswellSask 332, 2005 CarswellSask 333, 333 N.R. 201, 253 D.L.R. (4th) 209, 11 C.P.C. (6th) 199, [2005] 8 W.W.R. 199, 262 Sask. R. 281, 347 W.A.C. 281, [2005] 1 S.C.R. 649, 4 B.L.R. (4th) 252 (S.C.C.) — referred to

Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand (1996), 1996 CarswellQue 916, 1996 CarswellQue 917, 202 N.R. 321, (sub nom. *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand)* 138 D.L.R. (4th) 577, 1 C.P.C. (4th) 183, [1996] 3 S.C.R. 211 (S.C.C.) — considered

Québec (Procureur général) c. Louis Bédard inc. (1986), 1986 CarswellQue 981 (Que. C.S.P.) — referred to

R. v. Colgate-Palmolive Ltd. (1969), [1969] 1 O.R. 731, 57 C.P.R. 221, 3 D.L.R. (3d) 707, 1969 CarswellOnt 394, [1970] 1 C.C.C. 100 (Ont. Co. Ct.) — considered

R. v. Imperial Tobacco Products Ltd. (1971), [1971] 5 W.W.R. 409, 3 C.P.R. (2d) 178, 1971 CarswellAlta 75, 4 C.C.C. (2d) 423, 22 D.L.R. (3d) 51 (Alta. C.A.) — referred to

Riendeau c. Brault & Martineau inc. (2007), 2007 CarswellQue 9345, 2007 QCCS 4603, [2007] R.J.Q. 2620 (C.S. Que.) — referred to

Riendeau c. Brault & Martineau inc. (2010), 2010 CarswellQue 1445, 2010 QCCA 366, [2010] R.J.Q. 507 (C.A. Que.) — referred to

Santangeli c. 154995 Canada inc. (2005), 2005 CarswellQue 7175 (C.Q.) — referred to

Supermarché A.R.G. Inc. c. Provigo Distribution Inc. (1997), (sub nom. *Provigo Distribution Inc. c. Supermarché A.R.G. Inc.)* [1998] R.J.Q. 47, 1997 CarswellQue 1250, 1997 CarswellQue 4665 (C.A. Que.) — referred to

Tremblay c. Ameublements Tanguay inc. (2011), 2011 QCCS 3078, 2011 CarswellQue 6483 (C.S. Que.) — referred to

Tremblay c. Systèmes Techno-pompe inc. (2006), [2006] R.J.Q. 1791, 2006 CarswellQue 6916, 2006 QCCA 987 (C.A. Que.) — followed

Turgeon c. Germain Pelletier ltée (2001), 2001 CarswellQue 34, [2001] R.D.I. 28, [2001] R.J.Q. 291 (C.A. Que.) — followed

Veuve Clicquot Ponsardin c. Boutiques Cliquot Ltée (2006), 2006 CarswellNat 1402, 2006 CarswellNat 1403, 49 C.P.R. (4th) 401, (sub nom. *Veuve Clicquot Ponsardin v. Boutiques Cliquot ltée)* 349 N.R. 111, 2006 SCC 23, [2006] 1 S.C.R. 824, (sub nom. *Veuve Clicquot Ponsardin Maison Fondée en 1772 v. Boutiques Cliquot Ltée)* 270 D.L.R. (4th) 1 (S.C.C.) — referred to

Voltec ltée c. CJMF FM ltée (2002), [2002] R.R.A. 1078, 2002 CarswellQue 1965 (C.A. Que.) — referred to

Vorvis v. Insurance Corp. of British Columbia (1989), 25 C.C.E.L. 81, [1989] 1 S.C.R. 1085, [1989] 4 W.W.R. 218, 58 D.L.R. (4th) 193, 94 N.R. 321, 36 B.C.L.R. (2d) 273, 42 B.L.R. 111, 90 C.L.L.C. 14,035, 1989 CarswellBC 76, 1989 CarswellBC 704 (S.C.C.) — distinguished

Whiten v. Pilot Insurance Co. (2002), 156 O.A.C. 201, 35 C.C.L.I. (3d) 1, [2002] 1 S.C.R. 595, 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, 283 N.R. 1, 20 B.L.R. (3d) 165, [2002] I.L.R. I-4048, 209 D.L.R. (4th) 257 (S.C.C.) — distinguished

9029-4596 Québec inc. c. Duplantie (1999), [1999] R.J.Q. 3059, 1999 CarswellQue 3626 (C.Q.) — referred to

Statutes considered:

Accès aux documents des organismes publics et sur la protection des renseignements personnels, Loi sur l', L.R.Q., c. A-2.1

art. 167 — referred to

Arrangements préalables de services funéraires et de sépulture, Loi sur les, L.R.Q., c. A-23.001

art. 56 — referred to

Charte de la langue française, L.R.Q., c. C-11

en général — referred to

Charte des droits et libertés de la personne, L.R.Q., c. C-12

en général — referred to

art. 49 — referred to

art. 49 al. 2 — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 1386 — referred to

art. 1387 — referred to

art. 1388 — referred to

art. 1401 — referred to

art. 1412 — referred to

art. 1621 — considered

art. 1621 al. 2 — considered

art. 1899 — referred to

art. 1902 — referred to

art. 1968 — referred to

Combines Investigation Act, R.S.C. 1970, c. C-23

s. 52(4) — referred to

Competition Act, R.S.C. 1985, c. C-34

s. 52(4) — referred to

Produits pétroliers, Loi sur les, L.Q., c. P-30.01

art. 67 — referred to

Protection des arbres, Loi sur la, L.R.Q., c. P-37

art. 1 — referred to

Protection du consommateur, Loi de la, L.Q. 1971, c. 74

en général — referred to

Protection du consommateur, Loi sur la, L.R.Q., c. P-40.1

en général — referred to

Titre I — referred to

Titre II — referred to

Titre IV — referred to

art. 1(e) "consommateur" — considered

art. 2 — considered

art. 6.1 [ad. 1985, c. 34, art. 271] — referred to

art. 8 — considered

art. 9 — considered

art. 54.1 [ad. 2006, c. 56, art. 5] — referred to

art. 216 — considered

art. 217 — considered

art. 218 — considered

art. 219 — considered

art. 220-251 — referred to

art. 228 — considered

art. 238 — considered

art. 238(c) — considered

art. 253 — considered

art. 261 — referred to

art. 262 — referred to

art. 271 — referred to

art. 272 — considered

art. 272(a)-272(f) — referred to

art. 277 — referred to

art. 290 — referred to

art. 310 — referred to

art. 314 — referred to

art. 316 — referred to

Trade-marks Act, R.S.C. 1985, c. T-13

Generally — referred to

APPEAL by consumer from decision reported at *Richard v. Time Inc.* (2009), 2009 QCCA 2378, 2009 CarswellQue 12570, [2010] R.J.Q. 3 (C.A. Que.), allowing publishers' appeal from decision of Superior Court ordering them to pay compensatory and punitive damages to consumer following advertising campaign.

POURVOI formé par un consommateur à l'encontre d'une décision publiée à *Richard v. Time Inc.* (2009), 2009 QCCA 2378, 2009 CarswellQue 12570, [2010] R.J.Q. 3 (C.A. Que.), ayant accueilli l'appel interjeté par des éditeurs à l'encontre d'une décision de la Cour supérieure de les condamner à payer des dommages-intérêts compensatoires et punitifs à la suite d'une campagne publicitaire.

Per curiam:

Introduction

1 This appeal arises out of an advertising campaign that undoubtedly did not turn out as intended. The central issues in the case are whether the respondents, by mailing a document entitled "Official Sweepstakes Notification" (the "Document") to the appellant, engaged in a practice prohibited by the *Consumer Protection Act*, R.S.Q., c. P-40.1 ("*C.P.A.*"), and, if so, whether the appellant is entitled to punitive and compensatory damages under s. 272 *C.P.A.* To decide these issues, the Court must, *inter alia*, define the characteristics that are relevant to the determination of whether a commercial representation is false or misleading, as well as the conditions for exercising the recourses in damages provided for in s. 272 *C.P.A.*

2 In concrete terms, the appellant is appealing a judgment in which the Quebec Court of Appeal denied his claim for damages on the basis that the content of the Document did not violate any of the provisions of the *C.P.A.* (2009 QCCA 2378, [2010] R.J.Q. 3 (C.A. Que.)). The Court of Appeal's main reason for denying the claim was that the Document would not mislead a consumer [TRANSLATION] "with an average level of intelligence, scepticism and curiosity" (para. 50). In this Court, the appellant argues that the criteria used by the Court of Appeal to define the average consumer for the purposes of the *C.P.A.* undermine certain of the foundations of Quebec consumer law. He is therefore asking this Court to reject that definition, find that the Document is misleading and award him punitive damages equivalent to nearly $1 million.

3 For the reasons that follow, we agree with the appellant that the Document contains representations that contravene the *C.P.A.*'s provisions concerning prohibited business practices. We also agree with him that the Court of Appeal's definition of the "average consumer" is inconsistent with the objectives of the *C.P.A.* and must therefore be rejected. Finally, we would allow his claim for compensatory and punitive damages, but only in part.

II. Origin of the Case

4 On August 26, 1999, the appellant, Jean-Marc Richard, found the Document in his mail. It was in English only and was in the form of a "letter" addressed to him and signed by Elizabeth Matthews, Director of Sweepstakes. Along the edge of the letter were various boxes printed in colour, some of which, because they referred to *Time* magazine, could lead the recipient to infer that it was from the respondents. The Document began with a sentence that immediately caught the reader's attention:

> OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF $833,337.00!

5 However, a closer look at the Document reveals that this passage was part of a two-part sentence that read as follows:

> *If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we will officially announce that*
>
> **OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF $833,337.00!**

6 This opening sentence clearly illustrates the technique used in the writing and layout of the Document: several exclamatory sentences in bold uppercase letters, whose purpose was to catch the reader's attention by suggesting that he or she had won a large cash prize, were combined with conditional clauses in smaller print, some of which began with the words "If you have and return the Grand Prize winning entry in time". For example, the Document identified the appellant as one of the latest sweepstakes winners and stated in large print that payment of his cash prize had been authorized. However, the heading "*LATEST CASH PRIZE WINNERS*", under which the appellant's name appeared, was preceded by the following sentence in small letters: "If you have and return the Grand Prize winning entry in time, our new list of major cash prize winners will read as follows".

7 This same writing technique was used elsewhere in the letter, as several prominent sentences intended to boost the recipient's enthusiasm were combined with inconspicuous conditional clauses. It will be helpful to reproduce some passages from the Document to better illustrate the specific features of this technique:

> *If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we'll confirm that*
>
> **WE ARE NOW AUTHORIZED TO PAY $833,337.00 IN CASH TO MR JEAN MARC RICHARD!**

. . . . .

> ... And now that we've been authorized to pay the prize money, the very next time you hear from us if you win, it will be to inform you that
>
> **A BANK CHEQUE FOR $833,337.00 IS ON ITS WAY TO _____ ST!**
>
> . . . . .
>
> ... The truth is, if you hold the Grand Prize winning number,
>
> **YOU WILL FORFEIT THE ENTIRE $833,337.00 IF YOU FAIL TO RESPOND TO THIS NOTICE!**

8 Along with these many references to the "Grand Prize winning entry", the Document assigned the appellant a "Prize Claim Number" that was to be used for identification purposes when the entries were validated. In addition, the back side of the letter informed the appellant that he would qualify for a $100,000 bonus prize if he validated his entry within five days. It then referred to various benefits the appellant could have if he decided to subscribe to *Time* magazine at the same time as he validated his entry. All this information was set out as follows in the Document:

> **YOU'LL QUALIFY FOR A $100,000.00 BONUS IF YOU RESPOND WITHIN 5 DAYS!**
>
> . . . . .
>
> **YOU'LL RECEIVE A FREE GIFT: THE ULTRONICTM PANORAMIC CAMERA & PHOTO ALBUM SET!**
>
> . . . . .
>
> **YOU'LL ALSO RECEIVE TIME AT UP TO 74% SAVINGS!**
>
> . . . . .
>
> ... And if you hold the Grand Prize winning entry,
>
> **A BANK CHEQUE FOR $833,337.00 IN CASH WILL BE SENT TO YOU VIA CERTIFIED MAIL — IF YOU RESPOND NOW!**

9 To show more clearly what the Document looked like, we have reproduced it in its entirety in an appendix to these reasons. For now, suffice it to say that the Document's visual content and writing style are central to the issue of whether the mailing of the Document constitutes a prohibited practice within the meaning of the *C.P.A.*

10 In addition to the Document, the mailing received by the appellant contained a reply coupon entitled "Official Entry Certificate" and a return envelope on which the official rules of the sweepstakes appeared in small print. The reply coupon also offered the appellant the possibility of subscribing to *Time* magazine for a period ranging from seven months to two years. As well, the official rules stated that a winning number had been pre-selected by computer and that the holder of that number could receive the grand prize only if the reply coupon was returned by the deadline. If the holder of the pre-selected winning number did not return the reply coupon, the rules explained, the grand prize winner would be selected by random drawing among all eligible entries, that is, everyone who had returned the reply coupon, and each participant's odds of winning would then be 1:120 million.

11 The appellant testified that he had carefully read the Document twice the day he received it and had concluded that he had just won US$833,337. The next day, he took the Document to work to ask a vice-president of the company he worked for, whose first language was English, whether he had understood the Document correctly. The vice-president agreed that the appellant had just won the grand prize referred to in the Document. Convinced that he was about to receive the promised amount, the appellant immediately returned the reply coupon that was in the envelope. In doing so, he also subscribed to *Time* magazine for two years, and this entitled him to receive a free camera and photo album, as was indicated on the back of the Document.

12 The appellant received the camera and photo album a short time later. He also began regularly receiving issues of the magazine. However, the cheque he was expecting was a long time coming. Believing that he had been patient enough, he decided to call Elizabeth Matthews at Time Inc. to inquire about the processing of his cheque. After leaving a few messages to which he received no reply, the appellant was finally able to speak with a representative of the marketing department of the respondent Time Inc. in New York. He then learned that he would not be receiving a cheque, because the Document mailed to him had not contained the winning entry for the draw. During the telephone conversation, Time Inc.'s representative told the appellant that the Document was merely an invitation to participate in a sweepstakes. The appellant was also informed that Elizabeth Matthews did not exist; the name was merely a "pen name" used by the respondents in their advertising material.

13 The appellant replied that the Document clearly announced that he was the prize winner. His protests got him nowhere. The respondents flatly refused to pay him the amount he was claiming.

14 On September 29, 2000, the appellant filed a motion to institute proceedings. He first asked the Quebec Superior Court to declare him to be the winner of the cash prize mentioned in the Document. He argued that the Document was an offer to contract within the meaning of art. 1388 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), and that he had accepted the offer by returning the reply coupon. He accordingly asked the court to order the respondents to provide him with the skill-testing question and pay him the grand prize amount. In the alternative, he asked the court to order the respondents to pay compensatory and punitive damages corresponding to the value of the grand prize (A.R., vol. I, at p. 53).

III. Judicial History

A. Quebec Superior Court (2007 QCCS 3390, [2007] R.J.Q. 2008 (C.S. Que.), Cohen J.)

15 Cohen J. began by considering the contractual portion of the claim. She found that the parties had not entered into a contract and accordingly refused to order payment of the prize claimed by the appellant.

16 Cohen J. then considered the appellant's claim for damages, which was based on alleged violations of the *C.P.A.* She held that the convoluted style of the offer contravened Title II of the *C.P.A.* on prohibited business practices. She wrote the following:

> The very same "conditional" wording which enabled Time to avoid the argument that a contract was formed or that it undertook unconditionally to pay $833,337 to Mr. Richard, illustrates the contention that this document was **specifically** designed to mislead the recipient, that it contains misleading and even false representations, contrary to the clear wording of article 219 of the *Consumer Protection Act* ....
>
> [Emphasis in original; para. 34.]

17 Cohen J. reached this conclusion on the basis of the general impression conveyed by the Document. Referring to s. 218 *C.P.A.*, she stated that the Document gave the general impression that the appellant had won the grand prize. In her view, the general design of the Document thus amounted to a false or misleading representation within the meaning of s. 219 *C.P.A.*

18 Cohen J. added that the Document contained two false representations. First, its signer, Elizabeth Matthews, did not exist, so she could not have "certified" the content of the Document, contrary to what was stated. That fiction was in clear contravention of ss. 219 and 238 *C.P.A.*, since it gave an imaginary person a particular status or identity (para. 38). Next, the fact that the appellant might not be the grand prize winner had been withheld from him by the respondents or, at the very least, had been "buried in a sea of text" with the expectation that his enthusiasm would induce him to subscribe to *Time* magazine (para. 39). In Cohen J.'s opinion, the failure to reveal such an important fact was contrary to s. 228 *C.P.A.* She summed up her view on the presence of false or misleading information in the Document as follows: "It is

patently obvious to any reader that the mailing from Time was not only false and incomplete, it was specifically designed to be misleading, both in the words chosen, the size of the conditions or disclaimers and their ambiguity, especially to a person who is not reading in his or her mother tongue" (para. 40).

19 Cohen J. added that she did not need to determine whether the appellant had actually been misled by the content of the Document (para. 49). To hold that a commercial representation is a practice prohibited by the *C.P.A.*, it is sufficient for a court to find that the average consumer, that is, one who is credulous and inexperienced, could be misled:

> There can be no doubt here that the unsolicited publicity sent to Mr. Richard indeed had the capacity to mislead if viewed through the eyes of the average, inexperienced French-speaking consumer in Quebec. In any event, the testimony of Mr. Richard made it clear that he would never have read the subscription portion of the document had the misleading representations not been present, making it obvious that his paid subscription to Time Magazine was a direct result of these misleading representations in the present case. [para. 49]

20 According to Cohen J., the respondents' advertising strategy, as revealed by the content of the Document, involved the use of practices prohibited by Title II of the *C.P.A.* As a result, the civil sanctions provided for in s. 272 *C.P.A.* were available.

21 Relying on the principles adopted by the Quebec Court of Appeal in *Nichols c. Toyota Drummondville (1982) Inc.*, [1995] R.J.Q. 746 (C.A. Que.), Cohen J. stated that, in certain circumstances, punitive damages can be awarded under s. 272 *C.P.A.* in the absence of prejudice to the consumer, that is, even if compensatory damages are not awarded at the same time (para. 55). In any event, she found that the evidence in the record showed that the appellant had suffered moral injuries — difficulty sleeping and embarrassment in his relations with the people around him — as a result of the respondents' refusal to pay him the grand prize (para. 57). Cohen J. set the value of those moral injuries at $1,000.

