EB-2017-0022
EB-2017-0223

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF two Notices of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Active Energy Inc. (Retailer Licence No. ER-2012-0045).

ONTARIO ENERGY BOARD ENFORCEMENT TEAM OPENING STATEMENT AND BRIEF OF AUTHORITIES

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Ontario Energy Board | **Commission de l'énergie de l'Ontario**

Ontario

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OPENING STATEMENT OF THE OEB ENFORCEMENT TEAM

A. OVERVIEW

1. This enforcement proceeding will determine the correct interpretation of "consumer" under the *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8 ("**ECPA**")[1] and O. Reg. 389/10 ("**Regulation**")[2], and the nearly identical definition of "low volume consumer" under the Electricity Retailer Code of Conduct ("**Code**")[3] (together, the "**Consumer Protection Regime**").

2. In the course of interpreting these provisions, this Panel will have to decide whether the Consumer Protection Regime should be understood and applied narrowly so as to exclude certain persons from its protective ambit, or broadly in a way that maximizes the number of persons entitled to protection.

3. The Consumer Protection Regime applies to any person who "uses, for the person's own consumption, electricity that the person did not generate and who annually

[1] See OEB Enforcement Team's Brief ("**Brief**"), **Tab 1**.
[2] Brief, **Tab 2**.
[3] Brief, **Tab 3**.

uses less than" the prescribed amount of 150,000 kilowatt hours (the "**Threshold**"). The question at the heart of this case is how to calculate whether a person has exceeded the Threshold – which, in turn, will determine whether that person falls within or outside the scope of the Consumer Protection Regime.

4. Active Energy Inc. ("**Active**") argues that it is allowed to *aggregate* the total amount of electricity a person uses, across several different locations, for the purpose of determining whether that person is entitled to the protections of the Consumer Protection Regime (the "**Aggregation Approach**"). If a person's aggregate consumption across all locations exceeds the Threshold, then Active's practice is to offer that person a single contract for all locations, without applying or fulfilling the requirements of the Consumer Protection Regime.

5. The OEB Enforcement Team submits the Aggregation Approach is a breach of the Consumer Protection Regime. The latter does not allow for aggregating a person's energy use across multiple locations for the purpose of assessing whether they exceed the Threshold and are thus entitled to the protections of the Consumer Protection Regime. Instead, when making that determination, a retailer must consider only a person's electricity consumption *at a particular location* (i.e. municipal address) ("**Location Approach**"). Excluding persons from the Consumer Protection Regime because of their aggregate electricity consumption across multiple locations is impermissible as a matter of both statutory interpretation and sound regulatory policy. This has been the view of the OEB since early 2011, when OEB staff provided guidance for electricity retailers.

6. Although retailers may, as a matter of convenience, offer customers a single contract for multiple locations, if electricity use at any of those individual locations falls below the Threshold, the Consumer Protection Regime must apply in respect of those locations.

7. The Aggregation Approach used by Active would narrow the scope of the Consumer Protection Regime, excluding all manner of individuals and small businesses. Such an approach is undermined by a contextual interpretation of the Consumer Protection Regime, including the requirement in section 6 of the ECPA that any contractual ambiguities must be resolved in favour of the consumer.

8. Even more importantly, the Aggregation Approach is fundamentally inconsistent with the consumer protection purpose at the heart of the Consumer Protection Regime, which requires ensuring that the regime's protections apply as broadly as its words will permit. That is precisely what the Location Approach achieves, and why it ought to be preferred.

B. THE CONSUMER PROTECTION REGIME

9. Section 2 of the ECPA defines "consumer" as:

> 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.

10. The "prescribed amount of electricity" for the purpose of this provision is the Threshold of 150,000 kilowatt hours, as set out in section 4(a) of the Regulation.

11. Consistent with these provisions, section 1.2 of the Code defines "low volume consumer" as:

> a consumer[4] who annually uses less than 150,000 kilowatt hours of electricity or such other amount as may be prescribed for the purposes of section 2 of the ECPA.

12. A person who falls within the definition of "consumer" in the ECPA is entitled to all manner of protections under the Consumer Protection Regime, including:

- the disclosure of information relating to electricity prices and contractual rights[5];
- protection against unfair sales practices in the retailing of electricity[6];
- contracts that must contain certain consumer rights, including the right to cancel under certain circumstances[7];
- having any contracts verified after they are signed[8]; and
- being able to cancel contracts during a statutorily prescribed "cooling off" period.[9]

C. THE FACTS

13. The key facts in this case are not in dispute.

14. The ECPA was proclaimed and entered into effect on January 1, 2011. Later that same month, the OEB staff published a web page titled "ECPA Implementation – Frequently Asked Questions (FAQ)" ("**FAQ**"), which included the following:

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[4] The Code defines "consumer" as "a person who uses, for the person's own consumption, electricity that the person did not generate". Thus, the definition of "low volume consumer" in the Code is effectively the same as the definition of "consumer" in the ECPA.

[5] ECPA, ss. 8, 9, Brief, **Tab 1**.; Regulation, ss. 7, 8, Brief, **Tab 2**; Code, Part B, ss. 3-4, Brief, **Tab 3**.

[6] ECPA, s. 10, Brief, **Tab 1**; Regulation, s. 5, Brief, **Tab 2**.

[7] ECPA, ss. 11-12, Brief, **Tab 1**; Regulation, s. 7, Brief, **Tab 2**.

[8] ECPA, s. 15, Brief, **Tab 1**; Regulation, ss. 11-13, Brief, **Tab 2**.

[9] ECPA, s. 19, Brief, **Tab 1**.

4. Can a consumer with multiple locations which are each separate accounts that may individually consume not more than 150,000 kWh of electricity annually or 50,000 cubic metres of gas annually, but in the aggregate consume 150,000 kWh or more annually or 50,000 cubic metres or more annually be considered a single high-volume consumer?

No. Each account is considered to be a separate consumer for the purposes of determining whether the low-volume consumption threshold is exceeded.

15. Notwithstanding this clear guidance, in determining whether its electricity customers get the benefit of the Consumer Protection Regime, Active's business practice has been (and continues to be) to "aggregate" – or add up – the total amount of electricity used by a consumer, across multiple locations. This is the Aggregation Approach.

16. Active has failed to apply the Consumer Protection Regime in the case of 101 contracts identified in the Notices of Intention to make an Order for Compliance and Payment of an Administrative Penalty in this matter, presumably because it followed the Aggregation Approach.

D. THE COMPETING INTERPRETATIONS

17. Admittedly, the Consumer Protection Regime does not explicitly state how to calculate whether a person's use of electricity exceeds the Threshold. It will be up to this Panel to resolve this ambiguity. To the knowledge of the OEB Enforcement Team, the Board has not yet confronted this statutory interpretation issue in an enforcement proceeding, and therefore it will be a matter of first impression.

18. The outcome of this case will have significant implications for whether and to what degree many energy users – including gas users[10] – in Ontario are entitled to the benefits and protections of the Consumer Protection Regime.

19. The OEB Enforcement Team submits that, read contextually and purposively (as it must be), the proper interpretation of the Consumer Protection Regime requires calculation of the Threshold for a particular consumer on a "per location" (i.e. municipal address) basis. This is the Location Approach.

20. In other words, rather than aggregating a consumer's consumption across *multiple locations* (as per the Aggregation Approach), a consumer's use of electricity would be calculated separately *at each location* (i.e. all utility meters at a single municipal address) to determine whether the Consumer Protection Regime applies.

21. To be clear, even under the Location Approach, Active would still be free to have a consumer sign a single contract in respect of multiple utility accounts across multiple locations, as it does now. The key difference would be that the single contract offered by Active – and Active's interactions with a customer in relation to that contract – would be subject to the Consumer Protection Regime for those locations below the Threshold (*e.g.* Active would have to offer a disclosure statement and price comparison, and ensure that verification occurs in respect of each applicable location, among other requirements.)

[10] The consumer protection regime for users of gas is crafted in similar terms as the Consumer Protection Regime for users of electricity.

Section 2 of the ECPA defines a "consumer" of gas as "a person who annually uses less than the prescribed amount of gas." Section 4(b) of the Regulation sets the prescribed amount at 50,000 cubic metres. The OEB's *Code of Conduct for Gas Marketers* defines "consumer" as "a person who annually uses less than 50,000 cubic meters of gas or such other amount as may be prescribed for the purposes of section 2 of the ECPA."

E. LOCATION APPROACH SUPPORTED BY THE MODERN PRINCIPLE OF STATUTORY INTERPRETATION

22. The proper approach to statutory interpretation is well-established in Canadian law and is known as the "modern principle" of statutory interpretation. The modern principle requires that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[11]

23. An important aspect of the modern principle is that legislative text, standing alone, is not determinative of legislative meaning. As Prof. Sullivan explains in her leading treatise on statutory interpretation, when applying the modern principle to a legislative provision "a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, ***it must also take into account the purpose of the provision and all relevant context***. It must do so regardless of whether the legislation is considered ambiguous."[12]

24. Applying the modern principle to the Consumer Protection Regime, three main points stand out:

- the operative provision of the legislative **text** is ambiguous as to the proper approach to take in calculating whether a person's use of electricity exceeds the Threshold;
- the statutory **context** supports the Location Approach, rather than the Aggregation Approach; and
- the legislative **purpose** overwhelmingly supports the Location Approach, rather than the Aggregation Approach.

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[11] Sullivan on Statutes (6th ed.) at p. 7, Brief, **Tab 4**. The same principle applies to regulations: see pp. 412-413.

[12] Sullivan on Statutes (6th ed.) at pp. 7-8 (emphasis added), Brief, **Tab 4**. See also p. 261.

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**.

II. Statutory Context Supports the Location Approach

29. An analysis of statutory context requires one to look at elements of the legislative regime beyond the specific provision at issue. In this case, at least five contextual factors offer strong support for the Location Approach over the Aggregation Approach.

30. **First**, other provisions in the ECPA support the conclusion that ambiguities in the legislative text should be resolved in favour of broad protection. Section 6 states:

> Any ambiguity that allows for more than one reasonable interpretation of a contract provided by a supplier to a consumer or of any information that must be disclosed under this Part shall be interpreted to the benefit of the consumer.

31. If issues of contractual interpretation and information disclosure are to be resolved in favour of broadening the scope of consumer protection, then surely a similar approach should apply to the predicate question of whether a person is a "consumer" under the ECPA. That question determines whether the contractual terms and disclosure obligations required by the Consumer Protection Regime apply to a person *at all*.

32. It makes little sense to interpret the scope of the Consumer Protection Regime narrowly (i.e. using the Aggregation Approach) when determining who enters the gateway to receive any protections, but then generously when it comes to the scope of the protections themselves. The statutory context strongly suggests that <u>at both stages</u>, ambiguities should be resolved[14] in favour of the broadest scope of consumer protection that the words can support.

33. Other provisions in the ECPA further emphasize the broad protective scope of the statute. For example, section 3(3) preserves the right of consumers to pursue a superior

[14] Indeed, as discussed further below in Section E, section 6 of the ECPA reflects the principle that courts typically apply when interpreting consumer protection legislation – namely, that the legislation must be interpreted generously in favour of consumers.

court action, section 4(1) preserves the right of consumers to commence or participate in class proceedings, and section 5 preserves all other rights a consumer may have, in addition to those set out in the ECPA.

34. **Second**, the concept of aggregation is a familiar one in energy legislation in Ontario, including the ECPA – yet the notion of aggregating electricity consumption levels *across different locations* appears nowhere in section 2 of the ECPA, or anywhere else in the Consumer Protection Regime. In contrast, the concept of aggregation at a single, multi-unit complex does appear in section 31 of the ECPA (dealing with Suite Metering), which states:

> "bulk meter" means a device used to measure ***the aggregate electricity consumption of a multi-unit complex***, and includes any associated equipment, systems and technologies, but does not include a meter.[15]

35. To be clear, section 31 of the ECPA has nothing to do with the business practices that are the subject of this enforcement proceeding. However, the fact that the legislature used an expression relating to aggregating electricity consumption in one part of the ECPA (section 31) and not in another (section 2) is a contextual factor that undermines the Aggregation Approach. As Professor Sullivan explains:

> [C]onsistent expression is an important convention of legislative drafting. As much as possible, drafters strive for uniform and consistent expression, so that ***once a pattern of words has been devised to express a particular purpose or meaning, it is presumed that the pattern is used for this purpose or meaning each time the occasion arises***.[16]

36. By the same token, the principle of consistent expression provides that different words are presumed to have different meanings.

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[15] Emphasis added.

[16] Sullivan on Statutes (6th ed) at p. 251 (emphasis added), Brief, **Tab 4**.

37. The presumption of consistent expression is important. Had the legislature intended a person's electricity consumption for the purposes of the Threshold to be calculated by way of aggregation across different locations, it could easily have used wording similar to that used to draft section 31. Tellingly, the legislature chose not to do so. The difference is presumed to have been a careful and deliberate choice, which must be given effect.

38. **Third**, and similarly, other related statutes and regulations also directly reference the concept of aggregation when discussing matters relating to the retailing or consumption of electricity. For example:

- section 4(4) of Ontario Regulation 330/09 (made under the *Ontario Energy Board Act,1998*) provides that in calculating rate protection for consumers, "the Board shall… calculate an aggregate monthly compensation by aggregating the amounts calculated under subsection (2) for each qualified distributor…";

- section 5(6) of Ontario Regulation 442/01 (made under the *Ontario Energy Board Act,1998*) provides that when calculating compensation for distributors, "A distributor or retailer who bills a consumer for electricity shall aggregate the amount that the consumer is required to contribute to the compensation required by subsection 79(3) of the Act…";

- section 13(1) of Ontario Regulation 20/17 (made under the *Green Energy Act, 2009*) provides that when a distributor receives a request from the owner of a prescribed property, "the distributor… shall provide to the owner such aggregated information as to how much electricity… was consumed or used at the prescribed property during that year…";

- section 53.14 of the *Electricity Act* provides that a Smart Metering Entity "may manage and aggregate the data related to consumers' electricity consumption or use."

39. The use of "aggregation" in statutes and regulations that are broadly related to the same subject matter as the Consumer Protection Regime is a distinct aspect of the

presumption of consistent expression[17], which militates against adopting the Aggregation Approach.

40. These provisions confirm that the concept of "aggregating" electricity use or consumption is well-known to the legislature. It was incorporated not only into the ECPA itself, but in all manner of other regulations and statutes dealing with the retailing, distribution or consumption of electricity. Yet the language of aggregation was not used in the definition of "consumer" in the ECPA or "low-volume consumer" in the Code. Again, it would have been easy enough for the legislature to do so, had the Aggregation Approach been the true legislative intent.

41. **Fourth**, another way to characterize Active's interpretive approach in this case is that it classifies customers based on the amount of energy consumed *under their contract* (since a given contract may cover multiple locations), rather than the amount of energy consumed at a given location. Viewed in this light, Active's position in this proceeding runs into yet another consistent expression problem.

42. Section 23(4)(b)(i) of the Regulation defines "high volume consumer" for the purposes of cancellation fees as one "whose consumption ***under the contract*** for the 12-month period before the cancellation is more than 15,000 kilowatt hours, if the contract is for the provision of electricity" (emphasis added). This provision directs that the question of cancellation fees be determined based on the total, aggregate amount of electricity consumed under a given contract – not the amount of electricity consumed at a particular location. Had the legislature intended for the same approach to be applied when determining whether the ECPA applies, it could have used similar language. Yet again, it chose not to do so – and this choice must be given effect.

[17] Sullivan on Statutes (6th ed.) at pp. 416-417, Brief, **Tab 4**.

43. **Finally,** the FAQ published by the Board in 2011 reflects the Location Approach and is totally inconsistent with the Aggregation Approach. The FAQ does not have the force of law, but this Board has previously recognized that FAQs "can be referred to as a source of policy guidance".[18] Indeed, FAQs are a critical tool by which OEB staff offer guidance and provide clarity to both industry participants and the public. Courts have noted that these kinds of documents "assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case-by-case basis."[19]

44. Here, the policy guidance provided in the FAQ is yet another contextual factor militating against the Aggregation Approach.

III. Legislative Purpose Strongly Supports Location Approach

45. Perhaps the strongest argument in favour of the Location Approach is that it best reflects and supports the purpose of the Consumer Protection Regime.

46. The purpose of legislation plays a fundamental role in its interpretation. Indeed, the entire goal of statutory interpretation is for a court or tribunal to try to discern, and give effect to, what the legislature was trying to achieve when it drafted the words at issue.

47. Purpose can justify a broad or expansive interpretation of legislation – even where the words of a statute, standing alone, might suggest a narrower interpretation.[20] As the Supreme Court of Canada put it in one case, "[T]he best approach to the interpretation of words in a statute is to place upon them ***the meaning that best fits the object of the***

[18] Re Canadian Niagara Power Inc. (EB-2012-0112), Decision and Order dated November 22, 2012 at p. 8, Brief, **Tab 5**.

[19] *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 198 at para. 55, application for leave dismissed 2007 CanLII 55338 (S.C.C.), Brief, **Tab 6.**

[20] Sullivan on Statutes (6th ed.) at pp. 295-296, Brief, **Tab 4**.

statute, provided that the words themselves can reasonably bear that construction."[21]

48. In another decision, the Supreme Court put it this way:

> Where the usual meaning of the language falls short of the whole object of the legislature, ***a more extended meaning may be attributed to the words if they are fairly susceptible of it***.[22]

49. The principle that legislation should be interpreted broadly in order to achieve its purpose has now been codified in Ontario's *Legislation Act, 2006*, which requires that every statute and regulation "shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."[23]

50. As the very title of the ECPA suggests, its purpose is to protect energy consumers.[24] This Board has previously stated that the ECPA "is designed to protect energy consumers by ensuring that retailers and marketers follow fair business practices and that consumers are provided with essential information before they sign energy contracts."[25]

51. When introducing the bill for a third reading in the legislature, the responsible Minister described the ECPA's objectives in some more detail, as follows:

> 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***.
>
> …

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[21] *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 at 1042, cited in Sullivan on Statutes (6th ed.) at p. 262 (emphasis added), Brief, **Tab 4**.

[22] *Canadian Fishing Co. v. Smith,* [1962] S.C.R. 294 at 307, cited in Sullivan on Statutes (6th ed.) at p. 296 (emphasis added), Brief, **Tab 4**.

[23] S.O. 2006, c. 21, Sched. F, s. 64.

[24] The title of legislation can be used to help discern its meaning: see Sullivan on Statutes (6th ed.) at pp. 440-441, Brief, **Tab 4**.

[25] Re Energhx (EB-2011-0311), Board Decision and Order dated March 26, 2012 at p. 4, Brief, **Tab 7.**

> 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.***
>
> 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.[26]

52. The legislative objectives described above – ensuring consumers are empowered, informed and, ultimately, protected when navigating the complexities of the energy market – are best achieved by an interpretation that extends the Consumer Protection

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[26] Ontario House proceedings, 3 April 2010, starting at 1610 (per Hon. Brad Duguid, Minister of Energy) (emphasis added).

Statements made about a statute in the legislature, especially by Ministers introducing or defending it, are admissible evidence of legislative purpose: see Sullivan on Statutes (6th ed) at p. 277, Brief, **Tab 4**.

Regime to the broadest possible range of persons, so long as "the words themselves can reasonably bear that construction".[27]

53. This point was made at the Standing Committee on Resources Development when debating a series of provisions in the *Electricity Act, 1998*, including a definition of "low-volume consumer" that is substantially similar the definitions at issue in this proceeding.[28] MPP Helen Johns explained that she supported the provisions because "[t]his is ***the height of protecting the consumer***, and I think it's a very good way to start off the electricity market, with ***as many people as possible understanding all the implications of the marketplace***."[29]

54. The Location Approach achieves this important consumer protection purpose; the Aggregation Approach does not.

55. Under the Location Approach, persons who exceed the Threshold only because of their total use of electricity across a number of different locations would still be entitled to the Consumer Protection Regime. This interpretation would ensure that small business owners, people with multiple residences, and people using the same electricity retailer for both their business and personal use have the security of the Consumer Protection Regime.

56. By contrast, many of these same individuals would be excluded from the Consumer Protection Regime under the Aggregation Approach. It is indisputable that aggregating consumption across multiple locations for the purpose of calculating the

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[27] *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 at 1042, cited in Sullivan on Statutes (6th) at p. 262, Brief, **Tab 4**.

[28] Section 26(10) of the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A defines "low-volume consumer" for the purposes of that section as "a person who annually uses less than the amount of electricity prescribed by the regulations". The regulations set the amount at 150,000 kilowatt hours: see O. Reg. 515/99.

[29] Ontario Committee Documents: Standing Committee on Resources Development, 30 Sept 1998, starting at 1720 (per Sherry Johns) (emphasis added).

Threshold will result in more people exceeding the Threshold – and thus fewer people receiving the benefits, empowerment and information that flow from the Consumer Protection Regime. No doubt this is why Active advocates for the Aggregation Approach.

57. Narrowing the scope of the Consumer Protection Regime more than the words of that regime require does not reflect the remedial purpose of the ECPA, the Regulation and the Code.

58. To be certain, the legislature did not intend for *everyone* to have the protections of the Consumer Protection Regime: that is why the Threshold exists. But calculating the Threshold in a way that excludes more people than necessary is antithetical to the consumer protection objectives of the ECPA, the Regulation and the Code.

59. The Location Approach strikes the proper balance and one which is consistent with the text, context and purpose of the Consumer Protection Regime. Retailers would not be required to apply the Consumer Protection Regime to contracts for more than the Threshold amount of electricity at a single location. This represents an objective and workable proxy for the most sophisticated users of electricity, which are those persons responsible for owning and/or operating a major enterprise at a single location (*e.g.,* a factory, a manufacturing facility, a major retail store, a warehousing operation, large commercial real estate, etc.).

60. Apart from this limited group, everyone else would be entitled to the benefits and protections of the EPCA, the Regulation and the Code.

61. It is important to recognize that the Location Approach does not impose a major or unworkable burden on retailers. They would still be able to offer electricity at multiple locations to a consumer under a single contract. But if any of those locations are under

the Threshold amount, retailers would simply have to apply the Consumer Protection Regime in respect of those locations that are included in the contract – for example, by ensuring the consumer is provided a disclosure statement or price comparison, and that verification occurs in respect of each applicable location.

E. THE CONSUMER PROTECTION REGIME IS CONSUMER PROTECTION LEGISLATION

62. Finally, as with all consumer protection legislation, the Consumer Protection Regime "should be interpreted generously in favour of consumers."[30] Applying this approach, courts have consistently interpreted consumer protection legislation to offer protection to a broader section of the public, rather than a narrower one. This is yet another reason to favour the Location Approach over the Aggregation Approach.

63. Three recent cases from the Court of Appeal for Ontario, each decided in the context of different consumer protection legislation, are instructive.

I. Home warranties

64. The first case deals with the definition of "builder" under the *Ontario New Home Warranties Plan Act* ("**ONHWPA**").[31] Just as the definition of "consumer" in the Consumer Protection Regime acts as the gateway for energy users to receive protections, the definition of "builder" in the ONHWPA triggers protections and warranty coverage for many homebuyers.

65. The ONHWPA defines "builder" as "a person who undertakes the performance of ***all*** *the work and supply of* ***all*** *the materials necessary* to construct a completed

[30] *Harvey v. Talon International Inc.,* 2017 ONCA 267 at paras. 61-64, Brief, **Tab 8.**

[31] R.S.O. 1990, c. O. 31. The ONHWPA is recognized as consumer protection legislation: see *Tarion Warranty Corporation v. Kozy*, 2011 ONCA 795 at para. 2 ["*Kozy*"], Brief, **Tab 9.**

home…"[32] Attempts to read the term "builder" literally and narrowly – in a way that excludes companies that construct partially built homes, leaving some work to be done by the owner or other companies – have repeatedly failed.[33]

66. In *Tarion Warranty Corporation v. Kozy*, the Court of Appeal applied "a broad and liberal interpretation" to the ONHWPA's scope of coverage, explaining: "Given the purpose of the [ONHWPA] it is important not to deny such owners New Home Warranty Program coverage. To hold that a contractor who leaves some work to a homeowner is not a 'builder' would therefore be inconsistent with the statutory scheme."[34]

II. Travel agents

67. The second example deals with the definition of "travel agent" under a different piece of consumer protection legislation: the *Travel Industry Act, 2002* ("**TIA**").[35] Again, as with the definition of "consumer" in the Consumer Protection Regime, whether someone qualifies as a "travel agent" determines whether people dealing with that individual can gain the protections of the TIA.

68. In *Ontario (Travel Industry Council of Ontario) v. Gray*, the Court of Appeal rejected the interpretation of "travel agent" put forward by two lower courts, on the basis that limiting the scope of the TIA would not achieve the statute's consumer protection purpose:

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[32] See section 1 of the ONHWPA.

[33] *Kozy* at paras. 12-20 (and the cases cited therein), Brief, **Tab 9.**

[34] *Ibid.* at para. 14.

[35] S.O. 2002, c. 30, Sch. D. The TIA is recognized as consumer protection legislation: see *Ontario (Travel Industry Council of Ontario) v. Gray*, 2010 ONCA 518 at para. 18 ["*Gray*"], Brief, **Tab 10.**

Section 1(1) of the TIA defines "travel agent" as "a person who sells, to consumers, travel services provided by another person."

> [16] Both courts approached this question implicitly assuming that the statutory definition of "travel agent" is limited to circumstances in which the person sells as a principal. In other words, only one who contracts on his own behalf to sell travel services to consumers meets the definition.
>
> [17] ***With respect, I think that is too narrow an approach. In my view, the definition also encompasses one who sells travel services to consumers not as principal, but as an agent for the provider of those services.*** I say this for several reasons.
>
> …
>
> [21] In my opinion, to confine such a comprehensive regulatory regime to the sale of travel services by a person acting as a principal and to exclude the sale of such services by a person acting on behalf of the service provider ***is to interpret the statutory language too narrowly to achieve its intended purpose.*** Put another way, since the evidence was clear that many travel agents engage in both kinds of sales, ***a narrow reading of the statutory definition would provide, at best, only a partial regulation of the travel industry. This would fall short of the legislative intention.*** It would exclude sales of travel services to consumers by persons acting on behalf of the service provider, in the course of which those persons would perform the very activities that the [TIA] seeks to regulate.[36]

III. Insurance

69. The final example arises in the context of the *Insurance Act* – another statute recognized to be consumer protection legislation.[37] In *Lewis v. Economical Insurance Group*[38], the Court of Appeal had to determine whether an insured person who walked into a steel pole protruding from a parked truck was "struck by" the truck, within the meaning of the *Insurance Act*.[39] The answer to that question would determine whether the insured person was entitled to coverage.

70. The motion judge found that the plaintiff was not "struck by" the truck, on a literal interpretation of those words. However, the Court of Appeal disagreed. Writing for a

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[36] *Gray* (emphasis added), Brief, **Tab 10.**

[37] *Dominion of Canada v. Ali*, 2016 ONSC 4604 at para. 78, Brief, **Tab 11.**

[38] 2010 ONCA 528 ["*Lewis*"], Brief, **Tab 12.**

[39] R.S.O. 1990, c. I.8, s. 265(2)(c)(ii)(B).

unanimous panel, Justice Laskin explained that a purposive – not literal – interpretation was appropriate when examining the words “struck by”:

> [14] Although the motion judge stated the principle that coverage provisions should be interpreted broadly, I do not think that she applied this principle. ***Instead, she took quite a narrow or restrictive view of the words "struck by" or "hit by". In my opinion, these words should be interpreted broadly***, and a broad interpretation entitles Ms. Lewis to coverage for her injuries. I say this for the following reasons.
>
> [15] First, ***the words "struck by" or "hit by" must be interpreted in the context of the dominant purpose of this type of insurance coverage***: to compensate victims injured as a result of an accident involving an unidentified automobile. Ms. Lewis was injured in an accident with an unidentified automobile
>
> …
>
> [19] Fifth, the existing case law shows that courts have extended coverage to persons who were not in any literal sense struck or hit by an automobile. Three cases illustrate this point.
>
> …
>
> [23] In all three cases, a narrow interpretation of the words "struck by" or "hit by" would have disentitled the claimant to coverage, whereas a broad interpretation entitled each claimant to coverage. In all three cases, ***the court recognized that a narrow or literal interpretation of the words "stuck by" would produce a result contrary to common sense and the legislative intent*** of s. 265(1) of the Insurance Act. So too is the case with Ms. Lewis' claim.[40]

71. What *Kozy, Gray* and *Lewis* all demonstrate is that when it comes to interpreting consumer protection legislation – regardless of the precise context – courts will err on the side of giving the text as liberal, generous and expansive an interpretation as possible, so as to maximize the legislation’s protective scope.

72. Applying the same approach to the definition of “consumer” in the ECPA and the Regulation, and the definition of “low-volume consumer” in the Code, the Location Approach must be adopted and the Aggregation Approach rejected.

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[40] Emphasis added.

Ontario

Français

Energy Consumer Protection Act, 2010

S.O. 2010, CHAPTER 8

Consolidation Period: From January 1, 2017 to the e-Laws currency date.

Last amendment: 2015, c. 29, s. 1-6.

Legislative History: [+]

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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).

Section Amendments with date in force (d/m/y) [+]

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 waiver despite any term or acknowledgment in the contract, agreement or waiver that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding. 2010, c. 8, s. 4 (1).

Procedure to resolve dispute

(2) After a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law. 2010, c. 8, s. 4 (2).

Settlements or decisions

(3) A settlement or decision that results from the procedure agreed to under subsection (2) 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. 4 (3).

Non-application of *Arbitration Act, 1991*

(4) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration. 2010, c. 8, s. 4 (4).

Rights of consumers preserved

5 (1) The rights of a consumer under this Part are in addition to any other rights of the consumer under any other Act or by operation of law and nothing in this Part shall be construed to limit any such rights of the consumer. 2010, c. 8, s. 5 (1).

Conflict

(2) In the event of a conflict between a provision in this Part and a provision in any other Act, the provision that provides the greater protection to the consumer prevails. 2010, c. 8, s. 5 (2).

Interpretation: ambiguities to benefit consumers

6 Any ambiguity that allows for more than one reasonable interpretation of a contract provided by a supplier to a consumer or of any information that must be disclosed under this Part shall be interpreted to the benefit of the consumer. 2010, c. 8, s. 6.

Interpretation, in writing

7 (1) Despite section 5 of the *Electronic Commerce Act, 2000* but subject to subsection (7), in this Part, a requirement that information or a document be in writing is satisfied by information or a document that is in electronic form solely if it is,

(a) accessible so as to be usable for subsequent reference; and

(b) text-based. 2010, c. 8, s. 7 (1).

Same, provision of information or document in writing

(2) Despite subsection 6 (1) of the *Electronic Commerce Act, 2000* but subject to subsection (7), in this Part, a requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in an electronic form solely if it is,

(a) accessible by the other person so as to be usable for subsequent reference;

(b) capable of being retained by the other person; and

(c) text-based. 2010, c. 8, s. 7 (2).

Same, information or document in non-electronic form

(3) Despite subsection 7 (1) of the *Electronic Commerce Act, 2000* but subject to subsection (7), in this Part, a requirement that a person provide information or a document in writing in a specified non-electronic form to another person is satisfied by the provision of the information or document in an electronic form solely if it is,

(a) organized in the same or substantially the same way as the specified non-electronic form;

(b) accessible by the other person so as to be usable for subsequent reference;

(c) capable of being retained by the other person; and

(d) text-based. 2010, c. 8, s. 7 (3).

Same, signing a document
(4) Despite subsection 11 (1) of the *Electronic Commerce Act, 2000* but subject to subsection (7), in this Part, a requirement that a document be signed is satisfied by an electronic signature if the electronic information that a person creates or adopts in order to sign the document is capable of being read by the person and is in such form as may be prescribed. 2010, c. 8, s. 7 (4).

Signature, touching or clicking on an icon
(5) Despite subsection (4), touching or clicking on an appropriate icon or other place on a computer screen is deemed to satisfy a requirement in this Part that a document be signed, if the action is taken with the intent to sign the document and the action meets such requirements as may be prescribed. 2010, c. 8, s. 7 (5).

Intent
(6) Intent for the purpose of subsection (5) may be inferred from a person's conduct and the circumstances surrounding such conduct, including the information displayed on the computer screen and the person's conduct with respect to the information, if there are reasonable grounds to believe that the person intended to sign the document. 2010, c. 8, s. 7 (6).

Use of electronic document or information not mandatory
(7) Nothing in this Part requires a consumer who uses, provides or accepts information or a document to use, provide or accept it in an electronic form without the consumer's consent. 2010, c. 8, s. 7 (7).

Use of electronic signature not mandatory
(8) Nothing in this Part requires a consumer who uses, provides or accepts a document to sign the document by way of an electronic signature without the consumer's consent. 2010, c. 8, s. 7 (8).

Implied consent
(9) Consent for the purpose of subsections (7) and (8) may be inferred from a person's conduct if there are reasonable grounds to believe that the consent is genuine and is relevant to the information or document. 2010, c. 8, s. 7 (9).

Payments
(10) Subsection (7) applies to all kinds of information and documents, including payments. 2010, c. 8, s. 7 (10).

Disclosure of information
8 (1) If a supplier is required to disclose information under this Part, the disclosure shall be clear, comprehensible and prominent and, in addition, shall comply with any requirements that may be prescribed by regulation or mandated by a code issued by the Board or by a rule made by the Board or by an order of the Board. 2010, c. 8, s. 8 (1).

Delivery of document
(2) If a supplier is required to deliver a document to a consumer under this Act, the document must, in addition to satisfying the requirements in subsection (1), be delivered in a form in which it can be retained by the consumer. 2010, c. 8, s. 8 (2).

Manner of determining prices re contracts
9 (1) In the case of a contract with a consumer with respect to retailing of electricity, the supplier shall determine the price it charges for electricity,

(a) in the manner and in accordance with the requirements that may be prescribed; and

(b) in the manner and in accordance with the requirements that may be required by a code issued under section 70.1 of the *Ontario Energy Board Act, 1998* or under any conditions of a licence. 2015, c. 29, s. 1.

Same, gas
(2) In the case of a contract with a consumer with respect to gas marketing, the supplier shall determine the price it charges for gas,

(a) in the manner and in accordance with the requirements that may be prescribed; and

(b) in the manner and in accordance with the requirements that may be required by rules made by the Board pursuant to clause 44 (1) (c) of the *Ontario Energy Board Act, 1998* or under any conditions of a licence. 2015, c. 29, s. 1.

Conflict
(3) In the event of a conflict between the regulations referred to in clause (1) (a) and the code or conditions referred to in clause (1) (b), or between the regulations referred to in clause (2) (a) and the rules or conditions referred to in clause (2) (b), the regulations prevail. 2015, c. 29, s. 1.

Section Amendments with date in force (d/m/y) [+]

Door-to-door sales
9.1 (1) No supplier shall,

(a) sell or offer to sell electricity or gas to a consumer in person at the consumer's home; or

(b) cause a salesperson to sell or offer to sell electricity or gas to a consumer in person at the consumer's home. 2015, c. 29, s. 2.

Contract void
(2) A contract that is entered into as the result of a contravention of subsection (1) is deemed to be void in accordance with section 16. 2015, c. 29, s. 2.

Exception, advertising and marketing
(3) Subsection (1) does not restrict advertising and marketing activities. 2015, c. 29, s. 2.

Section Amendments with date in force (d/m/y) [+]

Advertising and marketing to consumers
9.2 (1) The Lieutenant Governor in Council may make regulations establishing rules governing the manner, time and circumstances under which a supplier or salesperson may advertise or market the sale of electricity or gas to a consumer in person at the consumer's home. 2015, c. 29, s. 2.

Rules must be obeyed
(2) Where rules have been established under subsection (1), every supplier or salesperson who advertises or markets the sale of electricity or gas to a consumer in person at the consumer's home shall comply with the rules. 2015, c. 29, s. 2.

Contract void
(3) A contract that is entered into as the result of a contravention of the rules established under subsection (1) is deemed to be void in accordance with section 16. 2015, c. 29, s. 2.

Section Amendments with date in force (d/m/y) [+]

Remuneration
9.3 No supplier shall provide remuneration to a salesperson who sells or offers to sell electricity or gas to consumers or who advertises or markets the sale of electricity or gas to consumers on behalf of the supplier if the manner of remuneration contravenes the rules provided for in the regulations. 2015, c. 29, s. 2.

Section Amendments with date in force (d/m/y) [+]

Unfair practices, prohibition
10 (1) No supplier shall engage in an unfair practice. 2010, c. 8, s. 10 (1).

Same, suppliers
(2) A supplier is deemed to be engaging in an unfair practice if,

(a) it engages in any practice that is prescribed as an unfair practice or it fails to do anything where such failure is prescribed as an unfair practice; or

(b) a salesperson acting on behalf of the supplier does or fails to do anything that would be an unfair practice if done or if failed to be done by the supplier. 2010, c. 8, s. 10 (2).

Contracts, in accordance with s. 12
11 (1) No supplier shall enter into a contract with a consumer other than in accordance with section 12. 2010, c. 8, s. 11 (1).

Application
(2) Subsection (1) applies to contracts entered into after subsection (1) comes into force. 2010, c. 8, s. 11 (2).

Classes or types of contracts
(3) A regulation made in respect of contracts to which this Part applies and any code issued by the Board or rule or order made by the Board in respect of contracts to which this Part applies may,

(a) distinguish between classes and types of contracts and between consumers and classes of consumers; and

(b) set out different requirements depending on the classes or types of contracts and the circumstances under which the contracts are made. 2010, c. 8, s. 11 (3).

Prohibition re entering, etc., certain contracts
(4) No supplier shall enter into, renew or extend a contract with such persons or classes of persons acting on behalf of the account holder as may be prescribed. 2010, c. 8, s. 11 (4).

Contract not binding
(5) A contract entered into by a supplier with a consumer that is not in accordance with subsection (4) is not binding on the consumer. 2010, c. 8, s. 11 (5).

Definition, account holder
(6) For the purposes of subsection (4),

"account holder" means the person in whose name an account has been established with a distributor for the provision of electricity or with a gas distributor for the provision of gas and,

(a) in whose name invoices are issued by the distributor or gas distributor, whether on its own behalf or on behalf of a supplier, in respect of the provision of the electricity or gas, or

(b) in whose name invoices would be issued by the distributor or gas distributor in respect of the provision of electricity or gas, if the invoices were not issued by a supplier. 2010, c. 8, s. 11 (6).

Information required in contract

12 (1) A contract with a consumer shall,

(a) in the case of retailing of electricity and in the case of gas marketing,

(i) contain such information as may be prescribed, presented in the prescribed form or manner, if any, and under the prescribed circumstances, if any, and

(ii) be accompanied by such information or documents as may be required by regulation, provided in such languages as may be prescribed, and presented in the prescribed form or manner, if any, and under the prescribed circumstances, if any;

(b) in the case of the retailing of electricity by a retailer,

(i) contain such information as may be required by a code issued under section 70.1 of the *Ontario Energy Board Act, 1998*, provided in such languages as may be required by the code, and presented in the form or manner, if any, and under the circumstances, if any, required by the code, if a condition of a licence requires the retailer to comply with the code, and

(ii) be accompanied by such information or documents as may be required by a code issued under section 70.1 of the *Ontario Energy Board Act, 1998*, provided in such languages as may be required by the code, and presented in the form or manner, if any, and under the circumstances, if any, required by the code, if a condition of a licence requires the retailer to comply with the code; and

(c) in the case of gas marketing,

(i) contain such information as may be required by rules made by the Board pursuant to clause 44 (1) (c) of the *Ontario Energy Board, Act 1998*, provided in such languages as may be required by the rules, and presented in the form or manner, if any, and under the circumstances, if any, required by the rules, and

(ii) be accompanied by such information or documents as may be required by rules made by the Board pursuant to clause 44 (1) (c) of the *Ontario Energy Board Act, 1998*, provided in such languages as may be required by the rules, and presented in the form or manner, if any, and under the circumstances, if any, required by the rules. 2010, c. 8, s. 12 (1); 2015, c. 29, s. 3 (1, 2).

Conflict

(1.1) In the event of a conflict between the regulations referred to in clause (1) (a) and the code referred to in clause (1) (b), or between the regulations referred to in clause (1) (a) and the rules referred to in clause (1) (c), the regulations prevail. 2015, c. 29, s. 3 (3).

Consumer acknowledgments and signatures

(2) If a supplier enters into a contract with a consumer, the supplier shall ensure that the consumer provides such acknowledgments and signatures as may be prescribed, in such form or manner as may be prescribed, and respecting such information or matters as may be prescribed. 2010, c. 8, s. 12 (2).

Information, etc., not permitted in contracts

(3) A contract with a consumer shall not contain or be accompanied by such information or requirements or obligations, as may be prescribed. 2010, c. 8, s. 12 (3).

Section Amendments with date in force (d/m/y) [+]

Text-based copy of contract

13 (1) If a supplier enters into a contract with a consumer, the supplier shall deliver a text-based copy of the contract to the consumer within the prescribed time. 2010, c. 8, s. 13 (1).

Copy in prescribed form

(2) Where a supplier enters into a contract with a consumer and the consumer is a member of a prescribed class of consumers, the supplier shall, within the prescribed time, provide the consumer with a copy of the contract in such form as may be prescribed, if the consumer requests it. 2010, c. 8, s. 13 (2).

Contract deemed void

(3) A contract is deemed to be void in accordance with section 16, in any of the following circumstances:

1. If no request is made under subsection (2) and the supplier fails to deliver a copy of the text-based contract in accordance with subsection (1).
2. If a request is made under subsection (2) and the supplier fails to provide a copy of the contract in the prescribed form.
3. If a request is made under subsection (2) and the supplier fails to provide a copy of the contract in the prescribed time. 2010, c. 8, s. 13 (3).

Requirement of acknowledgment of receipt

14 For the purposes of this Part, a requirement that a contract be delivered or provided to a consumer includes a requirement that the consumer acknowledges, in such form or manner as may be prescribed, that the consumer has received it and the consumer is deemed to have acknowledged receipt at the prescribed time. 2010, c. 8, s. 14.

Need for verification of contract

15 (1) If a text-based copy of the contract has been delivered to a consumer in accordance with subsection 13 (1) or a copy of the contract has been provided in accordance with subsection 13 (2), the contract is deemed to be void unless it is verified by a person who meets such conditions and qualifications as may be prescribed. 2010, c. 8, s. 15 (1).

Persons not permitted to verify contract

(2) Despite subsection (1), a contract shall not be verified by persons or classes of persons as may be prescribed. 2010, c. 8, s. 15 (2).

Verification in accordance with regulations

(3) A person may verify a contract only in accordance with the regulations. 2010, c. 8, s. 15 (3).

Timing of verification

(4) Unless otherwise prescribed, a person may verify the contract under subsection (2) no earlier than the 10th day and no later than the 60th day following the day on which a copy of the contract is delivered or provided to the consumer in accordance with section 13. 2010, c. 8, s. 15 (4).

Consumer notice that contract not verified

(5) The consumer may, in accordance with the regulations, give notice to not have the contract verified, at any time before the verification of the contract under this section. 2010, c. 8, s. 15 (5).

Application of subss. (1) to (5)

(6) Subsections (1), (2), (3), (4) and (5) apply with respect to contracts entered into on or after the day on which this section comes into force. 2010, c. 8, s. 15 (6).

Contract deemed void

16 (1) A contract is deemed to be void if,

(0.a) the contract is entered into as the result of a contravention of subsection 9.1 (1) or the rules established under subsection 9.2 (1);

(a) at the time the consumer enters into the contract the consumer does not provide the acknowledgments and signatures required under subsection 12 (2);

(b) a text-based copy of the contract is not delivered to the consumer in accordance with subsection 13 (1);

(c) a text-based copy of the contract is delivered to the consumer in accordance with subsection 13 (1) and,

(i) the contract is not verified in accordance with section 15, or

(ii) the consumer gives notice in accordance with subsection 15 (5) to not have the contract verified;

(d) a copy of the contract is not provided to the consumer in the prescribed form in accordance with subsection 13 (2), if requested by the consumer;

(e) a copy of the contract is provided to the consumer in the prescribed form in accordance with subsection 13 (2), if requested by the consumer and,

(i) the contract is not verified in accordance with section 15, or

(ii) the consumer gives notice in accordance with subsection 15 (5) to not have the contract verified; or

(f) the prescribed circumstances apply. 2010, c. 8, s. 16 (1); 2015, c. 29, s. 4.

No cause of action

(2) No cause of action against the consumer arises as a result of a contract being deemed to be void under subsection (1) or as a result of the operation of subsection (4). 2010, c. 8, s. 16 (2).

Refund within prescribed time

(3) Within a prescribed number of days after a contract is deemed to be void under this section, the supplier shall refund to the consumer the money paid by the consumer under the contract. 2010, c. 8, s. 16 (3).

Consequences of contract being deemed to be void

(4) If a contract is deemed to be void under this section, the consumer shall not be liable for any obligations under the contract or a related agreement, including obligations purporting to be incurred as cancellation charges, administration charges or any other charges or penalties. 2010, c. 8, s. 16 (4).

Section Amendments with date in force (d/m/y) [+]

17 Repealed: 2015, c. 29, s. 5.

Section Amendments with date in force (d/m/y) [+]

Renewals, extensions and amendments of contracts

18 (1) A contract with a consumer may be renewed or extended or amended only in accordance with the regulations. 2010, c. 8, s. 18 (1).

Application of subs. (1)

(2) Subsection (1) applies to,

(a) the renewal or extension of any contract that would, if not renewed or extended, expire after subsection (1) comes into force; and

(b) the amendment of any contract that would have effect after subsection (1) comes into force,

whether the contract was made before or after subsection (1) comes into force. 2010, c. 8, s. 18 (2).

Cancellation of contracts

Cancellation, cooling-off period

19 (1) A consumer may, without any reason, cancel a contract at any time from the date of entering into the contract until 10 days after,

(a) a text-based copy of the contract, or a copy of the contract in the form required under subsection 13 (2) if applicable, is delivered to the consumer; and

(b) the consumer acknowledges its receipt in accordance with section 14. 2010, c. 8, s. 19 (1).

Same, contract does not meet requirements

(2) A consumer may cancel a contract at any time after the date of entering into the contract if the requirements referred to in subsection 12 (1) are not met. 2010, c. 8, s. 19 (2).

Same, unfair practices

(3) A consumer may cancel a contract at any time after the date of entering into the contract if the supplier engages in an unfair practice. 2010, c. 8, s. 19 (3).

Same, other prescribed circumstances

(4) A consumer may cancel a contract under such other circumstances as may be prescribed. 2010, c. 8, s. 19 (4).

Same, without cause

(5) In addition to any other rights under this Part, a consumer may cancel a contract at any time and without cause, but the consumer must give the prescribed period of notice of cancellation. 2010, c. 8, s. 19 (5).

Application

20 (1) Subsections 19 (1) and (2) apply with respect to contracts entered into on or after the day on which this subsection comes into force. 2010, c. 8, s. 20 (1).

Same

(2) Subsection 19 (3) applies with respect to contracts entered into on or after the day on which this subsection comes into force. 2010, c. 8, s. 20 (2).

Same

(3) Subsection 19 (4) applies with respect to contracts entered into on or after the day on which this subsection comes into force. 2010, c. 8, s. 20 (3).

Same

(4) Subsection 19 (5) applies with respect to contracts entered into on or after the day on which this subsection comes into force. 2010, c. 8, s. 20 (4).

No required form of cancellation

21 (1) Cancellation of a contract by a consumer pursuant to this Part may be expressed in any way, as long as it indicates the intention of the consumer to cancel the contract. 2010, c. 8, s. 21 (1).

Notice of cancellation

(2) Unless the regulations provide otherwise, the notice of cancellation shall be in writing. 2010, c. 8, s. 21 (2).

Means of delivery

(3) A notice of cancellation may be given to a supplier by any means that provides evidence of the date on which the consumer delivered or sent the notice, including personal delivery, registered mail, courier or fax. 2010, c. 8, s. 21 (3).

When given

(4) Where notice of cancellation is given other than by personal delivery, the notice is deemed to have been given to the supplier when delivered or sent in accordance with subsection (3). 2010, c. 8, s. 21 (4).

When effective

(5) Unless otherwise prescribed, if a contract is cancelled pursuant to section 19, the cancellation takes effect on such day as is prescribed or as is determined in accordance with the regulations. 2010, c. 8, s. 21 (5).

Extended meaning of contract

(6) For the purposes of subsections (1), (2) and (3) and 23 (1), (2) and (3), the term “contract” is deemed to include such other agreements as may be prescribed between the consumer and the retailer or its affiliates. 2010, c. 8, s. 21 (6).

Cancellation fees and other obligations

Cancellations, s. 19 (1), (2) or (3)

22 (1) A consumer who cancels a contract under subsection 19 (1), (2) or (3) is not liable for,

(a) any obligations in respect of the cancellation, including obligations purporting to be incurred as cancellation charges, administration charges or any other charges or fees; or

(b) any monetary obligations under the contract respecting any period after the cancellation takes effect. 2010, c. 8, s. 22 (1).

Same, s. 19 (4) or (5)

(2) A consumer who cancels a contract under subsection 19 (4) or (5) is liable for,

(a) such class or classes of obligations, including charges or fees, in respect of the cancellation as may be prescribed and no others, but in no case is the consumer liable for any monetary obligations that are prescribed as excluded from liability or for more than any prescribed amount of such monetary obligations or any amount determined in accordance with the regulations; and

(b) such class or classes of monetary obligations under the contract as may be prescribed, respecting any period after the cancellation takes effect, but in no case is the consumer liable for more than any prescribed amount of such obligations or any amount determined in accordance with the regulations. 2010, c. 8, s. 22 (2).

Refunds on cancellation

Cancellation, s. 19 (1) or (3)

23 (1) Within such time period as may be prescribed, after a cancellation takes effect under subsection 19 (1) or (3), the supplier shall refund to the consumer any amount paid by the consumer under the contract. 2010, c. 8, s. 23 (1).

Same, s. 19 (2)

(2) Within such time period as may be prescribed, after a cancellation under subsection 19 (2) takes effect, the supplier shall refund to the consumer the amount prescribed by regulation or determined in accordance with the regulations. 2010, c. 8, s. 23 (2).

Same, s. 19 (4)

(3) Within such time period as may be prescribed, after a cancellation under subsection 19 (4) takes effect, the supplier shall refund to the consumer the amount, if any, prescribed by regulation or determined in accordance with the regulations. 2010, c. 8, s. 23 (3).

Return of pre-payment

24 Within such time period as may be prescribed, after a cancellation under subsection 19 (2), (4) or (5) takes effect, the supplier shall refund any amount paid by the consumer under the contract before the day the cancellation took effect in respect of electricity or gas that was to be sold on or after that day. 2010, c. 8, s. 24.

Retailer to ensure reading of consumer’s meter

25 (1) If a consumer gives notice of a cancellation under subsection 21 (2) with respect to a contract for the provision of electricity, the retailer shall promptly notify the distributor that the contract has been cancelled and the distributor shall read the consumer’s electricity meter within the prescribed period. 2010, c. 8, s. 25 (1).

Retailer responsible for additional costs

(2) The retailer is responsible for the payment to the distributor of any additional costs that are incurred by the distributor to ensure compliance with this section. 2010, c. 8, s. 25 (2).

No cause of action for cancellation

26 No cause of action against the consumer arises as a result of the cancellation of a contract under this Part. 2010, c. 8, s. 26.

Right of action in case of dispute

27 A consumer may commence an action against the supplier to recover the amount provided in subsection 28 (2) and in addition may seek such other damages or relief as are provided in subsection 28 (3),

(a) if the consumer has cancelled a contract under this Part; or

(b) if the contract is deemed to be void under section 16 and,

the consumer has not received a refund within such time period as may be prescribed after the effective date of cancellation or the day the contract is deemed void. 2010, c. 8, s. 27.

Action in Superior Court of Justice

28 (1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the Superior Court of Justice. 2010, c. 8, s. 28 (1).

Judgment

(2) If the consumer is successful in an action commenced under section 27, unless in the circumstances it would be inequitable to do so, the court shall order that the consumer recover,

(a) in the case of a cancellation under subsection 19 (2), (4) or (5), all of the money paid by the consumer under the contract;

(b) in the case of a cancellation under subsection 19 (1) or (3), twice the amount of the money paid by the consumer under the contract; and

(c) in the case of a contract that is deemed to be void, twice the amount of the money paid by the consumer under the contract. 2010, c. 8, s. 28 (2).

Same

(3) In addition to any order that may be made under subsection (2), the court may order exemplary or punitive damages or such other relief as the court considers proper. 2010, c. 8, s. 28 (3).

Evidence

(4) In the trial of an issue under this section, oral evidence respecting an unfair practice is admissible despite the existence of a written contract or written agreement and despite the fact that the evidence pertains to a representation in respect of a term, condition or undertaking that is or is not provided for in the contract or agreement. 2010, c. 8, s. 28 (4).

Waiver of notice

29 If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so. 2010, c. 8, s. 29.

Review of Part II of Act

30 (1) The Minister may require the Board to review Part II of the Act and the regulations made under Part II three years after this Part comes into force. 2010, c. 8, s. 30 (1).

Report

(2) If a review is required by the Minister under subsection (1), the Board shall prepare a report as expeditiously as possible on its review and, in the report, the Board may recommend changes to Part II and the regulations made under Part II. 2010, c. 8, s. 30 (2).

PART III
SUITE METERING

Definitions

31 In this Part,

"bulk meter" means a device used to measure the aggregate electricity consumption of a multi-unit complex, and includes any associated equipment, systems and technologies, but does not include a meter; ("compteur collectif")

"consumer" means a person who uses, for the person's own consumption, electricity that the person did not generate; ("consommateur")

"meter" means a device used to measure electricity consumption and includes any associated equipment, systems and technologies, but does not include a bulk meter; ("compteur")

"multi-unit complex" means,

(a) a building or related group of buildings in which two or more units are located,

(b) a residential complex as such term is defined in subsection 2 (1) of the *Residential Tenancies Act, 2006*,

(c) a building that forms part of a property as defined in the *Condominium Act, 1998*, or

(d) such other properties or classes of properties as may be prescribed,

but excludes such properties or classes of properties as may be prescribed; ("ensemble collectif")

"suite meter" means a unit smart meter or a unit sub-meter; ("compteur individuel")

"suite meter data" means data derived from a suite meter, including data related to the consumption of electricity as measured by the suite meter; ("données de compteur individuel")

"suite metering" means unit smart metering or unit sub-metering; ("activités liées aux compteurs individuels")

"suite meter provider" means a unit smart meter provider or unit sub-meter provider; ("fournisseur de compteurs individuels")

"suite meter specifications" has the same meaning as in subsection 32 (2); ("caractéristiques des compteurs individuels")

"unit" means,

(a) a residential unit as such term is defined in the *Residential Tenancies Act, 2006*,

(b) a rental unit as such term is defined in the *Residential Tenancies Act, 2006*,

(c) a unit as such term is defined in the *Condominium Act, 1998*, or

(d) such other properties or classes of properties as may be prescribed,

but excludes such properties or classes of properties as may be prescribed; ("unité")

"unit meter" means a meter used to measure the electricity consumption of a unit or part of a unit, and includes any associated equipment, systems and technologies, but excludes any prescribed class of meters for any prescribed class of properties in any prescribed circumstances; ("compteur d'unité")

"unit smart meter" means a unit meter that is installed by a distributor in a unit of a multi-unit complex where the multi-unit complex is not connected to a bulk meter, and includes such other meters as may be prescribed; ("compteur intelligent d'unité")

"unit smart metering" means such activities in relation to unit smart meters in multi-unit complexes as may be prescribed, under such circumstances as may be prescribed, for such classes of property or classes of consumers as may be prescribed, subject to such conditions as may be prescribed; ("activités liées aux compteurs intelligents d'unité")

"unit smart meter provider" means a distributor licensed by the Board to engage in unit smart metering; ("fournisseur de compteurs intelligents d'unité")

"unit sub-meter" means a unit meter that is installed by a unit sub-meter provider in a unit of a multi-unit complex where the multi-unit complex is connected to a bulk meter, and includes such other meters as may be prescribed; ("compteur divisionnaire d'unité")

"unit sub-metering" means such activities in relation to unit sub-meters in multi-unit complexes as may be prescribed, under such circumstances as may be prescribed, for such classes of property or classes of consumers as may be prescribed, subject to such conditions as may be prescribed; ("activités liées aux compteurs divisionnaires d'unité")

"unit sub-meter provider" means a person, including a distributor, licensed by the Board to engage in unit sub-metering, or such other persons or classes of persons as may be prescribed. ("fournisseur de compteurs divisionnaires d'unité") 2010, c. 8, s. 31; 2013, c. 3, s. 57.

Section Amendments with date in force (d/m/y) [+]

Suite meter specifications

32 (1) When a suite meter provider installs a suite meter or replaces an existing meter or suite meter, the suite meter provider shall use a suite meter that meets the suite meter specifications. 2010, c. 8, s. 32 (1).

Definition, specifications

(2) In this section,

"suite meter specifications" means the specifications that are prescribed by regulation or mandated by a code issued by the Board or by an order of the Board, or meet the criteria or requirements prescribed by regulation or mandated by a code issued by the Board or by an order of the Board, under the circumstances prescribed by regulation or mandated by a code issued by the Board or by an order of the Board in respect of,

(a) types, classes or kinds of suite meters,

(b) properties or classes of properties, and

(c) consumers or classes of consumers. 2010, c. 8, s. 32 (2).