22 Next, Cohen J. stated that it was appropriate in this case to award the appellant punitive damages in addition to the compensatory damages. On the issue of the quantum of punitive damages, she added that art. 1621 *C.C.Q.* required the court to consider all the circumstances, including the debtor's patrimonial situation and the gravity of the debtor's fault. In discussing the gravity of the fault, Cohen J. held that the respondents had failed to fulfil the obligations imposed on them by the *C.P.A.* by sending "thousands of these false and misleading mailings to francophone consumers in Quebec" (para. 59). She added that the respondents had also violated the *Charter of the French language*, R.S.Q., c. C-11, by sending the appellant advertising material in English only (para. 64). In her view, such a violation of the *Charter of the French language* could be taken into consideration in assessing the quantum of punitive damages awarded under s. 272 *C.P.A.* (para. 66).

23 Furthermore, Cohen J. stated that the sweepstakes advertising method was quite lucrative for the respondents. She noted that, although the quantum of punitive damages should not convey the impression that the court in this case was using those damages to indirectly uphold the contractual portion of the appellant's claim, the quantum nonetheless had to reflect the deterrent function of such damages and take the respondents' patrimonial situation into account. Exercising her judicial discretion, she fixed the quantum of the punitive damages awarded to the appellant at $100,000, which corresponded to the value of the "Bonus" prize to which the appellant would have been entitled if he had had the winning entry and returned the reply coupon within five days.

24 Cohen J. further ordered, again exercising her judicial discretion, that the costs awarded to the appellant be calculated on the basis of the value of the action "as instituted", namely $1,250,887.10, thus enabling the appellant to be reimbursed a portion of his judicial and extrajudicial costs, including the fees paid to his attorneys (para. 73).

B. Quebec Court of Appeal (2009 QCCA 2378, [2010] R.J.Q. 3 (C.A. Que.), Chamberland, Morin and Rochon JJ.A.)

25 Both parties appealed the Superior Court's decision. The Quebec Court of Appeal, in reasons written by Chamberland J.A., allowed the respondents' appeal and dismissed the incidental appeal. It thus dismissed the appellant's

recourse in damages in its entirety, but without costs because of the nature of the case and the novelty of the issues (para. 53).

26 The Court of Appeal began by dismissing the appellant's incidental appeal with respect to the payment of the prize. That conclusion is no longer being challenged. The principal issue concerned the award of compensatory and punitive damages against the respondents.

27 The Court of Appeal held, contrary to the respondents' argument, that the *C.P.A.* was applicable in this case. Chamberland J.A. pointed out that s. 217 *C.P.A.* clearly states that the fact that a prohibited practice has been used is not subordinate to whether or not a contract has been made (para. 25). He added that in any event, the parties had in fact formed a contractual relationship by means of the offer to participate in a sweepstakes and the acceptance of that offer in the form of the return of the reply coupon (para. 26).

28 Following those initial findings, the Court of Appeal concluded that the respondents had not violated the *C.P.A.* First, in its view, the respondents had not violated s. 228 *C.P.A.* by failing to indicate clearly in the Document that the appellant might not be the grand prize winner (para. 28).

29 Next, the Court of Appeal held that using the name of a fictitious person, Elizabeth Matthews, as the signer of the Document did not contravene s. 238(*c*) *C.P.A.* The use of a "pen name" did not on its own have the potential to mislead consumers about the merchant's identity and was simply intended to [TRANSLATION] "personalize" the mailings (para. 29).

30 Finally, Chamberland J.A. disagreed with Cohen J.'s view that the Document contained false or misleading representations contrary to s. 219 *C.P.A.* The Court of Appeal stated that it could not conclude that the Document might give the average Quebec consumer the general impression that the recipient was the grand prize winner (paras. 49-50). The court was not even critical of the respondents' conduct:

> [TRANSLATION] With respect, I see eye-catching text in the documentation sent to the [appellant], but I do not see any misleading, underhanded or deceitful statements. I even suspect that the [appellant], a well-informed businessman who worked locally and internationally in both French and English, understood the sweepstakes and his chances of winning perfectly well from the very start. [para. 51]

31 According to the Court of Appeal, there were no false or misleading representations in the Document. Although the court seemed to acknowledge that the Document's eye-catching headings might initially convey the impression that the appellant had just won the grand prize, it expressed the view that a careful reading of the Document was sufficient to dispel that impression. It is, in a word, up to consumers to be suspicious of advertisements that seem too good to be true. For these reasons, the Court of Appeal set aside the award of compensatory and punitive damages against the respondents.

IV. Analysis

A. Issues

32 This appeal raises the following issues:

1. What is the proper approach in Quebec for determining whether an advertisement constitutes a false or misleading representation for the purposes of the *Consumer Protection Act*?

2. In the absence of a contract referred to in s. 2 *C.P.A.*, can a consumer exercise a recourse in damages under s. 272 *C.P.A.*?

3. What are the conditions for exercising the recourse in punitive damages provided for in s. 272 *C.P.A.*?

4. Should punitive damages be awarded in this case and, if so, what criteria should be considered in determining their quantum?

B. Review of the General Objectives of Consumer Law and the Structure of the C.P.A.

33 For the purposes of this appeal, this Court must interpret certain core components of the legal scheme established by the *C.P.A.* As we mentioned above, we must define the characteristics of the prohibition against certain advertising practices and the conditions for exercising the recourse provided for in s. 272 *C.P.A.* where that prohibition has been violated. For this, a brief review of the objectives of modern consumer law and the origins of that law in Quebec and Canada will be helpful.

(1) Rise of the Consumer Society and Its Impact on the Normative Environment of Consumer Protection

34 Historically, the Canadian consumer protection legislation was originally focused on protecting consumers from [TRANSLATION] "abuses of power" by merchants (L.-A. Couture, "Rapport sur la protection du consommateur au niveau fédéral en droit pénal canadien", in *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, vol. 24 (1975), 303, at p. 307).

35 Preserving a competitive economic environment remained central to Canadian consumer protection mechanisms until the mid-20th century. Consumer protection remained indirect in nature: for example, federal legislation was focused more on regulating the Canadian economy at a structural level than on directly protecting consumers' interests (see J.-L. Baudouin, "Rapport général", in *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, vol. 24 (1975), 3, at p. 4).

36 With the rise of the consumer society after World War II, however, new concerns came to the fore with respect, in particular, to the increased vulnerability of consumers (N. L'Heureux and M. Lacoursière, *Droit de la consommation* (6th ed. 2011), at pp. 1-4).

37 Changes in the marketplace led to the realization that consumers needed to be better protected. In fact, the liberalization of markets favoured the emergence of systems focused more on protecting consumers (see Baudouin, at pp. 3-4; see also *Prebushewski v. Dodge City Auto (1984) Ltd.*, 2005 SCC 28, [2005] 1 S.C.R. 649 (S.C.C.), at para. 33).

38 Both the Parliament of Canada and the Quebec legislature tried to resolve the problems raised by the new consumer society. Within the Canadian constitutional framework, Parliament and the legislatures have all played important — and often complementary — roles in this regard. We will not dwell here on the measures adopted by Parliament. Instead, we will be focusing on the Quebec legislation and on how it has developed.

39 The rise of the consumer society called attention to the limits of the general law in Quebec, as in the other Canadian provinces. In Quebec, the contractual fairness model based on freedom of contract, consensualism and the binding force of contracts seemed increasingly unsuited to ensuring real equality between merchants and consumers. When the Quebec legislature first became involved in this area, its goal was to develop a new model of contractual fairness based on a scheme of public order that would be an exception to the traditional rules of the general law (see Baudouin, at p. 5).

40 Quebec consumer law has essentially centred around two successive consumer protection statutes enacted in 1971 and 1978, which were subsequently supplemented by the inclusion of certain provisions of public order in the *Civil Code of Québec*. The first *Consumer Protection Act* (S.Q. 1971, c. 74) applied only to contracts involving credit and distance contracts, and did not deal separately with business practices. In reality, advertising was regulated only indirectly by means of a legal fiction incorporating its content as a term of the resulting contract. Within just a few years after the first Act came into force, it had become obvious that the solution adopted by the legislature needed to be reviewed.

41 Today's *Consumer Protection Act* establishes a much more elaborate legal scheme than the previous version did. Its enactment reflects the Quebec legislature's desire to extend the protection of the *C.P.A.* to a broader range of contracts

and to explicitly regulate certain business practices that are considered fraudulent as regards their effect on consumers. In practical terms, the Act is divided into seven titles that reflect the main concerns of Quebec consumer law. Title I, "Contracts Regarding Goods and Services", contains provisions whose primary purpose is to restore the contractual balance between merchants and consumers. Title II, "Business Practices", identifies certain types of business conduct as prohibited practices in order to ensure the veracity of information provided to consumers through advertising or otherwise.

42 These two main titles are supplemented by, among others, Title IV, which sets out the civil and penal recourses that can be exercised to sanction violations of the Act by merchants. Aside from the recourse provided for in s. 272 *C.P.A.*, on which this appeal is focused, the main recourses are as follows: a demand by a consumer for the nullity of a contract (s. 271 *C.P.A.*), a penal proceeding instituted by the Director of Criminal and Penal Prosecutions (s. 277 *C.P.A.*) and an application for an interlocutory or permanent injunction by the Attorney General of Quebec, the president of the Office de la protection du consommateur ("Office") or a legal person that is a consumer advocacy body (ss. 290, 310 and 316 *C.P.A.*). The president of the Office may also negotiate a voluntary undertaking by a merchant to comply with the Act (s. 314 *C.P.A.*).

(2) Protection Against False or Misleading Advertising

43 The measures to protect consumers from fraudulent advertising practices are one expression of a legislative intent to move away from the maxim *caveat emptor*, or "let the buyer beware". As a result of these measures, merchants, manufacturers and advertisers are responsible for the veracity of information they provide to consumers and may, should such information contain falsehoods, incur the civil or penal consequences provided for in the legislation. As Judge Matheson of the Ontario County Court explained in *R. v. Colgate-Palmolive Ltd.* (1969), [1970] 1 C.C.C. 100 (Ont. Co. Ct.), a case involving federal law, the maxim *caveat venditor* is now far more appropriate to describe the merchant-consumer relationship. In an oft-cited judgment, he wrote the following:

> This legislation is the expression of a social purpose, namely the establishment of more ethical trade practices calculated to afford greater protection to the consuming public. It represents the will of the people of Canada that the old maxim *caveat emptor*, let the purchaser beware, yield somewhat to the more enlightened view *caveat venditor* — let the seller beware. [p. 102]

(3) Protection Against False or Misleading Representations in the C.P.A.

44 One of the main objectives of Title II of the *C.P.A.* is to protect consumers from false or misleading representations. Many of the practices it prohibits relate to the veracity of information provided to consumers. Section 219 *C.P.A.* sets out this objective in very clear language. It provides, quite generally, that no merchant, manufacturer or advertiser may make false or misleading representations to a consumer by any means whatever. The word "representation" is defined in s. 216 *C.P.A.* as including an affirmation, behaviour or an omission. Section 219 *C.P.A.* is supplemented by prohibitions relating to certain specific types of representations (ss. 220 to 251 *C.P.A.*).

45 Section 218 *C.P.A.* guides the application of all these provisions of Title II. It explains the approach to be used to determine whether a representation is to be considered a prohibited practice. Its wording is based to a large extent on that of s. 52(4) of the *Combines Investigation Act*, R.S.C. 1985, c. C-23, a slightly different version of which can now be found in s. 52(4) of the *Competition Act*, R.S.C. 1985, c. C-34. Section 218 *C.P.A.* reads as follows:

> **218.** To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

46 The analytical approach provided for in s. 218 *C.P.A.* requires the consideration of two factors: the "general impression" given by a representation and the "literal meaning" of the words used in it. We will review the requirements of each of these two factors.

47 The phrase "literal meaning of the terms used therein" does not raise any interpretation problems. It simply means that every word used in a representation must be interpreted in its ordinary sense. The purpose of this part of s. 218 *C.P.A.* is to prohibit merchants from raising a defence based on a subtle, technical or convoluted meaning of a word used in a representation. The legislature's intention was thus that the meanings given to words used in representations be the same as their meanings in everyday life.

48 What is meant by the expression "general impression" requires further explanation, however. Although there have been few cases on this point, the courts seem in some recent decisions to have established more explicit principles from which a predominant interpretation can be drawn.

49 One of these principles that has recently been developed more clearly by the Quebec courts relates to the abstract nature of the analysis of the general impression given by a representation. Influenced by Professor L'Heureux's comments on this point, the courts now seem to accept, as did the courts below in the instant case, that the "general impression" conveyed by a representation must be analysed in the abstract, that is, without considering the personal attributes of the consumer who has instituted proceedings against the merchant. (See *Québec (Procureur général) v. Distribution Canovex Inc.*, [1996] J.Q. No. 5302 (C.Q., Crim. and Pen. Div.), at paras. 39-40; *Option Consommateurs c. Brick Warehouse*, 2011 QCCS 569 (C.S. Que.), at paras. 71-73; N. L'Heureux, *Droit de la consommation* (5th ed. 2000), at p. 347. See also *Tremblay c. Ameublements Tanguay inc.*, 2011 QCCS 3078 (C.S. Que.) (CanLII), at para. 97; and L'Heureux and Lacoursière, at pp. 489-90.)

50 This approach is consistent with the spirit of the *C.P.A.*, whose main objective is to protect consumers. The courts must therefore be able to sanction any representation that, from an objective standpoint, constitutes a prohibited practice. Whether a commercial representation did or did not cause prejudice to one or more consumers is not relevant to the determination of whether a merchant engaged in a prohibited practice within the meaning of Title II of the *C.P.A.* The *C.P.A.* is concerned not only with remedying the harm caused to consumers by false or misleading representations, but also with preventing the distribution of advertisements that could mislead consumers and possibly cause them various types of prejudice.

51 In sum, this is the objective being pursued in requiring that an abstract analysis be conducted under s. 218 *C.P.A.* This approach takes account of the concrete impact that advertising can have on consumers in their everyday lives. Professor Claude Masse has written the following on this subject:

> [TRANSLATION] Commercial advertising often plays on the general impression that may be conveyed by an advertisement and even on the literal meaning of the terms used. Information in advertisements is transmitted quickly. Advertising relies on the image and the impression of the moment. This general impression is often what is sought in advertising. By definition, consumers do not have time to think at length about the real meaning of the messages being conveyed to them or about whether words are being used in their literal sense. The content of advertising is taken seriously in consumer law. Consumers do not have to wonder whether or not the promises made to them or the undertakings given are realistic, serious or plausible. Merchants, manufacturers and advertisers are therefore bound by the content of messages actually conveyed to consumers.
>
> [Emphasis added.]
>
> (*Loi sur la protection du consommateur: analyse et commentaires* (1999), at p. 828)

52 The use of the general impression test of s. 218 *C.P.A.* reflects how, in practice, consumers are very frequently led to exercise their freedom of choice. The question thus becomes how the courts are to determine the general impression conveyed by a commercial representation. The parties have taken very different positions in this Court on the interpretation of this concept.

53 The appellant basically argues that the general impression conveyed by a written advertisement must be assessed contextually, that is, by considering both the writing style and the choice of words. He submits that the approach required by s. 218 *C.P.A.* does not involve considering the words used in an advertisement in isolation from the medium in which they are used. In other words, the appellant contends that the general impression is based both on the layout of an advertisement and on the meaning of the words used.

54 The respondents counter that the general impression test must not be likened to an "instant impression" test. They argue that the general impression is not the instant impression conveyed by an advertisement's layout and that the courts cannot dispense with a careful reading of a written advertisement. The respondents therefore submit that s. 218 *C.P.A.* requires an analytical approach that emphasizes the text of an advertisement rather than its layout.

55 In our opinion, the respondents are wrong to downplay the importance of the layout of an advertisement. It must be remembered that the legislature adopted the general impression test to take account of the techniques and methods that are used in commercial advertising to exert a significant influence on consumer behaviour. This means that considerable importance must be attached not only to the text but also to the entire context, including the way the text is displayed to the consumer.

56 However, the respondents are right to say that the general impression referred to in s. 218 *C.P.A.* is not the impression formed as a result of a rushed or partial reading of an advertisement. The analysis under that provision must take account of the entire advertisement rather than merely of portions of its content. But it is just as true that the analytical approach required by s. 218 *C.P.A.* does not involve the minute dissection of the text of an advertisement to determine whether the general impression it conveys is false or misleading. The courts must not approach a written advertisement as if it were a commercial contract by reading it several times, going over every detail to make sure they understand all its subtleties. Reading over the entire text once should be sufficient to assess the general impression conveyed by a written advertisement, and it is that general impression that will then make it possible to determine whether a representation made by a merchant constitutes a prohibited practice.

57 In sum, it is our opinion that the test under s. 218 *C.P.A.* is that of the first impression. In the case of false or misleading advertising, the general impression is the one a person has after an initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words used. This test is similar to the one that must be applied under the *Trade-marks Act* (R.S.C. 1985, c. T-13) to determine whether a trade-mark causes confusion (*Veuve Clicquot Ponsardin c. Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 S.C.R. 824 (S.C.C.), at para. 20; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 (S.C.C.), at para. 41).

58 We cannot therefore accept the distinction proposed by the respondents between "instant impression" and "general impression". In actual fact, the respondents are asking this Court to apply a standard much more exacting than that of the first impression. This conclusion flows necessarily from their position on the application of the general impression test to the facts of the case at bar. To explain why their advertising strategy does not contravene Title II of the *C.P.A.*, they state that the "documents ... were in the possession of [the appellant] for a lengthy period of time and [that he] *was able to read them carefully on several occasions* before sending in the Official Entry Certificate" (R.F., at para. 46 (emphasis added)).

59 We will now consider the approach taken by the Court of Appeal in this case in light of the principles discussed above regarding the analytical approach required by s. 218 *C.P.A.* With respect, the Court of Appeal seems, in our view, to have favoured an approach that does away with the need to ascertain the general impression conveyed by the Document and replaces it with an opinion resulting from an analysis. In substance, this approach involved dissecting the Document to isolate and connect parts of sentences to reveal the "real message" it conveyed (paras. 45-48). This led the Court of Appeal to attach excessive importance to the parts of the Document containing phrases such as "if you have and return the Grand Prize winning entry" and "if you hold the Grand Prize winning number" (A.R., vol. 2, at p. 59). In so doing, it departed from the general impression test provided for in s. 218 *C.P.A.*

60 This dissection of the text by the Court of Appeal resembles the classical civil law approach to contract analysis and strays from the determination of the general impression the entire advertisement conveys to a consumer. Furthermore, the purpose of Title II of the *C.P.A.* is to make merchants responsible for the content of their advertisements on the basis of the general impression the advertisements convey. By adopting so exacting a standard in s. 218 *C.P.A.*, the legislature intended to ensure that consumers could view commercial advertising with confidence rather than suspicion. Thus, the objective of the current legislation is to enable a consumer to assume that the general impression conveyed by an advertisement is accurate and not the opposite. In sum, the analytical approach chosen by the Court of Appeal for establishing the general impression conveyed by the respondents' advertisement was inconsistent with the general impression test adopted by the legislature.

(4) Consumer in Issue in Title II of the C.P.A.

61 The above discussion of the general impression concept leaves an important question unanswered: From what perspective should the courts assess the general impression conveyed by a commercial representation? Who is the consumer for the purposes of s. 218 *C.P.A.*? Answering this question is the second step of the analytical approach required by s. 218 *C.P.A.*

62 In recent decisions, judges have commonly used the expression "average consumer" to describe the consumer in issue in Title II of the *C.P.A.* Of course, the average consumer does not exist, but is the product of a legal fiction personified by an imaginary consumer to whom a level of sophistication that reflects the purpose of the *C.P.A.* is attributed. In the case at bar, the crux of the issue is whether the level of sophistication of the average consumer conceptualized by the Court of Appeal is consistent with the objectives of the *C.P.A.*

63 The appellant argues that the Court of Appeal erred in defining the average consumer as one with [TRANSLATION] "an average level of intelligence, scepticism and curiosity" (para. 50). He submits that the Court of Appeal departed from the prevailing line of authority in Quebec, according to which the average consumer must be considered [TRANSLATION] "credulous and inexperienced". He adds that, by stressing the average consumer's intelligence, scepticism and curiosity, the Court of Appeal proposed a new standard that could deprive many consumers of the protection of the *C.P.A.* (A.F., at para. 40).

64 The respondents argue that the Court of Appeal did not change the definition of the average consumer. In their view, Chamberland J.A. simply pointed out that the average consumer, although credulous, is not completely unintelligent. He did not change the requirements of s. 218 *C.P.A.* (R.F., at paras. 28 and 32).

65 The *C.P.A.* is one of a number of statutes enacted to protect Canadian consumers. The courts that have applied these statutes have often used the average consumer test. In conformity with the objective of protection that underlies such legislation, the courts have assumed that the average consumer is not very sophisticated.

66 This Court's decisions relating to trade-marks provide a good example of this interpretive approach. In *Mattel U.S.A. Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772 (S.C.C.), the Court was asked to clarify the standard to be used by the courts to determine whether a trade-mark causes confusion with a registered trade-mark. Binnie J., writing for the Court, concluded that the average consumers protected by the *Trade-marks Act* are "ordinary hurried purchasers" (para. 56). He explained that "[t]he standard is not that of people 'who never notice anything' but of persons who take no more than 'ordinary care to observe that which is staring them in the face'" (para. 58).

67 The general impression test provided for in s. 218 *C.P.A.* must be applied from a perspective similar to that of "ordinary hurried purchasers", that is, consumers who take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement. The courts must not conduct their analysis from the perspective of a careful and diligent consumer.

68 Obviously, the adjectives used to describe the average consumer may vary from one statute to another. Such variations reflect the diversity of economic realities to which different statutes apply and of their objectives. The most important thing is not the adjectives used, but the level of sophistication expected of the consumer.

69 In applying the general impression test provided for in s. 218 *C.P.A.*, the Quebec courts have traditionally used the words "credulous" and "inexperienced" to describe the consumer in issue in the Act, relying on *R. v. Imperial Tobacco Products Ltd.*, [1971] 5 W.W.R. 409 (Alta. C.A.), to incorporate the "credulous and inexperienced person" concept into Title II of the *C.P.A.* (Masse, at p. 828). After the courts had referred to this concept occasionally in the 1980s and 1990s, including in *Québec (Procureur général) c. Louis Bédard inc.*, 1986 CarswellQue 981 (Que. C.S.P.), the Quebec Court of Appeal rendered a landmark decision on this question in *Turgeon c. Germain Pelletier ltée*, [2001] R.J.Q. 291 (C.A. Que.), in which it confirmed that the "credulous and inexperienced" consumer test is applicable in Quebec consumer law. Fish J.A., as he then was, wrote the following on this point:

> [TRANSLATION] As my colleague Gendreau J.A. pointed out in *Nichols v. Toyota Drummondville (1982) inc.*, the *Consumer Protection Act* is a statute of public order whose purpose is to restore the contractual [balance] between merchants and their customers. The credulous and inexperienced person test must be used to assess the misleading nature of the advertising and business practices to which the *Consumer Protection Act* applies.
>
> [Emphasis added; para. 36.]

70 Since then, trial courts in Quebec have followed *Turgeon*, including in several class actions based on the *C.P.A.* (see *Riendeau c. Brault & Martineau inc.*, 2007 QCCS 4603, [2007] R.J.Q. 2620 (C.S. Que.), at para. 149, aff'd by 2010 QCCA 366, [2010] R.J.Q. 507 (C.A. Que.); *Adams v. Amex Bank of Canada*, 2009 QCCS 2695, [2009] R.J.Q. 1746 (C.S. Que.), at para. 126; *Marcotte c. Banque de Montréal*, 2009 QCCS 2764 (C.S. Que.) (CanLII), at para. 357; *Marcotte c. Fédération des caisses Desjardins du Québec*, 2009 QCCS 2743 (C.S. Que.) (CanLII), at para. 257). In sum, it is clear that, since *Turgeon c. Germain Pelletier ltée*, the "general impression" referred to in s. 218 *C.P.A.* is the impression of a commercial representation on a credulous and inexperienced consumer.

71 Thus, in Quebec consumer law, the expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a well-informed person. To meet the objectives of the *C.P.A.*, the courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.

72 The words "credulous and inexperienced" therefore describe the average consumer for the purposes of the *C.P.A.* This description of the average consumer is consistent with the legislature's intention to protect vulnerable persons from the dangers of certain advertising techniques. The word "credulous" reflects the fact that the average consumer is prepared to trust merchants on the basis of the general impression conveyed to him or her by their advertisements. However, it does not suggest that the average consumer is incapable of understanding the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible.

73 We must therefore find that the Court of Appeal changed the standard of the average consumer for the purposes of Title II of the *C.P.A.* and that its decision was incompatible with the *C.P.A.*'s objective of protecting consumers. In our opinion, defining the average consumer as having [TRANSLATION] "an average level of intelligence, scepticism and curiosity" is inconsistent with the letter and the spirit of s. 218 *C.P.A.* Such a definition raises a number of problems.

74 First, the words "average level of intelligence" suggest that the consumer the legislature wanted to protect in Title II of the *C.P.A.* is a consumer who has the same level of sophistication as the average person. As we mentioned above, consumer law does not protect consumers only if they have proven to be prudent and well informed. The *C.P.A.*'s general objective of protecting consumers means that the appropriate test is not that of the prudent and diligent consumer.

75 Moreover, from a practical standpoint, this part of the definition proposed by Chamberland J.A. is not really compatible with the abstract analysis required by s. 218 *C.P.A.*, since the use of a standard like that of the "consumer with an average level of intelligence" could lead the courts to adopt a test based on determining the level of sophistication of the consumer in question in a given case. Such a test would make it possible to exonerate a merchant who is lucky enough to be sued by a consumer of above-average intelligence. The court's role would then be to determine whether the consumer exercising the recourse was in fact misled rather than whether the advertisement in question constituted a false or misleading representation. This would decrease the level of protection provided to consumers by the *C.P.A.*

76 Next, the words "average level of ... scepticism" replace the general intention test with a test based on the opinion formed after a more thorough analysis. It invites the courts to assume that the average consumer must take concrete action to find the "real message" hidden behind an advertisement that seems advantageous. This analytical approach can only weaken the general impression test, since a sceptical person will be inclined not to believe an advertisement solely on the basis of the general impression it conveys. A sceptical person will doubt, ask questions and perhaps make his or her own inquiries. If, at the end of that process, the person concludes that the content of the advertisement is true to reality, his or her assessment will be based not on the general impression conveyed by the advertisement but on the concrete action he or she has taken.

77 The above comments also apply to the "average level of ... curiosity" the average consumer must be presumed to have, according to the Court of Appeal. With respect, the use of this expression rests on the same incorrect premise as does that with respect to the scepticism of the average consumer. A consumer with "an average level of curiosity" will not be so stupid or naïve as to rely on the first impression conveyed by a commercial representation but will be curious enough to consider that impression more closely. He or she will try to determine whether the general impression conveyed by an advertisement is actually true to reality. On this point, we reiterate that the purpose of Title II of the *C.P.A.* is to make it possible for consumers to trust the general impression given by merchants in their advertisements. If this general impression is not true to reality, the advertisement in question constitutes a false or misleading representation and the merchant has engaged in a prohibited practice for the purposes of the *C.P.A.*, regardless of whether the "real message" of the advertisement could be understood by analysing it in depth. In fact, the Court of Appeal's interpretation of the average consumer concept is closer to that of the diligent person, which is neither mentioned in the Act nor in keeping with its spirit.

78 For all these reasons, we cannot endorse the definition of the average consumer proposed by the Court of Appeal. In our opinion, the concept of the credulous and inexperienced consumer applied by the Quebec courts in the line of authority that prevailed before the judgment of the Court of Appeal in the instant case is more consistent with the Quebec legislature's objective of protecting consumers from false or misleading advertising. A court asked to assess the veracity of a commercial representation must therefore engage, under s. 218 *C.P.A.*, in a two-step analysis that involves — having regard, provided that the representation lends itself to such an analysis, to the literal meaning of the words used by the merchant — (1) describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and (2) determining whether that general impression is true to reality. If the answer at the second step is no, the merchant has engaged in a prohibited practice.

C. Consistency of the Court of Appeal's Judgment with the C.P.A.

79 What must now be determined is whether, in light of these principles, the Court of Appeal was right to reverse the trial judge's finding that the Document contained representations that contravened certain provisions of Title II of the *C.P.A.* Cohen J. identified three violations of that Act. We will consider the alleged violations of ss. 219 and 228 *C.P.A.* together, since they concern different aspects of a single reality that cannot easily be separated from one another. We will discuss the alleged violation of s. 238(*c*) *C.P.A.* separately.

(1) Alleged Violation of Sections 219 and 228 C.P.A.

80 Sections 219 and 228 *C.P.A.* read as follows:

> **219.** No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.
>
> **228.** No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

81 In the instant case, the alleged violation of s. 219 *C.P.A.* lay in the fact that the Document falsely stated that the appellant was the grand prize winner, while the alleged violation of s. 228 *C.P.A.* related specifically to the respondents' failure to reveal in the Document that the appellant might not be the grand prize winner. These two allegations therefore raise the question whether a credulous and inexperienced consumer, after first reading the Document, would have been under the general impression that the appellant had won the grand prize or would instead have understood that the respondents were merely offering him an opportunity to participate in a contest with a minute chance of winning a cash prize.

82 The "real message" the respondents wanted to convey by sending the Document must be explained here. The sweepstakes in issue was a contest in which only one person would win the grand prize. To receive the prize, the person had to have the winning entry, return the reply coupon by the deadline and correctly answer a skill-testing question. Only one person had the winning entry, which had been selected before the mailings were sent. However, at the top of each recipient's document, the word "claim" appeared, followed by a combination of numbers and letters. In the event that the pre-selected winner failed to return the reply coupon, a draw would be held for the grand prize among all those who had returned it.

83 According to the respondents, the average consumer would be capable of understanding the following after reading once through the documentation received by the appellant: (1) the appellant had received number GV1T7IU62; (2) that number was not necessarily the winning number; (3) if his number was not the pre-selected number, his chances of winning were extremely small; (4) for him to have any chance of winning, the holder of the winning entry would have to fail to return his or her reply coupon, in which case a random draw would be held among all those who had returned their own reply coupons by the deadline; and (5) in such a case, the appellant's odds of winning would be 1:120 million. The Court of Appeal accepted the respondents' argument on this point (para. 49).

84 With respect, we find it hard to understand how a credulous and inexperienced consumer could deduce all this after reading the Document for the first time. The first sentence that leaps off the page is the following one, written in bold uppercase letters:

> OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF $833,337.00!

85 The general impression conveyed by the Document is influenced by this sentence placed at the top of the Document. The average consumer would of course, assuming that he or she understood English, be capable of reading the words preceding that sentence: "If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we will officially announce that". However, it is unreasonable to assume that the average consumer would be particularly familiar with the special language or rules of such a sweepstakes and would clearly understand all the essential elements of the offer made to the appellant in this case. The Document's strange collection of affirmations and restrictions is not clear or intelligible enough to dispel the general impression conveyed by the most prominent sentences. On the contrary, it is highly likely that the average consumer would conclude that the appellant held the winning entry and had only to return the reply coupon to initiate the claim process. Indeed, the Document did not state anywhere that a winner had been pre-selected and that the appellant had received only a participation number. This information instead appeared on the return envelope that accompanied the Document, where the terms and conditions of the random draw were defined very vaguely in small print.

86 Despite all the conditions laid down in the Document, on which the respondents placed great emphasis, a point was made in the Document of referring to the appellant as the sweepstakes winner. In the column on the left, he was listed with other winners — real or fictitious — and the entry contained the notation "PRIZE STATUS: AUTHORIZED FOR PAYMENT". There were repeated indications that a cheque was about to be mailed to the appellant. He was also urged to put aside all his doubts and hurry to return the reply coupon, for otherwise he might lose everything! The reply coupon received by the appellant even referred to the number assigned to him as a "Prize Claim Number", not as a contest participation number. It would be possible to continue this list of tricks used in writing and laying out the text for a long time.

87 In our opinion, the trial judge did not err in finding that the Document was misleading. The Document conveyed the general impression that the appellant had won the grand prize. Even if it did not necessarily contain any statements that were actually false, the fact remains that it was riddled with misleading representations within the meaning of s. 219 *C.P.A.* Furthermore, the contest rules were not all apparent to someone reading the Document for the first time. These are important facts that the respondents were required to mention. As a result, the respondents also violated s. 228 *C.P.A.*

(2) Alleged Violation of Section 238(c) C.P.A.

88 Section 238(*c*) reads as follows:

> **238**. No merchant, manufacturer or advertiser may, falsely, by any means whatever,
>
> . . . . .
>
> (*c*) state that he has a particular status or identity.

89 In our opinion, Chamberland J.A. rightly concluded that the respondents had not contravened s. 238(*c*) of the *C.P.A.* in this case. The Document contained no false representations concerning the respondents' status or identity. It can be understood from a single reading that the Document was from the respondents and that they did not claim to have a particular status or identity that they did not actually have. As the Court of Appeal found, using a fictitious person, Elizabeth Matthews, as the signer of the Document did not constitute a prohibited practice under s. 238(*c*) *C.P.A.*

D. Recourse Provided for in Section 272 C.P.A.: Conditions for Exercising the Recourse and Criteria for Granting Remedies

90 Our conclusion that the Document contained representations contrary to ss. 219 and 228 *C.P.A.* logically leads us to the question of the appropriate remedy in this case. The appellant submits that he is entitled to be awarded the equivalent of nearly US$1 million in punitive damages under s. 272 *C.P.A.* The respondents not only contend that he is not so entitled, but also deny that the recourse provided for in s. 272 *C.P.A.* can be exercised by a consumer to sanction a prohibited practice. This objection raised by the respondents revives a debate between Quebec authors that has been under way since the early 1980s and that this Court must now try to settle.

(1) Section 272 C.P.A. and Sanctioning Prohibited Practices

91 Section 272 *C.P.A.* reads as follows:

> **272.** If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,
>
> (a) the specific performance of the obligation;
>
> (b) the authorization to execute it at the merchant's or manufacturer's expense;
>
> (c) that his obligations be reduced;

(d) that the contract be rescinded;

(e) that the contract be set aside; or

(f) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

92 For many years now, the Quebec courts have held that s. 272 *C.P.A.* can be applied to sanction prohibited practices used by merchants and manufacturers (see, *inter alia*, *Chrysler Canada ltée c. Poulin* (C.A. Que.); *Assoc. coopérative d'économie familiale du Sud-Ouest de Montréal c. Arrangements alternatifs de crédit du Québec inc.* (1993), [1994] R.J.Q. 114 (C.S. Que.); *Beauchamp c. Relais Toyota Inc.*, [1995] R.J.Q. 741 (C.A. Que.); and *Centre d'économie en chauffage Turcotte inc. c. Ferland*, [2003] J.Q. No. 18096 (C.A. Que.)). Defendants in proceedings under s. 272 *C.P.A.*, and in class actions in particular, nevertheless argued that this provision should not apply to allegations of violations of Title II of the Act (see, for example, *9029-4596 Québec inc. c. Duplantie*, [1999] R.J.Q. 3059 (C.Q.)). But the Court of Appeal reiterated in *Brault & Martineau inc.* that s. 272 does apply to such violations. In that case, Duval Hesler J.A. stated that [TRANSLATION] "I believe it has been clearly established that sanctions for prohibited practices within the meaning of the CPA cannot be limited to the recourse provided for in s. 253 of that Act" (para. 40), that is, the recourses available in the general law.

93 Despite this case law, the respondents argue that s. 272 *C.P.A.* does not apply to prohibited practices. They submit that the sole purpose of that provision is to sanction failures by merchants and manufacturers to fulfil the contractual obligations imposed on them by Title I of the *C.P.A.* According to the respondents, the use of a prohibited practice is an offence that can be sanctioned only under the *C.P.A.*'s penal provisions.

94 The respondents rely on a view long advocated by Professor L'Heureux. In a former edition of her treatise entitled *Droit de la consommation*, she wrote the following:

> [TRANSLATION] Moreover, section 272 does not constitute a sanction for prohibited practices, since such practices are not obligations imposed by the Act. It must be recognized that the business practices in question in Title II are, first and foremost, offences that are matters of directive public order. They are prohibitions that are sanctioned mainly through penal proceedings.
>
> (N. L'Heureux, *Droit de la consommation* (5th ed. 2000), at p. 358; see also N. L'Heureux, "L'interprétation de l'article 272 de la Loi sur la protection du consommateur" (1982), 42 *R. du B.* 455.)

95 Not all the authors agree with Professor L'Heureux's view. A review of the literature published in Quebec on this question even suggests that it is a minority view. Some authors have taken the position that a literal reading of s. 272 *C.P.A.* does not support limiting the obligations to which it refers to certain specific [TRANSLATION] "duties" imposed by Title I of the Act. In their opinion, the words "obligation imposed on him by this Act" apply to the obligations established in both Title I and Title II of the *C.P.A.* (see, *inter alia*, F. Lebeau, "La publicité et la protection des consommateurs" (1981), 41 *R. du B.* 1016, at p. 1039; C.-R. Dumais, "Une étude des tenants et aboutissants des articles 271 et 272 de la Loi sur la protection du consommateur" (1985), 26 *C. de D.* 763, at p. 775; Masse, at p. 835; and D. Lluelles and B. Moore, *Droit des obligations* (2006), at p. 316).