Requirements to take certain actions

(3) A regulation, code or order referred to in the definition of "suite meter specifications" in subsection (2) may require that a suite meter provider take certain actions and may require that the actions be taken within a specified time. 2010, c. 8, s. 32 (3).

Exclusive authority of Board

(4) A regulation referred to in the definition of "suite meter specifications" in subsection (2) may provide the Board with exclusive authority to approve or authorize the suite meters after a prescribed date. 2010, c. 8, s. 32 (4).

Obligations of distributors, etc., re procurement, contracts or arrangements

(5) When a suite meter provider enters into a procurement process, contract or arrangement in relation to suite metering, the procurement process, contract or arrangement shall meet any criteria or requirements that may be prescribed by regulation or mandated by a code issued by the Board or by an order of the Board. 2010, c. 8, s. 32 (5).

Installation of suite meters permitted

33 (1) A suite meter provider may, in such circumstances as may be prescribed and subject to such conditions as may be prescribed, install a suite meter in such properties or classes of properties as may be prescribed and for such consumers or classes of consumers as may be prescribed. 2010, c. 8, s. 33 (1).

Installation of suite meters required

(2) Such persons or classes of persons as may be prescribed shall, in such circumstances as may be prescribed and subject to such conditions as may be prescribed, have a suite meter installed by a suite meter provider in such properties or classes of properties as may be prescribed and for such consumers or classes of consumers as may be prescribed. 2010, c. 8, s. 33 (2).

Same, condominiums
(3) The provisions of subsections (1) and (2) apply despite a registered declaration made in accordance with the *Condominium Act, 1998*, if a suite meter is installed in accordance with this section in respect of a unit of a condominium. 2010, c. 8, s. 33 (3).

Use of suite meters for billing permitted
34 (1) Subject to subsection (6), if a suite meter is installed in accordance with section 33 or in such circumstances as may be prescribed in respect of a unit of a prescribed class of properties, a suite meter provider may, in the prescribed circumstances, subject to the prescribed conditions and for the prescribed consumers or prescribed classes of consumers, bill the consumer based on the consumption or use of electricity by the consumer in respect of the unit as measured by the suite meter. 2010, c. 8, s. 34 (1).

Use of meters for billing required
(2) Subject to subsection (6), if a suite meter is installed in accordance with section 33 in respect of a unit of a prescribed class of properties, a suite meter provider shall, in the prescribed circumstances and subject to the prescribed conditions, and for the prescribed consumers or prescribed classes of consumers, bill the consumer based on the consumption or use of electricity by the consumer in respect of the unit as measured by the suite meter. 2010, c. 8, s. 34 (2).

Use of meters prohibited
(3) Except as provided in subsections (1) and (2), no person shall bill a prescribed class of consumers for electricity consumed in a unit of a prescribed class of properties as measured by a suite meter. 2010, c. 8, s. 34 (3).

Energy efficiency, etc.
(4) For the purposes of subsections (1) and (2), prescribed circumstances or prescribed conditions may include, but are not limited to, circumstances or conditions relating to energy efficiency, energy conservation or meter functionality. 2010, c. 8, s. 34 (4).

Priority over registered declaration
(5) Subsections (1) and (2) apply in priority to any registered declaration made in accordance with the *Condominium Act, 1998* or any by-law made by a condominium corporation registered in accordance with that Act and shall take priority over the declaration or by-law to the extent of any conflict or inconsistency, if a suite meter is installed in accordance with section 33 in respect of a unit of a condominium. 2010, c. 8, s. 34 (5).

Requirement to provide information
(6) If a suite meter is installed in accordance with section 33 in respect of a unit of a prescribed class of properties for a prescribed class of consumers, the suite meter provider or such other persons or class of persons as may be prescribed shall, in the prescribed circumstances, provide the consumer or such other persons or class of persons as may be prescribed with such information as may be prescribed, at such time as may be prescribed, presented in such form and manner as may be prescribed. 2010, c. 8, s. 34 (6).

No billing of consumer based on time of use
(7) A regulation made in respect of subsection (6) may provide that the suite meter provider shall not bill the consumer based on the consumption or use of electricity by the consumer in respect of the unit, if at the time of the billing there is outstanding non-compliance with subsection (6). 2010, c. 8, s. 34 (7).

PART IV
REGULATIONS

Regulations, general
35 (1) The Lieutenant Governor in Council may make regulations prescribing anything that is required or permitted to be prescribed or that is required or permitted to be done in accordance with the regulations or as provided in the regulations. 2010, c. 8, s. 35 (1).

Same
(2) The Lieutenant Governor in Council may make regulations,

(a) exempting any person or class of persons from any provision of this Act, subject to such conditions or restrictions as may be prescribed by the regulations;

(b) defining any word or expression used in this Act that is not defined in this Act. 2010, c. 8, s. 35 (2).

Same, Part II
(3) For the purposes of Part II, the Lieutenant Governor in Council may make regulations,

(a) prescribing the amount of electricity and gas for the purposes of the definition of “consumer” in section 2;

(b) prescribing forms, media and formats for the purposes of the definition of “text-based” in section 2 and forms, media and formats that are excluded from the definition;

(c) prescribing formats for electronic information for the purposes of subsection 7 (4);

(d) prescribing requirements for the purposes of subsection 7 (5);

(e) governing disclosure requirements for the purposes of subsection 8 (1);

(f) prescribing the manner of determining the price a supplier charges for electricity or gas and the requirements used in determining it for the purposes of section 9;

(g) governing unfair practices;

(h) governing consumer contracts;

(h.1) providing for rules for the purposes of section 9.3;

(i) prescribing the persons or classes of persons acting on behalf of the account holder for the purposes of subsection 11 (4);

(j) for the purposes of subsection 12 (1),

(i) governing information required to be contained in contracts, the form and manner of its presentation and the circumstances under which the information is to be provided,

(ii) governing what information is required in the information and documents that must accompany contracts, the languages in which the information and documents may be provided, the form and manner of their presentation and the circumstances under which they are to be provided, and

(iii) providing that such a regulation prevails over any code governing the conduct of a retailer issued by the Board under section 70.1 of the *Ontario Energy Board Act, 1998* or any rules that apply to gas marketing made by the Board under clause 44 (1) (c) of the *Ontario Energy Board Act, 1998*;

(k) for the purposes of subsection 12 (2), governing acknowledgments and signatures, prescribing their form or manner and respecting information and matters to which they apply;

(l) governing information, requirements or obligations that shall not be contained in or accompany any contract;

(m) governing the time in which a supplier must deliver a text-based copy of a contract to a consumer for the purposes of subsection 13 (1);

(n) prescribing the class or classes of consumers that may receive a contract in a prescribed form and within a prescribed time for the purposes of subsection 13 (2);

(o) governing acknowledgment of delivery of contracts and prescribing the time or the manner of determining the time in which the consumer is deemed to have acknowledged receipt of the contract for the purposes of section 14;

(p) governing the verification under section 15, including,

(i) the conditions and qualifications of the persons or class of persons who verified the contract,

(ii) the persons or class or persons who are excluded from verifying contracts, and

(iii) the notice given by a consumer under subsection 15 (5) not to have the contract verified;

(q) prescribing the circumstances in which a contract is deemed void and respecting the number of days or the manner of calculating the number of days after which a contract is deemed void for the purposes of section 16;

(r) governing the renewal, extension or amendment of contracts under Part II;

(s) prescribing circumstances under which a contract may be cancelled under subsection 19 (4) and the prescribed period of notice a consumer must give to cancel a contract under subsection 19 (5);

(t) governing the cancellation of contracts by a consumer, including governing notice of cancellation of a contract and when a cancellation takes effect;

(u) prescribing what agreements may be included in the term “contract” for the purposes of subsection 21 (6);

(v) respecting the class of obligations, including charges or fees and amount of the obligations for the purposes of section 22 and respecting the amount of obligations that are excluded from liability, as well as the amount of such monetary obligations or any other amount;

(w) governing the liability of consumers who cancel a contract under subsections 19 (4) and (5) and distinguishing between cancellations under subsections 19 (4) and (5);

(x) governing refunds to the consumer after a cancellation of a contract takes effect, the time or the manner of calculating the time in which a refund must be paid and the amount of the refund or the manner of determining the refund for the purposes of section 23;

(y) prescribing the time period or the manner of determining the time period in which a refund is to paid to a consumer for the purposes of section 24;

(z) governing the period in which a distributor is to read a consumer’s electricity meter under subsection 25 (1). 2010, c. 8, s. 35 (3); 2015, c. 29, s. 6.

Same, Part III

(4) For the purposes of Part III, the Lieutenant Governor in Council may make regulations,

(a) prescribing properties or classes of properties for the purposes of the definition of “multi-unit complexes” in section 31 and excluding properties or classes of properties for the purposes of that definition;

(b) prescribing properties or classes of properties for the purposes of the definition of “unit” in section 31 and excluding properties or classes of properties for the purposes of that definition;

(c) prescribing classes of meters, classes of properties and circumstances for the purposes of the definition of “unit meter” in section 31;

(d) prescribing other meters for the purposes of the definition of “unit smart meter” in section 31;

(e) prescribing, for the purposes of the definition of “unit smart metering” in section 31,

(i) activities in relation to unit smart meters in multi-unit complexes,

(ii) circumstances in which activities may be carried out in relation to unit smart meters,

(iii) classes of properties or classes of consumers,

(iv) conditions that may apply to carrying out the activities referred to in that definition;

(f) prescribing meters for the purposes of the definition of “unit sub-meter” in section 31;

(g) prescribing, for the purposes of the definition of “unit sub-metering” in section 31,

(i) activities in relation to unit sub-meters in multi-unit complexes,

(ii) circumstances in which activities may be carried out in relation to unit sub-meters,

(iii) classes of properties or classes of consumers,

(iv) conditions that may apply to carrying out the activities referred to in that definition;

(h) prescribing persons or classes of persons for the purposes of the definition of “unit sub-meter provider” in section 31;

(i) governing suite meter specifications for the purposes of section 32, including prescribing,

(i) types, classes or kinds of suite meters,

(ii) properties or classes of properties,

(iii) consumers or classes of consumers, and

(iv) criteria or requirements that must be met with respect to subclauses (i), (ii) and (iii);

(j) prescribing a date after which the Board has exclusive authority to approve or authorize suite meters;

(k) prescribing criteria or requirements that a suite meter provider must satisfy when entering into a procurement process, contract or arrangement for the purposes of subsection 32 (5);

(l) prescribing, for the purposes of section 33, the persons or classes of persons who are required to install suite meters, the circumstances in which such persons or classes of persons are required to install suite meters, the circumstances in which a suite meter provider is permitted to install suite meters, the properties or classes of properties where they may or must be installed and the consumers or classes of consumers to which the regulation may or must apply;

(m) prescribing, for the purposes of subsection 34 (1), the circumstances in which that subsection applies, the conditions to which that subsection is subject, the circumstances in which a suite meter provider is permitted to bill consumers based on their consumption or use of electricity, the classes of properties in respect of which such billing is permitted and the consumers or classes of consumers who may or must be so billed;

(n) prescribing, for the purposes of subsection 34 (2), the conditions to which that subsection is subject, the circumstances in which a suite meter provider is required to bill consumers based on their consumption or use of electricity, the classes of properties in respect of which such billing is permitted and the consumers or classes of consumers who may or must be so billed;

(o) prescribing classes of consumers and classes of properties for the purposes of subsection 34 (3);

(p) prescribing, for the purposes of subsection 34 (6),

(i) classes of properties and classes of consumers,

(ii) persons or classes of persons, and

(iii) information and the form and manner of the presentation of the information. 2010, c. 8, s. 35 (4).

Same, transition

(5) The Lieutenant Governor in Council may make regulations governing transitional matters that, in the opinion of the Lieutenant Governor in Council, are necessary or desirable to facilitate the implementation of this Act. 2010, c. 8, s. 35 (5).

Section Amendments with date in force (d/m/y) [+]

36-39 Omitted (amends, repeals or revokes other legislation). 2010, c. 8, ss. 36-39.

40 Omitted (provides for coming into force of provisions of this Act). 2010, c. 8, s. 40.

41 Omitted (enacts short title of this Act). 2010, c. 8, s. 41.

Français

Ontario

Energy Consumer Protection Act, 2010
Loi de 2010 sur la protection des consommateurs d'énergie

ONTARIO REGULATION 389/10

GENERAL

Consolidation Period: From January 1, 2017 to the e-Laws currency date.

Last amendment: O. Reg. 241/16.

This Regulation is made in English only.

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PART I
CONSUMER PROTECTION

Application and Interpretation

Application

1. (1) This Part applies for the purposes of Part II of the Act. O. Reg. 389/10, s. 1 (1).

(2) Sections 17 to 20 apply with respect to contracts entered into before or after those sections come into force. O. Reg. 389/10, s. 1 (2); O. Reg. 241/16, s. 1.

Definitions

2. In this Part,

"account holder" means, in relation to particular premises, the person in whose name an account has been established with an energy distributor for the provision of electricity or gas to the premises and,

(a) to whom invoices relating to the provision of the electricity or gas are issued by the energy distributor, whether on its own behalf or on behalf of a supplier, or

(b) in whose name invoices would be issued by the energy distributor in respect of the provision of electricity or gas if invoices were not issued by a supplier;

"account holder's agent" means,

(a) the spouse of the account holder, within the meaning of section 29 of the *Family Law Act*, if the spouse is co-habiting with the account holder, unless the account holder has notified the supplier that the account holder has withdrawn the authority of the spouse to act on behalf of the account holder, or

(b) a person who, at the time of taking any action with respect to a contract on behalf of the account holder, is authorized to do so by the account holder or at law;

"additional energy charges" means all categories of amounts payable by a consumer with respect to the supply or delivery of electricity or gas, other than,

(a) the category or categories of amounts payable as part of the contract price,

(b) interest,

(c) penalties, and

(d) any charges and fees referred to in clause 22 (1) (a) of the Act;

"contract price" means all amounts payable by a consumer under a contract with respect to the supply or delivery of electricity or gas to the consumer, other than interest, penalties and any charges and fees referred to in clause 22 (1) (a) of the Act;

"disclosure statement" means a disclosure statement required under this Part;

"energy distributor" means a distributor or gas distributor;

"unconscionable action" means an action by a supplier in connection with a contract if the supplier taking the action knows or ought to know,

(a) that, in the case of a representation made to the consumer, the consumer is not reasonably able to protect his or her interests because he or she does not understand the representation or its implications by reason of a physical or mental disability, ignorance, illiteracy, an inability to understand the language in which the representation is made or another disadvantage, or

(b) that the consumer is being subjected to undue pressure to enter into a contract with the supplier. O. Reg. 389/10, s. 2.

Interpretation

3. (1) For the purposes of this Part,

(a) an act or omission by an employee or agent of a supplier is deemed to be the act or omission of the supplier; and

(b) in determining if a statement is false or misleading, there may be taken into consideration any omission that makes the statement sufficiently incomplete as to result in the statement being false or misleading with respect to a material fact. O. Reg. 389/10, s. 3 (1).

(2) In this Part,

(a) a reference to an order made by the Board is a reference to an order made by the Board under the *Ontario Energy Board Act, 1998*;

(b) a reference to a code issued by the Board is a reference to a code issued by the Board under section 70.1 of that Act; and

(c) a reference to a rule made by the Board is a reference to a rule made by the Board under section 44 of that Act. O. Reg. 389/10, s. 3 (2).

Amounts prescribed for purposes of definition of "consumer"

4. For the purposes of the definition of "consumer" in section 2 of the Act,

(a) the prescribed amount of electricity for the purpose of clause (a) of the definition is 150,000 kilowatt hours; and

(b) the prescribed amount of gas for the purpose of clause (b) of the definition is 50,000 cubic metres. O. Reg. 389/10, s. 4.

Unfair Practices

Unfair practice

5. Each of the following acts or omissions of a supplier is prescribed as an unfair practice with respect to a consumer:

1. Knowingly making a false or misleading statement to the consumer, either directly or by way of an advertisement or other publicly released statement, including, but not limited to, a false or misleading statement relating to one or more of the following:

   i. The provisions of a contract.

   ii. The quality or another characteristic of electricity or gas provided or to be provided by the supplier or another supplier.

   iii. The status of the supplier or another supplier or the relationship between the supplier and another person or between another supplier and another person.

   iv. A benefit to be received by the consumer that arises from the status of the supplier or the relationship between the supplier and another person.

   iv.1 The requirements to qualify for any financial or other assistance from the Government of Ontario or otherwise, including whether the consumer is entitled or may be entitled to the assistance,

      A. if the consumer enters into a contract with the supplier or does not enter into a contract with the supplier, or

      B. if the consumer has any other type of relationship with the supplier or does not have any other type of relationship with the supplier.

   v. The amount of, or the method of calculating,

      A. the contract price or any component of the contract price, if the contract price is made up of more than one component,

      B. any of the additional energy charges, or

C. any financial or other assistance from the Government of Ontario or otherwise to which the consumer is or may be entitled.

vi. The fact that any of the additional energy charges are payable by the consumer in addition to the contract price.

vii. Differences in contract prices or additional energy charges by different suppliers or energy distributors.

viii. A price or financial advantage from entering into a contract with the supplier or a cost saving or the amount of a cost saving if the consumer purchases electricity or gas from the supplier instead of another supplier or an energy distributor.

ix. The period of time during which a contract for the provision of electricity or gas at a specified contract price may be entered into or any period of time to which a specified contract price applies.

x. The consequences if the consumer does not enter into, verify, agree to amend, renew or extend the term of a contract.

xi. The consumer's rights under any Act or regulation.

2. Taking an unconscionable action with respect to the consumer.

3. Failing to disclose information about the products, services or business of the supplier if the failure misleads or can reasonably be expected to mislead the consumer in a way that influences his or her decision to enter into, verify, agree to amend, renew, extend the term of or cancel a contract with the supplier.

4. When making a statement to the consumer about the contract price, whether directly or by way of an advertisement or other publicly released statement, failing to make clear that additional energy charges would be payable by the consumer if he or she enters into the contract.

5. When making a statement to the consumer about the contract price in relation to the price charged by an energy distributor or another supplier, whether the statement is made directly or by way of an advertisement or other publicly released statement,

i. failing to make clear that the additional energy charges are not included in the contract price and would be payable by the consumer if he or she enters into the contract, or

ii. failing to make clear that those additional energy charges are included in the price charged by the energy distributor.

6. If a person acting on behalf of a supplier calls on a consumer in person, the failure by that person,

i. to prominently display a valid identification badge in accordance with the conditions of the supplier's licence, the regulations made under the *Ontario Energy Board Act, 1998* and any code, order or rule issued or made by the Board,

ii. to offer to the consumer a business card that complies with the conditions of the supplier's licence, the regulations made under the *Ontario Energy Board Act, 1998* and any code, order or rule issued or made by the Board, or

iii. to give to the consumer, at the consumer's request, a text-based copy of any document that is presented to but not signed by the consumer unless clause 5.1 (2) (d) or (e) applies with respect to the document.

7. If a person acting on behalf of the supplier enters into a contract in person with the consumer, the failure by that person to give the consumer,

i. a text-based copy of the contract, including the disclosure statement, before the consumer enters into the contract, irrespective of whether the consumer requests a copy, or

ii. a text-based copy of the signed contract, including the disclosure statement, immediately after the consumer has entered into the contract, irrespective of whether the consumer requests a copy.

8. Entering into, verifying, amending, renewing, extending the term of or cancelling a contract with anyone other than a person who, at that time, is or will be the account holder or the account holder's agent in respect of the residence or premises to which the contract applies.

9. Entering into a contract with the consumer if the contract does not satisfy the requirements prescribed under this Part.

10. Taking any action intended to verify, amend, renew or extend the term of a contract, with or without the consent of the consumer, except in accordance with the Act, the regulations and any applicable code, order or rule issued or made by the Board.

11. Structuring the contract price or the billing or payment arrangements for a contract in such a manner that a reasonable person could be misled with respect to,

i. the cost of the contract, or

ii. the cost of the contract over any period during the term of the contract or, if the contract is renewed or extended, during any period in the term of the renewed or extended contract.

12. Directing an energy distributor to provide electricity or gas to the consumer under a contract if the contract has not been verified.

13. Failing to comply with the requirements relating to disclosure obligations or disclosure statements in the Act and the regulations and under any code, order or rule issued or made by the Board.

14. Failing to comply with any applicable code, order or rule issued or made by the Board, including but not limited to the Fair Marketing Practices set out in the Electricity Retailer Code of Conduct or the Code of Conduct for Gas Marketers issued by the Board.

15. Requiring at any time, including upon the cancellation of a contract by the consumer, the return or repayment of,

i. a gift card, gift certificate or other financial incentive of any kind that has been provided by the supplier to the consumer, or

ii. any equipment, product or service that has been provided by the supplier to the consumer. O. Reg. 389/10, s. 5; O. Reg. 497/10, s. 1; O. Reg. 241/16, s. 2.

Door-to-Door Advertising and Marketing

Permissible door-to-door advertising and marketing

5.1 (1) The rules set out in subsection (2) are established for the purposes of section 9.2 of the Act. O. Reg. 241/16, s. 3.

(2) A supplier or salesperson shall not,

(a) advertise, market or otherwise attend in person without being solicited at the home of a consumer where the consumer has indicated by posted sign or otherwise not to do so;

(b) advertise, market or otherwise attend in person without being solicited at the home of a consumer,

(i) on a holiday within the meaning of section 87 of the *Legislation Act, 2006*, other than a Sunday (subject to subclause (iii));

(ii) before 10 a.m. or after 8 p.m. on a weekday, or

(iii) before 10 a.m. or after 5 p.m. on a Saturday or a Sunday;

(c) advertise, market or otherwise attend in person at the home of a consumer without being solicited more than four times in any 12-month period;

(d) leave with a consumer, at the home of a consumer, a copy of a contract;

(e) provide, in person at the home of a consumer, a gift card, gift certificate or other financial incentive of any kind, or any equipment, product or service, to be redeemed following entry into, amendment of or renewal of a contract;

(f) enter into, verify, amend, renew or extend the term of a contract in person at the home of a consumer; or

(g) after attending in person without being solicited at the home of a consumer, communicate with the consumer by any means more than once in the subsequent 30-day period, unless,

(i) the consumer solicits the communication, or

(ii) the communication is for the purposes of contract verification in accordance with this Regulation. O. Reg. 241/16, s. 3.

CONTRACTS

With whom a supplier may enter into a contract

6. For the purposes of subsection 11 (4) of the Act, a supplier shall not enter into, verify, amend, renew or extend the term of a contract with anyone other than a person who is,

(a) the account holder; or

(b) the account holder's agent at the time the action is taken. O. Reg. 389/10, s. 6.

Contract requirements

7. (1) A contract must contain the following, be clearly legible and, except for the information to be added at the time the contract is entered into, must be in a typeface having a font size of at least 12:

1. The name, business address and telephone number of the supplier and any fax number, website address, e-mail address and toll-free telephone number for the supplier.
2. The number of the supplier's licence issued under the *Ontario Energy Board Act, 1998*.
3. If the contract is entered into with the consumer in person, the name of the person who negotiated and signed the contract on behalf of the supplier.
4. In printed letters, the consumer's name, the address to which the electricity or gas is to be provided and, if it is different, the account holder's name and mailing address.
5. The date on which the contract is entered into, the length of time during which electricity or gas is to be provided pursuant to the contract, the date that the provision of electricity or gas is intended to start under the contract and a description of any circumstances that may prevent the provision of electricity or gas from starting on that date.
6. The contract price for the electricity or gas, or the method of calculating it, and, if any additional energy charges are payable by the consumer for the supply or delivery of the electricity or gas, a statement describing the categories of the additional energy charges and indicating to whom they are payable.
7. The terms of payment for the electricity or gas, including the terms relating to any deposit, late payment or other charges, interest or penalties that may be payable under the contract.
8. A statement that the consumer has the right under the Act to cancel the contract without cost or penalty up to 10 days after the consumer acknowledges receipt or is deemed to acknowledge receipt of a text-based copy of the contract.
9. A statement that if the consumer cancels the contract within that 10-day period, the consumer is entitled to a full refund of all amounts paid under the contract.
10. A statement,

i. that the consumer may cancel the contract without cost or penalty up to 30 days after receiving the first bill under the contract, in the case of a contract for the provision of electricity entered into before the day Ontario Regulation 241/16 came into force, and

ii. in the case of a contract entered into on or after that day, that the consumer may cancel the contract without cost or penalty up to 30 days after receiving the second bill under the contract.

11. A statement that nothing in the contract negates or varies the consumer's rights to cancel the contract under and in accordance with the Act and this Part.
12. A statement that if the consumer permanently moves out of the premises to which the electricity or gas is provided under the contract, the consumer may, without cost or penalty, cancel the contract.
13. A description of any other circumstances in which the consumer or the supplier is entitled to cancel the contract with or without notice or cost or penalty, the length of any notice period, the manner in which notice can be given and the amount of any cost or penalty.
14. Information about whether the contract may be assigned by either the supplier or the consumer and any provisions relating to the assignment.
15. If the contract is for the provision of electricity and provides for the assignment of any rebate to which the consumer is entitled to another person, a statement informing the consumer that he or she will not receive the rebate.
16. A description of how the consumer may contact the supplier to make a complaint, request information or renew, extend the term of or cancel the contract.
17. Except as otherwise provided in section 9, the signature and printed name of the consumer, or the account holder's agent signing the contract on behalf of the consumer, and of the person signing the contract on behalf of the supplier, at the bottom of the contract and before the acknowledgment described in paragraph 18.
18. Except as otherwise provided in section 9, following the signatures referred to in paragraph 17, an acknowledgment to be signed and dated by the consumer or account holder's agent that he or she has received a text-based copy of the contract. O. Reg. 389/10, s. 7 (1); O. Reg. 241/16, s. 4.

(2) For the purposes of subsection 12 (3) of the Act, a contract must not contain any provision or be accompanied by any document,

(a) that purports to negate or vary any of the consumer's rights under any Act or regulation or under any code, order or rule issued or made by the Board;

(b) that falsely represents that the supplier is relieved from the requirement to comply with any provision of any Act or regulation or any code, order or rule issued or made by the Board. O. Reg. 389/10, s. 7 (2).

(3) A provision of a contract or document that is prohibited under subsection (2) is void and, in the case of a contract, is severable from the contract and shall not be evidence of circumstances showing an intent that a deemed or implied warranty or condition does not apply. O. Reg. 389/10, s. 7 (3).

(4) If a contract is in a language other than English, the contract is deemed to be void if it does not comply with the requirements of the Act, this Part or any applicable code, order or rule issued or made by the Board by reason that the wording is inaccurate, incomplete, unclear or capable of more than one meaning. O. Reg. 389/10, s. 7 (4).

Disclosure statement

8. (1) A contract for the provision of electricity or gas must be accompanied by a disclosure statement,

(a) that contains such information as is required by any code, order or rule issued or made by the Board;

(b) that is provided in such language or languages as may be required or permitted by that code, order or rule;

(c) that is presented in the form or manner and under the circumstances, if any, required by that code, order or rule; and

(d) that requires the signature of the consumer, or the account holder's agent who signs the contract on behalf of the consumer, to acknowledge receipt of the disclosure statement. O. Reg. 389/10, s. 8 (1).

(2) A renewal or extension form provided as required under section 15 must be accompanied by a disclosure statement,

(a) that contains such information as is required by a code, order or rule issued or made by the Board;

(b) that is provided in such language or languages as may be required or permitted by that code, order or rule;

(c) that is presented in the form or manner and under the circumstances, if any, required by that code, order or rule; and

(d) that requires the signature of the consumer, or the account holder's agent who renews or extends the contract on behalf of the consumer, to acknowledge receipt of the disclosure statement. O. Reg. 389/10, s. 8 (2).

(3) A disclosure statement required under subsection (1) or (2) must be accompanied by a price comparison,

(a) that contains such information as may be required by a code, order or rule issued or made by the Board;

(b) that is provided in such language or languages as may be required by a code, order or rule issued or made by the Board;

(c) that is presented in the form or manner and under the circumstances, if any, as may be required by a code, order or rule issued or made by the Board; and

(d) that requires the signature of the consumer, or the account holder's agent who renews or extends the contract on behalf of the consumer, to acknowledge receipt of the disclosure statement. O. Reg. 389/10, s. 8 (3).