96 The most thorough critique of Professor L'Heureux's view has come from Professor Pauline Roy. According to Professor Roy, to exclude the prohibitions set out in Title II of the *C.P.A.* from the application of s. 272 *C.P.A.* is to forget that in Quebec civil law, the failure to fulfil an obligation not to do something can trigger civil liability in the same way as the failure to fulfil an obligation to do something. For this reason, she does not believe that [TRANSLATION] "the [legislature's] choice of a negative wording to describe the obligation not to mislead and not to engage in unfair practices to induce consumers to enter into contracts can have the effect of depriving consumers of the civil recourses specifically

provided for in the *Consumer Protection Act*" (P. Roy, "Les dommages exemplaires en droit québécois: instrument de revalorisation de la responsabilité civile", doctoral thesis (1995), at p. 476).

97 Professor Roy also advances arguments related to the general interest and the objectives of the *C.P.A.* If the contrary view were to prevail, she says, it would have to be concluded that the Quebec legislature intended to prevent consumers from claiming punitive damages from merchants or manufacturers who had engaged in practices prohibited by the Act. In her view, such an outcome would be inconsistent with the role the legislature intended for Title II of the *C.P.A.* She explains this as follows:

> [TRANSLATION] To accept that the recourse in exemplary damages is unavailable where merchants engage in prohibited practices would have consequences that the legislature certainly did not intend, especially given that such practices are generally fraudulent and often involve trifling amounts. Consumers are thus disinclined to sue, yet such conduct can, when all is said and done, be a significant source of profit for merchants. If an award of exemplary damages is unavailable, therefore, merchants will, given that the risk of being sued is minimal, keep a large share of the profits derived from their fraudulent conduct. It must be asked how it can be logical for a merchant who engages in fraudulent practices to be shielded from an award of exemplary damages even though such a sanction can be imposed on someone who violates the Act's other provisions without any malicious intent.
>
> [Emphasis added; p. 476.]

98 In our opinion, Professor Roy's view on this point is persuasive. Section 272 *C.P.A.* begins with the following words: "If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act". It refers, without distinction, to obligations imposed "by this Act". Read literally, this section thus requires that all the obligations merchants and manufacturers have under the *C.P.A.* be taken into account. This undoubtedly includes the obligations in Title II related to business practices. Therefore, the language of s. 272 *C.P.A.* does not support the distinction proposed by Professor L'Heureux between "obligations imposed by the Act" and "prohibitions". If the legislature had intended the word "obligation" in s. 272 *C.P.A.* to mean something other than what it means in Quebec civil law, it would have said so. It must therefore be concluded that the legislature's intention was that a civil sanction for prohibited practices would also be available under s. 272 *C.P.A.*

99 This conclusion is consistent with the Quebec legislature's general objectives in this area. The purpose of the *C.P.A.* is above all to purge business practices in order to protect consumers as fully as possible. To this end, the legislature has included in the *C.P.A.* administrative, civil and penal sanctions that jointly make up the Act's enforcement mechanism. The interpretation advocated by the respondents in this case would greatly reduce the Act's effectiveness by inappropriately limiting the role of consumers in ensuring the achievement of its objectives. From this standpoint, it is preferable to involve consumers, within a well-defined framework, in the pursuit of the legislative objectives associated with the prohibition of certain business practices. The public interest is thus better served, since consumers can actively contribute to the enforcement of legislation that is designed to protect them and can make up for any inadequacies in government intervention (E. P. Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977), 15 *Osgoode Hall L.J.* 327, at pp. 356-57).

100 In our opinion, s. 272 *C.P.A.* establishes a legislative scheme that makes it possible, *inter alia*, to sanction prohibited practices by means of civil proceedings instituted by consumers. However, it is important that this be done in accordance with the principles governing the application of the *C.P.A.* and, where applicable, the rules of the general law. We will therefore now turn to the conditions for implementing this type of sanction.

(2) Legal Interest Under Section 272 C.P.A.

101 Section 272 *C.P.A.* provides that "the consumer may demand, ... subject to the other recourses provided by this Act". This wording raises the following question: Does the consumer referred to in s. 272 *C.P.A.* have to be a natural person who has a contractual relationship with a merchant or a manufacturer?

102 The *C.P.A.* does not expressly define the consumer as a natural person who has entered into a contract governed by the Act. According to s. 1(*e*) *C.P.A.*, a consumer is "a natural person, except a merchant who obtains goods or services for the purposes of his business". At first glance, therefore, it might be thought that the "consumer" referred to in s. 272 *C.P.A.* need not have a contractual relationship with a merchant or a manufacturer to be found to have the legal interest required to institute proceedings under that provision. This view appears to be reinforced by s. 217 *C.P.A.*, which provides that "[t]he fact that a prohibited practice has been used is not subordinate to whether or not a contract has been made". This is the gist of the position taken by the appellant on this question (transcript, at pp. 26-27).

103 This position is undeniably based on a large and liberal conception of the role of consumer protection legislation, and specifically that of s. 272 *C.P.A.* The case law of the Quebec Court of Appeal confirms that such a conception is necessary to fully achieve the legislature's objectives in this area. For example, in *Nichols c. Toyota Drummondville (1982) Inc.*, Gendreau J.A. noted that s. 272 *C.P.A.* must be [TRANSLATION] "interpreted liberally in order to give full effect to this Act and ensure that it achieves its purpose in a manner consistent with the principles that underlie it, while at the same time complying with legal rules" (p. 750).

104 However, even a large and liberal principle of interpretation cannot justify overlooking the rules that are laid down in the Act to govern its application. One of those rules is found in s. 2 of the Act, which determines the general scope of the *C.P.A.*, providing that "[t]his Act applies to every contract for goods or services entered into between a consumer and a merchant in the course of his business". Section 2 *C.P.A.* establishes the basic principle that a consumer contract must exist for the Act to apply, except in the specific case of the Act's penal provisions. Professor Masse explains this as follows:

> [TRANSLATION] Generally speaking, five conditions must be met for the C.P.A. to apply:
>
> 1 — A contract must be entered into by the parties;
>
> 2 — One of the parties to the contract must be a "consumer";
>
> 3 — One of the parties must be a "merchant";
>
> 4 — The "merchant" must be acting in the course of his or her business; and
>
> 5 — The contract must be for goods or services. [p. 72]

105 If ss. 1(*e*) and 2 *C.P.A.* are read together, it must be concluded that the recourse under s. 272 *C.P.A.* is available only to natural persons who have entered into a contract governed by the Act with a merchant or a manufacturer. A natural person who has not entered into such a consumer contract cannot be considered a "consumer" within the meaning of s. 272 *C.P.A.*

106 The fact that advertising companies are not referred to in s. 272 *C.P.A.* also confirms that legal interest under that provision depends on the existence of a contract to which the Act applies. This legislative choice is no doubt attributable to the fact that advertisers have no contractual relationship with consumers, so they are not in a position to enrich themselves at the expense of consumers when they contribute to the use of prohibited practices. In this context, it is not surprising that the legislature has chosen not to make the recourse provided for in s. 272 *C.P.A.* available to hold advertisers liable to consumers for violations of the *C.P.A.*

107 Contrary to the appellant's arguments, the recourse provided for in s. 272 *C.P.A.* is therefore not available to a natural person who has not entered into a contract for goods or services to which the Act applies with a merchant or a manufacturer. In this sense, the fact that a natural person read a representation that constitutes a prohibited practice is not enough for that person to have the legal interest required to institute civil proceedings under that provision. As Professor Roy has noted, only a natural person who has been the "victim" of a prohibited practice can institute proceedings to have the practice sanctioned by a civil court (Roy, at p. 474). To be clear, this means that a consumer

must have entered into a contractual relationship with a merchant or a manufacturer to be able to exercise the recourse provided for in s. 272 *C.P.A.* against the person who engaged in the prohibited practice.

108 Nevertheless, there is an important point with regard to legal interest that needs to be clarified. A consumer contract is not necessarily formed at the precise time when the consumer purchases or obtains goods or services. In Quebec civil law, a contract is formed when the acceptance of an offer to contract is received by the offeror (art. 1387 *C.C.Q.*). If a representation concerning goods or services constitutes an offer under civil law rules, it can be concluded, subject to the formal requirements imposed by the *C.P.A.* on the undertakings to which it applies, that a consumer contract is formed at the moment when a merchant or one of the merchant's employees receives from a consumer the manifestation of his or her wish to accept that offer. However, s. 54.1 *C.P.A.* provides that every distance contract is deemed to be entered into at the consumer's address. Although the consumer's acceptance of the offer must always be assessed contextually, it remains distinct from the conclusion of the juridical operation envisaged by the parties (art. 1386 *C.C.Q.*). The performance of prestations does not coincide with, but rather results from, the formation of the contract.

109 Despite the limits to which the recourse provided for in s. 272 are subject as a result of the rules on the legal interest required by the *C.P.A.*, it must be borne in mind that the Act provides for other recourses for its enforcement.

110 In the instant case, whether the sending of a reply coupon (or the receipt of the coupon by the respondents) resulted in the formation of a contract for participation in a sweepstakes could be debated at length. Was it impossible for a contract to be formed because there was no agreement on its object within the meaning of art. 1412 *C.C.Q.*? Did the parties enter into a contract and, if so, could it be annulled owing to the respondents' fraud? At the very least, the parties entered into a contract for a subscription to *Time* magazine. In this Court, the respondents emphasized the fact that, according to the Superior Court, the appellant understood that participating in the sweepstakes and subscribing to the magazine were separate undertakings. When the question is whether a consumer has the interest required to institute proceedings under s. 272 *C.P.A.*, however, the two undertakings are linked. Logically, one depends on the other. Moreover, a contract for a magazine subscription is a contract to which the *C.P.A.* applies. As a result, in these circumstances, the appellant had the interest required to take action against the respondents and his action was properly brought.

(3) Remedies Available Under Section 272 C.P.A.

111 The recourse provided for in s. 272 *C.P.A.* must be exercised in accordance with the specific principles governing consumer law in Quebec and, where applicable, the general rules of the civil law. We must now explain how these principles relate to the application of s. 272 *C.P.A.*

(a) Contractual Remedies

112 Subject to the other recourses provided for in the *C.P.A.*, a consumer with the necessary legal interest can institute proceedings under s. 272 *C.P.A.* to have the court sanction a failure by a merchant or a manufacturer to fulfil an obligation imposed on the merchant or manufacturer by the *C.P.A.*, by the regulations made under the *C.P.A.* or by a voluntary undertaking. The Court of Appeal has correctly confirmed that the recourse provided for in s. 272 *C.P.A.* is based on the premise that any failure to fulfil an obligation imposed by the Act gives rise to an absolute presumption of prejudice to the consumer. In *Nichols c. Toyota Drummondville (1982) Inc.*, Gendreau J.A. stressed that [TRANSLATION] "a merchant sued under s. 272 cannot have the action dismissed by raising the defence that the consumer suffered no prejudice" (p. 749). The recourse provided for in s. 272 *C.P.A.* thus differs from the one provided for in s. 271 *C.P.A.* Section 271 *C.P.A.* sanctions the violation of certain rules governing the formation of consumer contracts, whereas the purpose of s. 272 *C.P.A.* is not simply to sanction violations of formal requirements of the Act, but to sanction all violations that are prejudicial to the consumer (*Banque de Montréal c. Boissonneault*, [1988] R.J.Q. 2622 (C.A. Que.)).

113 There are basically two types of obligations that can result in a sanction under s. 272 *C.P.A.* if not fulfilled. First, the *C.P.A.* imposes a range of statutory contractual obligations on merchants and manufacturers that are set out primarily in Title I of the Act. Proof that one of these substantive rules has been violated entitles a consumer, without having to meet any additional requirements, to obtain one of the contractual remedies provided for in s. 272 *C.P.A.* As Rousseau-Houle J.A. stated in *Beauchamp c. Relais Toyota Inc.*, [TRANSLATION] "[t]he legislature has adopted an absolute presumption that a failure by the merchant or manufacturer to fulfil any of these obligations causes prejudice to the consumer, and it has provided the consumer with the range of recourses set out in s. 272" (p. 744). It is up to the consumer to choose the remedy, but the court has the discretion to award another one that is more appropriate in the circumstances (L'Heureux and Lacoursière, at p. 621). Unlike s. 271 *C.P.A.*, s. 272 does not permit the merchant to raise the defence that the consumer suffered no prejudice where violations of Title I are in issue (L'Heureux and Lacoursière, at p. 620; *Option Consommateurs c. Service aux marchands détaillants ltée (Household Finance)*, 2006 QCCA 1319 (C.A. Que.) (CanLII)).

114 Second, Title II of the *C.P.A.* imposes obligations on merchants, manufacturers and advertisers that apply to them regardless of whether a consumer contract referred to in s. 2 of the Act exists. Unlike the obligations imposed under Title I of the Act, which apply to the contractual phase, the prohibitions against certain business practices set out in Title II apply to the pre-contractual phase. As Françoise Lebeau notes, Title II of the *C.P.A.* imposes on merchants, manufacturers and advertisers a duty to act honestly and an obligation to provide information during the period preceding the formation of the contract (p. 1020). The legislature's objective with respect to business practices is clear: to ensure the veracity of pre-contractual representations in order to prevent a consumer's consent from being vitiated by inadequate, fraudulent or improper information.

115 In the case of prohibited practices, some judges and authors have asserted that the contractual remedies provided for in s. 272 *C.P.A.* are available to a consumer only if the consumer has suffered prejudice as a result of an unlawful act committed by a merchant or a manufacturer (see *Ata v. 9118-8169 Québec inc.*, 2006 QCCS 3777, [2006] R.J.Q. 1883 (C.S. Que.)). For advocates of this view, the contravention of a provision of Title II of the *C.P.A.* does not give rise to an irrebuttable presumption of prejudice, since s. 272 *C.P.A.* is intended only to sanction unlawful acts that have actually deceived a consumer (see also Lluelles and Moore, at p. 312). This view corresponds in substance to the position taken by the respondents in the case at bar (R.F., at para. 57).

116 According to this approach, a court cannot award a consumer one of the contractual remedies provided for in s. 272 *C.P.A.* if the merchant, after publishing a misleading advertisement in the pre-contractual phase, gave corrected information directly to the consumer just before they entered into the contract. Since such behaviour merely constitutes [TRANSLATION] "fraud that has been uncovered and is not prejudicial", it cannot give rise to these specific remedies (L. Nahmiash, "Le recours collectif et la *Loi sur la protection du consommateur*: le dol éclairé et non préjudiciable — l'apparence de droit illusoire", in *Développements récents sur les recours collectifs* (2004), 75).

117 In our opinion, this position minimizes the influence that misleading advertising can have on a consumer's decision to enter into a contractual relationship with a merchant. It suggests that an advertisement cannot have a fraudulent effect if the consumer discovers that it is misleading a few minutes before entering into a contract with a merchant. This concept of "fraudulent effect" is too restrictive for the objectives of the recourse provided for in s. 272 *C.P.A.* to be achieved. It does not accurately reflect the way consumers are often invited to give their consent in such situations.

118 To say that advertising can place consumers under a merchant's influence is an understatement. Very often, advertising stimulates the interest of consumers and induces them to go in person to the merchant's premises to learn more about the product or service being promoted. Their decision-making process begins at that time: they consider purchasing a good or service on the basis of the representations made in the advertisement. And then the consumer becomes more vulnerable once he or she is on the merchant's premises.

119 In absolute terms, there is nothing reprehensible about a merchant's use of representations and insistence to induce the customer to give in. Such acts are normal and inevitable in an economic system based on free competition. But this is not true where the consumer is lured by false or misleading advertising, even if the merchant "corrects" the information in a one-on-one discussion just before they conclude the contract. Of course, a rigid interpretation of the rules of contract formation may lead to the conclusion that the consumer's consent is nonetheless free and informed if he or she discovers the misleading nature of an advertisement before entering into the contract. However, a view more in keeping with the social significance of the *C.P.A.* would lead to the conclusion that the consumer's decision to enter into a contractual relationship with the merchant was fundamentally tainted by the misleading advertisement.

120 It would be hard to deny that such a "correction" of misleading information often occurs late in the contract formation process. For example, the members of the group covered by the class action in *Brault & Martineau* learned that they had to pay the sales taxes only once they were at the cash, that is, after they had discussed the payment and financing terms with a salesperson and after a purchase order had been issued (Sup. Ct., at paras. 29-30; see also *Chartier c. Meubles Léon ltée*, [2003] J.Q. No. 842 (C.S. Que.)). The correction might thus be made *after* the consumer has in fact consented to purchase the product in question. In such circumstances, the prohibited practice clearly plays a role in inducing the consumer to enter into a contractual relationship on the basis of misleading information.

121 For this reason, the argument that s. 272 *C.P.A.* is intended solely to sanction prohibited practices that have actually resulted in fraud improperly underemphasizes the prejudice resulting from a violation of a provision of Title II of the Act. It effectively introduces a variable rule. On the one hand, in cases in which the presumption of fraud provided for in s. 253 *C.P.A.* applies, this rule would allow a merchant or a manufacturer to raise the defence that the consumer suffered no prejudice. Section 253 *C.P.A.* creates a presumption that, had the consumer been aware of certain prohibited practices, he or she would not have agreed to the contract or would not have paid as high a price. On the other hand, where the presumption does not apply, the rule would require consumers to fully prove the prejudice they have suffered. There is no reason why consumers should bear a higher burden of proof where the breach of a statutory obligation falls under Title II of the Act rather than under Title I and the presumption of s. 253 *C.P.A.* does not apply. Neither the wording of s. 272 *C.P.A.* nor the philosophy underlying the application of the Act warrants such a conclusion, which could also dangerously pave the way for acceptance of the concept of "*bon dol*" (harmless fraud) in consumer law. As we will explain below, this position is based on a misconception of the role of s. 253 *C.P.A.*

122 This interpretation also leads to strange results. The presumption in s. 253 *C.P.A.* does not apply to all prohibited business practices. For reasons of its own, the legislature has chosen to list the practices that are covered by the presumption of fraud established in that provision. Where s. 253 does not apply, a consumer claiming to be the victim of a prohibited practice would be able to sue under s. 272 *C.P.A.* but would have to use the rules of the *Civil Code of Québec* to justify the application of the contractual remedies in that section. If we disregard the question of punitive damages, the recourse provided for in s. 272 *C.P.A.* would thus be of no real use to the consumer. With this in mind, it cannot be assumed that the legislature intended the implementation of s. 272 to be subject to the application of s. 253 *C.P.A.*

123 We greatly prefer the position taken by Fish J.A. in *Turgeon c. Germain Pelletier ltée*, namely that a prohibited practice does not create a *presumption* that a merchant has committed fraud but in itself *constitutes* fraud within the meaning of art. 1401 *C.C.Q.* (para. 48). This position is consistent with the spirit of the Act and is also more consistent with the case law relating to failures to fulfil the obligations imposed by Title I of the Act. In our opinion, the use of a prohibited practice can give rise to an absolute presumption of prejudice. As a result, a consumer does not have to prove fraud and its consequences on the basis of the ordinary rules of the civil law for the contractual remedies provided for in s. 272 *C.P.A.* to be available. As well, a merchant or manufacturer who is sued cannot raise a defence based on [TRANSLATION] "fraud that has been uncovered and is not prejudicial". The severity of the sanctions provided for in s. 272 *C.P.A.* is not variable: the irrebuttable presumption of prejudice can apply to all violations of the obligations imposed by the Act.

124 This absolute presumption of prejudice presupposes a rational connection between the prohibited practice and the contractual relationship governed by the Act. It is therefore important to define the requirements that must be met for the presumption to apply in cases in which a prohibited practice has been used. In our opinion, a consumer who wishes to benefit from the presumption must prove the following: (1) that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act; (2) that the consumer saw the representation that constituted a prohibited practice; (3) that the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract; and (4) that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract. This last requirement means that the prohibited practice must be one that was capable of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract. Where these four requirements are met, the court can conclude that the prohibited practice is deemed to have had a fraudulent effect on the consumer. In such a case, the contract so formed, amended or performed constitutes, in itself, a prejudice suffered by the consumer. This presumption thus enables the consumer to demand, in the manner described above, one of the contractual remedies provided for in s. 272 *C.P.A.*

(b) Compensatory Damages

125 Where a merchant or a manufacturer fails to fulfil an obligation to which s. 272 *C.P.A.* applies, the consumer can ask the court for an award of compensatory damages. The respondents argue that the recourse in compensatory damages is available only if the court awards one of the contractual remedies provided for in s. 272(*a*) to (*f*) *C.P.A.* (R.F., at para. 72). This argument is without merit. Section 272 *C.P.A.* contains the words "without prejudice to his claim in damages, in all cases". This phrase, which is in no way ambiguous, means that the recourse in damages, regardless of whether it is contractual or extracontractual in nature, is not dependent on the specific contractual remedies set out in s. 272(*a*) to (*f*). By using these words in s. 272 *C.P.A.*, the legislature intended to leave consumers free to choose the sanctions they consider appropriate to repair any prejudice they suffer.

126 Nevertheless, the independence of the recourse in damages provided for in s. 272 *C.P.A.* does not mean that there is no legal framework for exercising it. First of all, the recourse in damages, regardless of whether it is based on a breach of contract or a fault, must be exercised in accordance with the rule concerning the legal interest required to institute proceedings under that provision. Next, where a consumer chooses to claim damages from the merchant or manufacturer he or she is suing, the exercise of the recourse is subject to the general rules of Quebec civil law. In particular, an award of compensatory damages can be obtained only if the prejudice suffered can be assessed or quantified.

127 The use by a merchant or a manufacturer of a prohibited practice can also form the basis of a claim for extracontractual compensatory damages under s. 272 *C.P.A.* A majority of the Quebec authors and judges who have considered this issue have taken the view that fraud committed during the pre-contractual phase is a civil fault that can give rise to extracontractual liability (Lluelles and Moore, at p. 321; *Kingsway Financial Services Inc. c. 118997 Canada inc.*, [1999] J.Q. No. 5922 (C.A. Que.)). Proof of fraud thus establishes civil fault. However, because of the specific nature of the *C.P.A.*, the procedure for proving fraud is different from the one under the *Civil Code of Québec.*

128 This difference stems from the fact that, where the recourse provided for in s. 272 *C.P.A.* is available to a consumer, his or her burden of proof is eased because of the absolute presumption of prejudice that results from any unlawful act committed by the merchant or manufacturer. This presumption means that the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case. According to the interpretation proposed by Fish J.A. in *Turgeon c. Germain Pelletier ltée*, a consumer to whom the irrebuttable presumption of prejudice applies has also succeeded in proving the fault of the merchant or manufacturer for the purposes of s. 272 *C.P.A.* The court can thus award the consumer damages to compensate for any prejudice resulting from that extracontractual fault.

(4) Issue of the Interplay Between Sections 253 and 272 C.P.A.

129 However, the role of s. 253 *C.P.A.* in cases in which the recourse provided for in s. 272 *C.P.A.* is exercised raises an important issue of statutory interpretation. A brief review of some of the academic literature makes it apparent that there are a variety of viewpoints on this issue. Section 253 *C.P.A.* reads as follows:

> **253.** Where a merchant, manufacturer or advertiser makes use of a prohibited practice in case of the sale, lease or construction of an immovable or, in any other case, of a prohibited practice referred to in paragraph *a* or *b* of section 220, *a*, *b*, *c*, *d*, *e* or *g* of section 221, *d*, *e* or *f* of section 222, *c* of section 224 or *a* or *b* of section 225, or in section 227, 228, 229, 237 or 239, it is presumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price.

130 As we have seen, Professor L'Heureux has long maintained that the presumption provided for in s. 253 *C.P.A.* shows that s. 272 *C.P.A.* is not intended to be used to sanction prohibited business practices. In her view, consumers who claim to be victims of prohibited practices must instead turn to the general law or to ss. 8 and 9 *C.P.A.* to obtain a finding that their consent has been vitiated. Sections 8 and 9 *C.P.A.* read as follows:

> **8.** The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable.
>
> **9.** Where the court must determine whether a consumer consented to a contract, it shall consider the condition of the parties, the circumstances in which the contract was entered into and the benefits arising from the contract for the consumer.

131 Another view, voiced by Professors Lluelles and Moore among others, is that the presence of s. 253 *C.P.A.* at the end of Title II precludes the argument that the absolute presumption of prejudice applicable to violations of Title I also applies in the context of proceedings based on the use of a prohibited practice (Lluelles and Moore, at p. 312). The respondents rely on both of these views.

132 In our opinion, these two positions are wrong in suggesting that the role of s. 253 *C.P.A.* can be considered solely in relation to the statutory recourse provided for in s. 272 *C.P.A.* There is no direct relationship between these two statutory provisions: each of them makes its own contribution to the achievement of the legislature's social and legal objectives. The presumption of fraud provided for in s. 253 *C.P.A.* does not delimit the scope of s. 272 *C.P.A.* or govern the principles that underlie the application of that section; rather, it provides consumers with additional protection in situations in which they do not wish or are not able to exercise a recourse under s. 272 *C.P.A.* The primary purpose of s. 253 *C.P.A.* is to ease the burden of proof for consumers who choose to sue a merchant, a manufacturer or an advertiser under the ordinary rules of the general law. In such cases, s. 253 relieves consumers of the obligation to prove that the fraud was determinative in inducing them to give their consent. A rule of evidence such as this is helpful to consumers who want to sue advertisers under the general law, since they cannot take action against advertisers under s. 272 *C.P.A.*

133 This conclusion is dictated not only by the characteristics of s. 272 *C.P.A.* itself, but also by the express reference in s. 253 *C.P.A.* to contracts relating to immovables. Although s. 6.1 *C.P.A.* provides that the provisions of Title II of the Act apply to such contracts, it is impossible to sanction prohibited practices involving immovables under s. 272 *C.P.A.* For this reason, aggrieved consumers will logically turn to the fraud provisions of the *Civil Code of Québec* (arts. 1401 and 1407 *C.C.Q.*). The whole rationale for the presumption provided for in s. 253 *C.P.A.* can therefore be found in this area (*Turgeon c. Germain Pelletier ltée*, at para. 40).

134 It must not be forgotten that the application of the *C.P.A.* is not dependent on the exercise of one of the civil or penal recourses for which it provides. The *C.P.A.* applies to any legal situation covered by s. 2 of the Act, and not solely to civil or penal proceedings instituted under the Act.

135 For the purposes of this appeal, we need not extend the discussion of the relationship between s. 253 *C.P.A.* and s. 272 *C.P.A.* to include a review of ss. 8 and 9 *C.P.A.* This being said, the assertion that [TRANSLATION] "[m]isleading advertising makes the recourse under sections 8 and 9 available, with or without the presumption of fraud of section 253", may have to be approached with caution (L'Heureux, *Droit de la consommation*, at p. 235). In Quebec civil law, lesion and fraud are two different defects of consent. Fraud does not necessarily involve exploitation of the consumer and, as a result, lesion. In this respect, it is important that the *C.P.A.* be interpreted in accordance with general principles of civil law obligations.

(5) Role of Section 217 C.P.A.

136 We must now clarify the role of s. 217 *C.P.A.*, which provides that "[t]he fact that a prohibited practice has been used is not subordinate to whether or not a contract has been made". The Court of Appeal suggested that this provision makes the *C.P.A.* applicable once a prohibited practice is used, regardless of whether a consumer contract is entered into as a result of that practice (para. 25). However, it is important not to confuse the question of the existence of a prohibited practice with the question of interest under s. 272 *C.P.A.*

137 Title II of the *C.P.A.* prohibits certain types of representations made "to a consumer". The definition of "consumer" in s. 1(*e*) of the Act might suggest that the provisions of Title II apply only where a consumer enters into a contract as a result of the use of a prohibited practice. However, the prohibitions relating to business practices also apply on a preventive basis, that is, before an unlawful representation dupes one or more consumers by fraudulently inducing them to enter into contractual relationships. This is why s. 217 *C.P.A.* exists: its purpose is to make it easier to sanction violations of the Act on a preventive basis by specifying that a merchant's representation may constitute a prohibited practice even if none of the natural persons targeted by the advertisement entered into a contract as a result of the advertisement. It is enough that the advertisement target a [TRANSLATION] "potential consumer" (L'Heureux and Lacoursière, at p. 489).

138 Therefore, s. 217 *C.P.A.* relates strictly to the *existence* of a prohibited practice. It authorizes the Director of Criminal and Penal Prosecutions to enforce the Act on a *preventive* basis, in keeping with the legislature's intention. As Professor Masse explains,

> [TRANSLATION] [t]his provision authorizes penal proceedings where provisions of Title II have been contravened but no contract has been entered into as a result of a violation of the C.P.A. It is as a result possible to prove that an advertisement is misleading and to institute penal proceedings against the offender even where no contract was entered into with one or more consumers as a result of the advertisement. [p. 827]

139 The applicability of the penal provisions is governed by a specific rule: s. 277 *C.P.A.* provides that an offence is committed where, *inter alia*, a person contravenes the Act. This rule, which constitutes a departure from s. 2 of the Act, can be explained by the fact that penal proceedings are instituted in the general interest. Thus, the purpose of such proceedings is not to protect the private interests of one or more consumers, but to protect the public in general from business practices that may be misleading. On the other hand, the general rule set out in s. 2 *C.P.A.* necessarily applies where consumers apply for the protection of the Act (Masse, at pp. 28-29), for example, when they seek to avail themselves of the recourses provided for in s. 272 *C.P.A.* Therefore, s. 217 *C.P.A.* is not intended to govern the conditions under which the recourses provided for in s. 272 *C.P.A.* are available and can be exercised. The principles that apply to s. 217 *C.P.A.* are different from those that apply to s. 272 *C.P.A.*, and the two provisions have different roles in the scheme of the *C.P.A.*

(6) Application of the Principles to This Appeal

140 The appellant has not asked for any contractual remedies in this case. He is instead seeking the equivalent of US$1 million in damages. Although his motion to institute proceedings is unclear in this respect, it became apparent as the case progressed that this amount is mainly for punitive damages and also includes an incidental amount for

an extracontractual claim. We must begin by determining whether the appellant has established the respondents' extracontractual liability on the basis of the principles discussed above.

141 To establish the respondents' extracontractual liability, the appellant had to show that they had engaged in a prohibited practice. He then had to prove that he had seen the representation constituting a prohibited practice before the contract was formed, amended or performed and that a sufficient nexus existed between the representation and the goods or services covered by the contract. If these facts were proven, the absolute presumption of prejudice would apply and the respondents' extracontractual liability would be triggered for the purposes of s. 272 *C.P.A.* The appellant did prove this. We have already found that the respondents contravened ss. 219 and 228 *C.P.A.* Whether the appellant saw the representations in question does not present any problems, since it is common ground that he subscribed to *Time* magazine after reading the documentation the respondents had sent him. Finally, there is no doubt that a sufficient nexus existed between the content of the Document and *Time* magazine: not only did the Document promote the magazine directly, but the trial judge found that the appellant would not have subscribed to the magazine had he not read the misleading documentation (para. 49). As a result, we find that the appellant has discharged his burden of proving a sufficient nexus between the prohibited practices engaged in by the respondents and his subscription contract with the respondents. This means that for the purposes of s. 272 *C.P.A.*, the Document is deemed to have had a fraudulent effect on the appellant's decision to subscribe to *Time* magazine. The conduct of the respondents that is in issue constitutes a civil fault.

142 The trial judge found that the respondents' fault had caused moral injuries to the appellant and awarded him $1,000 in compensatory damages. In this Court, the respondents have not shown that the trial judge erred in assessing the evidence or in applying the legal principles with regard either to their liability or to the quantum of damages. There is no reason for this Court to interfere with those findings. The appeal will accordingly be allowed to restore this part of the trial judge's judgment.

E. Did the Trial Judge Err in Awarding the Appellant Punitive Damages?

143 In this part of our reasons, we must define the legal principles and tests that govern the admissibility of a recourse in punitive damages under s. 272 *C.P.A.* and the determination of the quantum of such damages. These questions of law will of course be considered on the basis of the trial judge's findings of fact, unless palpable and overriding errors were made in assessing the facts (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 25 and 37; *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.)).

(1) Independent Nature of Punitive Damages

144 The respondents argue in their factum that a claim for punitive damages under s. 272 *C.P.A.*, like a claim for compensatory damages, is admissible only if one of the contractual remedies provided for in s. 272(*a*) to (*f*) is awarded at the same time (R.F., at para. 91). They submit that the trial judge erred in ordering them to pay punitive damages, because she had not awarded the appellant any of the remedies provided for in s. 272(*a*) to (*f*) *C.P.A.* In our opinion, the respondents' argument is wrong in law and must fail.

145 First of all, as with compensatory damages, we must take account of the actual wording of s. 272 *C.P.A.*, which clearly states that consumers who exercise a recourse under that section "may *also* claim punitive damages". As we explained above, this confirms that the legislature intended to allow consumers who exercise a recourse under s. 272 *C.P.A.* to choose between a number of remedies capable of correcting the effects of the violation of the rights conferred on them by the Act. Consumers who exercise the recourse provided for in s. 272 *C.P.A.* can therefore *choose* to claim contractual remedies, compensatory damages and punitive damages or to claim just one of those remedies. It will then be up to the trial judge to award the remedies he or she considers appropriate in the circumstances.

146 Moreover, our interpretation is consistent with the one adopted by this Court in *de Montigny c. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64 (S.C.C.). In that case, the Court stated that s. 49(2) of the *Charter of*

human rights and freedoms ("*Quebec Charter*") creates an independent and distinct right to claim punitive damages. In its decision, the Court accepted (at para. 40) the opinion expressed by L'Heureux-Dubé J., dissenting in part, in *F.E.E.S.P. c. Béliveau St-Jacques*, [1996] 2 S.C.R. 345 (S.C.C.), at para. 62, that the words "in addition" in s. 49(2) of the *Quebec Charter*

> simply mean that a court can not only award compensatory damages but can "in addition", or equally, as well, moreover, also (see the definition of "*en outre*" in *Le Grand Robert de la langue française* (1986), vol. 6), grant a request for exemplary damages. The latter type of damages is therefore not dependent on the former.
>
> [Emphasis in original.]

According to LeBel J. in *de Montigny*, "[t]he solution adopted by L'Heureux-Dubé J. seems in fact to be the appropriate one in cases where, as here, the imperative of preserving government compensation systems is not part of the legal context" (para. 42). These comments are also applicable in the instant case.

147 Consumers can be awarded punitive damages under s. 272 *C.P.A.* even if they are not awarded contractual remedies or compensatory damages at the same time. This means that there was nothing to prevent the trial judge from ordering the respondents to pay punitive damages.

(2) General Criteria for Awarding Punitive Damages

(a) Heterogeneous Nature of the Criteria in Quebec Civil Law

148 The respondents argue that, even if this Court finds that the appellant has the legal interest required to claim punitive damages, such damages cannot be awarded on the facts of this case. The respondents urge the Court to accept that an award of punitive damages under s. 272 *C.P.A.* is appropriate only if the conduct of the merchant or manufacturer was in bad faith or malicious (R.F., at para. 133). They rely in this regard on this Court's reasons in several decisions rendered in cases concerning the common law: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.), and *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.). In our opinion, this argument is wrong and must fail.

149 To begin with, the decisions of this Court upon which the respondents rely were rendered in tort cases at common law. But the conditions for claiming punitive damages are approached very differently in Quebec civil law and at common law. At common law, punitive damages can be awarded in any civil suit in which the plaintiff proves that the defendant's conduct was "malicious, oppressive and high-handed [such] that it offends the court's sense of decency": *Hill*, at para. 196. The requirement that the plaintiff demonstrate misconduct that represents a marked departure from ordinary standards of decency ensures that punitive damages will be awarded only in exceptional cases (*Whiten*, at para. 36).

150 In Quebec civil law, this test has not been adopted in its entirety. Punitive damages are an exceptional remedy in the civil law, too. Article 1621 *C.C.Q.* provides that they can be awarded only where this is provided for by law. The *Civil Code of Québec* does not create a general scheme for awarding punitive damages and does not establish a right to this remedy in all circumstances.

> Where the awarding of punitive damages is provided for by **law**, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

As a result, [TRANSLATION] "punitive damages must be denied where there is no enabling enactment" (J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (7th ed. 2007), vol. I, *Principes généraux*, at para. 1-364; see also *Béliveau St-Jacques*, at para. 20). The Quebec legislature thus intended to leave it to specific statutes to identify situations in which punitive damages can be awarded and, in some cases, establish the requirements for awarding them or rules for calculating them. Article 1621 *C.C.Q.* plays only a suppletive role by establishing a general principle for awarding such damages and by identifying their purpose.

151 The legislature has thus retained greater flexibility in structuring specific schemes for awarding punitive damages. A review of Quebec legislation containing provisions that authorize awards of punitive damages confirms the flexibility and variability of the rules applicable to such damages in Quebec law. On the one hand, the enabling provisions take a variety of forms. Not all of them require proof that the act was malicious, oppressive or high-handed, which is required at all times at common law. For example, a violation of s. 1 of the *Tree Protection Act*, R.S.Q., c. P-37, automatically entails the payment of punitive damages. As well, art. 1899 *C.C.Q.*, s. 56 of the *Act respecting prearranged funeral services and sepultures*, R.S.Q., c. A-23.001, and, of particular relevance in this appeal, s. 272 of the *C.P.A.* do not explicitly require malicious or high-handed conduct.