Contracts entered into over the internet

9. If a contract is entered into over the internet, the supplier shall ensure,

(a) that its internet website is secure;

(b) that its internet server will cancel the consumer's session on the website in a reasonable period of time if the consumer does not continue the session;

(c) that the web page includes statements with boxes to be checked off by the consumer in order to proceed with the transaction,

(i) that remind the consumer that entering and leaving his or her personal information on a public computer is not recommended,

(ii) that confirm that the consumer understands that the supplier does not represent an energy distributor, the Board or the Government of Ontario, and

(iii) that confirm that the consumer is the account holder with respect to any contract entered into through the website or is the account holder's agent for the purposes of entering into the contract;

(d) that the website provides the terms and conditions of available contracts, the disclosure statement applicable to each form of contract and a link to the Board's website, without requiring the consumer to commence a transaction;

(e) that, as part of the transaction, the consumer is requested to review the applicable disclosure statement and price comparison and indicate that he or she has read and understood it by checking a box;

(f) that the consumer has the option to download or print each form of available contract and disclosure statement without any obligation to enter into a contract;

(g) that the signature page of the contract contains the electronic signature of a director or officer of the supplier and the date the contract was entered into over the internet;

(h) that below the signature contemplated in clause (g), two boxes are displayed with a request that the consumer check only one, to either,

(i) expressly accept the provisions of the contract offer, or

(ii) expressly decline the contract offer and terminate the transaction without completing it; and

(i) that, if the reader checked the box to accept the terms and conditions of the contract offer, the consumer is required to provide his or her e-mail address in order to complete the transaction. O. Reg. 389/10, s. 9.

Receipt of contract and acknowledgement of receipt

10. (1) If a consumer enters into a contract in person with someone acting on behalf of the supplier,

(a) the person shall give to the consumer a text-based copy of the contract at the time the contract is entered into; and

(b) the consumer is deemed to acknowledge receipt of a text-based copy of the contract if and when the consumer signs the acknowledgement at the end of the contract. O. Reg. 389/10, s. 10 (1).

(2) If a consumer enters into a contract over the internet,

(a) the supplier shall, immediately after the contract is entered into, deliver a text-based copy of the contract, disclosure statement and price comparison to the e-mail address provided by the consumer; and

(b) the consumer is deemed to acknowledge receipt of the text-based copy of the contract, disclosure statement and price comparison if and when the contract, disclosure statement and price comparison are electronically sent by e-mail to the address provided by the consumer. O. Reg. 389/10, s. 10 (2).

(3) If a consumer enters into a contract by mail, the consumer,

(a) is considered to have received a text-based copy of the contract when he or she receives and signs and dates the contract; and

(b) is deemed to acknowledge receipt of the text-based copy of the contract on the day the consumer mails back to the supplier the signed and dated copy of the contract on which the consumer has signed the acknowledgement. O. Reg. 389/10, s. 10 (3).

Permissible remuneration

10.1 For the purposes of section 9.3 of the Act, the remuneration provided to a salesperson must not include any remuneration that is based on a commission or on the value or volume of sales. O. Reg. 241/16, s. 5.

Verification of Contracts

Verification

11. A contract may be verified for the purposes of section 15 of the Act only as provided in sections 12 to 13.2 of this Regulation. O. Reg. 389/10, s. 11; O. Reg. 241/16, s. 6.

Verification, general

12. (1) A person shall verify a contract for the provision of electricity or gas to particular premises,

(a) only by telephone in accordance with section 13.1 or, subject to subsection (2), over the internet in accordance with section 13.2; and

(b) only with the account holder for those premises or the account holder's agent at that time in respect of the premises. O. Reg. 241/16, s. 7.

(2) A contract may be verified over the internet only if the Board has issued or made a code, order or rule relating to the internet verification procedure. O. Reg. 241/16, s. 7.

(3) Despite subsection 15 (4) of the Act, a contract may be verified no earlier than the 10th day and no later than the 45th day after the day on which a text-based copy of the contract is delivered or provided to the consumer. O. Reg. 241/16, s. 7.

(4) An account holder or the account holder's agent may, by any means that indicates to the supplier or person the intention not to proceed with the contract, give notice to the supplier or to the person verifying the contract not to have the contract verified. O. Reg. 241/16, s. 7.

(5) A notice given under subsection (4), other than by personal service or by a telephone call to the supplier or person, is deemed to have been given when sent by the account holder or the account holder's agent. O. Reg. 241/16, s. 7.

Who may verify a contract, third party verification

13. (1) A contract may be verified by telephone in accordance with section 13.1 only by an individual who satisfies the following criteria:

1. The individual's employer is not a party to the contract being verified, nor an affiliate or partner of a party to the contract.

2. The individual must not receive any remuneration or other compensation or benefit,

i. from the supplier or from an affiliate or partner of the supplier, or

ii. that is determined, directly or indirectly, by reference to the number of contracts that are verified or the percentage of contracts that are verified.

3. The individual must have successfully completed such training for individuals who verify contracts by telephone as may be required by a code, order or rule issued or made by the Board. O. Reg. 241/16, s. 7.

(2) A contract may be verified over the internet in accordance with section 13.2 only by a person who satisfies the following criteria:

1. The person must not be a party to the contract being verified, nor be an affiliate or partner of a party to the contract.

2. The person must not receive any remuneration or other compensation or benefit from the supplier or from an affiliate or partner of the supplier that is determined, directly or indirectly, by reference to the number of contracts that are verified or the percentage of contracts that are verified. O. Reg. 241/16, s. 7.

(3) In this section,

"affiliate" means an affiliate within the meaning of the *Business Corporations Act*;

"partner" means a partner in a partnership under the *Partnerships Act*, or a general or limited partner in a limited partnership under the *Limited Partnerships Act*. O. Reg. 241/16, s. 7.

Verification process, telephone

13.1 Where a contract is verified by telephone, the supplier shall ensure that,

(a) the process complies with any code, order or rule issued or made by the Board relating to the verification procedure;

(b) if, at any time during the verification process, the person who is verifying the contract is made aware by the account holder or the account holder's agent of an act or omission that appears to be a violation of section 5.1 or an unfair practice of the supplier, or has reasonable grounds for believing that the supplier has committed an unfair practice, whether at the time of soliciting, negotiating or entering into the contract or after, the person does not proceed with the verification process;

(c) if the person who is verifying a contract is advised that the account holder or the account holder's agent did not receive a text-based copy of the contract or the disclosure statement, the person does not proceed with the verification process;

(d) if the person who is verifying the contract does not proceed with the verification process in accordance with clause (b) or (c), the person advises the account holder, or the account holder's agent, and the supplier of the reason for not proceeding; and

(e) the person verifying the contract makes a recording of the telephone call and advises the account holder or account holder's agent that the telephone call is being recorded. O. Reg. 241/16, s. 7.

Verification process, internet

13.2 Where a contract is verified over the internet, the supplier shall ensure that,

(a) the process complies with any code, order or rule issued or made by the Board relating to the verification procedure;

(b) the verification process is automatically terminated if the responses of the account holder or the account holder's agent indicate that,

(i) there has been an act or omission that appears to be a violation of section 5.1 or an unfair practice of the supplier at the time of soliciting, negotiating or entering into the contract or after, or

(ii) the account holder or the account holder's agent did not receive a text-based copy of the contract or the disclosure statement;

(c) if the verification process is automatically terminated in accordance with clause (b), the account holder, or the account holder's agent, and the supplier are advised of the reason for the termination; and

(d) communications over the internet between the person verifying the contract and the account holder or the account holder's agent are recorded and maintained, and the account holder, or the account holder's agent, is advised that this will be the case during the internet verification process. O. Reg. 241/16, s. 7.

Void Contracts

When a contract is void

14. (1) For the purposes of clause 16 (1) (f) of the Act, a contract is deemed to be void if,

(a) the contract is entered into before, on or after January 1, 2011, and,

(i) the consumer has a right to cancel the contract, whether the right arises under the contract or otherwise,

(ii) the consumer gives the supplier notice of cancellation of the contract, whether or not the consumer complies with any other requirements, if there are any, relating to the cancellation of the contract (such as the payment of a cancellation fee), and

(iii) the supplier does not, within 10 days after receiving the notice of cancellation, notify the appropriate energy distributor of that fact; or

(b) the contract is entered into on or after January 1, 2011 and, at the time the contract is entered into, the supplier is not in compliance with the conditions of its licence set out in sections 3 and 4 of Ontario Regulation 90/99 (Licence Requirements — Electricity Retailers and Gas Marketers) made under the *Ontario Energy Board Act, 1998*. O. Reg. 389/10, s. 14 (1); O. Reg. 33/11, s. 1.

(2) For the purpose of subsection 16 (3) of the Act, the prescribed period in which the supplier must refund to the consumer the money paid by the consumer under the contract is 60 days after the day the contract is deemed to be void. O. Reg. 389/10, s. 14 (2).

Contract Renewals, Extensions And Amendments

Conditions for renewals and extensions of contracts

15. (1) A contract may be renewed or the term of the contract may be extended only if,

(a) the contract permits the renewal or permits the term of the contract to be extended as proposed by the supplier;

(b) the supplier sends to the consumer, not more than 120 days and not less than 60 days before the current term of the contract expires,

(i) a text-based copy of the proposed renewed or extended contract,

(ii) two copies of a text-based disclosure statement and price comparison that complies with section 8, and

(iii) two copies of a text-based renewal or extension form that complies with subsection (2);

(c) the requirements of the Act, this Part and any applicable code, order or rule issued or made by the Board are satisfied;

(d) the contract is renewed or the term of the contract is extended without any changes other than,

(i) the change to the termination date,

(ii) any change in the contract price or method of calculating the contract price, and

(iii) any changes necessary for the purposes of compliance with the Act, the regulations and any applicable code, order or rule issued or made by the Board;

(e) the contract price and method of calculating the contract price, after any change referred to in subclause (d) (ii) will apply throughout the term of the renewed contract or extended term of the contract; and

(f) the contract as renewed or extended is in compliance with the Act, this Part and any applicable code, order or rule issued or made by the Board. O. Reg. 389/10, s. 15 (1).

(2) For the purposes of subclause (1) (b) (iii), a renewal or extension form must be in a clearly legible typeface having a font size of at least 12 and satisfy the following requirements:

1. It must clearly indicate that the supplier is offering to renew the contract or extend the term of the contract and must clearly describe any change to the contract that the supplier is proposing to make under each renewal or extension option offered by the supplier.

2. Revoked: O. Reg. 241/16, s. 8 (1).

3. It must contain a clearly indicated place for the consumer to sign if the consumer does not wish to renew or extend the contract.

4. The renewal or extension form must clearly indicate that the contract will be renewed or the term of the contract extended if,

i. the consumer,

A. clearly marks on the form the renewal or extension option he or she has chosen,

B. acknowledges having read and understood the disclosure statement and price comparison applicable to the renewal or extension option he or she has chosen by signing the appropriate acknowledgements on the disclosure statement and price comparison,

C. signs one copy of the form to indicate that he or she agrees with the terms of the renewal or extension option he or she has chosen, and

D. returns the signed copies of the form, disclosure statement and price comparison to the supplier, or

ii. the consumer renews or extends the term of the contract by telephone in accordance with subsection (4).

5. Revoked: O. Reg. 241/16, s. 8 (2).

6. It must contain the consumer's name, in printed letters, where he or she is to sign at the end of the acknowledgement referred to in subparagraph 4 i and at the end of the form.

7. It must contain the toll-free telephone number, if any, for the supplier. O. Reg. 389/10, s. 15 (2); O. Reg. 241/16, s. 8 (1, 2).

(3) A contract is renewed or its term extended only if the consumer takes the action described in subparagraph 4 i or ii of subsection (2). O. Reg. 241/16, s. 8 (3).

(4) A contract may be renewed or extended by telephone only if,

(a) the consumer advises the supplier by telephone that he or she,

(i) has received the renewal or extension form, the disclosure statement and the price comparison, and

(ii) indicates which renewal or extension option the consumer accepts;

(b) the supplier records the telephone call with the consumer; and

(c) the supplier complies with any applicable code, order or rule issued or made by the Board relating to the renewal or extension and the telephone call is conducted by the supplier in accordance with any applicable code, order or rule of the Board. O. Reg. 389/10, s. 15 (4).

(5) For the purposes of this section,

(a) if a consumer has indicated to the supplier that he or she wishes to communicate with the supplier by e-mail, the supplier may electronically send the material described in clause (1) (b) to the consumer at the most recent e-mail address provided by the consumer; and

(b) a consumer may take the action described in subparagraph 4 i of subsection (2) to renew or extend the term of a contract or to indicate he or she does not wish to renew or extend the contract,

(i) by taking the equivalent action through the supplier's website, if the supplier posts the material described in clause (1) (b) and the renewal or extension form on its website, or

(ii) by using e-mail to return the signed renewal or extension form to the supplier or to advise the supplier that he or she does not wish to renew or extend the contract. O. Reg. 389/10, s. 15 (5).

16. Revoked: O. Reg. 241/16, s. 9.

No automatic renewal, extension of contracts

17. (1) A contract may not be renewed, nor its terms extended, automatically. O. Reg. 241/16, s. 10.

(2) Subsections 17 (2) and (3), as they read immediately before Ontario Regulation 241/16 came into force, continue to apply to contracts renewed or extended under this section before that date. O. Reg. 241/16, s. 10.

Retraction of renewal or extension

18. (1) A consumer may, without cost or penalty, retract his or her agreement to renew or extend the term of a contract by giving notice of the retraction to the supplier in writing or by telephone not more than 14 days after notifying the supplier of his or her agreement to the renewal or extension. O. Reg. 389/10, s. 18 (1).

(2) If the consumer gives a notice under subsection (1) by telephone,

(a) the supplier shall ensure the telephone call is recorded; and

(b) promptly send written confirmation of the retraction to the account holder. O. Reg. 389/10, s. 18 (2).

Contract amendments

19. (1) A supplier may request an amendment to a contract by telephone or by sending a text-based copy of the proposed amendment to the consumer. O. Reg. 389/10, s. 19 (1).

(2) The amendment takes effect only if the consumer consents to the amendment by telephone or in writing, not less than 60 days before the amendment is effective. O. Reg. 389/10, s. 19 (2).

(3) If a consumer consents to an amendment under subsection (2), the supplier shall, no later than 10 days after the consumer gives his or her consent,

(a) provide the consumer with a clearly legible text-based copy, having a font size of at least 12, of the amendment which states, on its first page, that the consumer may, without cost or penalty, retract his or her consent to the amendment within 20 days after the text-based copy of the amendment is provided to the consumer, by giving notice of his or her retraction to the supplier in writing or by telephone; and

(b) confirm with the consumer the name, business address and any toll-free telephone number, fax number, website address and e-mail address of the supplier. O. Reg. 389/10, s. 19 (3).

(4) If a contract is amended, the consumer may, without any reason, retract his or her consent to the amendment not more than 20 days after the text-based copy of the amendment is sent to the consumer. O. Reg. 389/10, s. 19 (4).

(5) A consumer may give notice to retract his or her consent to the amendment of the contract by any means that indicates his or her intention, including by telephone. O. Reg. 389/10, s. 19 (5).

(6) All telephone calls between the supplier and the consumer relating to the amendment, consent to the amendment and any retraction of the consumer's consent must be recorded by the supplier. O. Reg. 389/10, s. 19 (6).

New contract not prevented

20. Nothing in section 14, 15, 16, 17, 18 or 19 prevents a new contract from being entered into. O. Reg. 389/10, s. 20.

Contract Cancellation

Cancellation

21. For the purposes of subsection 19 (4) of the Act, a consumer may cancel a contract without cost or penalty if,

(a) the supplier fails to meet the requirements of section 28 with respect to the consumer;

(b) the contract is amended, renewed or extended on or after January 1, 2011 and, at the time of the amendment, renewal or extension, the supplier is not in compliance with the conditions of its licence set out in sections 3 and 4 of Ontario Regulation 90/99 (Licence Requirements — Electricity Retailers and Gas Marketers) made under the *Ontario Energy Board Act, 1998*;

(c) the consumer permanently moves from the premises to which the electricity or gas is provided under the contract;

(d) the consumer cancels the contract,

(i) not more than 30 days after receiving the first bill under the contract, in the case of a contract for the provision of electricity entered into before the day Ontario Regulation 241/16 came into force, or

(ii) in the case of a contract entered into on or after that day, not more than 30 days after receiving the second bill under the contract;

(e) the contract was entered into for a term that begins before the expiry of the term of a pre-existing contract, but only if notice of the cancellation is provided before the end of the term of the pre-existing contract; or

(f) the contract was automatically renewed or extended. O. Reg. 389/10, s. 21; O. Reg. 241/16, s. 11.

Notice of cancellation

22. (1) For the purposes of subsection 19 (5) of the Act, the prescribed period of notice of cancellation is 10 days. O. Reg. 389/10, s. 22 (1).

(2) Despite subsection 21 (2) of the Act, notice of cancellation may be provided by telephone if not expressly prohibited by the contract. O. Reg. 389/10, s. 22 (2).

(3) A notice of cancellation is deemed to be given to the supplier on the date of,

(a) receipt by the supplier of a telephone call from the consumer cancelling the contract;

(b) an electronic date stamp for an e-mail from the consumer cancelling the contract; or

(c) the postmark on a letter received from the consumer cancelling the contract. O. Reg. 389/10, s. 22 (3).

(4) If the consumer cancels the contract by telephone, the supplier shall,

(a) record the telephone call; and

(b) promptly send written confirmation of the cancellation to the consumer. O. Reg. 389/10, s. 22 (4).

Cancellation fees

23. (1) For the purposes of subsection 22 (2) of the Act and subject to subsection (2), a consumer who cancels a contract under subsection 19 (5) of the Act is liable for the following fee and is not liable for any other charges or fees relating to the cancellation:

1. In the case of a contract entered into before the day Ontario Regulation 241/16 came into force,

i. a fee of not more than $50 for each year, or part year, remaining on the contract if the contract is for the provision of electricity, or

ii. a fee of not more than $100 for each year, or part year, remaining on the contract, if the contract is for the provision of gas.

2. In the case of a contract entered into on or after the day Ontario Regulation 241/16 came into force, a fee of not more than $50, whether the contract is for the provision of electricity, gas or both, and regardless of the term remaining on the contract. O. Reg. 389/10, s. 23 (1); O. Reg. 241/16, s. 12.

(2) Despite paragraphs 1 and 2 of subsection (1), the fee payable by a high volume consumer who cancels a contract under subsection 19 (5) of the Act is,

(a) for every month or part month remaining in the term of the contract, if the contract is for the provision of electricity, $0.015 multiplied by the quotient calculated by dividing the consumer's consumption of electricity in kilowatt hours during the 12-month period immediately before the cancellation by 12; or

(b) for every month or part month remaining in the term of the contract, if the contract is for the provision of gas, $0.05 multiplied by the quotient calculated by dividing the consumer's consumption of gas in cubic meters during the 12-month period immediately before the cancellation by 12. O. Reg. 389/10, s. 23 (2).

(3) For the purposes of clauses (2) (a) and (b), the supplier may use a reasonable estimate of what the consumer's consumption would have been for the 12-month period if the supplier does not have the necessary information about the consumer's consumption to calculate the fee under subsection (2) and has been unable to obtain it after reasonable efforts. O. Reg. 389/10, s. 23 (3).

(4) In subsection (2),

"high volume consumer" means a consumer,

(a) whose contract is for the provision of electricity or gas to property occupied for the primary purpose of carrying on a business, or

(b) whose consumption under the contract for the 12-month period before the cancellation,

(i) is more than 15,000 kilowatt hours, if the contract is for the provision of electricity, or

(ii) is more than 3,500 cubic metres, if the contract is for the provision of gas. O. Reg. 389/10, s. 23 (4).

Cancellation, when effective

24. For the purposes of subsection 21 (5) of the Act, the cancellation of a contract takes effect,

(a) if no electricity or gas, as applicable, has been provided under the contract and no notice of cancellation is given under subsection 19 (5) of the Act or under a contractual right described in clause 16 (1) (e) of this Regulation, on the day the notice of cancellation is given by the consumer to the supplier;

(b) if a notice of cancellation is given under subsection 19 (5) of the Act or under a contractual right described in clause 16 (1) (e) of this Regulation, on the later of,

(i) the end of the notice period, and

(ii) the day electricity or gas ceases to be provided under the contract; or

(c) in any other case, on the day electricity or gas ceases to be provided under the contract. O. Reg. 389/10, s. 24.

Refunds

25. (1) For the purposes of subsections 23 (1) and (2) of the Act, the prescribed time period for paying a refund to the consumer is 60 days after the day the cancellation of the contract takes effect. O. Reg. 389/10, s. 25 (1).

(2) For the purposes of subsection 23 (2) of the Act, the prescribed amount of the refund is the total of all amounts, if any, paid by the consumer under the contract. O. Reg. 389/10, s. 25 (2).

(3) For the purposes of section 24 of the Act, a supplier shall pay the refund, if any, to the consumer not more than 15 days after the effective date of the cancellation under subsection 19 (2), (4) or (5) of the Act. O. Reg. 389/10, s. 25 (3).

Meter reading

26. For the purposes of subsection 25 (1) of the Act, the distributor shall read the consumer's electricity meter,

(a) within 45 days after the notice of cancellation is given to the supplier; or

(b) within such longer period of time as approved by the Board if it is not reasonably possible for the distributor to read the meter within the 45-day period. O. Reg. 389/10, s. 26.

General

Exemptions

27. (1) The following persons and entities are exempt from Part II of the Act:

1. Broader public-sector procurement agents in respect of contracts they enter into with suppliers or broader public-sector account holders for the provision of gas and electricity.
2. A gas distributor who is not required to hold a gas marketer's licence under subsection 48 (1) of the *Ontario Energy Board Act, 1998*.
3. Ag Energy Co-Operative Ltd. in respect of contracts with its members that it enters into, amends, renews or extends. O. Reg. 389/10, s. 27 (1); O. Reg. 241/16, s. 13.

(2) In paragraph 1 of subsection (1),

"broader public sector" means health service providers, school boards, colleges, universities, municipalities, community and social service providers and Crown agencies, boards, commissions and authorities that provide public services under the laws of Ontario or under a ministry transfer payment program;

"broader public-sector procurement agent" means, with respect to a member of the broader public sector, an entity that is controlled or owned by the member and one or more other members and that procures electricity or gas on behalf of one or more of them. O. Reg. 389/10, s. 27 (2).

Copies of telephone recordings, internet records

28. (1) If a supplier is required under this Part to make a recording of a telephone call to or by a consumer or maintain a record of communications with a consumer over the internet, or is required to ensure that such a recording is made or such a record is maintained, the supplier shall provide a copy of the recording or record to the consumer not more than 10 days after the consumer requests the copy. O. Reg. 241/16, s. 14.

(2) Subsection (1) does not apply if the consumer requests the copy after the later of,

(a) the day that is three years after the day of the telephone call or provision of information over the internet; and

(b) the day that is one year after the effective date of cancellation, termination or expiry of the last contract or last renewed or extended contract between the consumer and the supplier. O. Reg. 241/16, s. 14.

Transitional, written copy of contract

29. (1) This section applies with respect a contract signed by a consumer on or after November 22, 2010 and before January 1, 2011. O. Reg. 389/10, s. 29 (1).

(2) If a written copy of the contract is not delivered to the consumer within 40 days after the consumer signs the contract, the contract ceases to have effect and the consumer has no further obligations under the contract as of the 41st day after the day the consumer signed the contract. O. Reg. 389/10, s. 29 (2).

Transitional, reaffirmation of contract, etc.

30. (1) This section applies with respect to a contract signed by a consumer on or after November 22, 2010 and before January 1, 2011 other than,

(a) a contract negotiated and entered into as a result of a consumer contacting a supplier, unless the contact occurred within 30 days after the supplier contacted the consumer;

(b) a contract entered into by a consumer's response to a direct mail solicitation from a supplier; and

(c) an internet agreement within the meaning of Part IV of the *Consumer Protection Act, 2002*. O. Reg. 389/10, s. 30 (1).

(2) For the purpose of clause (1) (a), a supplier is deemed not to have contacted a consumer if the only contact by the supplier is through the dissemination of an advertisement that is seen or heard by the consumer. O. Reg. 389/10, s. 30 (2).

(3) If a written copy of the contract has been delivered to the consumer in accordance with subsection 88.9 (1) of the *Ontario Energy Board Act, 1998*, as it read on December 31, 2010, within 40 days after the consumer signs the contract, the contract ceases to have effect unless it is reaffirmed by the consumer in accordance with this section no earlier than the 10th day after the written copy of the contract is delivered to the consumer and no later than the 60th day following the day on which the written copy of the contract is delivered to the consumer. O. Reg. 389/10, s. 30 (3).

(4) The consumer may give notice to not reaffirm the contract no later than the 60th day following the day on which the written copy of the contract is delivered to the consumer. O. Reg. 389/10, s. 30 (4).

(5) Despite subsection (4), if the consumer has reaffirmed a contract in accordance this section, he or she may not give notice to not reaffirm the contract. O. Reg. 389/10, s. 30 (5).

(6) A consumer may reaffirm a contract or give notice to not reaffirm a contract by giving written notice to the supplier or by any means that indicates an intention of the consumer to reaffirm the contract or to not reaffirm the contract, as the case may be. O. Reg. 389/10, s. 30 (6).

(7) If written notice is given under subsection (6) other than by personal service, it is deemed to have been given when sent. O. Reg. 389/10, s. 30 (7).

(8) Despite the *Electronic Commerce Act, 2000*, notice under subsection (6) may not be given by telephone unless a voice recording of the telephone notice is made and, on request, is given to the consumer. O. Reg. 389/10, s. 30 (8).

(9) The contract ceases to have effect and the consumer has no further obligations under the contract as of the 61st day following the day on which the written copy of the contract is delivered to the consumer if,

(a) the consumer does not reaffirm the contract in accordance with this section; or

(b) the consumer gives notice not to reaffirm the contract in accordance with this section. O. Reg. 389/10, s. 30 (9).

(10) No cause of action against the consumer arises as a result of a contract ceasing to have effect under this section. O. Reg. 389/10, s. 30 (10).

(11) Within 15 days after a contract ceases to have effect pursuant to this section, the supplier shall refund to the consumer any amount paid under the contract before the day the contract ceased to have effect in respect of electricity or gas that was to be sold on or after that day. O. Reg. 389/10, s. 30 (11).

Transitional, information required in contract

31. Subsections 88.10 (1) and (2) and section 88.11 of the *Ontario Energy Board Act, 1998*, as they read on December 31, 2010, and sections 7, 8 and 9 of Ontario Regulation 200/02 (Consumer Protection) made under that Act, as they read on December 31, 2010, continue to apply to contracts entered into before January 1, 2011. O. Reg. 389/10, s. 31.

PART II
SUITE METERING

Definitions and Interpretation

Definitions

32. (1) In this Part,

"board of directors" means the board of directors of a condominium corporation;

"commercial building" means a commercial, industrial or office building to which the *Commercial Tenancies Act* applies;

"commercial landlord" means a landlord as defined in section 1 of the *Commercial Tenancies Act;*

"commercial lease" means a lease as contemplated in the *Commercial Tenancies Act;*

"common elements" means, in respect of a multi-unit complex, all of the multi-unit complex other than,

(a) condominium units,

(b) demised premises,

(c) member units,

(d) non-member units,

(e) rental units, and

(f) residential units;

"condominium building" means a building as defined in subsection 1 (1) of the *Condominium Act, 1998*;

"condominium corporation" means a corporation as defined in subsection 1 (1) of the *Condominium Act, 1998*;

"condominium unit" means a unit as defined in subsection 1 (1) of the *Condominium Act, 1998*;

"demised premises" means premises in a commercial building that are demised premises for the purposes of the *Commercial Tenancies Act*;

"member unit" has the same meaning as in the *Co-operative Corporations Act*;

"non-member unit" has the same meaning as in the *Co-operative Corporations Act*;

"non-profit housing co-operative" has the same meaning as in the *Co-operative Corporations Act*;

"non-profit housing co-operative building" means a property owned or leased by a non-profit housing corporation that includes one or more housing units each of which is a member unit or a non-member unit;

"rental unit" means a rental unit as defined in the *Residential Tenancies Act, 2006*, including a non-member unit, but does not include any class of accommodation contemplated in section 5 of that Act;

"residential complex" means a residential complex as defined in the *Residential Tenancies Act, 2006,* but does not include any class of accommodation contemplated in section 5 of that Act;

"residential landlord" means a landlord as defined in the *Residential Tenancies Act, 2006*;

"residential tenant" means a tenant as defined in the *Residential Tenancies Act, 2006*;

"residential unit" has the same meaning as in the *Residential Tenancies Act, 2006*;

"tenancy agreement" has the same meaning as in the *Residential Tenancies Act, 2006.* O. Reg. 389/10, s. 32 (1).

(2) The definitions in section 31 of the Act apply for the purposes of this Part. O. Reg. 389/10, s. 32 (2).

Multi-unit complex

33. For the purposes of clause (d) of the definition of "multi-unit complex" in section 31 of the Act, the following are prescribed as a multi-unit complex:

1. A commercial building that contains two or more demised premises.
2. A non-profit housing co-operative building that contains two or more housing units each of which is a member unit or a non-member unit. O. Reg. 389/10, s. 33.