152 On the other hand, the legislature does sometimes provide that malicious conduct or intentional fault must be proven in order to obtain punitive damages. Some examples are (1) s. 49 of the *Quebec Charter* (unlawful and intentional interference); (2) s. 167 of the *Act respecting access to documents held by public bodies and the protection of personal information*, R.S.Q., c. A-2.1 (gross neglect or intentional infringement); (3) arts. 1968 and 1902 *C.C.Q.* (bad faith or harassment); and (4) s. 67 of the *Petroleum Products Act*, R.S.Q., c. P-30.01 (abusive and unreasonable business practice). If the *Hill* test were applicable by default in Quebec civil law as proposed by the respondents (R.F., at paras. 133-36), it would be very difficult to explain the legislature's decision to insert the equivalent of that test into various statutes.

153 Thus, unlike in the common law, there is no unified scheme for awarding punitive damages in Quebec civil law. Moreover, it cannot be argued that there is a traditional rule in Quebec civil law to the effect that only malicious misconduct can result in an award of such damages.

(b) Factors to Consider in Developing Criteria for Awarding Punitive Damages

154 In this legislative context, in view of the silence of the Act, the criteria for awarding punitive damages must be established by taking account of the general objectives of punitive damages and those of the legislation in question.

155 Article 1621 *C.C.Q.* itself requires that the general objectives of punitive damages be taken into account. It indicates that punitive damages are essentially preventive. Under it, the ultimate objective of an award of punitive damages must always be to prevent the repetition of undesirable conduct. This Court has held that the preventive purpose of punitive damages is fulfilled if such damages are awarded where an individual has engaged in conduct the repetition of which must be prevented, or that must be denounced, in the specific circumstances of the case in question (*Béliveau St-Jacques*, at paras. 21 and 126; *de Montigny*, at para. 53). Where a court chooses to punish a wrongdoer for misconduct, its decision indicates to the wrongdoer that he or she will face consequences both for that instance of misconduct and for any repetition of it. An award of punitive damages is based primarily on the principle of deterrence and is intended to discourage the repetition of similar conduct both by the wrongdoer and in society. The award thus serves the purpose of specific and general deterrence. In addition, the principle of denunciation may justify an award where the trier of fact wants to emphasize that the act is particularly reprehensible in the opinion of the justice system. This denunciatory function also helps ensure that the preventive purpose of punitive damages is fulfilled effectively.

156 The need to also consider the objectives of the legislation in question is justified by the fact that the right to seek punitive damages in Quebec civil law always depends on a specific legislative provision. As well, punitive damages in their current form are not intended to sanction generally every act prohibited by law. Rather, their purpose is to protect the integrity of a legislative scheme by sanctioning any act that is incompatible with the objectives the legislature was pursuing in enacting the statute in question. The types of conduct whose repetition needs to be prevented and the legislature's objectives are determined on the basis of the statute under which a sanction is sought.

157 In practice, to discharge its obligation to take the above-mentioned objectives into account, the court must identify the types of conduct that are incompatible with the objectives the legislature was pursuing in enacting the statute in question and that interfere with the achievement of those objectives. Punitive damages can be awarded only for those types of conduct.

(3) Criteria for Awarding Punitive Damages Under Section 272 C.P.A.

158 Under s. 272 *C.P.A.*, punitive damages can be sought only if it is proved that an obligation resulting from the Act has not been fulfilled. However, s. 272 establishes no criteria or rules for awarding such damages. It is thus necessary to refer to art. 1621 *C.C.Q.* and determine what criteria for awarding punitive damages would suffice to enable s. 272 *C.P.A.* to fulfil its function.

159 The objectives of the Act must therefore be identified to ensure that punitive damages will indeed meet the objectives of art. 1621 *C.C.Q.*

(a) Objectives of the C.P.A.

160 The *C.P.A.*'s first objective is to restore the balance in the contractual relationship between merchants and consumers (Roy, at p. 466; L'Heureux and Lacoursière, at pp. 25-26). This rebalancing is necessary because the bargaining power of consumers is weaker than that of merchants both when they enter into contracts and when problems arise in the course of their contractual relationships. It is also necessary because of the risk of informational vulnerability consumers face at every step in their relations with merchants. In sum, the obligations imposed on merchants and the formal requirements for contracts to which the Act applies are intended to restore the balance between the respective contractual powers of merchants and consumers (L'Heureux and Lacoursière, at pp. 26-31).

161 The *C.P.A.*'s second objective is to eliminate unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices (L'Heureux and Lacoursière, at pp. 479 *et seq.*). Most of the measures imposed by the legislature to achieve this objective are found in Title II of the *C.P.A.*, which we discussed above.

162 The legislature's intention in pursuing these two objectives is to secure the existence of an efficient market in which consumers can participate confidently.

(b) Differences of Opinion Among Judges About the Criteria for Awarding Punitive Damages Under the C.P.A.

163 The criteria to be applied in awarding punitive damages under the *C.P.A.* are not at all clear from the decisions of the Quebec courts. Sharply conflicting positions can be found both in the case law and in the academic literature. We will discuss these positions before proposing a test for implementing the recourse in punitive damages.

164 According to one of these positions, proof of conduct that is intentional or in bad faith, or of gross fault or similar behaviour, is necessary. The Quebec Court of Appeal has rejected this approach for more than a decade now (see *Lambert c. Minerve Canada, cie de transport aérien inc.*, [1998] R.J.Q. 1740 (C.A. Que.), and, more recently, *Brault & Martineau inc.* (C.A.), at para. 44). However, it would seem that some judges have nevertheless continued to require such proof (see, e.g., *Lafontaine c. Source d'eau Val-d'Or inc.* [(November 20, 2001), Doc. C.Q. Abitibi 615-02-000477-969 (C.Q.)], 2001 CanLII 10566, at paras. 50-51; *Jabraian c. Trévi fabrication inc.* [2005 CarswellQue 1827 (C.Q.)], 2005 CanLII 10580, at para. 31; *Santangeli c. 154995 Canada inc.* [2005 CarswellQue 7175 (C.Q.)], 2005 CanLII 32103 (C.Q.), at paras. 34-35; *Martin c. Rénovations métropolitaines (Québec) ltée*, 2006 QCCQ 1760 (C.Q.) (CanLII), at para. 75; *Darveau c. 9034-9770 Québec inc. (Piscine Sansouci inc.)* [2005 CarswellQue 9986 (C.Q.)], 2005 CanLII 41136, at para.123).

165 This position is inconsistent with the objectives of the *C.P.A.* The burden of proof it imposes would not contribute to changing the conduct of merchants and manufacturers. This interpretation of the Act would not encourage merchants and manufacturers to fulfil the obligations imposed on them by the *C.P.A.* Instead, it might suggest to them that they do not have to worry about complying with the Act as long as their violations are not particularly serious. L'Heureux and Lacoursière note that the requirement of bad faith could sterilize the implementation of the Act, so they propose a test based on conduct [TRANSLATION] "that goes beyond what is normal" (p. 630).

166 According to the second position, a finding that an obligation imposed by the *C.P.A.* has not been fulfilled is in itself sufficient to justify an award of punitive damages. Duval Hesler J.A. (as she then was) took this position in *Brault & Martineau inc.* (C.A.):

> [TRANSLATION] In my opinion, and at the risk of repeating myself, the existence of an unlawful business practice, such as advertising that does not meet the requirements of the CPA, in itself justifies an award of punitive damages.
>
> [Emphasis added; para. 45.]

167 This position lies at the other end of the spectrum of solutions contemplated by the courts. Such a strict, if not automatic, application of s. 272 *C.P.A.* is not necessary to achieve the legislature's objectives.

168 It is true that consumers should be encouraged to enforce their rights under the *C.P.A.* This does not necessarily mean that court proceedings must always be instituted for this purpose or that informal methods of dispute resolution cannot be considered first. It seems to us that the commencement of proceedings implies the failure of attempts by a consumer and a merchant or manufacturer to resolve their disagreement informally. The rule advocated by Duval Hesler J.A. would make an informal resolution less appealing and would encourage the indiscriminate judicialization of disputes that might have been resolved differently. Punitive damages would then be awarded in circumstances in which doing so would serve none of the objectives of the *C.P.A.* or of punitive damages generally.

169 According to a third position, an award of punitive damages is justified where there is proof of a certain carelessness by a merchant or manufacturer with respect to the Act and the conduct it is supposed to prevent. As we shall see, however, the exact level of carelessness required to satisfy this test has been defined in various, inconsistent ways by authors and judges.

170 The carelessness test is stated in its most basic form by Professor Masse:

> [TRANSLATION] For [punitive] damages to be awarded, therefore, it is sufficient that the merchant display carelessness with respect to the Act and the conduct it is supposed to prevent. [p. 1000]

171 Quebec courts have adopted Professor Masse's opinion in several judgments: *Marcotte c. Fédération des caisses Desjardins du Québec*, at para. 724; *Gastonguay c. Entreprises D. L. paysagiste* [2004 CarswellQue 2493 (C.Q.)], 2004 CanLII 31925, at paras. 77-79; and *Mathurin c. 3086-9069 Québec inc.* [2003 CarswellQue 3698 (C.S. Que.)], 2003 CanLII 19131, at para. 18.

172 In *Tremblay c. Systèmes Techno-pompe inc.*, 2006 QCCA 987, [2006] R.J.Q. 1791 (C.A. Que.), the Quebec Court of Appeal opted for a test of carelessness that is serious enough to justify an award of punitive damages:

> [TRANSLATION] Finally, the most important aspect of exemplary damages is the prevention of similar conduct. Before awarding such damages, a court must assess the merchant's conduct to determine whether it displays carelessness with respect to the consumer's rights that is serious enough to justify imposing an additional sanction in order to prevent the conduct from being repeated.
>
> It was this last objective of punishment and deterrence that the trial judge adopted as a basis for awarding exemplary damages. It can hardly be concluded that the appellant displayed malice and carelessness that were serious enough to justify an additional sanction.
>
> [Emphasis added; paras. 33-34.]

173 Similarly, in *Champagne c. Toitures Couture & Associés inc.*, [2002] R.J.Q. 2863 (C.S. Que.), Poulin J. of the Quebec Superior Court denied an award of punitive damages on the basis that there was little risk of the defendant acting carelessly again with respect to the application of the Act (para. 79).

174 According to the Court of Appeal in *Systèmes Techno-pompe inc.* and the Superior Court in *Champagne c. Toitures Couture & Associés inc.*, a violation of the *C.P.A.* that results from mere carelessness by a merchant will not as a general rule suffice to justify an award of punitive damages. Although we accept this proposition in principle, it is our opinion that the decision to award punitive damages should also not be based solely on the seriousness of the carelessness displayed at the time of the violation. That would encourage merchants and manufacturers to be imaginative in not fulfilling their obligations under the *C.P.A.* rather than to be diligent in fulfilling them. As we will explain below, our position is that the seriousness of the carelessness must be considered in the context of the merchant's conduct both before and after the violation. At this point, we will look more specifically at the types of conduct other than carelessness that are covered by the recourse in punitive damages provided for in s. 272 *C.P.A.*

(c) Criteria for Awarding Punitive Damages

175 In establishing the criteria for awarding punitive damages under s. 272 *C.P.A.*, it must be borne in mind that the *C.P.A.* is a statute of public order. No consumer may waive in advance his or her rights under the Act (s. 262 *C.P.A.*), nor may any merchant or manufacturer derogate from the Act, except to offer more advantageous warranties (s. 261 *C.P.A.*). The provisions on prohibited practices are also of public order (L'Heureux and Lacoursière, at pp. 443 *et seq.*).

176 The fact that the consumer-merchant relationship is subject to rules of public order highlights the importance of those rules and the need for the courts to ensure that they are strictly applied. Therefore, merchants and manufacturers cannot be lax, passive or ignorant with respect to consumers' rights and to their own obligations under the *C.P.A.* On the contrary, the approach taken by the legislature suggests that they must be highly diligent in fulfilling their obligations. They must therefore make an effort to find out what obligations they have and take reasonable steps to fulfil them.

177 In our opinion, therefore, the purpose of the *C.P.A.* is to prevent conduct on the part of merchants and manufacturers in which they display ignorance, carelessness or serious negligence with respect to consumers' rights and to the obligations they have to consumers under the *C.P.A.* Obviously, the recourse in punitive damages provided for in s. 272 *C.P.A.* also applies, for example, to acts that are intentional, malicious or vexatious.

178 The mere fact that a provision of the *C.P.A.* has been violated is not enough to justify an award of punitive damages, however. Thus, where a merchant realizes that an error has been made and tries diligently to solve the problems caused to the consumer, this should be taken into account. Neither the *C.P.A.* nor art. 1621 *C.C.Q.* requires a court to be inflexible or to ignore attempts by a merchant or manufacturer to correct a problem. A court that has to decide whether to award punitive damages should thus consider not only the merchant's conduct prior to the violation, but also how (if at all) the merchant's attitude toward the consumer, and toward consumers in general, changed after the violation. It is only by analysing the whole of the merchant's conduct that the court will be able to determine whether the imperatives of prevention justify an award of punitive damages in the case before it.

(d) Summary of Principles

179 The principles applicable to the recourse in punitive damages under the *C.P.A.* can be summarized as follows:

- The current rule in Quebec civil law is that punitive damages may be awarded only if there is a legislative provision authorizing them;

- Once an enabling legislative provision has been identified, the court must first determine whether the plaintiff has the interest required to claim punitive damages under that provision;

- The court is bound by any criteria for awarding punitive damages established in the enabling provision;

- If the conditions for awarding punitive damages or the criteria for assessing them are not set out in the enabling statute, the court must consider the general provisions of art. 1621 *C.C.Q.* and the objectives of the enabling statute;

• For this purpose, the court must identify the conduct that is to be sanctioned to discourage its repetition, having regard to the general objectives of punitive damages under art. 1621 *C.C.Q.* and the objectives the legislature was pursuing in enacting the statute in question. The court must determine (1) whether the conduct is incompatible with the objectives the legislature was pursuing in enacting the statute and (2) whether it interferes with the achievement of those objectives.

180 In the context of a claim for punitive damages under s. 272 *C.P.A.*, this analytical approach applies as follows:

• The punitive damages provided for in s. 272 *C.P.A.* must be awarded in accordance with art. 1621 *C.C.Q.* and must have a preventive objective, that is, to discourage the repetition of undesirable conduct;

• Having regard to this objective and the objectives of the *C.P.A.*, violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the *C.P.A.* may result in awards of punitive damages. However, before awarding such damages, the court must consider the whole of the merchant's conduct at the time of and after the violation.

F. Is the Appellant Entitled to Punitive Damages in This Case?

181 The trial judge found that the respondents had intentionally violated the *C.P.A.* in a calculated manner:

... The very same "conditional" wording which enabled Time to avoid the argument that a contract was formed or that it undertook unconditionally to pay $833,337 to Mr. Richard, illustrates the contention that this document was *specifically* designed to mislead the recipient, that it contains misleading and even false representations, contrary to the clear wording of [section] 219 of the *Consumer Protection Act* .... [Italics in original, underlining added; para. 34.]

182 These findings contain no palpable and overriding errors. Accordingly, this Court would not be justified in changing them.

183 These findings are fatal to the respondents' defence in the circumstances of this case. The violations in issue were intentional and calculated. Moreover, nothing in the evidence indicates that, after the appellant complained, the respondents took corrective action to make their advertising clear or consistent with the letter and spirit of the *C.P.A.* On the contrary, the evidence suggests that they rejected his entire claim and proposed nothing. An award of punitive damages was therefore justified.

184 For these reasons, we would allow the appellant's recourse in respect of the claim for punitive damages. The appropriate quantum of damages remains to be determined.

G. What is the Appropriate Quantum of Damages in This Case?

185 The trial judge fixed the quantum of the punitive damages payable by the respondents to the appellant at $100,000. The respondents challenge the fairness of this amount, arguing that the trial judge erred in several respects in determining the appropriate quantum of punitive damages. They submit that, if this Court upholds the trial judge's decision to award punitive damages, the quantum should be reduced significantly.

186 More specifically, the respondents criticize the trial judge for (1) speculating about the number of violations of the *C.P.A.* they had committed; (2) taking what she perceived as a violation of the *Charter of the French language* into consideration in her assessment of the gravity of their conduct; and (3) making inferences about their patrimonial situation without a sufficient factual basis.

187 Finally, according to the respondents, the trial judge's decision to fix the quantum of punitive damages at $100,000 was arbitrary. At para. 71 of her reasons, the trial judge stated that she had chosen that amount because it was the

amount of the bonus prize the appellant had a chance to win in addition to the grand prize of US$833,337 if he validated his entry within five days after receiving the Document. The respondents seem to be arguing that it was irrational to fix the quantum at $100,000 in these circumstances.

(1) Role of Trial Courts

188 This appeal highlights the problems trial judges face in calculating punitive damages. Although they have a discretion in this regard, they must exercise it judicially and must also, to the extent possible, comply with the practice established by the courts and consider all the specific circumstances of each case, bearing in mind the principles of deterrence, punishment and denunciation that underlie punitive damages.

189 Since this task requires trial judges to examine the facts carefully, the Court of Appeal must show considerable deference before varying the quantum of damages. It must not set aside a trial judge's decision in respect of findings and inferences of fact related to the assessment of damages absent a palpable and overriding error (*Housen v. Nikolaisen*, at paras. 1-6, 10 and 25; *L. (H.) v. Canada (Attorney General)*, at para. 53; *Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 (S.C.C.), at para. 129; *Landry c. Quesnel*, [2002] R.J.Q. 80 (C.A. Que.), at para. 31; C. Dallaire, "La gestion d'une réclamation en dommages exemplaires: éléments essentiels à connaître quant à la nature et l'objectif de cette réparation, les éléments de procédure et de preuve incontournables ainsi que l'évaluation du quantum", in Barreau du Québec, *Tous ensemble: Congrès annuel (2007)* (2007), at p. 168).

190 It should be borne in mind that a trial court has latitude in determining the quantum of punitive damages, provided that the amount it awards remains within rational limits in light of the specific circumstances of the case before it (*Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, at para. 125; *Whiten v. Pilot Insurance Co.*, at para. 100). Appellate intervention will be warranted only where there has been an error of law or a wholly erroneous assessment of the quantum. An assessment will be wholly erroneous if it is established that the trial court clearly erred in exercising its discretion, that is, if the amount awarded was not rationally connected to the purposes being pursued in awarding punitive damages in the case before the court (*St-Ferdinand*, at para. 129; *Supermarché A.R.G. Inc. c. Provigo Distribution Inc.* (1997), [1998] R.J.Q. 47 (C.A. Que.)). In our opinion, errors of this nature have been made in the case at bar, and they warrant the intervention of this Court in assessing the quantum of punitive damages.

(2) Trial Judge's Assessment of the Quantum of Punitive Damages

191 In her decision to award punitive damages, the trial judge began by noting that the respondents' fault was of considerable gravity, since they had sent false and misleading advertisements to thousands of French-speaking consumers in Quebec. The respondents sharply dispute this finding of fact by the trial judge. In their view, no evidence was adduced to support this finding, and the appropriate quantum of punitive damages should instead have been established on the assumption that only *one* advertisement was sent to only *one* consumer (R.F., at para. 109).

192 This argument is untenable. William Miller, Director of Promotion Policy for the respondent Time Consumer Marketing Inc., himself testified that "[t]he sweepstakes are used to attract attention to our subscription promotions" (A.R., vol. II, at p. 4). He also explained in detail that Time Inc. had decided to send out direct mailings using several lists of names in order to increase subscriptions (*ibid.*, at p. 5). The mailings were personalized to attract the attention of consumers and invite them to subscribe to *Time* magazine (trial judgment, at para. 21; *ibid.*, at pp. 4 and 5). We infer from Mr. Miller's testimony that the distribution of such mailings was not only a common practice for the respondents but was also done on a large scale. In light of this evidence, although the trial judge did not have evidence that could indicate the precise number of mailings, her finding cannot be characterized as wholly erroneous. In our opinion, the gist of her finding was that the respondents had sent many mailings in Quebec to a large number of consumers. The evidence supporting this finding was something she could properly consider in analysing the gravity of the respondents' conduct in this case. The quantum of punitive damages cannot therefore be revised on this basis.

193 The respondents also challenge the trial judge's findings (1) that Time Inc. violated the *Charter of the French language*, in particular by sending out advertising material in English only (paras. 64-65), and (2) that this violation had to be taken into consideration in determining the appropriate quantum. On this issue, the respondents are correct. It was not open to the trial judge to consider the *Charter of the French language* in assessing the appropriate quantum of punitive damages. The *C.P.A.* and the *Charter of the French language* are two separate statutes with distinct legislative objectives. Moreover, violations of the *Charter of the French language* are sanctioned pursuant to its own provisions.

194 Finally, the respondents argue that the trial judge made palpable and overriding errors in her conclusions respecting their patrimonial situation. First of all, they submit that she erred in finding that William Miller, Director of Promotion Policy for Time Consumer Marketing Inc., had admitted in his testimony that the company "certainly [had] the capacity to pay the amount of $833,337.00US" (*per* Cohen J., at para. 24). A second submission the respondents make in this regard is that there was no basis in the facts for the trial judge's finding that the evidence established that their advertising campaign was lucrative in terms of the subscriptions they generated. We are in partial agreement with the respondents on this point. In our opinion, the trial judge did in fact err in attributing to Mr. Miller an admission he had not actually made. On the other hand, we do not consider it unreasonable for her to find that the respondents' advertising campaign was profitable.

195 Where Mr. Miller's testimony is concerned, we, like the respondents, were unable to find any admission in it that Time Inc. was capable of paying the amount of US$833,337 claimed by the appellant. Quite the contrary, it is clear from his testimony that at no time did Mr. Miller attempt to quantify the company's assets or assess its ability to pay. Indeed, he said he was unable to do so because he was not part of the company's financial team (testimony of William Miller, at p. 32, lines 2-4). We believe it would be helpful to reproduce the relevant passage from Mr. Miller's testimony on this point:

> [**THE COURT**]:
>
> [William Miller] admitted [that Time Inc.] did [use the advertising scheme at issue over the years]. Why don't you ask him if Time is able to pay that amount if I would award the amount in the claim, the part of the claim which relates to moral and punitive damages?
>
> **HUBERT SIBRE:**
>
> Q. 338 Would Time be able to pay this amount? Would it have the solvency to pay this amount if ever condemned?
>
> [A]. You know, I'm not part of the financial structure of the company so I really can't comment on that.
>
> [Emphasis added; A.R., vol. II at pp. 31-32.]

196 This passage speaks for itself. The trial judge's finding that Mr. Miller had made an admission regarding Time Inc.'s ability to pay had no basis in the facts and constituted a palpable error. The trial judge was not therefore in a position to make, as she did, findings with respect to the respondents' patrimonial situation on the basis of this testimony.

197 However, our conclusion is quite different as to the trial judge's finding that the respondents' advertising campaign that led to this litigation was profitable. The respondents argue that it was not open to the trial judge to make this finding, (1) because all that had been proven was that a single consumer had purchased a single subscription, and (2) because the fact that Time Inc. had paid out more than US$1 million to winners of its sweepstakes in the year 2000 provided no information on its patrimonial situation in 2007 (the year of the trial judge's decision in this case). In our view, these arguments are unconvincing. In Mr. Miller's own words, the respondents had been organizing promotional sweepstakes in Canada and the United States since the mid-1980s. He added that several hundred people had won amounts ranging from US$1,000 to $1,600,000 in these sweepstakes, the admitted purpose of which was to attract consumers' attention to the respondents' subscription promotions (testimony of William Miller, A.R., vol. II, at p. 4). We find it logical and reasonable, in light of the amounts paid out by Time Inc. and the number of years that the promotional sweepstakes

have existed, to infer from the evidence, as the trial judge did, that these sweepstakes were lucrative in that they enabled Time Inc. to add significantly to its readership.

198 When all is said and done, should this Court vary the amount of $100,000 awarded by the trial judge as punitive damages? In our opinion, it should. Although the trial judge did not err in finding that the respondents had sent many mailings in Quebec to a large number of consumers and that these promotional sweepstakes had enabled them to sell many new subscriptions, we consider that the errors she made had a by no means insignificant impact on her assessment. In light of those errors and the fact that the trial judge's decision seems to have been influenced by the fact that the respondents had promised a $100,000 bonus in addition to the grand prize, we believe that it will be necessary to re-assess the quantum of the punitive damages she awarded.

(a) Criteria for Assessing the Quantum

199 An assessment of the quantum of punitive damages must start with art. 1621 *C.C.Q.*, which sets out some guiding principles that are intended to bring greater consistency and objectivity to the assessment of such damages (J.-L. Baudouin and P.-G. Jobin, with N. Vézina, *Les obligations* (6th ed. 2005), at para. 912). Article 1621 *C.C.Q.* begins by stating that the amount awarded as punitive damages must never exceed what is necessary to fulfil their preventive purpose. The second paragraph of art. 1621 adds that the amount must be determined in light of all the appropriate circumstances, in particular (1) the gravity of the debtor's fault, (2) the debtor's patrimonial situation, (3) the extent of the reparation for which the debtor is already liable to the creditor and (4), where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

200 The gravity of the fault is undoubtedly the most important factor (*ADISQ c. Genex Communications inc.*, 2009 QCCA 2201, [2009] R.J.Q. 2743 (C.A. Que.); *Fondation québécoise du cancer c. Patenaude*, 2006 QCCA 1554, [2007] R.R.A. 5 (C.A. Que.) ; *Voltec ltée c. CJMF FM ltée*, [2002] R.R.A. 1078 (C.A. Que.); Baudouin, Jobin and Vézina, at para. 912). It is assessed from two perspectives: the wrongful conduct of the wrongdoer and the seriousness of the infringement of the victim's rights. According to Claude Dallaire, the courts consider the gravity of the conduct and its impact on the victim (pp. 127 *et seq.*). The analysis of the evidence will therefore be focused sometimes on the offender's conduct and sometimes on the effect of that conduct on the victim (*Boisclair c. Québec (Procureur général)*, [2001] R.J.Q. 2449 (C.A. Que.), at paras. 9-10). In either case, it must be borne in mind that a myriad of contextual factors can be taken into account in the analysis. If, for example, the evidence shows that the contract was abusive, that the merchant committed a fault and gained an undue competitive advantage by doing so, or that the consumers who were victims of the practice were particularly vulnerable, these facts will obviously be relevant to the assessment of the gravity of the fault.

201 The second factor mentioned in art. 1621(2) *C.C.Q.* is the debtor's patrimonial situation, and its purpose is to ensure that the amount of the award is tailored to the offender's situation in order to achieve the intended effect of the statute in question. Thus, the larger the debtor's patrimony, the higher the award of punitive damages must be to ensure that the general objectives of such damages are achieved and to discourage any repetition. The reverse is also true where a debtor is of modest means. Obviously, even where an offender is extremely wealthy, the amount of the award must still be rationally connected with the purposes for which punitive damages are awarded in a particular case.

202 The third factor mentioned in art. 1621(2) *C.C.Q.*, the extent of the reparation already awarded under other heads, is an analytical criterion that has been used frequently (*St-Ferdinand*; *Augustus v. Gosset*, [1996] 3 S.C.R. 268 (S.C.C.); *Macara c. 2845-4288 Québec inc.*, [2004] R.J.Q. 2637 (C.A. Que.)). According to it, the court must not award punitive damages unless compensatory damages are not enough to discourage repetition either because their amount is too small or because they will have no impact on the debtor's financial situation. However, this principle does not change the independent nature of punitive damages. Even if an award of compensatory damages is generous, it will not necessarily preclude an award of punitive damages.

203 Finally, the purpose of the fourth factor mentioned in art. 1621(2) *C.C.Q.* is to adjust the quantum of punitive damages on the basis of the total amount the debtor will have to pay personally. This assessment ensures that the amount

of the award will actually have the intended effect on the offender. The amount may sometimes have to be varied where a third person is paying, since the objective of preventing repetition is then achieved through an intermediary. The person actually paying must thus be punished to motivate that person to encourage the wrongdoer to change his or her ways. Closely related to this consideration, another purpose of this factor is to evaluate the real utility of the second of the factors mentioned in art. 1621(2) *C.C.Q.*, namely the debtor's patrimonial situation. Thus, where the debtor of the obligation will not personally be paying the amount of the award of punitive damages, there is no need to assess his or her patrimony to determine that amount.

(b) Other Criteria to be Considered

204 Although art. 1621(2) *C.C.Q.* lists various factors that are relevant in determining the appropriate quantum of punitive damages, the fact that this list is preceded by the words "all the appropriate circumstances" and "in particular" clearly indicates that the legislature intended that it be possible to consider other, unnamed factors as well. In our view, it will be helpful to mention a few of the factors we believe can be of assistance to trial courts in this regard. Some of them have already been referred to by the Quebec courts, while others, although taken from the common law, can also be applied within the framework of Quebec law in this area.

205 First, where rights and freedoms guaranteed by the *Quebec Charter* have been interfered with, the courts have held that the identity and characteristics of a legal person established for a private interest can also be considered. The courts' approach to the quantification of damages may therefore vary depending on whether the wrongdoer is a natural person, a legal person or a legal person established in the public interest. [TRANSLATION] "It is easy to understand why the courts react unfavourably to antisocial conduct on the part of a legal person established for a private interest or a legal person established in the public interest that is greedy to make profits or to gain political or strategic advantages" (Dallaire, at pp. 131-33).

206 Also, in our opinion, it is perfectly acceptable to use punitive damages, as is done at common law, to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than an expense paid to earn greater profits while flouting the law (*Whiten*, at para. 72).

207 Third, the civil, disciplinary or criminal history of the person guilty of a violation may be a relevant factor. The amount awarded against a wrongdoer who has committed a first offence and whose previous conduct has been exemplary may therefore differ from the amount awarded against one who has been involved in many serious prior offences (*Whiten*, at para. 69; Dallaire, at pp. 136-42 and 164-65).

208 Finally, in addition to the fact that compensatory damages have been awarded, the trial court can in determining the appropriate quantum of punitive damages in the civil proceedings before it take account of any disciplinary, criminal or administrative penalties that have already been imposed as punishment for the offender's conduct (*Whiten*, at para. 123). In appropriate circumstances, therefore, the quantum of punitive damages may be limited because such other penalties have already contributed to achieving the legislature's objective of prevention.

209 We note that the above factors must not be considered automatically by the trial court in every case. Their relevance will depend on the circumstances of the specific case. As well, these factors do not represent an exhaustive list of the considerations that are relevant to determining the quantum of punitive damages. Every relevant factor can be considered, provided that the purpose of the analysis remains the same: to ensure that the amount awarded as punitive damages is rationally proportionate to the objectives for which those damages are awarded in the case in question, having due regard to the specific circumstances of the case (*Whiten*, at paras. 74 and 111).

(3) Application to the Facts

210 Where a court decides to award punitive damages, it must relate the facts of the case before it to the objectives that underlie such damages and ask itself how, in that particular case, awarding them would further those objectives. It must try to fix the most appropriate amount, that is, the lowest amount that would serve the purpose (*Whiten*, at para.

71). Even if we disregard the alleged violation of the *Charter of the French language* as an aggravating factor, the fact remains that the respondents' conduct was serious and deliberate and that it was capable of affecting a large number of consumers. Moreover, even after the consumer complained about their misleading practices, there is no evidence that the respondents did anything to correct them. This must also be considered an aggravating factor.

211 On the other hand, the impact of the respondents' fault on the appellant remains quite limited, though, granted, not negligible. The appellant subscribed to *Time* magazine, began receiving it the following month and also received, as promised, a camera and photo album as a bonus. Moreover, he never asked to be reimbursed for the cost of the subscription to *Time* magazine on the basis of the misleading advertising material. As we have seen, he instituted a proceeding in which he alleged that the respondents were contractually bound to pay him $1,250,887.10, a claim which proved to be unfounded. Thus, the appellant's attitude has contributed to the proportions this case has ultimately assumed.

212 In a context in which a large number of consumers may have been victims of the prohibited practices engaged in by the respondents, we believe that the limited impact of the respondents' fault on the appellant and the appellant's attitude in this case are relevant factors in determining the amount that should be awarded as punitive damages.

213 Where the respondents' patrimonial situation is concerned, the information obtained at trial was insufficient to make any useful findings. The appellant tries to get around this lack of evidence by arguing that it was open to the trial judge to take judicial notice of the fact that the respondents were wealthy. His position is based on the facts that they belong to the TimeWarner conglomerate and that the wealth of that conglomerate is common knowledge. In our view, the appellant's position is incorrect. The respondents and TimeWarner are distinct entities, and TimeWarner is not a defendant in this case. The criterion of the patrimonial situation set out in the second paragraph of art. 1621 *C.C.Q.* concerns the patrimony of one or more *debtors*, not of third persons. The patrimony of a third person can in principle be taken into account only if it is shown that this person will be wholly or partly assuming the payment of the damages (art. 1621(2) *C.C.Q.*). The appellant has not proven this to be the case. It follows that the fact that the respondents belong to the TimeWarner conglomerate is of no assistance to the appellant in this case. Nevertheless, we would like to make it clear that the lack of evidence regarding the respondents' patrimonial situation in no way means that they are immune from a possible award of damages. On the contrary, it means that this Court may properly render its decision without having to assess their actual financial capacity. The Court cannot assume that the respondents' financial capacity would not permit them to pay an award set at an otherwise reasonable amount. Moreover, it must not be forgotten that the evidence showed that the prohibited practices engaged in by the respondents had been very profitable for them from a financial standpoint. In the circumstances of this case, this is a relevant factor to be considered in determining the quantum of punitive damages.

214 Finally, the fact that the amount of the award of compensatory damages is small favours awarding a significant amount of punitive damages. At trial, the respondents were ordered to pay $1,000 in compensatory damages, and we propose to uphold that award. However, that amount is clearly inadequate to meet the preventive purpose of art. 1621 *C.C.Q.*

215 Having regard to all the factors discussed above, we would reduce the punitive damages awarded to the appellant to $15,000. This amount suffices in the circumstances to fulfil the preventive purpose of punitive damages, underlines the gravity of the violations of the Act and sanctions the respondents' conduct in a manner that is serious enough to induce them to cease the prohibited practices in which they have been engaging, if they have not already done so.

216 The appellant has requested costs on the amount of his original action. In our view, this request is not justified. Costs in the Superior Court and the Court of Appeal will be taxed in accordance with the tariffs applicable in those courts. However, the appellant will have his costs in this Court on a solicitor and client basis because of the importance of the issues of law he raised before us (*McCullock Finney c. Barreau (Québec)*, 2004 SCC 36, [2004] 2 S.C.R. 17 (S.C.C.)).

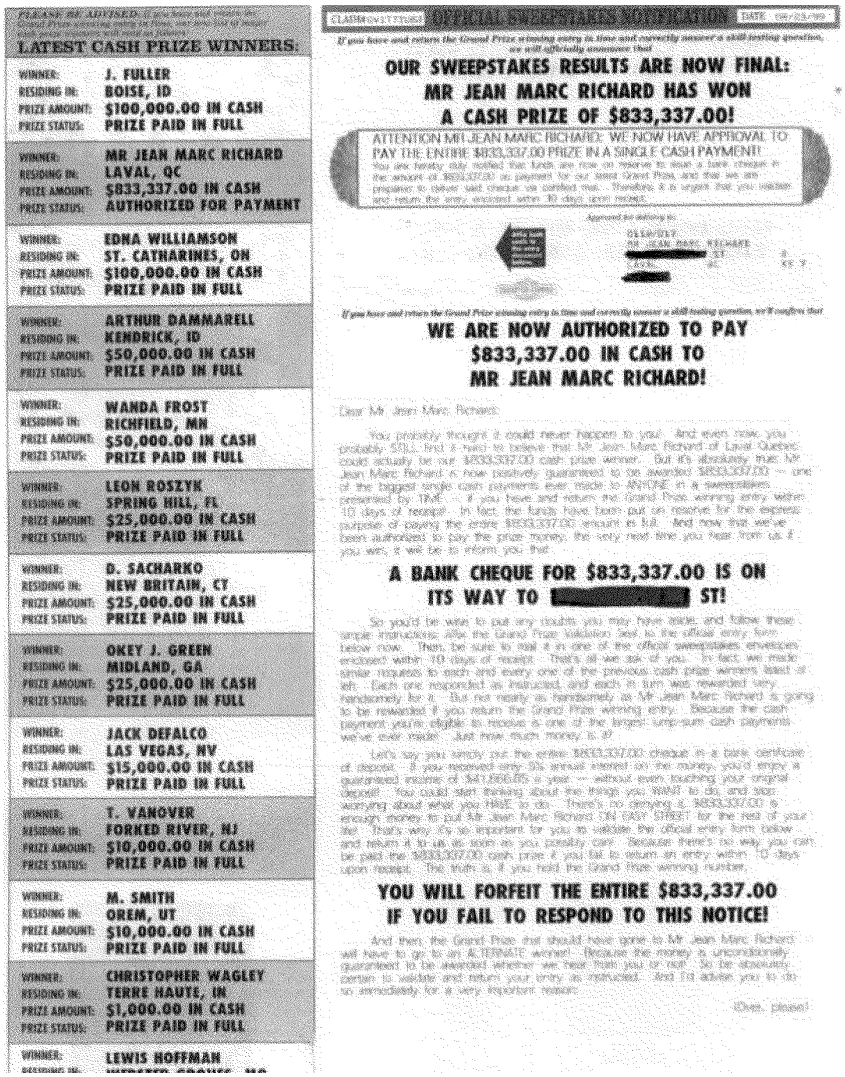
V. Conclusion

217 For the reasons set out above, the appellant's appeal is allowed in part. The judgment of the Court of Appeal, in which it set aside the judgment of the Superior Court and dismissed the appellant's action in damages against the respondents, is set aside. The Superior Court's judgment is restored in part, as the respondents are ordered to pay the appellant $1,000 in compensatory damages and $15,000 in punitive damages, with interest from the date of service. The appellant is entitled to costs in the Superior Court and the Court of Appeal in accordance with the tariffs applicable in those courts, and on a solicitor and client basis in this Court.