Unit

34. For the purposes of clause (d) of the definition of "unit" in section 31 of the Act, each of the following is prescribed as a unit:

(a) demised premises in a commercial building;

(b) common elements of a multi-unit complex;

(c) a member unit; and

(d) a non-member unit. O. Reg. 389/10, s. 34.

Unit smart metering, prescribed activities

35. The following are prescribed activities for the purposes of the definition of "unit smart metering" in section 31 of the Act:

1. Distributing electricity in accordance with a licence issued under clause 57 (a) of the *Ontario Energy Board Act, 1998*.
2. Providing and maintaining unit smart meters in a multi-unit complex, including billing and collecting payment in respect of the electricity consumed in the multi-unit complex and other associated and ancillary activities.
3. Any other activities required to be carried out by a unit smart meter provider under Part III of the Act. O. Reg. 389/10, s. 35.

Unit sub-metering, prescribed activities

36. The following are prescribed activities for the purposes of the definition of "unit sub-metering" in section 31 of the Act:

1. Providing and maintaining unit sub-meters in a multi-unit complex, including billing and collecting payment in respect of the electricity consumed in the multi-unit complex and other associated and ancillary activities.
2. Any other activities required to be carried out by a unit sub-meter provider under Part III of the Act. O. Reg. 389/10, s. 36.

Suite Meter Specifications

Suite meter specifications

37. (1) For the purposes of the definition of "suite meter specifications" in subsection 32 (2) of the Act, the prescribed suite meter specifications for unit smart meters installed by a unit smart meter provider on and after the day this section comes into force are the criteria and requirements specified in the Functional Specifications, as defined in Ontario Regulation 425/06 (Criteria and Requirements for Meters and Metering Equipment, Systems and Technology) made under the *Electricity Act, 1998*. O. Reg. 389/10, s. 37 (1).

(2) For the purposes of the definition of "suite meter specifications" in subsection 32 (2) of the Act, the prescribed suite meter specifications for unit sub-meters installed on and after the day this section comes into force are the criteria and requirements specified in the Functional Specifications, as defined in Ontario Regulation 425/06 (Criteria and Requirements for Meters and Metering Equipment, Systems and Technology) made under the *Electricity Act, 1998*, with the following modifications:

1. A reference in the Functional Specifications to a distributor is deemed to be a reference to a unit sub-meter provider.
2. Unless required by an order or code issued by the Board, unit sub-meter providers are not required to interface or integrate their unit sub-meter systems with the meter data management and data repository operated by the Smart Metering Entity. O. Reg. 389/10, s. 37 (2).

(3) The reference in paragraph 2 of subsection (2) to the Smart Metering Entity is a reference to the entity established under Part IV.2 of the *Electricity Act, 1998*. O. Reg. 389/10, s. 37 (3).

Installation and Billing

When installation of suite meters permitted

38. (1) Subject to subsection (2), and except as otherwise provided in section 39, for the purpose of subsection 33 (1) of the Act, a suite meter provider may install a suite meter for a unit in a class of units in Column 2 of the following Table at any time during construction or after in the circumstances set out in Column 3 opposite the class of units.

TABLE

Column 1 Item	Column 2 Class of Units	Column 3 Circumstances
1.	Rental unit	The residential landlord, owner or other person in charge of the residential complex in which the rental unit is located has retained the suite meter provider to install suite meters in the residential complex in which the rental unit is located
2.	Common elements of a residential complex	The residential landlord, owner or other person in charge of the residential complex in which the common elements are located has retained the suite meter provider to install suite meters in the residential complex
3.	Condominium unit	With the approval of the condominium corporation's board of directors, the condominium corporation or other person in charge of the condominium building has retained the suite meter provider to install suite meters in the condominium building.
4.	Common elements of a condominium building	With the approval of the condominium corporation's board of directors, the condominium corporation or other person in charge of the condominium building has retained the suite meter provider to install suite meters in the condominium building.
5.	Member unit	Unless the articles or by-laws of the non-profit housing co-operative provide otherwise, the non-profit housing co-operative has retained the suite meter provider to install suite meters in the non-profit housing co-operative building.
6.	Common elements of a non-profit housing co-operative building	Unless the articles or by-laws of the non-profit housing co-operative provide otherwise, the non-profit housing co-operative has retained the suite meter provider to install suite meters in the non-profit housing co-operative building.
7.	Demised premises	The commercial landlord, owner or other person in charge of the building in which the demised premises are located has retained the suite meter provider to install suite meters in the building.
8.	Common elements of a commercial building	The commercial landlord, owner or other person in charge of the building in which the common elements are located has retained the suite meter provider to install suite meters in the building.

O. Reg. 389/10, s. 38 (1).

(2) Despite subsection (1), a suite meter provider shall not install a suite meter for a rental unit that is occupied by a tenant unless the installation is conducted in accordance with clause 137 (2) (b) of the *Residential Tenancies Act, 2006*. O. Reg. 389/10, s. 38 (2).

When installation of suite meters is required in new buildings

39. (1) For the purposes of subsection 33 (2) of the Act, the owner or other person in charge of a unit belonging to a class of units described in Column 2 of the following Table shall have a suite meter installed for that unit by a suite meter provider retained by the owner or other person in the circumstances set out in Column 3 opposite the class of units and subject to the conditions set out in Column 4 opposite the class of units.

TABLE

Column 1 Item	Column 2 Class of Units	Column 3 Circumstances	Column 4 Conditions
1.	Rental unit in a residential complex	Before completion of construction of the residential complex in which the rental unit is located.	Installation must take place in the rental unit before the rental unit is occupied.

2.	Common elements of a residential complex	Before completion of construction of the residential complex.	Installation must take place before any rental unit in the residential complex is occupied.
3.	Condominium unit in a condominium building	Before completion of construction of the condominium building in which the condominium unit is located.	Installation must take place in the condominium unit before the condominium unit is occupied.
4.	Common elements of a condominium building.	Before completion of construction of the condominium building.	Installation must take place before any condominium unit in the condominium building is occupied.
5.	Member unit of a non-profit housing co-operative building	Before completion of construction of the non-profit housing co-operative building.	Installation must take place in the member unit before the member unit is occupied.
6.	Common elements of a non-profit housing co-operative building	Before completion of construction of the non-profit housing co-operative building.	Installation must take place before any member unit in the non-profit housing co-operative building is occupied.

O. Reg. 389/10, s. 39 (1).

(2) For the purposes of subsection 33 (1) of the Act and despite subsection (1), a suite meter provider retained by the residential landlord or other person in charge of a property may, but is not required to, have a suite meter installed in the following classes of units in the following classes of properties and may do so at the time the property or unit is under construction:

1. A rental unit to be included in a care home as defined in the *Residential Tenancies Act, 2006*.
2. A unit that will be an accommodation contemplated in subsection 6 (1) of the *Residential Tenancies Act, 2006*. O. Reg. 389/10, s. 39 (2).

Use of meters for billing purposes in new and existing buildings

40. (1) No person shall bill a consumer based on the consumption or use of electricity by the consumer in respect of a unit as measured by a suite meter except in accordance with the Act, the *Ontario Energy Board Act, 1998*, the *Electricity Act, 1998*, this Part and any applicable code or order issued by the Board. O. Reg. 389/10, s. 40 (1).

(2) For the purposes of subsection 34 (2) of the Act and subject to subsection (3), a suite meter provider shall bill a member of a class of consumers described in Column 2 of the following Table based on the consumption or use of electricity in respect of a unit described in Column 3, opposite the class of consumers, as measured by a suite meter, in the circumstances described in Column 4 opposite the class of consumers.

TABLE

Column 1 Item	Column 2 Class of consumers	Column 3 Class of units	Column 4 Circumstances

1.	Occupant	Rental unit	The suite meter was installed in respect of the rental unit in accordance with section 33 of the Act and this Part, and the residential landlord, (a) has terminated its obligation to supply electricity to the rental unit under the tenancy agreement pursuant to subsection 137 (3) of the *Residential Tenancies Act, 2006*; or (b) does not have an obligation under the tenancy agreement for the rental unit to supply electricity to the rental unit.
2.	Residential landlord, owner or other person in charge of a residential complex	Common elements of the residential complex	The suite meter was installed in respect of the common elements in the residential complex in accordance with section 33 of the Act and this Part.
3.	Person who is both owner and occupant of a condominium unit	The condominium unit	The suite meter was installed in respect of the condominium unit in accordance with section 33 of the Act and this Part.
4.	Condominium corporation or other person in charge of the condominium building	Common elements of the condominium building	The suite meter was installed in respect of the common elements of the condominium building in accordance with section 33 of the Act and this Part.
5.	Occupant	Member unit	The suite meter was installed in respect of the member unit of the non-profit housing co-operative building in accordance with section 33 of the Act and this Part.
6.	Non-profit housing co-operative	Common elements of the non-profit housing co-operative building	The suite meter was installed in respect of the common elements of the non-profit housing co-operative building in accordance with section 33 of the Act and this Part.
7.	Occupant	Demised premises	The suite meter was installed in respect of the demised premises in accordance with section 33 of the Act and this Part, and the commercial landlord does not have an obligation under the commercial lease for the demised premises to supply electricity to the demised premises.
8.	Commercial landlord, owner or other person in charge of the commercial building	Common elements of the commercial building	The suite meter was installed in respect of the common elements of the commercial building in accordance with section 33 of the Act and this Part.

O. Reg. 389/10, s. 40 (2).

(3) A suite meter provider shall not bill an occupant of a rental unit or a member unit based on the consumption or use of electricity by the occupant in respect of the unit, as measured by a suite meter, if,

(a) the suite meter was installed after the day this section comes into force but is not deemed under subsection 43 (2) to have been installed after the day this section comes into force;

(b) the unit is heated primarily by electricity; and

(c) the electricity measured by the suite meter includes the electricity used in heating the unit. O. Reg. 389/10, s. 40 (3).

(4) For the purposes of subsection 34 (1) of the Act, a suite meter provider is permitted but not required to bill a residential landlord of a rental unit based on the consumption or use of electricity in respect of the rental unit as measured by a suite meter if,

(a) the residential landlord has not terminated its obligation to supply electricity to the rental unit under the tenancy agreement pursuant to subsection 137 (3) of the *Residential Tenancies Act, 2006*; or

(b) the residential landlord has an obligation under the tenancy agreement to supply electricity to the rental unit. O. Reg. 389/10, s. 40 (4).

(5) For the purposes of subsection 34 (1) of the Act, a suite meter provider is permitted but not required to bill a non-profit housing co-operative based on the consumption or use of electricity in respect of a member unit as measured by a suite meter if the non-profit housing co-operative has an obligation under its by-laws or other binding resolution or decision of the non-profit housing co-operative's directors or members to supply electricity to the member unit. O. Reg. 389/10, s. 40 (5).

Information and Disclosure

Information to be provided

41. (1) Within 10 days after receiving a request from a residential landlord for any of the following, or within such other period of time as may be required by a code or order issued by the Board, a suite meter provider who provides suite metering in respect of a rental unit in the landlord's residential complex shall provide the residential landlord with such of the following information as it relates to the rental unit as the landlord requests:

1. Contact information for the suite meter provider.
2. For the most recently completed 12-month period for which the following information is available to the suite meter provider:
    i. the sum of all amounts charged, including applicable taxes but net of any late payment and one-time set-up charges, on all suite metering invoices for the rental unit for that 12-month period,

    ii. the total amount of electricity consumed in the rental unit in kilowatt hours during that 12-month period,

    iii. the sum of all amounts charged in respect of just the commodity price of the electricity on all suite metering invoices for the rental unit for that 12-month period.

3. Information about all fees and charges imposed on the consumer in the rental unit by the suite meter provider.
4. In the case of a unit sub-meter provider, information about the circumstances in which the amount of fees and charges imposed on the consumer in the rental unit by the unit sub-meter provider may increase.
5. In the case of a unit sub-meter provider, information about any planned increases in the amount of fees or charges imposed on the consumer in the rental unit by the unit sub-meter provider.
6. In the case of a unit smart meter provider, a statement that the rates and other charges imposed on the consumer in the rental unit by the unit smart meter provider and any changes to these rates and charges are approved or fixed by the Board.
7. The suite meter provider's security deposit policies applicable to the consumer in the rental unit.
8. The suite meter provider's disconnection policies applicable to the consumer in the rental unit. O. Reg. 389/10, s. 41 (1).

(2) A unit sub-meter provider shall include with its first invoice to a consumer, in a clearly legible typeface having a font size of at least 12,

(a) detailed information about all applicable fees and charges imposed by the unit sub-meter provider; or

(b) information that there are regular recurring fees and charges imposed by the unit sub-meter provider and the address of the website on which detailed information about the fees and charges may be obtained. O. Reg. 389/10, s. 41 (2).

(3) A unit sub-meter provider who provides suite metering in respect of a unit in a multi-unit complex shall, in accordance with subsection (4), notify a consumer,

(a) about all changes in the fees or charges to be imposed on the consumer in the unit by the unit sub-meter provider and provide information on the amount of the fees and charges before the change and after the change;

(b) about all changes in the commodity price and provide information on the commodity price charged before and after the change;

(c) about any change in the person who sells electricity to the owner or other person in charge of the multi-unit complex and information on the current person who sells electricity and the new person; and

(d) about the date when a change referred to in clause (a), (b) or (c) is scheduled to take effect. O. Reg. 389/10, s. 41 (3).

(4) Information required by subsection (3) to be provided to a consumer must be printed in a clearly legible typeface having a font size of at least 12 and included on the front page of, or as a separate insert with, the first invoice issued to the consumer following the earlier of,

(a) the announcement of the change; and

(b) the day that the change takes effect. O. Reg. 389/10, s. 41 (4).

(5) A suite meter provider who provides suite metering in respect of a multi-unit complex shall provide such other information in such form and manner to consumers or such other persons as may be required in an order or code issued by the Board. O. Reg. 389/10, s. 41 (5).

(6) In this section,

"commodity price" means the commodity price for electricity referred to in section 2 of Ontario Regulation 275/04 (Information on Invoices to Low-Volume Consumers of Electricity) made under the *Ontario Energy Board Act, 1998*. O. Reg. 389/10, s. 41 (6).

TRANSITION

Residential complexes and condominium buildings

42. (1) Subsection 39 (1) applies to a residential complex or condominium building for which a permit under section 8 of the *Building Code Act, 1992* was issued on or after January 1, 2011 for the original installation or erection of the residential complex or condominium building. O. Reg. 389/10, s. 42 (1).

(2) Without limiting the generality of subsection (1), if a residential complex or condominium corporation is substantially extended, materially altered or repaired to the extent that it is considered to be newly erected or installed, the extension, material alteration or repair is considered to be an original installation or erection for the purposes of subsection (1). O. Reg. 389/10, s. 42 (2).

Smart meters and smart sub-meters

43. (1) In this section,

"excluded unit sub-meter" means a smart sub-metering system, equipment and technology and any associated equipment, system and technology installed before the day this section comes into force, other than a specified unit sub-meter;

"licensed distributor" means a distributor licensed under Part V of the *Ontario Energy Board Act, 1998* as required under clause 57 (a) of that Act;

"specified unit smart meter" includes any smart meter system equipment and technology and any associated equipment, system, and technology installed in a multi-unit complex by a licensed distributor,

(a) before November 3, 2005,

(b) pursuant to section 53.16 of the *Electricity Act, 1998*,

(c) pursuant to section 53.17 of the *Electricity Act, 1998*, as that section read on December 31, 2010, or

(d) pursuant to a regulation made under clause 53.21 (1) (q) of the *Electricity Act, 1998* authorizing activities as discretionary metering activities for the purposes of section 53.18 of that Act;

"specified unit sub-meter" includes a smart sub-metering system, equipment and technology and any associated equipment, system and technology installed in a multi-unit complex,

(a) before November 3, 2005,

(b) pursuant to section 53.17 of the *Electricity Act, 1998*, as that section read on December 31, 2010,

(c) pursuant to a regulation made under clause 53.21 (1) (q) of the *Electricity Act, 1998* authorizing activities as discretionary metering activities for the purposes of section 53.18 of that Act, or

(d) in accordance with a code or order issued by the Board. O. Reg. 389/10, s. 43 (1).

(2) Every specified unit smart meter, specified unit sub-meter and excluded unit sub-meter installed before the day this section comes into force is deemed for the purposes of Part III of the Act to be a suite meter installed in accordance with section 33 of the Act and this Part. O. Reg. 389/10, s. 43 (2).

(3) Every specified unit smart meter and specified unit sub-meter may be used to bill a consumer under subsection 34 (1) of the Act if, at the time this section comes into force, the meter was being used to bill a consumer in accordance with,

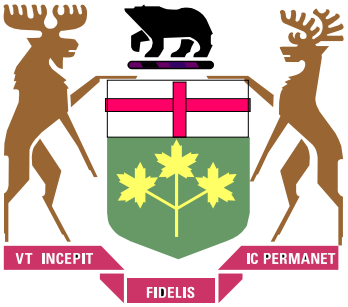
(a) the *Electricity Act, 1998* or the *Residential Tenancies Act, 2006*; or

(b) an order or code issued by the Board. O. Reg. 389/10, s. 43 (3).

(4) Every excluded unit sub-meter installed before the day this section comes into force may be used to bill a member of a class of consumers described in Column 2 of the Table set out in subsection 40 (2), based on the consumption or use of electricity in respect of a unit described in Column 3 opposite the class of consumers, as measured by a suite meter, in the circumstances described in Column 4 opposite the class of consumers. O. Reg. 389/10, s. 43 (4).

PART III (OMITTED)

44. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 389/10, s. 44.



Ontario

ONTARIO ENERGY BOARD

Electricity Retailer Code of Conduct

Restated
May 18, 2017

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PART A

1 GENERAL PROVISIONS

1.1 The Purpose of this Code

The purpose of this Electricity Retailer Code of Conduct (the "Code") is to set out the minimum standards that a licensed retailer must meet when retailing electricity to consumers.

1.2 Definitions

In this Code:

“account holder” has the meaning given to it in the ECPA;

“account holder’s agent” has the meaning given to it in the ECPA Regulation;

“Act” means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

“consumer” means a person who uses, for the person’s own consumption, electricity that the person did not generate;

“consumer information” means information relating to a specific consumer obtained by a retailer, its salesperson or its verification representative, and includes information obtained without the consent of the consumer;

“contract” has the meaning given to it in section 2 of the ECPA;

"contract price" has the meaning given to it in section 2 of the ECPA Regulation;

"customer" means a consumer with whom a retailer has a contract for the supply of electricity;

"disclosure statement" has the meaning given to it in the ECPA Regulation;

"ECPA" means the *Energy Consumer Protection Act, 2010,* S.O. 2010, c. 8;

"ECPA Regulation" means Ontario Regulation 389/10 made under the ECPA;

"Effective ECPA Date" means January 1, 2011;

"low volume consumer" means a consumer who annually uses less than 150,000 kilowatt hours of electricity or such other amount as may be prescribed for the purposes of section 2 of the ECPA;

"OEB" means the Ontario Energy Board

"regulation" means a regulation made under the Act or the ECPA;

"retailing" includes door-to-door selling, internet selling, direct mail selling, and any other means by which a retailer or a salesperson or verification representative of a retailer interacts directly with a consumer;

"salesperson" has the meaning given to it in section 2 of the ECPA, and for greater certainty includes any person that offers or negotiates the renewal or extension of a contract on behalf of a retailer but excludes a verification representative when acting solely in that capacity*;*

"text-based" has the meaning given to it in section 2 of the ECPA; and

"verification representative" means a person that conducts the verification of a contract on behalf of a retailer.

1.3 Application

This Code applies to all retailers licensed under section 57(d) of the Act.

1.4 Interpretation

1.4.1 Unless otherwise defined in this Code, words and phrases shall have the meanings ascribed to them in the Act, the ECPA or the regulations, as the case may be. Where a word or phrase is defined in this Code, the Act, or the ECPA, other parts of speech and grammatical forms of the word or phrase have a corresponding meaning. Headings are for convenience only and shall not affect the interpretation of this Code. Words importing the singular include the plural and vice versa. Words importing a gender include any gender. Words importing a person include: (i) an individual; (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public body corporate; and (iii) any government, government agency or body, regulatory agency or body or other body politic or collegiate. A reference to a person includes that person's successors and permitted assigns. A reference to a body, whether statutory or not, that ceases to exist or whose functions are transferred to another body is a reference to the body that replaces it or that substantially succeeds to its powers or functions. A reference to a document (including a statutory instrument) or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision. The expression "including" means including without limitation.

1.4.2 Nothing in this Code shall be construed as permitting a retailer to:

(a) sell or offer to sell electricity to a low volume consumer in person at the consumer's home;

(b) cause a salesperson to sell or offer to sell electricity to a low volume consumer in person at the consumer's home; or

(c) undertake advertising or marketing activities in a manner contrary to the ECPA Regulation.

1.5 Low volume consumer contracts only with account holder

A retailer shall not enter into, verify, renew or extend a contract with any low volume consumer for the supply of electricity to premises other than:

(a) the account holder for the premises; or

(b) an account holder's agent for the premises,

and references in Parts A and B of this Code to "consumer" or "low volume consumer" shall be interpreted accordingly.

1.6 Obligation to comply with the law

1.6.1 A retailer shall comply with all applicable provisions of the Act, the ECPA and the regulations. Nothing in this Code affects the obligation of a retailer, its salespersons or its verification representatives to comply with all applicable provincial and federal law.

1.6.2 The requirements set out in this Code apply in addition to any other requirements imposed by law, whether dealing with the same subject-matter or not.

1.7 Obligation to ensure persons comply

1.7.1 A retailer shall ensure that its salespersons and verification representatives adhere to the same standards required of the retailer as set out in this Code.

1.7.2 Any acts or omissions of a salesperson or a verification representative acting on behalf of a retailer shall be deemed to be the acts or omissions of the retailer.

1.8 Determinations by the OEB

1.8.1 Any matter under this Code requiring a determination of the OEB may be determined by the OEB without a hearing or through an oral, written or electronic hearing, at the OEB's discretion.

1.9 Breach of this Code

A breach of this Code may occur in the course of retailing even if no contract is entered into, amended, renewed or extended.

1.10 Coming into Force

1.10.1 This Code shall come into force on the Effective ECPA Date.

1.10.2 This Code replaces the Electricity Retailer Code of Conduct dated December 20, 2004, as of the Effective ECPA Date, and the Electricity Retailer Code of Conduct dated December 20, 2004, is revoked as of the Effective ECPA Date.

1.10.3 Except where expressly stated otherwise, any amendment to this Code shall come into force on the date that the OEB publishes the amendment by placing it on the OEB's website after it has been made by the OEB.

1.10.4 The amendments to this Code made by the OEB on December 1, 2016, come into force on January 1, 2017.

1.10.5 The amendments to this Code made by the OEB on March 31, 2017 come into force on April 18, 2017.

PART B

1 FAIR MARKETING PRACTICES

1.1 A retailer or salesperson of a retailer, when retailing to a consumer, shall:

(a) immediately and truthfully give the name of the salesperson and the retailer to the consumer, and state that the retailer is not the consumer's electricity distributor and is not associated with the Ontario Energy Board or the Government of Ontario;

(b) if retailing to a low volume consumer in person at a place other than the retailer's place of business, provide the low volume consumer with a business card that meets the requirements of this Code;

(c) if retailing to a low volume consumer in person at a place other than the retailer's place of business, display an identification badge that meets the requirements of this Code;

(d) state the price to be paid under the contract for the supply of electricity, and state the term of the contract;

(e) not exert undue pressure on a consumer;

(f) allow a consumer sufficient opportunity to read all documents provided;

(f.1) if retailing to a low volume consumer at residential premises, provide and leave with the low volume consumer such documents as may be approved by the OEB;

(f.2) not undertake advertising or marketing activities in a manner contrary to the ECPA Regulation;

(g) not make any offer or provide any promotional material to a consumer that is inconsistent with the contract being offered to or entered into with the consumer; and

(h) not make any representation or statement or give any answer or take any measure that is false or is likely to mislead a consumer.

1.2 If a low volume consumer asks whether an OEB-approved document referred to in section 1.1(f.1) is available in a language other than English or requests one, the retailer shall inform the low volume consumer that the OEB can make a translation available on request.

2 BUSINESS CARDS AND IDENTIFICATION BADGES

Business cards

2.1 A retailer shall ensure that every salesperson that is acting on its behalf and that is retailing to a low volume consumer in person at a place other than the retailer's place of business provides the low volume consumer with a business card that meets the requirements set out in section 2.2 before making any representation to the low volume consumer about the retailer's products, services or business and before requesting any information about the low volume consumer, including asking that the low volume consumer locate any utility bills.

2.2 The business card referred to in section 2.1 shall be clear and legible and include the following information:

(a) the licence number issued to the retailer under the Act;
(b) the name and address of the retailer;
(c) the name of the salesperson acting on behalf of the retailer;
(d) the toll-free telephone number of the retailer; and
(e) the website address of the retailer.

Identification badges

2.3 A retailer shall ensure that every salesperson that is acting on its behalf and that is retailing to a low volume consumer in person at a place other than the retailer's

place of business at all times wears, on the front of the salesperson's outer clothing, an identification badge that meets the requirements set out in section 2.4.

2.4 The identification badge referred to in section 2.3 shall be clear and legible and:

(a) clearly identify that the salesperson is acting on behalf of the retailer, is not a representative of the low volume consumer's electricity distributor and is not associated with the Ontario Energy Board or the Government of Ontario;
(b) include a photograph of the salesperson's face that is not more than 2 years old at any time;
(c) identify the retailer;
(d) identify the name of the salesperson acting on behalf of the retailer;
(e) identify the title or position of the salesperson;
(f) include an identification number for the salesperson that has been issued by the retailer for that purpose; and
(g) include an expiry date that is not more than 2 years after the date on which the identification badge was issued to the salesperson.

2.5 The salesperson's photograph and all of the information required by section 2.4 to appear on an identification badge must be shown on the same side of the identification badge, and must at all times be facing the low volume consumer.

3 CONTRACTS AND TRANSFER REQUESTS

Contracts with low volume consumers

3.1 A contract between a retailer and a low volume consumer shall clearly state:

(a) the time period for which the contract is in effect;

(b) the type and frequency of bills the low volume consumer will receive; and

(c) any terms and conditions for renewal, extension or amendment.

3.2 A retailer shall not enter into any contract with a low volume consumer that has a term of more than five years.

3.2A A contract with a low volume consumer shall:

(a) include standard contract terms and conditions approved by the OEB; and

(b) not contain any provision that is inconsistent with the OEB-approved standard contract terms and conditions.

3.2B A retailer shall use the OEB-approved standard contract terms and conditions referred to in section 3.2A without alteration or redaction except as expressly contemplated by the OEB-approved standard contract terms and conditions and then only in respect of the information specifically called for by the OEB-approved standard contract terms and conditions.

3.2C A retailer shall ensure that any provision that it includes in a contract in addition to the OEB-approved standard contract terms and conditions referred to in secton 3.2A is in plain language.

3.2D If a low volume consumer asks whether the OEB-approved standard contract terms and conditions referred to in section 3.2A are available in a language other than English or requests them, the retailer shall inform the low volume consumer that the OEB can make a translation available on request.

Transfer requests and supply (low volume consumers)

3.3 A retailer shall not submit a request to an electricity distributor for a change of electricity supply for a low volume consumer to that retailer or supply electricity to a low volume consumer unless:

(a) the retailer has given a text-based copy of the contract to the low volume consumer;
(b) the retailer has given the applicable OEB-approved disclosure statement to the low volume consumer;
(c) the retailer has given to the low volume consumer the applicable price comparison that complies with this Code;
(d) the low volume consumer has acknowledged receipt of the text-based contract, the disclosure statement and the price comparison; and
(e) the contract has been validly verified.

Transfer requests and supply (other consumers)

3.4 A retailer shall not submit a request to an electricity distributor for a change of electricity supply for a consumer who is not a low volume consumer to that retailer or supply electricity to a consumer that is not a low volume consumer unless the retailer has the permission of the consumer in writing to do so.

3.5 If a retailer discovers that a transfer request that it has submitted to an electricity distributor for a consumer who is not a low volume consumer is supported by a contract that does not comply with the Act, the regulations made under the Act, the retailer's licence or this Code, or does not contain the signature of the consumer, the retailer shall contact the affected consumer, clearly explain the non-compliance, and offer that consumer a compliant contract; and

(a) if the consumer accepts the compliant contract, provide a copy of the compliant contract to the consumer within 14 days of acceptance by that consumer; or

(b) if the consumer does not accept the compliant contract, immediately reverse the transfer request.

Transfer requests where contract with low volume consumer is cancelled

3.6 Where a retailer receives notice of cancellation of a contract from a low volume consumer, the retailer shall submit a request to the applicable electricity distributor for a change of electricity supply for that low volume consumer to the electricity distributor, within 10 days of receipt of the notice of cancellation.

Transfer requests where low volume consumer enters into contract with another retailer

3.7 A retailer that is notified of a pending transfer request by an electricity distributor under section 10.5.4 of the Retail Settlement Code that pertains to a contract with a low volume customer shall, within 5 business days of the date of receipt of that notification, notify the low volume consumer to whom the transfer request relates of the pending transfer request and of the consequences to the low volume consumer if processing of the transfer request is completed. The notification to the low volume consumer shall, at a minimum, identify any cancellation fee or other financial amounts that may be payable to the retailer if the processing of the transfer request is completed. The notification to the low volume consumer may be:

(a) text-based; or

(b) by telephone, provided that the retailer makes a voice recording of the telephone call and the recording of the call has associated with it a verifiable date and time stamp.

Subject to section 28 of the ECPA Regulation, where a retailer makes a recording of a telephone call under this section, the retailer shall provide a copy of the recording to the low volume consumer within 10 days after the low volume consumer requests it.

3.8 Section 3.7 only applies where the low volume consumer's contract with the retailer will expire after the proposed transfer date.

4 DISCLOSURE STATEMENTS, PRICE COMPARISONS, VERIFICATION AND RENEWALS OR EXTENSIONS

Disclosure statements for low volume consumers

4.1 A retailer shall not offer a contract to a low volume consumer unless the contract is accompanied by a disclosure statement in the applicable form approved by the OEB.

4.2 A retailer shall not renew or extend a contract with a low volume consumer unless the retailer has given the low volume consumer a disclosure statement in the applicable form approved by the OEB.

4.3 If a low volume consumer asks whether an OEB-approved disclosure statement is available in a language other than English or requests one, the retailer shall inform the low volume consumer that the OEB can make a translation available on request.

4.4 If a retailer wishes to provide a low volume consumer with an OEB-approved disclosure statement in a language other than English, the retailer shall first ascertain whether the disclosure statement is available from the OEB in that language. If the disclosure statement is available from the OEB in that language,

the retailer may only provide the low volume consumer with the disclosure statement as made available by the OEB. If the disclosure statement is not available from the OEB in that language, the retailer may provide the low volume consumer with a translation of the OEB-approved disclosure statement provided that the translation is true, accurate and complete.

4.5 A retailer shall not alter or redact an OEB-approved disclosure statement except where expressly contemplated by the disclosure statement and then only in respect of the information specifically called for by the disclosure statement. Where a retailer that prepares a translation of an OEB-approved disclosure statement as permitted by section 4.4(b), the retailer shall not include any information in the translated disclosure statement other than the information set out in or specifically called for by the OEB-approved disclosure statement.

Price comparisons

4.6 A retailer shall ensure that a disclosure statement provided to a low volume consumer is accompanied by a price comparison. For that purpose, the retailer shall:

(a) use the applicable price comparison template approved by the OEB, in the form and with the content that is made available by the OEB at the relevant time and without alteration or redaction other than to include details of the retailer's contract price offer and such other information as is required by the instructions contained in or posted on the OEB's website with the template; and

(b) complete the OEB-approved price comparison template by including details of the retailer's contract price offer and such other information as is required by the instructions contained in or posted on the OEB's website with the template, and shall do so in accordance with those instructions.

4.7 A retailer shall ensure that the information regarding the contract price being offered to a low volume consumer that is included by the retailer in the price comparison is an accurate reflection of the contract price over the term of the contract and is not presented in a manner that is misleading in any way.

4.8 A retailer shall not include in the price comparison any statements of a promotional nature about the products, services or business of the retailer.

4.9 If a retailer wishes to provide a low volume consumer with a price comparison in a language other than English, the retailer may provide the low volume consumer with a translation of the price comparison provided that the translation includes a true, accurate and complete translation of the content that is made available by the OEB referred to in section 4.6(a), and the translated price comparison otherwise complies with sections 4.6 to 4.8.

Verification of contracts with low volume consumers

4.10 A retailer shall ensure that the verification of a contract with a low volume consumer by telephone complies with section 4.11.

4.11 The verification of a contract with a low volume consumer by telephone shall be effected within the period and in the manner prescribed by the ECPA Regulation, and shall comply with the following requirements:

(a) the verification representative shall ensure that the call includes all of the statements and questions set out in the applicable script approved for that purpose by the OEB and that those statements and questions are made and asked in the order set out in the script;

(b) the verification representative shall not deviate from the applicable OEB-approved script except when and as expressly permitted by the terms of the script, or as required to comply with paragraph (e), to provide a factual

answer to a question from the low volume consumer or to provide a factual clarification where the low volume consumer has indicated that he or she does not understand a statement made by the verification representative;

(c) except where expressly permitted by the terms of the applicable OEB-approved script, where the script calls for a “yes” or “no” answer from the low volume consumer, the verification representative shall terminate the verification call if the low volume consumer does not provide a clear affirmative response;

(d) the verification representative shall not at any time during the verification call make any statements of a promotional nature about the products, services or business of the retailer or make any representation that is inconsistent with or contrary to any of the statements or questions set out in the applicable OEB-approved script;

(e) the verification representative shall terminate the verification call where the ECPA Regulation or the applicable OEB-approved script so requires, and shall do so in accordance with the requirements of the ECPA Regulation or the applicable OEB-approved script, as applicable; and

(f) the recording of the verification call has associated with it a verifiable date and time stamp.

4.11A A retailer shall ensure that verification of a contract with a low volume consumer over the internet:

(a) complies with sections 4.11B and 4.11C; and

(b) is conducted through an internet verification website that is secure.

4.11B The verification of a contract with a low volume consumer over the internet shall comply with the following requirements:

(a) the retailer’s verification representative shall send an e-mail to the consumer, to the e-mail address provided by the consumer for internet verification purposes, that complies with paragraph (c) and that contains a

link to the internet verification website that meets prevailing and generally-accepted security standards and protocols;

(b) the internet verification website must not be accessible by consumers other than through the link referred to in paragraph (a), and a consumer must not be permitted access to the internet verification website once the verification period prescribed by the ECPA Regulation has expired in relation to that consumer's contract;

(c) the e-mail referred to in paragraph (a) must comply with the following requirements:

(i) the e-mail may only be sent to the consumer within the verification period prescribed by section 12(3) of the ECPA Regulation that is applicable to the consumer's contract;

(ii) the date and time of communication of the e-mail to the consumer must be verifiable;

(iii) the e-mail shall contain the applicable message approved for that purpose by the OEB, without deviation except when and as expressly permitted by the terms of the applicable OEB-approved message, or as required to comply with paragraph (iv) or applicable law; and

(iv) the e-mail shall contain contact information for the retailer's verification representative for purposes of making inquiries or reporting technical issues with the internet verification website;

(d) the consumer's session on the internet verification website must be cancelled in a reasonable period of time if the consumer does not continue the session, and a message to that effect must automatically be displayed on the consumer's device;

(e) the consumer must be provided with the option to download or print the applicable OEB-approved verification form referred to in paragraph (g) at any time without any obligation to verify the contract;

(f) the internet verification process must include the following functionality:

(i) the consumer must be required to authenticate his or her identity before being able to proceed to the applicable OEB-approved verification form referred to in paragraph (g);

(ii) the IP address of the device from which the consumer is undertaking the internet verification process must be recorded and maintained;

(iii) the consumer's responses to questions or statements on the OEB-approved verification form referred to in paragraph (g) must be saved such that the consumer may leave a session on the internet verification website and return to it later without having to start over;

(iv) the consumer must be able to return to his or her responses to questions or statements on the OEB-approved verification form referred to in paragraph (g) and change them at any time before completing the form;

(v) the internet verification website must allow the consumer to increase the font size of content on the website; and

(vi) the internet verification process must have such additional functionality as may be specified in the instructions on the applicable OEB-approved verification form;

(g) the applicable verification form approved by the OEB must be used, without deviation except when and as expressly permitted by the terms of the applicable OEB-approved verification form, or as required to comply with applicable law;

(h) the internet verification process must be automatically terminated where required by the ECPA Regulation or the applicable OEB-approved verification form, and a termination message must automatically be displayed on the consumer's device advising the consumer of the reason for the termination in plain language; and

(i) where a consumer completes the applicable OEB-approved verification form, a message must automatically be displayed on the consumer's device at the time and in accordance with the instructions on the form.

4.11C A contract with a consumer is not considered verified unless the consumer has provided a response to each question or statement on the OEB-approved verification form referred to in section 4.11B(g) and the message referred to in section 4.11B(i) is displayed.

4.11D Where a consumer has been sent the e-mail referred to in section 4.11B(a) but has not yet completed the internet verification process, a verification representative may re-send the e-mail to the consumer or otherwise communicate with the consumer with a reminder that the contract has not yet been verified, but may do so no more than once in any seven-day period. Such communication shall not contain any statements of a promotional nature about the products, services or business of the retailer or contain any representation that is inconsistent with or contrary to the OEB-approved message referred to in section 4.11B(c) or the applicable OEB-approved verification form referred to in section 4.11B(g).

4.12 Where a low volume consumer notifies a retailer that the consumer does not wish to verify a contract, whether as part of a verification call or an internet verification process or by separate notice, the retailer shall not thereafter contact the low volume consumer for the purposes of obtaining verification of that contract.

Renewal or extension of contracts with low volume consumers

4.13 A retailer shall ensure that the renewal or extension of a contract with a low volume consumer complies with section 4.14.

4.14 The renewal or extension of a contract with a low volume consumer shall be effected within the period and in the manner prescribed by the ECPA Regulation and shall, where effected by telephone, comply with the following requirements:

(a) the salesperson shall ensure that the call includes all of the statements and questions set out in the applicable script approved for that purpose by the OEB;
(b) the salesperson shall not make any representation that is inconsistent with or contrary to any of the statements or questions set out in the applicable OEB-approved script;
(c) except where expressly permitted by the terms of the applicable OEB-approved script, where the script calls for a “yes” or “no” answer from the low volume consumer, the salesperson shall terminate the renewal or extension call if the low volume consumer does not provide a clear affirmative response;
(d) the salesperson shall terminate the renewal or extension call where the applicable OEB-approved script so requires, and shall do so in accordance with the requirements of the applicable OEB-approved script; and
(e) the recording of the renewal or extension call has associated with it a verifiable date and time stamp.

4.15 Where, following receipt of the material referred to in section 15 of the ECPA Regulation, a low volume consumer notifies a retailer that the consumer does not wish to renew or extend a contract, whether as part of a renewal or extension call or by separate notice, the retailer shall not thereafter contact the low volume consumer for the purposes of obtaining the renewal or extension of that contract.

4.16 If, within the last year of a contract but prior to receipt of the material referred to in section 15 of the ECPA Regulation, a customer that is a low volume consumer notifies a retailer that the customer does not wish to renew or extend the contract, the retailer shall not renew or extend the contract unless the retailer reminds the customer of the notice of non-renewal or non-extension as part of the contract renewal or extension process referred to in section 15 of the ECPA Regulation and obtains positive acceptance of the renewed or extended contract from the customer.

5 TRAINING

5.1 A retailer shall ensure that no salesperson or verification representative that acts on its behalf retails to a low volume consumer or negotiates, enters into, verifies, renews or extends a contract with a low volume consumer unless the salesperson or verification representative has successfully completed training as set out in this Code.

5.2 A retailer shall ensure that the training referred to in section 5.1 includes the following for a salesperson other than a person involved solely in the renewal or extension of contracts:

(a) training in relation to all of the legal and regulatory requirements applicable to the sales process, contract verification, consumer cancellation rights and the renewal or extension process, in each case as they pertain to low volume consumers; and

(b) adequate and accurate material covering the following areas as they pertain to low volume consumers:

(i) electricity market structure;

(ii) how to complete a contract application;
(iii) behaviour that constitutes an unfair practice;
(iv) use of business cards;
(v) use of identification badges;
(vi) any OEB-approved document referred to in section 1.1(f.1);
(vii) the OEB-approved standard contract terms and conditions referred to in section 3.2A;
(viii) disclosure statements;
(ix) price comparisons;
(x) verification;
(xi) consumer cancellation rights;
(xii) renewals and extensions;
(xiii) how electricity pricing works, including the pricing of electricity supplied by electricity distributors;
(xiv) persons with whom a retailer may enter into, verify, renew or extend a contract; and
(xv) all relevant OEB regulatory requirements not already covered above, including those set out in this Code.

5.3 A retailer shall ensure that the training referred to in section 5.1 includes the following for a verification representative:

(a) training in relation to all of the legal and regulatory requirements applicable to the verification process, including the use of the OEB-approved script referred to in section 4.11 or the requirements for internet verification as set out in sections 4.11B to 4.11D, including the OEB-approved message referred to in section 4.11B(c) and the OEB-approved verification form referred to in section 4.11B(g), as applicable to the method of verification that the verification representative will be using; and

(b) adequate and accurate material covering the following areas as they pertain to low volume consumers:

(i) electricity market structure;
(ii) behaviour that constitutes an unfair practice;
(iii) any OEB-approved document referred to in section 1.1(f.1);
(iv) the OEB-approved standard contract terms and conditions referred to in section 3.2A;
(v) disclosure statements;
(vi) price comparisons;
(vii) verification;
(viii) consumer cancellation rights;
(ix) how electricity pricing works, including the pricing of electricity supplied by electricity distributors;
(x) persons with whom a retailer may enter into and verify a contract; and
(xi) all other relevant OEB regulatory requirements not already covered above, including those set out in this Code.

5.4 A retailer shall ensure that the training referred to in section 5.1 includes the following for a salesperson involved solely in the renewal or extension of contracts:

(a) training in relation to all of the legal and regulatory requirements applicable to the renewal or extension process applicable to low volume consumers, including the use of the OEB-approved script referred to in section 4.14; and
(b) adequate and accurate material covering the following areas as they pertain to low volume consumers:

(i) electricity market structure;
(ii) behaviour that constitutes an unfair practice;
(iii) use of business cards, unless renewals and extensions are conducted solely by telephone;
(iv) use of identification badges, unless renewals and extensions are conducted solely by telephone;
(v) any OEB-approved document referred to in section 1.1.(f.1);
(vi) the OEB-approved standard contract terms and conditions referred to in section 3.2A;
(vii) disclosure statements;
(viii) price comparisons;
(ix) consumer cancellation rights;
(x) renewals and extensions;
(xi) how electricity pricing works, including the pricing of electricity supplied by electricity distributors;
(xii) persons with whom a retailer may renew or extend a contract; and
(xiii) all relevant OEB regulatory requirements not already covered above, including those set out in this Code.

5.5 A retailer shall ensure that the training referred to in section 5.1 is conducted or, in the case of internet-based training (or “e-training”), developed only by an employee of the retailer or by a person under contract, provided that such person is not also under contract to the retailer for the purpose of providing salespersons or verification representatives or of otherwise carrying out retailing or verification activities. A retailer shall also ensure that training is conducted or, in the case of internet-based training (or “e-training”), developed only by persons with detailed knowledge of all of the elements listed in section 5.2, 5.3 or 5.4, as applicable, of this Code.

5.6 For the purposes of section 5.1:

(a) a retailer shall determine the successful completion of training by means of a training test that is designed to assess the state of the salesperson's or verification representative's knowledge of the elements listed in section 5.2, 5.3 or 5.4, as applicable;

(b) the training test questions may be fixed or taken randomly from a test question repository;

(c) in order to be considered to have successfully complete training, the salesperson or verification representative must achieve a minimum 80% pass mark on the training test;

(d) if a salesperson or verification representative fails a training test, the salesperson or verification representative may be permitted to re-take the training test once, provided that before re-taking the training test the salesperson or verification representative must also re-take the full training described in section 5.2, 5.3 or 5.4, as applicable; and

(e) the retailer shall ensure that the training test is not conducted in a manner that would permit the persons taking the training test to share questions and answers with one another while taking the training test.

5.7 In sections 5.1 to 5.6, a reference to a salesperson or a verification representative includes a reference to a prospective salesperson or a prospective verification representative.

5.8 A retailer shall ensure that each salesperson and verification representative that acts on its behalf in relation to low volume consumers re-takes the training referred to in section 5.2, 5.3 or 5.4, as applicable, and re-takes and passes a training test in accordance with section 5.6 once every 12 months as a condition of continuing to act on behalf of the retailer.

5.9 A retailer shall ensure that any salesperson or verification representative that has

not acted in that capacity on behalf of the retailer in relation to low volume consumers for a continuous period of 60 days or more re-takes the training referred to in section 5.2, 5.3 or 5.4, as applicable, and re-takes and passes a training test in accordance with section 5.6 prior to resuming activities as a salesperson or verification representative on behalf of the retailer in relation to low volume consumers.

5.10 A retailer shall maintain, for each salesperson and verification representative that acts on its behalf in relation to low volume consumers, compete records of the following:

(a) the training material used (updated for each time the person undergoes training);
(b) the name and title or position of the person(s) who conducted the training (updated for each time the person undergoes training);
(c) proof of identity of the person;
(d) the date(s) any training of the person was conducted;
(e) the date(s) any testing of the person was conducted;
(f) the training test questions, answers and score (for each time the person undergoes testing);
(g) a signed statement from the person that he or she will comply with all applicable legal and regulatory requirements in relation to the activities the person will conduct on behalf of the retailer in relation to low volume consumers; and
(h) a copy of all business cards and identification badges issued to the person.

The records referred to above shall be retained for a period of not less than two years from the date on which the salesperson or verification representative ceases to act on behalf of the retailer in relation to low volume consumers, and shall be provided to the OEB on request.

6 CERTIFICATION

6.1 A retailer shall not enter into, renew, extend or amend a contract with a low volume consumer on and after the Effective ECPA Date unless the retailer has filed with the OEB a certificate of compliance in the form set out in Appendix A and received from the OEB the written acknowledgement referred to in section 3 of Ontario Regulation 90/99.

6.2 Where a retailer indicates “N/A” on the certificate of compliance referred to in section 6.1 in relation to a given statement, the retailer shall not conduct the activity to which that statement relates unless the retailer has filed with the OEB a further certificate of compliance in respect of that activity in the form set out in Appendix B and has received from the OEB written acknowledgement of that certification.

6.3 A certificate of compliance referred to in section 6.1 or section 6.2 shall be signed by the retailer’s Chief Executive Officer, Chief Operating Officer, President or person of equivalent position.

6.4 Commencing in 2012, a retailer shall provide in the form and manner required by the OEB, annually by April 30, a self-certification statement on compliance with the Act, the ECPA, the regulations and this Code in relation to retailing to low volume consumers.

7 CONSUMER COMPLAINTS AND COMPLIANCE MONITORING

Consumer complaints

7.1 A retailer shall provide to its low volume consumer customers and prospective customers in all written offers, contracts, contract amendment forms and contract renewal or extension forms, the retailer's toll-free telephone number and the telephone number of the OEB's Consumer Relations Centre.

7.2 If any low volume consumer makes a complaint to a retailer regarding retailing or verification by or on behalf of the retailer, the conduct of the retailer's salespersons or verification representatives, the contract the low volume consumer has with the retailer, or any other matter related to the retailer, the retailer shall expeditiously investigate the complaint and take all appropriate and necessary steps to resolve the complaint. If the complaint is not resolved to the satisfaction of the low volume consumer, the retailer shall provide to the low volume consumer the telephone number of the OEB's Consumer Relations Centre.

7.3 In cases where a consumer complaint has been referred to the retailer from the OEB and resolution of that complaint is reached, the retailer shall implement the resolution immediately and shall confirm this, in writing, with the OEB.

Compliance monitoring

7.4 A retailer shall maintain a compliance monitoring and quality assurance program that enables the retailer to monitor compliance with the Act, the ECPA, the regulations and all applicable OEB regulatory requirements in relation to retailing to low volume consumers and to identify any need for remedial action.

7.5 The program referred to in section 7.4 shall:

(a) include regular quality assurance assessments of the performance of all salespersons and verification representatives acting on behalf of the retailer in relation to compliance with the Act, the ECPA, the regulations and all applicable OEB regulatory requirements;
(b) make provision for appropriate support to salespersons and verification representatives acting on behalf of the retailer; and
(c) facilitate the identification of any need for specific training and/or coaching that a salesperson or verification representative may require.

7.6 Where a retailer receives a bona fide complaint that alleges that a salesperson or verification representative has failed to comply with a material requirement of the Act, the ECPA, the regulations or an applicable OEB regulatory requirement in relation to retailing to low volume consumers, the retailer shall ensure that the salesperson or verification representative successfully undergoes remedial training on the subject-matter of the complaint (i.e., re-training on the applicable legal or regulatory requirement that the person is alleged to have violated) as a condition of continuing to act on behalf of the retailer in relation to low volume consumers.

Retailer complaint and compliance information

7.7 As of a date to be determined by the OEB, a retailer shall maintain on its website such information as may be prescribed by the OEB relating to the retailer's performance in relation to complaints and compliance with applicable legal and regulatory requirements pertaining to low volume consumers. The information shall be posted in the form provided or approved by the OEB, shall be updated as required by the OEB and shall be posted on a separate page on the retailer's website.

7.8 The retailer shall include on the webpage referred to in section 7.7 a prominent link to the page on the OEB's website designated by the OEB for that purpose that reads: "For more information on our complaint and compliance performance visit the Ontario Energy Board website."

7.9 A retailer shall include a prominent link to the webpage referred to in section 7.7 on the home page of its website.

8 SERVICES TO BE MAINTAINED BY A RETAILER

8.1 A retailer shall have a current mailing address in Ontario and a current telephone number listed in Ontario, and shall provide them to every customer. If the retailer retails electricity to low volume consumers, the retailer shall have a telephone number which may be reached by the general public without charge, and shall provide the telephone number to every low volume consumer.

9 CONFIDENTIALITY OF CONSUMER INFORMATION

9.1 A retailer shall not disclose consumer information as defined in this Code to any person other than the consumer or the OEB without the consent of the consumer in writing, except when the information has been sufficiently aggregated such that an individual consumer's information cannot be identified, or where consumer information is required to be disclosed:

(a) for billing or market operation purposes;
(b) for law enforcement purposes;
(c) to comply with a statute or an order of a court or tribunal;
(d) when past due accounts of the consumer have been passed to a debt collection agency; or
(e) for the purpose of complying with the Market Rules.

9.2 A retailer shall inform consumers regarding the conditions described in section 9.1 under which consumer information may be released to a third party without the consumer's consent.

9.3 A retailer shall not use consumer information obtained for one purpose from a consumer for any other purpose without the consent of the consumer in writing.

10 TRANSFER AND ASSIGNMENT OF CONTRACTS

10.1 A retailer shall not sell, transfer or assign the administration of a contract with a customer to another person who is not a licensed retailer.

10.2 A retailer must notify the OEB of any sale, transfer or assignment of contracts within 10 days of the sale, transfer or assignment.

10.3 Within 60 days of any sale, transfer or assignment or a contract to another retailer, the new retailer must notify the affected customers of the new retailer's address for service and toll-free telephone number.

APPENDIX A

Form of Certificate of Compliance under Section 6.1 of the Code

Electricity Retailer
Certificate of Compliance
Under Section 6.1 of the Electricity Retailer Code of Conduct

Part I: Definitions and Interpretation

1.1 In this Certificate:

"applicable legal and regulatory requirements" means all applicable requirements under the *Energy Consumer Protection Act, 2010*, the *Ontario Energy Board Act, 1998*, regulations made under those Acts, a licence issued under section 57(d) of the *Ontario Energy Board Act, 1998* and any code issued by the OEB under section 70.1 of the *Ontario Energy Board Act, 1998* that are in force on the Effective Certification Date;

"Effective Certification Date" means the date on which this Certificate is signed by the Retailer and filed with the OEB;

"low volume consumer" has the meaning given to it in the OEB's Electricity Retailer Code of Conduct;

"Retailer" means the licensed retailer identified in the opening paragraph of section II;

"salesperson" has the meaning given to it in the OEB's Electricity Retailer Code of Conduct; and

"verification representative" has the meaning given to it in the OEB's Electricity Retailer Code of Conduct.

1.2 Unless otherwise defined in this Certificate, words and phrases shall have the meanings given to them in the *Ontario Energy Board Act, 1998*, the *Energy Consumer Protection Act, 2010* or the regulations made under those Acts.

1.3 In this Certificate, "N/A" in relation to a given statement means that the Retailer will not, as of the Effective Certification Date and for a period of not less than 1 month thereafter, carry on the activity to which the statement relates.

1.4 All statements in this Certificate pertain to retailing to low volume consumers.

Part II: Certification

I, <*identify (i) the certifying officer; (ii) his/her position with the Retailer; and (iii) the name of the Retailer*>, having made all necessary enquiries, certify on behalf of the Retailer that:

Confirmation of Retailing Activities		
The channels that the Retailer intends to use for the purpose of retailing electricity as of the Effective Certification Date are the following:	**Yes**	**No**
(A) Door-to-Door		
(B) Exhibitions		
(C) Trade shows		
(D) Direct Mail		
(E) Retailer's place of business		
(F) Internet		
(G) Telephone Renewals		
(H) Other (please specify below)		
The methods of verification the Retailer intends to use as of the Effective Certification Date are the following:	**Yes**	**No**
(A) Telephone		
(B) Internet		

Certificate of Compliance		
	Yes	**N/A**
1. Salespersons		
(A) No salesperson acting on behalf of the Retailer will be remunerated on and after the Effective Certification Date in a manner contrary to any applicable legal and regulatory requirements.		
(B) All salespersons acting on behalf of the Retailer have undergone training and testing in accordance with all applicable legal and regulatory requirements		
(C) Each salesperson acting on behalf of the Retailer has been provided with business cards that meet all applicable legal and regulatory requirements		
(D) Each salesperson acting on behalf of the Retailer has been provided with an identification badge that meets all applicable legal and regulatory requirements		
(E) The Retailer's practices for hiring or contracting for salespersons are such that on and after the Effective Certification Date, those persons can be expected to conduct their activities in compliance with all applicable legal and regulatory requirements and with integrity and honesty.		
(F) Adequate processes and controls, designed to ensure that the conduct of salespersons on and after the Effective Certification Date is in accordance with all applicable legal and regulatory requirements, are in place		
2. Sales using a text-based contract		
(A) All contract offers, contracts and promotional material pertaining to the sale of electricity to consumers have been prepared or revised as required to comply with all applicable legal and regulatory requirements and only offers, contracts and promotional material that so comply will be used on and after the Effective Certification Date		
(B) The required disclosure statement, price comparison and any OEB document referred to in section 1.1(f.1) of the OEB's Electricity Retailer Code of Conduct will be used on and after the Effective Certification Date in accordance with all applicable legal and regulatory requirements		
(C) Adequate processes and controls, designed to ensure that the text-based contracting process on and after the Effective Certification Date is conducted in accordance with all applicable legal and regulatory requirements, are in place		
3. Sales using the Internet		
(A) The Retailer's internet website and internet contracting process have been prepared or revised to comply with all applicable legal and regulatory requirements		

Certificate of Compliance		
	Yes	**N/A**
(B) All contract offers, contracts and promotional material pertaining to the sale of electricity to consumers have been prepared or revised as required to comply with all applicable legal and regulatory requirements and only offers, contracts and promotional material that so comply will be used on and after the Effective Certification Date		
(C) The required disclosure statement and price comparison will be used on and after the Effective Certification Date in accordance with all applicable legal and regulatory requirements		
(D) Adequate processes and controls, designed to ensure that the internet contracting process on and after the Effective Certification Date is conducted in accordance with all applicable legal and regulatory requirements, are in place		
4. Verification		
(A) No verification representative acting on behalf of the Retailer will be remunerated on and after the Effective Certification Date in a manner contrary to any applicable legal and regulatory requirements		
(B) All verification representatives acting on behalf of the Retailer have undergone training and testing in accordance with all applicable legal and regulatory requirements		
(C) All verification representatives conducting verification by telephone on behalf of the Retailer have been instructed to do so using the verification call script approved by the OEB		
(C.1) All verification representatives conducting internet verification on behalf of the Retailer have been instructed to do so using the e-mail message and verification form approved by the OEB		
(D) Adequate processes and controls, designed to ensure that each verification call made or received by the Retailer's verification representative on and after the Effective Certification Date (including a call from a consumer for the purpose of giving notice not to verify) is recorded and that a copy of the call recording can be retrieved and provided to the consumer upon request in accordance with all applicable legal and regulatory requirements, are in place		
(D.1) Adequate processes and controls, designed to ensure that all communications over the internet between the Retailer's verification representative and a consumer are recorded and that the record of such communications can be retrieved and provided to the consumer upon request in accordance with all applicable legal and regulatory requirements, are in place		
(E) Adequate processes and controls, designed to ensure that the verification of electricity contracts with consumers on and after the Effective Certification Date is conducted in accordance with all applicable legal and regulatory requirements, are in place		

Certificate of Compliance		
	Yes	**N/A**
5. Contract Renewals and Extensions		
(A) All contract renewal/extension offers, contract renewal/extension forms and promotional material pertaining to the renewal/extension of electricity contracts with consumers have been prepared or revised in accordance with all applicable legal and regulatory requirements and only contract renewal/extension offers, renewal/extension forms and promotional material that so comply will be used		
(B) The required disclosure statement, price comparison and any OEB-approved document referred to in section 1.1(f.1) of the OEB's Electricity Retailer Code of Conduct will be used on and after the Effective Certification Date in accordance with all applicable legal and regulatory requirements		
(C) All salespersons conducting telephone renewals on behalf of the Retailer have undergone training and testing in accordance with all applicable legal and regulatory requirements		
(D) All salespersons conducting renewal calls on behalf of the Retailer have been instructed to do so using the renewal call script approved by the OEB		
(E) Adequate processes and controls, designed to ensure that each renewal/extension call made or received by the Retailer on and after the Effective Certification Date (including a call from a consumer for the purpose of giving notice not to renew/extend) is recorded and that a copy of the call recording can be retrieved and provided to the consumer upon request in accordance with all applicable legal and regulatory requirements, are in place		
(F) Adequate processes and controls, designed to ensure that the renewal/extension of electricity contracts with consumers on and after the Effective Certification Date is conducted in accordance with all applicable legal and regulatory requirements, are in place		
6. Contract Amendments		
(A) Adequate processes and controls, designed to ensure that the amendment of any electricity contract with a consumer on and after the Effective Certification Date is conducted in accordance with all applicable legal and regulatory requirements, are in place		
7. Cancellations and Retractions		
(A) Adequate processes and controls, designed to ensure that the cancellation of any contract with a consumer on and after the Effective Certification Date is processed in accordance with all applicable legal and regulatory requirements, including as to the payment of any refund to which the consumer may by law be entitled and to the switching of the consumer back to the consumer's utility, are in place		

Certificate of Compliance		
	Yes	**N/A**
(B) Adequate processes and controls, designed to ensure that the retraction of the renewal/extension of any electricity contract by a consumer on and after the Effective Certification Date is processed in accordance with all applicable legal and regulatory requirements, including as to the switching of the consumer back to the consumer's utility, are in place		
(C) Adequate processes and controls, designed to ensure that each cancellation call and each retraction call received by the Retailer on and after the Effective Certification Date is recorded and that a copy of the call recording can be retrieved and provided to the consumer upon request in accordance with all applicable legal and regulatory requirements, are in place		
8. Complaint Handling		
(A) Adequate processes and controls are in place to ensure that consumer complaints on and after the Effective Certification Date alleging non-compliance with any applicable legal or regulatory requirement can be received and are reviewed by the Retailer in a timely manner		
(B) Adequate processes and controls are in place to ensure that remedial action is taken in a timely manner to address consumer complaints referred to in (A) above, with the consumer and/or with any person that is the subject of the complaint		

Date: *<insert date of filing>*

_____

[Signature]
[Title]

Notes:

1. In accordance with section 6.3 of the OEB's Electricity Retailer Code of Conduct, this Certificate must be signed by the Retailer's Chief Executive Officer, Chief Operating Officer, President or other person of equivalent position.