Appeal allowed in part.

Pourvoi accueilli en partie.

Appendix



Graphic 1

Graphic 2

Graphic 3

Graphic 4

End of Document

TAB 17

Kazimierczuk and Pembridge Insurance Company

2017 CarswellOnt 19104
Financial Services Commission of Ontario (Appeal Decision)

Kazimierczuk and Pembridge Insurance Co., Re

2017 CarswellOnt 19104

JOZEF KAZIMIERCZUK (Appellant) and PEMBRIDGE INSURANCE COMPANY (Respondent)

Edward Lee Dir. Delegate

Heard: August 11, 2017
Judgment: October 16, 2017
Docket: P16-00057

Proceedings: Affirmed, 2016 CarswellOnt 11370 (F.S.C.O. Arb.)

Counsel: Roman Baber, for Mr. Kazimierczuk
Brian Yung, for Pembridge Insurance Company

Subject: Insurance
Headnote
Insurance

***Edward Lee Dir. Delegate*:**

1 Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, *2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The Arbitrator's order of July 24, 2016 is confirmed and this appeal is dismissed.

2. If the parties are unable to agree about the legal expenses of this appeal, an expense hearing may be arranged in accordance with the *Dispute Resolution Practice Code*.

***Edward Lee Dir. Delegate*:**

I. NATURE OF THE APPEAL

2 The Appellant, Mr. Kazimierczuk, appeals the Arbitrator's preliminary issue decision of July 24, 2016. The Arbitrator ruled that Mr. Kazimierczuk was not entitled to receive a weekly income replacement (an "IRB"), because he was not receiving benefits under the *Employment Insurance Act* (Canada) ("EIA") at the time of the accident.

3 For reasons that follow, I find the Arbitrator did not err in his determination that the Appellant was not entitled to receive an IRB.

II. BACKGROUND

4 Mr. Kazimierczuk was injured in a motor vehicle accident on November 25, 2010. He applied for statutory accident benefits from Pembridge Insurance Company ("Pembridge"), and for arbitration after mediation failed to resolve disputes that arose regarding the benefits.

5 At the preliminary issue hearing, the question (apart from interest and expenses) that came before the Arbitrator was the following:

> 1. Is Mr. Kazimierczuk entitled to receive a weekly income replacement benefit?

6 The facts were not disputed. Mr. Kazimierczuk was terminated from his employment on March 1, 2010. As part of his termination package, he was paid a salary continuance that was to continue for eight months until November 2010. Mr. Kazimierczuk also applied for Employment Insurance benefits on March 2, 2010. Human Resources and Skills Development Canada ("HRSDC") informed Mr. Kazimierczuk they considered the separation monies as "earnings", and these "earnings" would be "deducted" from his EI benefits. [1]

7 Mr. Kazimierczuk was in the midst of the two-week statutory waiting period of section 13 of the *Employment Insurance Act* ("*EIA*") when his accident occurred on November 25, 2010. No monies in the form of EI benefits were paid to Mr. Kazimierczuk until the week of December 4, 2010, some eight days *after* the date of his accident.

8 The Arbitrator applied section 5(1)(ii) of the *Schedule*. [2] Because Mr. Kazimierczuk was not employed at the time of the accident, and had not been employed for at least 26 weeks during the 52 weeks before the accident, he could only be eligible to receive IRBs if he "... was receiving benefits under the *Employment Insurance Act* (Canada) at the time of the accident."

9 The Arbitrator determined that according to section 13 of the *EIA*, a claimant is not entitled to receive EI benefits until *after* serving the two-week waiting period. Thus the Arbitrator ruled Mr. Kazimierczuk was not "receiving EIA benefits at the time of the accident." Accordingly, he was not entitled to receive an IRB under section 5(1)(ii) of the *Schedule*.

10 This is the ruling from which Mr. Kazimierczuk now appeals.

III. ARGUMENTS OF THE APPELLANT

1. The appellant argues the Arbitrator erred by failing to apply or misinterpreted section 9 of the EIA, which provides for the establishment of a benefit claim period. The Appellant states, "[I]t is readily apparent that an EI claimant may be within the claim benefit period (or "on claim") long before any payment is made."

11 I reject this argument. At page 8 of his decision, the Arbitrator made this finding:

> The provisions of the *EI Act* are clear and not in dispute. Mr. Kazimierczuk qualified for EI benefits and a *benefit period was established*. He was not entitled to receive EI benefits until he served a *two-week waiting period*. It was during this waiting period that he was involved in an accident that gave rise to his claim for accident benefits. [Italics mine]

12 Based on this paragraph, it is clear the Arbitrator correctly determined that both a benefit period and a waiting period had been established under sections 9 and 13 of the *EIA*. The Arbitrator accepted the uncontested evidence of the HRSDC document, "Pay History Details" [3] , which showed a Benefit Period was commenced on February 28, 2010, and also specified a two-week Waiting Period from November 21, 2010 to December 4, 2010.

13 Nor did the Arbitrator fail to recognize that a benefit period may be established before a payment is made to an applicant. Section 13 of the *EIA* provides that a claimant "... is not entitled to be paid benefits in a benefit period until, *after* the beginning of the benefit period, the claimant has served a two week waiting period ...". [Italics mine]

14 Therefore, I do not find the Arbitrator erred or failed to apply or misinterpreted section 9 of the *EIA*.

2. The Arbitrator erred by using the word "received" interchangeably with "paid" in section 5(1)(ii) of the Schedule, which is the lynch pin legal issue in this case.

15 Essentially, the Appellant argues that even though he was "paid" nothing by EI from February 2010 until December 4, 2010, he was still "receiving" EI benefits during this time.

16 The Arbitrator rejected this argument and I find no error in his analysis. He makes his determinations at page 8 and 9 of his decision:

> Sub clause 5(1)(ii)(a) of the *Schedule* is clear. Mr. Kazimierczuk was not receiving EI benefits at the date of the accident (November 25, 2010). He was only entitled to receive EI benefits on December 4, 2010, i.e., after the expiry of the statutory two week waiting period.
>
> The phrase "was receiving benefits" as found in section 5(1) of the *Schedule* refers to an event that occurred in the past. Here, in order for Mr. Kazimierczuk to receive IRBs he had to have been receiving, i.e., was in receipt of benefits under the *EI Act*.
>
> Mr. Kazimierczuk was in receipt of separation benefits from his employer from the date of the termination of his employment on March 1, 2010 until November 15, 2010 (the severance period).
>
> . . .
>
> Mr. Kazimierczuk was not entitled to receive EI benefits until he used up the monies he received from his employer as a consequence of being terminated from employment. [emphasis mine]

17 The Arbitrator correctly determined Mr. Kazimierczuk had received no EI benefits until after December 4, 2010. The "Pay History Details"[4] presented to the Arbitrator showed no EI monies, or any other benefits, were paid to Mr. Kazimierczuk from February 28, 2010 until December 4, 2010.

18 Further, the "Pay History Details" document describes Mr. Kazimierczuk's status from February 28, 2010, to November 13, 2010, as "Not on claim." From November 14, 2010 to November 20, 2010, he is described as "Not payable-Allocated earnings." From November 21, 2010 to December 4, 2010, he is described as "Week of waiting period served." For every report week from February 28, 2010 to December 4, 2010, the amount of $0 is indicated.

19 It is only from December 5, 2010 and onward that the amount of $457.00 is indicated for each report week. The Appellant is described as being on "Regular benefits," from December 26, 2010 to February 19, 2012.

20 Therefore, I do not find the Arbitrator erred by using the words "paid" and "received" interchangeably.

3. The arbitrator erred by failing "to consider that the reason Mr. Kazimierczuk was not paid EI benefits prior to the accident was that his termination pay was deducted from his benefits. The deduction utilized by HRSDC is set off of something (namely EI benefits) and cannot be off nothing. There had to be some sort of benefit to deduct off."

21 I reject this argument. First, the Arbitrator clearly recognized that Mr. Kazimierczuk had received termination pay in the form of a salary continuance. He also recognized how HRSDC had treated those monies. At page 10 of his decision the Arbitrator states the following:

> Mr. Kazimierczuk received a summary of payments made to him following the termination of employment that covered the pay period extending from March 5, 2010 to November 15, 2010. This document refers to "salary continuance for 8 months..."

Mr. Kazimierczuk received a document from Service Canada called Supplementary Record of Claim, which states in part:

> "Claimant is receiving a salary continuance so his employer will not issue him an ROE [record of employment] until that is finished. He was advised to submit a new application once the salary continuance is finished as that is considered insurable hours and earnings and to submit the ROE at that time.

On October 7, 2010, Service Canada wrote Mr. Kazimierczuk a letter stating that he received separation monies from his employer in the amount of $39,321.98. "This total income before deductions is earnings that will be deducted from his benefits ...."

22 Further, I do not find the Arbitrator erred by not considering that the salary continuance was being deducted from the EI benefits, or that a "set-off of EI benefits" had occurred.

23 The Appellant based much of his argument on the letter sent by Service Canada [5] that mentions that the separation monies will be "deducted" from the Appellant's benefits, but the same letter also states that the separation monies had been "allocated":

> Since we are aware of these [separation] monies that you have received and they have already been *allocated*, please do not report this amount on your reports(s). You must however, report all other earnings and pension income you receive or may receive. [Italics mine]

24 Section 8(3) of the *Employment Insurance Act* provides for the "allocation" of some earnings:

> **Extension resulting from severance payments**
>
> (3) A qualifying period mentioned in paragraph (1)(a) is extended by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Commission may direct, that
>
> (a) earnings paid because of the complete severance of their relationship with their former employer have been *allocated* to weeks in accordance with the regulations; and
>
> (b) The *allocation* has prevented them from establishing an interruption of earnings. [italics mine]

25 The Arbitrator correctly determined that Mr. Kazimierczuk's separation monies were paid as a result of the complete separation of his relationship with his former employer. The separation monies were allocated in accordance with the *EIA*. Contrary to the Appellant's argument, no actual set-off occurred. Nothing was deducted against benefits that would otherwise have been paid to Mr. Kazimierczuk.

26 This reasoning is supported by section 10(10)(b) of the *EIA*, which allows for an extension of the benefit period.

> **Extension of benefit period**
>
> (10)a claimant's benefit period is extended by the aggregate of any weeks during the benefit period for which the claimant proves, ... the claimant was not entitled to benefits because the claimant was
>
> (b) In receipt of earnings paid because of the complete severance of their relationship with their former employer;

27 Mr. Kazimierczuk was receiving separation monies until November 2010. Under the *EIA*, the effect of these "earnings" was to extend his benefit period by the aggregate of any weeks during which he was in receipt of these earnings.

A claimant is "not entitled to benefits" during the weeks when he is in receipt of these earnings. Further, unless extended by section 10(10)(b), the length of the benefit period is 52 weeks. [6]

28 If the Appellant's argument were correct, his period benefit would have commenced in February 2010 and ended in February 2011 (according to section 10(2) *EIA*). Instead, the Pay History Details document [7] shows EI benefits were paid to Mr. Kazimierczuk until February 2012. His benefit period was extended well past the 52 weeks mandated in section 10(2) of the *EIA*.

29 Thus, I reject the Appellant's argument that the Arbitrator erred by not finding that some EI benefit had to have been paid to the Appellant to allow for a set-off, and that the Appellant was, in fact, 'receiving' EI benefits from the commencement of his benefit period, except that the EI benefits had been set-off by his salary continuance.

4. The Appellant submits the Arbitrator created a time continuum that does not exist

30 The Appellant makes the following argument: Under the *Schedule*, "... the receipt of income continuation does not equal employment. If the Appellant was not employed, nor was he "Receiving" EI benefits during the deduction period or two week waiting period then the appellant is left in a legal purgatory of some sort."

31 The Arbitrator's consideration of the two-week waiting period of the *EIA* is found at page 7 of his decision:

> Paragraph 1.8.0 of the Digest refers to the Waiting Period and reads as follows:
>
> > The waiting period is a two-week period for which no benefit is paid to the claimant. This provision can be likened to the deductible clause in fire and automobile insurance policies under which the insured person is expected to share a part of the damages or loss.
>
> Pembridge submitted that the waiting period is a "safeguard for the Government." The Applicant must share in the risk. It is only after the waiting period expires that an Applicant can receive EI benefits. The motor vehicle accident occurred within the waiting period at a time when Mr. Kazimierczuk was not receiving EI Benefits. He was not eligible to receive IRBs.

32 The parties agreed that Mr. Kazimierczuk was within the mandatory two-week waiting period at the time of his accident. I do not find the Arbitrator created a time continuum that does not exist. The two-week period is mandated by the operation of section 13 of the *EIA*. I find no error in the Arbitrator's ruling that the Appellant was not entitled to be paid benefits during this period.

5. The arbitrator erred by failing to consider public policy behind the employment insurance scheme, specifically that Applicants should not burden EI while they are receiving income continuation.

33 I reject this argument. It is unclear what duty an Arbitrator had to consider public policy, but as mentioned in the previous section, the Arbitrator clearly considered public policy by reviewing the Digest of Benefit Entitlement Principles underlying the employment insurance legislation.

34 Further, if the Appellant's argument were accepted, the first eight months of his fifty-two available weeks of EI benefits would have to be set off or deducted against the eight months of his salary continuance. It cannot be public policy that Parliament intended a claimant to be penalized a portion of his EI benefits merely because he had obtained a salary continuance from his former employer.

6. The appellant argues the Arbitrator erred by failing to apply a statutory ambiguity in favour of the Applicant, and ignored trite law that the SABs are remedial, consumer protection legislation. They should be given a large and liberal construction that best attains its purpose of protecting the insured.

35 I reject this argument. In his decision, the Arbitrator determined that section 5(1)(ii)(a) is "clear." [8] Like the Arbitrator, I find no statutory ambiguity in section 5(1)(ii)(a) of the *Schedule*. Nor do I find that the word "received" should be given the interpretation sought by the Appellant.

36 Some of the basic principles of statutory interpretation are as follows:

> The starting point of every interpretative exercise is determining the ordinary meaning of the text. This is what Driedger means when he says the words of an act are to be read in their ordinary, grammatical sense." It is the meaning that spontaneously comes to the mind of a competent language user upon reading the text. [9]

37 One may be guided by three principles: "(1) words must be given their ordinary meaning; (2) words must be given the meaning they had on their day the statute was enacted; (3) adding to the terms of the stature or depriving them of effect, should be avoided." [10]

38 To determine the "ordinary meaning" of a word, one may refer to a dictionary. The *Concise Oxford Dictionary* [11] gives the following definitions for the word "receive":

> 1. Take or accept (something offered or given) into one's hands or possession.
>
> 2. Acquire, be provided with, or given.
>
> 3. Accept delivery of (something sent).

39 In the present case, the Arbitrator gave the word "receiving" its ordinary, everyday meaning, as suggested by the authorities mentioned. Further, his interpretation was consistent with the dictionary definition which states that one "receives" when something offered or given is taken or accepted into one's hands or possession. Something must be acquired, provided with, or given. Delivery must be accepted.

40 The Appellant's interpretation would add words to the stature or deprive the meaning of the word "receive" altogether. In the present case, the Appellant took nothing into his hands or possession. He acquired nothing and was provided with nothing. He accepted delivery of nothing.

41 The Arbitrator correctly determined 5(1)(ii) of the *Schedule* to be clear and unambiguous. There was no ambiguity to resolve in favour of the Appellant.

42 The Arbitrator did not err in finding the Appellant was not receiving EI benefits at the time of the accident.

IV. EXPENSES

43 If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Appendix — Statutory Accident Benefits Schedule

5(1) The insurer shall pay an income replacement benefit to an insured person ... if the insured person satisfies one or both of the following conditions:

> 1. The insured person,
>
> i. . . .
>
> ii. was not employed at the time of the accident but,

> A. was employed for at least 26 weeks during the 52 weeks before the accident or was *receiving benefits under the Employment Insurance Act (Canada) at the time of the accident*, [emphasis mine]

Employment Insurance Act

Benefit Period

Establishment of benefit period

9. When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

Waiting period

13. A claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.

Extension resulting from severance payments

8. (3) A qualifying period mentioned in paragraph (1)(a) is extended by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Commission may direct, that

> (a) earnings paid because of the complete severance of their relationship with their former employer have been allocated to weeks in accordance with the regulations; and
>
> (c) the allocation has prevented them from establishing an interruption of earnings.

Beginning of benefit period

10. (1) A benefit period begins on the later of

> (a) the Sunday of the week in which the interruption of earnings occurs, and
>
> (b) the Sunday of the week in which the initial claim for benefits is made.

Length of benefit period

(2) Except as otherwise provided in subsections (10) to (15) and section 24, the length of a benefit period is 52 weeks.

Extension of benefit period

10. (10) A claimant's benefit period is extended by the aggregate of any weeks during the benefit period for which the claimant proves, in such manner as the Commission may direct, that the claimant was not entitled to benefits because the claimant was

> (a) confined in a jail, penitentiary or other similar institution;
>
> (b) in receipt of earnings paid because of the complete severance of their relationship with their former employer;

Footnotes

1 Tab G of Joint Document Brief

2 *The Statutory Accident Benefits Schedule — Accidents on or after November, 1, 1996*, Ontario Regulation 403/96, as amended.

3 Tab H of Joint Document Brief

4 *Ibid.*

5 Tab G of Joint Document Brief

6 Section 10(2) *Employment Insurance Act*

7 *Ibid.*

8 Page 8 of decision

9 Ruth Sullivan, *Statutory Interpretation: Third Edition*, page 59, 2016 Irwin Law Inc.

10 Pierre André Côté, *The Interpretation of Legislation in Canada*, 4th Edition, Carswell, page 277

11 *Concise Oxford Dictionary*, Eighth Edition, Clarendon Press, 1990, at page 1001

End of Document