2. It is an offence under section 126(1)(b) of the *Ontario Energy Board Act, 1998* to knowingly furnish false or misleading information in any application, statement or return made under that Act or in any circumstances where information is required or authorized to be provided under that Act.

APPENDIX B

Form of Certificate of Compliance under Section 6.2 of the Code

Electricity Retailer
Certificate of Compliance
Under Section 6.2 of the Electricity Retailer Code of Conduct

Part I: Definitions and Interpretation

1.1 In this Certificate:

"applicable legal and regulatory requirements" means all applicable requirements under the *Energy Consumer Protection Act, 2010*, the *Ontario Energy Board Act, 1998*, regulations made under those Acts, a licence issued under section 57(d) of the *Ontario Energy Board Act, 1998* and any code issued by the OEB under section 70.1 of the *Ontario Energy Board Act, 1998* that are in force on the Effective Date;

"Effective Date" means the date this Certificate is signed by the Retailer and filed with the OEB;

"low volume consumer" has the meaning given to it in the OEB's Electricity Retailer Code of Conduct;

"Retailer" means the licensed retailer identified in the opening paragraph of section II;

"salesperson" has the meaning given to it in the OEB's Electricity Retailer Code of Conduct; and

"verification representative" has the meaning given to it in the OEB's Electricity Retailer Code of Conduct.

1.2 Unless otherwise defined in this Certificate, words and phrases shall have the meanings given to them in the *Ontario Energy Board Act, 1998*, the *Energy Consumer Protection Act, 2010* or the regulations made under those Acts.

1.3 All statements in this Certificate pertain to retailing to low volume consumers.

Part II: Certification

Whereas on <*insert date*> the Retailer filed with the OEB a Certificate of Compliance under section 6.1 of the Electricity Retailer Code of Conduct in which the Retailer indicated "no" or "N/A" in relation to one or more statements.

And whereas the Retailer now intends to conduct the activities to which those statements relate.

I, <*identify (i) the certifying officer; (ii) his/her position with the Retailer; and (iii) the name of the Retailer*>, having made all necessary enquiries, certify on behalf of the Retailer that:

Note: Indicate "yes" for any statement for which "no" or "N/A" was indicated in the certificate filed under section 6.1 of the Electricity Retailer Code of Conduct and in relation to which the Retailer now intends to conduct the relevant activities.

Confirmation of Retailing Activities		
The channels that the Retailer intends to use for the purpose of retailing electricity as of the Effective Date are the following:	**Yes**	**No**
(A) Door-to-Door		
(B) Exhibitions		
(C) Trade shows		
(D) Direct Mail		
(E) Retailer's place of business		
(F) Internet		
(G) Telephone Renewals		
(H) Other (please specify below)		
The methods of verification the Retailer intends to use as of the Effective Date are the following:	**Yes**	**No**
(A) Telephone		
(B) Internet		

Certificate of Compliance		
	Yes	**N/A**
1. Salespersons		
(A) No salesperson acting on behalf of the Retailer will be remunerated on and after the Effective Certification Date in a manner contrary to any applicable legal and regulatory requirements		
(B) All salespersons acting on behalf of the Retailer have undergone training and testing in accordance with all applicable legal and regulatory requirements		
(C) Each salesperson acting on behalf of the Retailer has been provided with business cards that meet all applicable legal and regulatory requirements		
(D) Each salesperson acting on behalf of the Retailer has been provided with an identification badge that meets all applicable legal and regulatory requirements		
(E) The Retailer's practices for hiring or contracting for salespersons are such that those persons can be expected to conduct their activities in compliance with all applicable legal and regulatory requirements and with integrity and honesty.		
(F) Adequate processes and controls, designed to ensure that the conduct of salespersons is in accordance with all applicable legal and regulatory requirements, are in place		
2. Sales using a text-based contract		
(A) All contract offers, contracts and promotional material pertaining to the sale of electricity to consumers have been prepared or revised as required to comply with all applicable legal and regulatory requirements and only offers, contracts and promotional material that so comply will be used		
(B) The required disclosure statement, price comparison and any OEB document referred to in section 1.1(f.1) of the OEB's Electricity Retailer Code of Conduct will be used in accordance with all applicable legal and regulatory requirements		
(C) Adequate processes and controls, designed to ensure that the text-based contracting process is conducted in accordance with all applicable legal and regulatory requirements, are in place		
3. Sales using the Internet		
(A) The Retailer's internet website and internet contracting process have been prepared or revised to comply with all applicable legal and regulatory requirements		
(B) All contract offers, contracts and promotional material pertaining to the sale of electricity to consumers have been prepared or revised as required to comply with all applicable legal and regulatory requirements and only offers, contracts and promotional material that so comply will		

Certificate of Compliance		
	Yes	**N/A**
be used		
(C) The required disclosure statement and price comparison will be used in accordance with all applicable legal and regulatory requirements		
(D) Adequate processes and controls, designed to ensure that the internet contracting process is conducted in accordance with all applicable legal and regulatory requirements, are in place		
4. Verification		
(A) No verification representative acting on behalf of the Retailer will be remunerated in a manner contrary to any applicable legal and regulatory requirements		
(B) All verification representatives acting on behalf of the Retailer have undergone training and testing in accordance with all applicable legal and regulatory requirements		
(C) All verification representatives conducting verification by telephone on behalf of the Retailer have been instructed to do so using the verification call script approved by the OEB		
(C.1) All verification representatives conducting internet verification on behalf of the Retailer have been instructed to do so using the e-mail message and verification form approved by the OEB		
(D) Adequate processes and controls, designed to ensure that each verification call made or received by the Retailer's verification representative (including a call from a consumer for the purpose of giving notice not to verify) is recorded and that a copy of the call recording can be retrieved and provided to the consumer upon request in accordance with all applicable legal and regulatory requirements, are in place		
(D.1) Adequate processes and controls, designed to ensure that all communications over the internet between the Retailer's verification representative and a consumer are recorded and that the record of such communications can be retrieved and provided to the consumer upon request in accordance with all applicable legal and regulatory requirements, are in place		
(E) Adequate processes and controls, designed to ensure that the verification of electricity contracts with consumers is conducted in accordance with all applicable legal and regulatory requirements, are in place		
5. Contract Renewals and Extensions		
(A) All contract renewal/extension offers, contract renewal/extension forms and promotional material pertaining to the renewal/extension of electricity contracts with consumers have been prepared or revised in accordance with all applicable legal and regulatory requirements and		

Certificate of Compliance		
	Yes	**N/A**
only contract renewal/extension offers, renewal/extension forms and promotional material that so comply will be used		
(B) The required disclosure statement, price comparison and any OEB document referred to in section 1.1(f.1) of the OEB's Electricity Retailer Code of Conduct will be used in accordance with all applicable legal and regulatory requirements		
(C) All salespersons conducting telephone renewals on behalf of the Retailer have undergone training and testing in accordance with all applicable legal and regulatory requirements		
(D) All salespersons conducting renewal calls on behalf of the Retailer have been instructed to do so using the renewal call script approved by the OEB		
(E) Adequate processes and controls, designed to ensure that each renewal/extension call made or received by the Retailer (including a call from a consumer for the purpose of giving notice not to renew/extend) is recorded and that a copy of the call recording can be retrieved and provided to the consumer upon request in accordance with all applicable legal and regulatory requirements, are in place		
(F) Adequate processes and controls, designed to ensure that the renewal/extension of electricity contracts with consumers is conducted in accordance with all applicable legal and regulatory requirements, are in place		
6. Contract Amendments		
(A) Adequate processes and controls, designed to ensure that the amendment of any electricity contract with a consumer is conducted in accordance with all applicable legal and regulatory requirements, are in place		
7. Cancellations and Retractions		
(A) Adequate processes and controls, designed to ensure that the cancellation of any contract with a consumer is processed in accordance with all applicable legal and regulatory requirements, including as to the payment of any refund to which the consumer may by law be entitled and to the switching of the consumer back to the consumer's utility, are in place		
(B) Adequate processes and controls, designed to ensure that the retraction of the renewal/extension of any electricity contract by a consumer is processed in accordance with all applicable legal and regulatory requirements, including as to the switching of the consumer back to the consumer's utility, are in place		
(C) Adequate processes and controls, designed to ensure that each cancellation call and each retraction call received by the Retailer is recorded and that a copy of the call recording can be retrieved and		

Certificate of Compliance		
	Yes	**N/A**
provided to the consumer upon request in accordance with all applicable legal and regulatory requirements, are in place		
8. Complaint Handling		
(A) Adequate processes and controls are in place to ensure that consumer complaints alleging non-compliance with any applicable legal or regulatory requirement can be received and are reviewed by the Retailer in a timely manner		
(B) Adequate processes and controls are in place to ensure that remedial action is taken in a timely manner to address consumer complaints referred to in (A) above, with the consumer and/or with any person that is the subject of the complaint		

Date: *<insert date of filing>*

_____

[Signature]
[Title]

Notes:

1. In accordance with section 6.3 of the OEB's Electricity Retailer Code of Conduct, this Certificate must be signed by the Retailer's Chief Executive Officer, Chief Operating Officer, President or other person of equivalent position.

2. It is an offence under section 126(1)(b) of the *Ontario Energy Board Act, 1998* to knowingly furnish false or misleading information in any application, statement or return made under that Act or in any circumstances where information is required or authorized to be provided under that Act.

SULLIVAN ON THE CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

CHAPTER 2

Driedger's Modern Principle

ANALYSIS OF THE MODERN PRINCIPLE

§2.1 ***Introduction.*** In the first edition of the *Construction of Statutes*, published in 1974, Elmer Driedger described an approach to statutory interpretation which he called the modern principle:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[1]

In the years following that first edition, the modern principle was frequently cited and relied on, and in 1998, in *Re Rizzo & Rizzo Shoes Ltd.*, it was declared to be the preferred approach of the Supreme Court of Canada. Speaking for the Court, Iacobucci J. wrote:

> Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone.[2]

Since the Rizzo case, Driedger's modern principle has been the starting point for statutory interpretation in innumerable decisions by Canadian courts. It has even been applied to interpretation of Quebec's Civil Code.[3]

§2.2 The chief virtue of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. In interpreting a legislative provision, a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, it must also take into account

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1 Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67. This principle was reproduced in the second edition, published in 1983, without modification at p. 87.

2 [1998] S.C.J. No. 2, at para. 21, [1998] 1 S.C.R. 27, at 41 (S.C.C.). For a comprehensive and critical analysis of Driedger's modern principle, see Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimation" (2006), 40 Thémis 131-72.

3 See *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] S.C.J. No. 55, [2004] 3 S.C.R. 257, at para. 20*ff.* (S.C.C.).

the purpose of the provision and all relevant context. It must do so regardless of whether the legislation is considered ambiguous.

§2.3 The first dimension emphasized is textual meaning. Although texts issue from an author and a particular set of circumstances, once published they are detached from their origin and take on a life of their own — one over which the reader has substantial control. Research in psycholinguistics has shown that the way readers understand the words of a text depends on the expectations they bring to their reading. While these expectations are rooted in linguistic competence and shared linguistic convention, they are also dependent on the wide-ranging knowledge, beliefs, values and experience that readers have stored in their brain. The content of a reader's memory constitutes the most important context in which a text is read and influences in particular his or her impression of ordinary meaning — what Driedger calls the grammatical and ordinary sense of the words.

§2.4 A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct as a result of the communication. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.

§2.5 A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. They are also an integral part of legislative intent, as that concept is explained by Driedger. In the second edition he wrote:

> It may be convenient to regard 'intention of Parliament' as composed of four elements, namely
>
> - the expressed intention — the intention expressed by the enacted words;
> - the implied intention — the intention that may legitimately be implied from the enacted words;
> - the presumed intention — the intention that the courts will in the absence of an indication to the contrary impute to Parliament; and

> must be the case that viable seeds will be included.... The exclusion of non-viable seeds appears to admit of no other inference....[155]

By excluding "non-viable seeds", as opposed to "seeds", the legislature shows first that it has considered how seeds should be dealt with under the Act and second that it wants to treat non-viable seeds differently from viable ones. Otherwise, the word "non-viable" in front of "seeds" would serve no purpose, contrary to the presumption against tautology.

§8.97 ***Failure to follow a pattern of express reference.*** As described above, consistent expression is an important convention of legislative drafting.[156] As much as possible, drafters strive for uniform and consistent expression, so that once a pattern of words has been devised to express a particular purpose or meaning, it is presumed that the pattern is used for this purpose or meaning each time the occasion arises. This convention naturally creates expectations that may form the basis for an implied exclusion argument. This point is made by Iacobucci J. in *R. v. Ulybel Enterprises Ltd.* when he writes:

> [H]ad Parliament intended the phrase "any proceeds of its disposition" [in s. 72(1) of the *Fisheries Act*] to be limited to proceeds of [seized] perishables ..., it could have done so expressly, as it did in s.72(2) and 72(3). Instead, a pattern in the use of the phrase at issue is evident whereby in some sections it is expressly limited to the proceeds of perishables and in other sections it refers more generally to all forms of property seized under the Act and the proceeds thereof.[157]

Patterns in legislation are assumed to be intended rather than inadvertent. Once a pattern has been established, it becomes the basis for expectations about legislative intent.[158]

§8.98 An example of how such expectations play out is found in *Prassad v. Canada (Minister of Employment and Immigration)*.[159] The issue in *Prassad* was

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155 *Ibid.*, at para. 9.

156 For discussion of the presumption of consistent expression, see above at §8.32*ff.*

157 [2001] S.C.J. No. 55, [2001] 2 S.C.R. 867, at para. 42 (S.C.C.). See also *R. v. Summers*, [2014] S.C.J. No. 26, 2014 SCC 26, at paras. 7, 38-41 (S.C.C.).

158 See discussion of patterns of expression, above at §8.38-8.39.

159 [1989] S.C.J. No. 25, [1989] 1 S.C.R. 560 (S.C.C.). See also *Németh v. Canada (Justice)*, [2010] S.C.J. No. 56, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 29 (S.C.C.); *Yugraneft Corp. v. Rexx Management Corp.*, [2010] S.C.J. No. 19, 2010 SCC 19, [2010] 1 S.C.R. 649, at para. 47 (S.C.C.); *Century Services Inc. v. Canada (Attorney General)*, [2010] S.C.J. No. 60, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 45 (S.C.C.); *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, 2009 SCC 9, [2009] 1 S.C.R. 222, at para. 116 (S.C.C.); *GreCon Dimter Inc. v. J.R. Normand Inc.*, [2005] S.C.J. No. 46, [2005] 2 S.C.R. 401, at para. 25 (S.C.C.); *Hickman Motors Ltd. v. Canada*, [1997] S.C.J. No. 62, [1997] 2 S.C.R. 336, at paras. 79-80 (S.C.C.); *R. v. Multiform Manufacturing Co.*, [1990] S.C.J. No. 83, [1990] 2 S.C.R. 624, 79 C.R. (3d) 390, at 395 (S.C.C.); *R. v. Hajivasilis*, [2013] O.J. No. 253, 2013 ONCA 27, at para. 35 (Ont. C.A.); *Lukács v. Canada (Transportation Agency)*, [2014] F.C.J. No. 301, 2014 FCA 76, at paras. 42-44 (F.C.A.); *First Majestic Silver Corp. v. Santos*, [2014] B.C.J. No. 526, 2014 BCCA 115, at para. 30 (B.C.C.A.); *Balancing Pool v. TransAlta Corp.*, [2013] A.J. No.

> any principle by which these decisions can be supported, unless it be one which would place all legislation in the power of the judiciary.[4]

Sedgwick wrote in 1874, when the dominant approach to interpretation was "literal" construction. During this period, legislation in common law jurisdictions was drafted in a concrete and detailed style which left little room for judicial choice. Yet even in this era, the idea that legislation should be interpreted so as to promote its purpose remained an important part of statutory interpretation. If the words to be interpreted lent themselves to two or more plausible interpretations, the courts would choose the interpretation that best advanced the purpose. As Viscount Simon said in *Nokes v. Doncaster Amalgamated Collieries Ltd.*:

> [I]f the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.[5]

Legislative purpose was also taken into account under the golden rule. It would be absurd for a legislature to adopt a provision that conflicted with the purpose of legislation or was likely to render it futile. To avoid this absurdity, the courts could reject the ordinary meaning of the provision in favour of a more reasonable alternative.[6]

§9.6 ***Modern purposive analysis.*** Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. This is clear from Driedger's modern principle, which makes purpose an essential part of the entire context. It is also clear from the caselaw. In 1975, in *Carter v. Bradbeer*, Lord Diplock wrote:

> If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the past thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.[7]

A similar trend is evident in the case law of the Supreme Court of Canada and other appellate courts in Canada. In *Covert v. Nova Scotia (Minister of Finance)*, for example, Dickson J. wrote:

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4 T. Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*, 2d ed. (New York: Baker, Voorhis & Co., 1874), p. 261.

5 [1940] A.C. 1014, at 1022 (H.L.).

6 For discussion of the absurdity of defeating the legislature's purpose, see Chapter 10, at §10.28-10.29.

7 [1975] 3 All E.R. 158, at 161 (H.L.).

> The correct approach, applicable to statutory interpretation generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose.[8]

In *R. v. Z. (D.A.)*, Lamer C.J. wrote:

> In interpreting ... an Act, the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and the purpose of the legislation.... [T]he Court of Appeal properly proceeded on this basis when it stated that the best approach to the interpretation of words in a statute is to place upon them the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction.[9]

In *R. v. Adams*, Sopinka J. wrote:

> In approaching the interpretation of any statutory provision, it is prudent to keep in mind the simple but fundamental instruction offered by the court in *Reigate Rural District Council v. Sutton District*... and affirmed by this court in *Hirsch v. Protestant Board of School Commissioners*...
>
> > it is always necessary in construing a statute, and in dealing with the words you find in it, to consider the object with which the statute was passed, because it enables one to understand the meaning of the words introduced into the enactment.[10]

In *R. v. Khawaja*, McLachlin C.J. wrote:

> The Terrorism section of the *Criminal Code*, like any statutory provision, must be interpreted with regard to its legislative purpose.[11]

§9.7 ***Purposive analysis distinguished from purposive approach.*** Purposive analysis as described in this chapter differs from what is sometimes called a purposive approach to interpretation. Under the modern principle, an interpreter must always carry out an analysis to determine the relevant purpose or mix of purposes, but the results of this analysis are not necessarily controlling. Purpose is not inherently more important than other contextual factors, and purpose cannot be relied on to justify adopting an implausible interpretation.

§9.8 Under a purposive approach, however, the purpose or mix of purposes identified by the interpreter is the primary concern and other indicators of legislative intent, including the words of the text, are subordinate. The so-called purposive approach is thus a reincarnation of equitable construction. This approach is well described by Justice Shamgar in the following passage quoted by L'Heureux-Dubé J. in *R. v. St. Pierre*:

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8 [1980] S.C.J. No. 101, [1980] 2 S.C.R. 774, at 807 (S.C.C.).
9 [1992] S.C.J. No. 80, [1992] 2 S.C.R. 1025, at 1042 (S.C.C.).
10 [1995] S.C.J. No. 105, [1995] 4 S.C.R. 707, at 719 (S.C.C.).
11 [2012] S.C.J. No. 69, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 44 (S.C.C.).

purposes, the assistance they offer is often quite limited. They typically recite the primary objects of legislation, which are apt to be obvious in any event, while failing to mention secondary purposes. Even purpose statements or preambles that are relatively specific rarely indicate how multiple purposes should be weighed or how competing purposes should be balanced.[63] It is left to the courts to work out the relationship between purposes declared in preambles or purpose statements and the purposes of individual provisions within the legislation, generally through scheme analysis.[64]

§9.48 ***Non-legislative statements of purpose.*** The reports of Law Reform Commissions, Parliamentary Commissions and other similar studies have long been admissible as evidence of the mischief or evil that legislation was designed to overcome.[65] Courts now also accept these and comparable sources as direct evidence of legislative purpose.[66] Statements made about a statute in the legislature, especially by Ministers introducing or defending it, are admissible and may be considered sufficiently reliable to serve as direct or indirect evidence of legislative purpose.[67] In *Re Application under s. 83.28 of the Criminal Code*, Iacobucci J. relied not only on the preamble to the amending Act, but also on Parliamentary debates and on notes presented before the Committees considering the proposed legislation in the House and the Senate, to determine the purpose of the Act and of s. 83.28 in particular.[68] Statements issued by government departments or agencies involved in the development or administration of legis-

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63 There are, of course, exceptions to this general statement. See, for example, the preamble to the *Youth Criminal Justice Act*, as interpreted by Bastarache J. in *R. v. C.D.*, [2005] S.C.J. No. 79, [2005] 3 S.C.R. 668, at paras. 34-35 (S.C.C.).

64 For a more detailed discussion of preambles, see Chapter 14, at §14.25*ff.*

65 For discussion of the use of commission reports in statutory interpretation, see Chapter 23, at §23.69-23.71.

66 See *R. v. St-Onge Lamoureux*, [2012] S.C.J. No. 57, 2012 SCC 57, [2012] 3 S.C.R. 187, at para. 11 (S.C.C.); *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, 2010 SCC 21, [2010] 1 S.C.R. 721, at paras. 11, 14, 23 (S.C.C.); *United States of America v. Kwok*, [2001] S.C.J. No. 19, [2001] 1 S.C.R. 532, at 557-58 (S.C.C.); *Dagg v. Canada (Minister of Finance)*, [1997] S.C.J. No. 63, [1997] 2 S.C.R. 403, at 426-27 (S.C.C.).

67 See *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] S.C.J. No. 66, 2013 SCC 66, [2013] 3 S.C.R. 866, at paras. 43-44 (S.C.C.); *Celgene Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 1, 2011 SCC 1, para. 26 (S.C.C.); *Tele-Mobile Co. v. Ontario*, [2008] S.C.J. No. 12, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 40 (S.C.C.); *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, at paras. 12-13 (S.C.C.); *H.L. v. Canada (Attorney General)*, [2005] S.C.J. No. 24, [2005] 1 S.C.R. 401, at paras. 105-06 (S.C.C.); *Tataryn v. Tataryn Estate*, [1994] S.C.J. No. 65, [1994] 2 S.C.R. 807, at 814-15 (S.C.C.); *Canada (Attorney General) v. Young*, [1989] F.C.J. No. 634, [1989] 3 F.C. 647, at 657 (F.C.A.); *Lor-Wes Contracting Ltd. v. R.*, [1985] F.C.J. No. 178, [1985] 2 C.T.C. 79, at 84-85 (F.C.A.). For discussion of the use of *Hansard* in statutory interpretation, see Chapter 23, at §23.80*ff.*

68 [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at paras. 37-38 (S.C.C.). See also *Németh v. Canada (Justice)*, [2010] S.C.J. No. 56, 2010 SCC 56, [2010] 3 S.C.R. 281, at paras. 46-47 (S.C.C.); *R. v. Tse*, [2012] S.C.J. No. 16, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 28 (S.C.C.).

The majority here relied on the legislative purpose to justify its preference for a narrow interpretation of the word "finances", one that added certain restricting features (namely, deliberateness and directness) to the dictionary meaning of the word.[125]

§9.81 ***Purpose justifies expansive interpretation.*** Purposive analysis may be relied on to justify rejecting an invitation to read a provision narrowly, even though there are legitimate grounds for doing so. In *Canadian OxyChemicals Ltd. v. Canada (Attorney General)*,[126] for example, the Supreme Court of Canada considered s. 487(1) of the *Criminal Code*, which authorized a justice to issue a search warrant if satisfied that the search "will afford evidence with respect to the commission of an offence." The issue was whether a warrant issued under this section was limited to evidence required by the Crown to make out its own case or could extend to evidence relating to potential defences, such as due diligence, which might not even be raised at the trial.

§9.82 Pointing to the intrusive nature of searches and the high value placed on privacy in our law, the accused called for a narrow reading of the section. Major J. relied on a purposive analysis to justify giving full effect to the broad language of the section:

> On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant....[127]
>
> While s. 487(1) is part of the *Criminal Code*, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that *all* relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the *Criminal Code* and the demands of a fair and expeditious administration of justice....[128]

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125 See also *National Trust Co. v. Mead*, [1990] S.C.J. No. 76, [1990] 2 S.C.R. 410 (S.C.C.).

126 [1998] S.C.J. No. 87, [1999] 1 S.C.R. 743 (S.C.C.). See also *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] S.C.J. No. 66, 2013 SCC 66, [2013] 3 S.C.R. 866, at paras. 43-45 (S.C.C.); *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, [2002] 2 S.C.R. 773, at para. 54 (S.C.C.); *R. v. Adams*, [1995] S.C.J. No. 105, [1995] 4 S.C.R. 707, at 720*ff.* (S.C.C.); *Hill and Hill Farms Ltd. v. Bluewater (Municipality)*, [2006] O.J. No. 3674, at paras. 2, 13, 18-19 (Ont. C.A.); *Von Czieslik v. Ayuso*, [2007] O.J. No. 1513, at para. 31*ff.* (Ont. C.A.).

127 *Ibid.*, at 750-51. See also *Peracomo Inc. v. TELUS Communications Co.*, [2014] S.C.J. No. 29, 2014 SCC 29, at para. 24 (S.C.C.); *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36, 2014 SCC 36, at para. 51 (S.C.C.).

128 *Ibid.*, at 751-52.

> It would be undesirable if a narrow reading of s. 487(1) resulted in either inculpatory or exculpatory evidence being lost because of the investigators' inability to secure it.[129]
>
> [Emphasis in original]

§9.83 In the *CanadianOxy* case, purposive analysis is used to justify a refusal to read down the ordinary meaning of a provision. It can also be used to justify rejecting the ordinary meaning of language in favour of a plausible but more expansive reading. As Locke J. wrote in *Canadian Fishing Co. v. Smith*:

> Where the usual meaning of the language falls short of the whole object of the legislature, a more extended meaning may be attributed to the words if they are fairly susceptible of it.[130]

This use of purposive analysis is illustrated by the judgment of the Supreme Court of Canada in *Adam v. Daniel Roy Ltée.*[131] This is one of many cases in which the courts have considered the scope of s. 36 of Quebec's *Labour Code.* Under this section, when an employer transfers a business to a successor, the latter is bound by any certification or collective agreement negotiated by the former and is also "a party to any proceeding relating thereto, in the place and stead of the former employer". The appellant in the case was dismissed by her employer on the same day that he sold his business to the respondent. She alleged that this dismissal was a punishment for her pre-certification union activities and was therefore contrary to ss. 14 to 16 of the Code. She filed a complaint for wrongful dismissal under s. 14. This complaint proved successful and the Commissioner ordered the employer to reinstate her and to pay compensation. The issue was whether the appellant's complaint was a "proceeding relating thereto" [that is, to certification or a collective agreement] within the meaning of s. 36 of the *Code.* If so, the respondent was a party to the complaint and was bound by its result.

§9.84 The respondent argued that the words of the section should be given their ordinary meaning, and if they were, the expression "proceedings relating thereto" would apply to the documents and procedures required for certification or for concluding a collective agreement under the Code but not to complaints

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129 *Ibid.*, at 753.

130 [1962] S.C.J. No. 10, [1962] S.C.R. 294, at 307 (S.C.C.).

131 [1983] S.C.J. No. 48, [1983] 1 S.C.R. 683 (S.C.C.). In *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 740 v. W. W. Lester (1978) Ltd.*, [1990] S.C.J. No. 127, [1990] 3 S.C.R. 644, at 674-75 (S.C.C.) McLachlin J. points out that, "In keeping with the purpose of successorship provisions — to protect the permanence of bargaining rights — labour boards have interpreted 'disposition' broadly to include almost any mode of transfer and have not relied on technical legal forms of business transactions." For other examples of expansive interpretation, see *R. v. Fitzgibbon*, [1990] S.C.J. No. 45, [1990] 1 S.C.R. 1005 (S.C.C.), in which the Supreme Court of Canada interpreted "aggrieved person" in a *Criminal Code* compensation provision as including the Law Society that had paid back the victim of a solicitor's fraud.

> domestic offences, it would have been much easier to do so directly, and I cannot imagine why it would have done so in the General Part of the Code.[27]

The reasoning in this passage is persuasive and illustrates the power of a well done scheme analysis.

REGULATIONS

§13.16 ***Introduction.*** A regulation is a form of delegated legislation in which the delegated authority makes substantive law. It is well-established that, subject to few constraints, Canadian legislatures can delegate whatever powers they possess under *The Constitution Act, 1867* to whatever persons or bodies they choose.[28] So long as they remain able to withdraw the delegated power, the delegation falls short of impermissible abdication.

§13.17 At the federal level, regulations are broadly defined in the *Interpretation Act* to include orders, rules, tariffs, proclamations, by-laws and other instruments made under a power conferred by an Act.[29] Similar definitions are found in provincial Acts. In these and other contexts, the term is thus used as a loose synonym for delegated legislation.

§13.18 ***Interpretation of regulations.*** It is well-established that delegated legislation, like Acts of the legislature, must be interpreted in accordance with

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27 *Ibid.*, at paras. 32-35. For other examples of interpretation based on scheme analysis, see *R. v. Craig*, [2009] S.C.J .No. 23, 2009 SCC 23, [2009] 1 S.C.R. 762, at paras. 43-45 (S.C.C.); *Société de l'assurance automobile du Québec v. Cyr*, [2008] S.C.J. No. 13, [2008] 1 S.C.R. 338, 2008 SCC 13, at para. 56*ff.* (S.C.C.); *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at para. 16*ff.* (S.C.C.); *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] S.C.J. No. 51, [2004] 3 S.C.R. 152, at para. 27*ff.* (S.C.C.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84, at para. 60*ff.* (S.C.C.); *Opetchesaht Indian Band v. Canada*, [1997] S.C.J. No. 50, [1997] 2 S.C.R. 119 (S.C.C.); *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213, at paras. 134-46, 149, 156 (S.C.C.); *R. v. Bernshaw*, [1994] S.C.J. No. 87, [1995] 1 S.C.R. 254 at 271-72 (S.C.C.); *R. v. Chartrand*, [1994] S.C.J. No. 67, [1994] 2 S.C.R. 864, at para. 31 (S.C.C.); *R. v. Deruelle*, [1992] S.C.J. No. 69, [1992] 2 S.C.R. 663 (S.C.C.); *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] S.C.J. No. 13, [1992] 1 S.C.R. 385 (S.C.C.); *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] S.C.J. No. 68, [1989] 1 S.C.R. 1722, at 695, 704, 707 (S.C.C.); *R. v. Thompson*, [1990] S.C.J. No. 104, [1990] 2 S.C.R. 1111, at 609, 611-12 (S.C.C.), *per* La Forest dissenting; *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85, at 130-34 (S.C.C.); *Waldick v. Malcolm*, [1991] S.C.J. No. 55, [1991] 2 S.C.R. 456 (S.C.C.); *Rawluk v. Rawluk*, [1990] S.C.J. No. 4, [1990] 1 S.C.R. 70, at 339, 348 (S.C.C.).

28 For discussion and analysis of the relevant cases, see J.M. Keyes, *Executive Legislation* (Markham, ON: Butterworths, 1992), at pp. 40*ff.*

29 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2. Note that this definition applies to the provisions of the *Interpretation Act*; it does not purport to apply to all federal legislation. See also the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 2.

Driedger's modern principle.[30] Generally speaking, the rules governing the meaning of statutory texts and the types of analysis relied on by interpreters to determine legislative intent apply equally to regulations. There are some differences, however. As explained by Binnie J. and Bastarache J. in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*,[31] regulations must be read in the context of their enabling Act, having regard to the language and purpose of the Act in general and more particularly the language and purpose of the relevant enabling provisions.[32] Regulations are normally made to complete and implement the statutory scheme and that scheme therefore constitutes a necessary context in which regulations must be read.

§13.19 In the *Bristol-Myers* case, the Court rejected the "plain meaning" of s. 5(1.1) of the *Patented Medicines (Notice of Compliance) Regulations* in favour of an interpretation that harmonized the regulatory provision with the Act as a whole. Bristol-Myers had been issued a patent for a drug Taxol which contained paclitaxel, a medicine in the public domain. Biolyse subsequently discovered a new way to produce paclitaxel and applied to the Minister of Health for a notice of compliance, which was a precondition for marketing its product. To obtain the notice Biolyse prepared a "new drug submission". Because it was relying on a new botanical source for the paclitaxel, it could not make an abbreviated submission referencing the work done by Bristol-Myers.

§13.20 Bristol-Myers alleged that Biolyse was in breach of s. 5(1.1) of the Notice of Compliance Regulations which applied to persons meeting the following description:

> 5(1.1) ... where a person files or has filed a submission for a notice of compliance in respect of a drug that contains a medicine found in another drug that has been marketed in Canada pursuant to a notice of compliance issued to a first person ....

On its face this language appeared to apply to Biolyse. It had submitted a new drug submission for a drug containing paclitaxel, a medicine found in Taxol, and

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30 See, for example, *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] S.C.J. No. 66, 2013 SCC 66, at paras. 36-37, 46 (S.C.C.); *Contino v. Leonelli-Contino*, [2005] S.C.J. No. 65, [2005] 3 S.C.R. 217, at para. 19 (S.C.C.); *Glykis v. Hydro-Québec*, [2004] S.C.J. No. 56, [2004] 3 S.C.R. 285, at para. 5 (S.C.C.); *Apotex Inc. v. Canada (Minister of Health)*, [2012] F.C.J. No. 1659, 2012 FCA 322, at paras. 24-25 (F.C.A.); *Walsh v. Ontario (Disability Support Program)*, [2012] O.J. No. 2980, 2012 ONCA 463, at para. 36 (Ont. C.A.); *Newfoundland and Labrador (Consumer Advocate) v. Newfoundland Power Inc.*, [2006] N.J. No. 80, 2006 NLCA 20, at para. 17 (N.L.C.A.).

31 [2005] S.C.J. No. 26, [2005] 1 S.C.R. 533 (S.C.C.).

32 *Ibid.*, at para. 38 (Binnie J.) and paras. 97-101 (Bastarache J. dissenting). See also *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] S.C.J. No. 66, 2013 SCC 66, at paras. 36, 46 (S.C.C.); *Wood v. Schaeffer*, [2013] S.C.J. No. 71, 2013 SCC 71, [2013] 3 S.C.R. 1053, at para. 32 (S.C.C.); *Weller v. Reliance Home Comfort Limited Partnership*, [2012] O.J. No. 2415, 2012 ONCA 360, at para. 15 (Ont. C.A.); *Hamid v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 896, at para. 20 (F.C.A.).

> Such an argument is difficult to square with s. 3(1) of the *Narcotic Control Regulations* which authorizes the police to possess narcotics that come to them from "sting" operations....
>
> Even though the authority [to possess] is contained in a regulation rather than the Act itself, it is clear that the Regulation would be entirely unnecessary and superfluous if the Act did not apply to the police in the first place.[40]

The Court here, in effect, accepts the Governor in Council's opinion that the Act applied to police as it would to any other person, even though the possession or trafficking by the police was in the service of law enforcement.

RELATED LEGISLATION

§13.25 ***Introduction.*** When interpreting legislation, common law courts generally consider any statutes *in pari materia*, that is, any statutes dealing with the same subject matter as the statute to be interpreted. Their concern is to ensure coherence and consistency between rules dealing with the same thing.

§13.26 ***Governing principle.*** Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principle was stated by Lord Mansfield in *R. v. Loxdale*:

> Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.[41]

In *Vancouver Oral Centre for Deaf Children Inc. v. British Colombia (Assessor of Area No. 09 – Vancouver)*, Smith J.A. wrote:

> The "entire context" includes not only the whole of the statute in which the words are contained, but includes other statutes *in pari materia*.[42]

In *Point-Claire (City) v. Quebec (Labour Court)*, Lamer C.J. wrote:

> There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among statutes should prevail over discordant ones ....[43]

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40 *Ibid.*, at para. 26. In *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 58, [2005] 2 S.C.R. 706, at para. 92 (S.C.C.), Deschamps J. (dissenting) relied on regulations that had been declared *ultra vires* for "guidance with respect to legislative intent". In *Sero v. Canada*, [2004] F.C.J. No. 71, at para. 34 (F.C.A.), the Federal Court of Appeal rejected a proposed interpretation of a term in the Act because it was inconsistent with regulations made under the Act. See also *R. v. Verma*, [1996] O.J. No. 4418, 31 O.R. (3d) 622, at 628 (Ont. C.A.).

41 (1758), 1 Burr. 445, at 447, 97 E.R. 394.

42 [2002] B.C.J. No. 2715, 2002 BCCA 667, at para. 17 (B.C.C.A.).

43 [1997] S.C.J. No. 41, [1997] 1 S.C.R. 1015 (S.C.C.).

In *Euro-Excellence Inc. v. Kraft Canada Inc.*, after referring to "the principle of statutory interpretation that requires coherent interpretation of statutes *in pari materia*," Bastarache J. wrote:

> According to this principle, the *Copyright Act* ought not only to be interpreted with an eye to the internal coherence of its own scheme; it must also not be interpreted in a fashion which is inconsistent with the *Trade-marks Act*....[44]

The provisions of related legislation are read in the context of the others and the presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act. Definitions in one statute are taken to apply in the others and any purpose statements in the statutes are read together.

§13.27 In referring to two or more statutes on the same subject the courts rarely inquire which statute was enacted first. When the issue does arise, however, it sometimes causes confusion.[45] The correct view is that previously enacted legislation may be considered and relied on in the same manner and to the same degree as subsequently enacted legislation — and vice versa.[46]

§13.28 ***Defined terms.*** Section 15(2) of the federal *Interpretation Act* provides:

> Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> ...
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.[47]

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44 [2007] S.C.J. No. 37, 2007 SCC 37, [2007] 3 S.C.R. 20, at para. 83 (S.C.C.). See also *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, at para. 34-39 (S.C.C.); *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, [2011] S.C.J. No. 23, 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 117 (S.C.C.); *R. v. Ulybel Enterprises Ltd.*, [2001] S.C.J. No. 55, 2001 SCC 56, [2001] 2 S.C.R. 867, at paras. 50-51 (S.C.C.); *Nova, an Alberta Corp. v. Amoco Canada Petroleum Co.*, [1981] S.C.J. No. 92, [1981] 2 S.C.R. 437, at 448-49 (S.C.C.); *Keewatin v. Ontario (Minister of Natural Resources)*, [2013] O.J. No. 1138, 2013 ONCA 158, at para. 194 (Ont. C.A.); *Thunderbird Holdings Ltd. v. Manitoba*, [2013] M.J. No. 292, 2013 MBCA 78, at para. 91 (Man. C.A.); *Fishing Lake Metis Settlement v. Metis Settlements Appeal Tribunal Land Access Panel*, [2003] A.J. No. 563, 15 Alta. L.R. (4th) 8, at 36 (Alta. C.A.); *Armbrust v. Ferguson*, [2001] S.J. No. 703, 2001 SKCA 122, at para. 39*ff.* (Sask. C.A.); *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.*, [2001] A.J. No. 864, 2001 ABCA 174, at paras. 21-22 (Alta. C.A.).

45 See the dissenting judgment of Pratte J. in *Township of Goulbourn v. Ottawa-Carleton (Regional Municipality)*, [1979] S.C.J. No. 118, [1980] 1 S.C.R. 496, 101 D.L.R. (3d) 1, at 23 (S.C.C.).

46 *Ibid.*, at 15-16; *Hayes v. Mayhood*, [1959] S.C.J. No. 36, [1959] S.C.R. 568, 18 D.L.R. (2d) 497, at 504 (S.C.C.).

47 R.S.C. 1985, c. I-21, s. 15(2). A comparable provision is not found in provincial and territorial Interpretation Acts.

the rule of law if those components cannot in fact be relied on. Finally, in contemporary law, there is no sound basis for distinguishing between substantive provisions and descriptive components. As psycholinguistic studies show, the message communicated by a text is a product of many features — the meaning of words, the placement of words, the fonts and format, the genre, the circumstances of speaking and the interaction of these variables. It is contrary to the actual practice of reading for courts to draw a sharp distinction between substantive provisions and descriptive components.[8]

§14.11 Given these considerations, it should be acceptable for interpreters to look to the descriptive components of legislation in every case, and at any stage of interpretation, for help in understanding the meaning and purpose of an enactment. There should be no formal restrictions on the use of these features in interpretation. Rather, the weight they receive should depend on the circumstances — the function of the particular component, the clarity of the provision to be interpreted and the like.

TITLES

§14.12 ***General.*** Parliamentary procedure requires that all bills be given a title indicating the purpose and scope of the proposed Act. Most bills have a long title that is set out at the beginning of the Act, before the enacting clause and that begins with the words "An Act respecting ..." or "An Act to ..." or similar words. Bills that have a long title often include a short title set out in a section, either the first or the last, that is enacted as law. In some Canadian jurisdictions, bills now receive a short title only, set out at the beginning of the Act before the enacting clause.

§14.13 At one time the long title was not considered an integral part of an enactment. In modern Canadian practice, however, the long title is inserted by the drafter and is "carried" in committee after the other clauses are passed, so it undoubtedly forms part of the Act.[9] This is explicitly confirmed by some Interpretation Acts and is implicit in others.[10] The internal status of titles was confirmed by the Supreme Court of Canada in *Committee for the Commonwealth of Canada v. Canada*.[11] One of the issues in the case was whether s. 7 of the

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8 See Karen Shriver, *Dynamics in Document Design: Creating Texts for Readers* (New York: Wiley & Sons, 1997), especially Chapters 5-7.

9 A. Fraser, W. Dawson, J. Holtby, eds., *Beauchesne's Rules and Forms of the House of Commons of Canada*, 6th ed. (Toronto: Carswell, 1989), at pp. 374-75.

10 R.S.A. 2000, c. I-8, s. 12; R.S.B.C. 1996, c. 238, ss. 9, 11; C.C.S.M. c. I80, ss. 13, 14; R.S.N.B. 1973, c. I-13, s. 15 [am. 1982, c. 33, s. 4], s. 16 [am. 1982, c. 33, s. 5, 1992, c. 13, s. 1, 2005, c. Q-3.5, s.18, 2011, c.20, s. 10]; R.S.N.L. 1990, c. I-19, ss. 14-15; R.S.N.S. 1989, c. 235, ss. 11-12; S.O. 2006, c. 21, Sch. F, ss. 69-70; R.S.P.E.I. 1988, c. I-8, ss. 10-11; CQLR, c. I-16, ss. 17, 40; S.S. 1995, c. I-11.2, ss. 11-12; R.S.N.W.T. 1988, c. I-8, ss. 11-12; R.S.Y. 2002, c. 125, ss. 8-9.

11 [1991] S.C.J. No. 3, [1991] 1 S.C.R. 139 (S.C.C.).

Government Airport Concession Operations Regulations, which prohibited unauthorized advertising or soliciting at an airport, applied to political advertising or solicitation. In concluding that it did not, Lamer C.J. relied on both the long and the short title:

> In considering the context in which s. 7 of the Regulations appears, I shall examine first the full title of the Regulations and then the short title. Both form an integral part of the text of the Regulations and may validly be used by anyone interpreting them in order to clarify the meaning of other provisions of the Regulations.... The full title of the Regulations reads as follows: "*Regulations Respecting the Control of Commercial and Other Operations at Government Airports*".... The very idea of an operation, in my opinion, carries with it a connotation of industry or profit; this term seems to me to have intrinsically commercial overtones.
>
> The short title of the said Regulations reads as follows: "*Government Airport Concession Operations Regulations*". It will be seen from reading this version of the title that the commercial emphasis given to the application of the Regulations is still more clearly defined by the reference to the operation of *concessions*. I cannot imagine a concession being operated for any purpose other than a commercial or lucrative one. Though the short title "of necessity ... sacrifices precision for concision", it is an indication of the federal legislature's intention to limit the scope of the Regulations to commercial matters.[12]
>
> [Emphasis in original]

Lamer C.J. here speaks of titles in the context of regulations, but his remarks apply equally to statutes.

§14.14 ***Uses of long title.*** Under parliamentary procedure, the long title is supposed to cover everything contained in a bill.[13] If the provisions to be enacted exceed the purpose or scope of the title, either the title must be amended or the excessive provisions must be dropped.[14] In light of this procedural rule, the long title is used in interpretation to delineate the purpose and scope of an Act. As Ferguson J.A. wrote in *Hughes v. J.H. Watkins & Co.*:

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12 *Ibid.*, at 162-63. See also *O'Connor v. Nova Scotia Telephone Co.*, [1893] S.C.J. No. 29, 22 S.C.R. 276, at 292-93 (S.C.C.); *DeWare v. R.*, [1954] S.C.J. No. 12, [1954] S.C.R. 182 (S.C.C.).

13 "The objects (also referred to as the principle or scope) of a bill are stated in its long title, which should cover everything contained in the bill as it was introduced. Amendments, however, are not necessarily limited by the title of the bill." A. Fraser, W. Dawson, J. Holtby, eds., *Beauchesne's Rules and Forms of the House of Commons of Canada*, 6th ed. (Toronto: Carswell, 1989), at p. 374.

14 *Ibid.*, p. 209.

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0112

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Canadian Niagara Power Inc. for an order approving or fixing just and reasonable rates and other charges for the distribution of electricity to be effective January 1, 2013.

BEFORE: Paula Conboy
Presiding Member

Cathy Spoel
Member

DECISION AND ORDER

November 22, 2012

Canadian Niagara Power Inc. ("CNPI") filed a cost of service application ("application") with the Ontario Energy Board (the "Board") on May 11, 2012. The application was filed under section 78 of the *Ontario Energy Board Act, 1998* (the "Act"), seeking approval for changes to the rates that CNPI charges for electricity distribution to be effective January 1, 2013. The Board assigned the application file number EB-2012-0112.

A description of the procedural matters related to this application can be found in the Board's partial decision issued November 8, 2012 accepting the Settlement Agreement reached by the parties in this proceeding, namely CNPI, Energy Probe Research Foundation, School Energy Coalition ("SEC") and Vulnerable Energy Consumers Coalition. The full record of the proceeding is also available on the Board's website.

This decision provides the Board's determination on the following threshold question set out in Procedural Order No. 4:

> "Should the Board's findings and instructions from the Combined [Payments in Lieu of Taxes] PILs proceeding, and from other Board decisions pertaining to PILs, be applied to CNPI?"

Submissions on the threshold question were received from CNPI, SEC and Board staff.

In its original filing in this application, CNPI used the Board's spreadsheet, which included the methodology developed as result of the Board's Decision and Order in the Combined PILs Proceeding (EB-2008-0381). This resulted in a proposed refund of a credit balance in "Account 1562 – Deferred Payments in Lieu of Taxes" ("PILs") in the amount of $1,119,031, the sum of the balances for each of CNPI's three service areas (Fort Erie, Eastern Ontario Power, and Port Colborne).

In a letter dated August 27, 2012 amending its application in regard to Account 1562, CNPI withdrew this proposal. CNPI stated that after filing its original application it had concluded that it was not required to use Account 1562 for its Fort Erie and Eastern Ontario Power service areas because the company is not subject to section 93 of the Electricity Act.

CNPI stated that as a privately owned company it pays taxes in accordance with the *Income Tax Act* and does not remit PILs. CNPI also pointed out that further

confirmation that Account 1562 did not apply to it was that the Board's Decision and Order in the Combined PILs Proceeding excluded CNPI as a beneficiary of the principles derived from that proceeding.

The Combined PILs Proceeding was a proceeding held by the Board to determine the accuracy of the final account balances in Account 1562 for the period October 1, 2001 to April 30, 2006 (EB-2008-0381).

"Account 1562 - Deferred Payments in Lieu of Taxes", is described in the Uniform System of Accounts, which forms part of the Board's Accounting Procedures Handbook ("APH") as an:

> "account [that] shall record the amount resulting from the Board-approved PILs methodology for determining 2001 Deferral Account Allowance and the PILs proxy amount determined for 2002 and subsequent years" .

The amounts to be recorded refer to the Board approved PILS methodology and the recording of variances between the Deferral Account Allowance and the actual results reflected in a utility's tax filing (e.g. to the Ministry of Finance for payments in lieu of tax).

SEC argued that the APH did not explicitly state that the amount resulting from the Board approved PILs methodology was intended for only distributors who are now subject to section 93. In support of this SEC argued that the use of "e.g. to the Ministry of Finance for payments in lieu of taxes" in the APH is an indication that the intention was that the APH contemplated tax amounts remitted other than PILs to the Ministry of Finance (such as taxes paid by CNPI). CNPI argued that the difference between 'e.g.' and 'i.e.' is obscure and that these two terms are often used interchangeably. CNPI argued that it would be placing too much emphasis on the use of 'e.g.' to consider this an indication of the Board's intention for Account 1562, especially since the Board entitled the account "Deferred Payments in Lieu of Taxes". CNPI submitted, and the Board agrees, that if it had been the Board's intention to expand the meaning of Account 1562 in the APH to this extent, the Board would have had more effective, clearer and easier ways to do so. The term 'e.g.' cannot be used as an indication of the Board's intention for Account 1562

Account 1562 was created in 2002 at the time that the previously tax-exempt municipal electricity utilities ("MEUs") were first required to make PILs as a result of Section 93 of the *Electricity Act*. This was a new expense that MEUs were required to incur beginning October 1, 2001. However, they needed a mechanism to recover these PILs amounts in rates. The Board developed such a mechanism in time for setting March 1, 2002 electricity distribution rates.

There were three types of owners of distribution companies at the time: MEUs (the vast majority), provincially owned (Hydro One Networks and its affiliates), and privately owned, such as CNPI. While the provincially owned utilities were not subject to the new requirements under section 93, they were required to remit PILs under section 89 of the Electricity Act, having also been previously exempt from taxes.

Privately owned utilities such as CNPI had, however, been paying taxes for many years prior to 2001, so there was no change in their status in 2001, and no new category of expense to be recovered in rates.

CNPI repeated that Account 1562 specifically refers only to PILs. CNPI pointed out that unlike MEUs, it had no deferred balances for the time period October 1, 2001 to December 31, 2001 to record in the account nor did it record any amounts after that time as it did not remit PILs.

CNPI reminded the Board that rates were initially set based on historical expenses; however MEUs had never recorded PILs expenses so the Board calculated a PILs proxy to be embedded into base rates and established a pass-through mechanism in the form of Account 1562 for those utilities to which PILs would now apply. It is CNPI's position that the Board did not intend all taxes to be considered a pass through, only PILs.

CNPI argued that in its case estimating their tax expense wasn't any different than estimating any other operating expenses as it had been paying taxes under the *Income Tax Act* for years, and therefore it did not require a variance account to capture this uncertainty. CNPI reiterated that the APH as it was back then, clearly showed that Account 1562 dealt with PILs, and not income taxes. CNPI argued that the APH could have articulated that the account was for income taxes as well as for deferred payments in lieu of taxes, but it did not.

CNPI further noted that as part of the Board's Reporting and Record-keeping Requirements, CNPI has historically showed a zero balance in Account 1562 for all three of its service areas demonstrating that it has not been using the account nor has it filed annual reconciliations between estimated and actual taxes, with the exception of the Port Colborne service area which showed a balance in Account 1562 relating to the October 2001 to April 2002 PILs it remitted before CNPI started to operate its assets. CNPI argued that it would be retroactive ratemaking for the Board to determine now that the account should have applied to CNPI and record today what should have been recorded in the past.

CNPI noted that the methodology for filing rate applications in 2002 was the use of a Rate Adjustment Model ("RAM"), which was a very mechanistic approach. The RAM provided the calculation of a PILs proxy to be included into base rates. CNPI stated that the only way it could recover its tax costs in its 2002 rate filing was to include the amount in the PILs proxy cell to the RAM spreadsheet, but repeated the fact that they had confidence in their calculated tax expense because they had been paying taxes for decades.

Board Staff and SEC's position is that Account 1562 is broader than just PILs. Staff and SEC argued that the intention was that taxes, whether PILs or income taxes were meant to be a pass through and therefore Account 1562 was to be used by utilities that estimated their taxes as well as those that estimated PILs.

In addition, SEC suggested that the Board consider whether it was fair to allow CNPI to gain from a significant windfall if not required to reconcile Account 1562.

The Board accepts CNPI's argument that its review should be a legal consideration about the application of Account 1562 and whether or not the account when it was created, encompassed CNPI, and not a consideration of whether it seems to be unfair to CNPI customers relative to other customers in the province. In reaching a decision the Board may look at consistency across decisions but must take into account all aspects of the specific fact situation and the interplay amongst facts and issues within the application. The Board may well reach a different decision in two cases which present similarities in their fact situations. For the same reason, the Board may reach the same decision in two cases which present different fact situations.

The Board finds that it should have regard first to the Board documents available to distributors at the time Account 1562 was established. Regrettably, not all of these were placed on the record for consideration during the argument phase of the hearing so the Board did not have the benefit of submissions on those. However, they are all readily available on the Board's website. As they form part of the public record, the Board will take notice of them and refer to them in this decision.

The guidance available to distributors at the time rates were set in 2002 included:

- the APH;
- the December 21, 2001 Filing Guidelines for March 1, 2002 Distribution Rate Adjustments and their related appendices; and,
- the Rate Adjustment Model, a spreadsheet to be completed by distributors.

As noted in the December 21, 2001 Filing Guidelines, the rate adjustments to take place on March 1, 2002 included recovery of the 2001 PILs deferral account allowance, and a pass through of the 2002 PILs proxy (estimate).

Those guidelines include the following:

With respect to the 2001 PILs Deferral Account Allowance, the guidelines state:

> Ontario electricity distribution utilities have been subject to payments in Lieu of taxes (PILs) since October 1, 2001. These expenses for 2001 have not been included in distribution rates but have been recorded in a deferral account. The Board has issued a methodology for utilities to calculate the PILs deferral account allowance that may be recoverable. The methodology is shown in Appendix "B" to these guidelines.

With respect to the 2002 PILs Proxy (estimate) the guidelines state:

> Rate adjustments to reflect the 2002 Payments in Lieu of taxes (PILs) will also be made on March 1, 2002. The Board has issued a methodology for utilities to calculate the recoverable 2002 PILs proxy which is attached as Appendix "B" to these guidelines.

Appendix B provides details of the methodology but states as its last paragraph that:

> Please note that the model is designed to address PILs imposed under section 93 of the *Electricity Act*. Contact the above staff regarding how it should be applied in the case of utilities paying proxy taxes under different rules, or paying regular corporate taxes.

There is no evidence as to what advice staff gave any utilities that enquired or indeed whether any such enquiries were made.

The Board finds however that the wording is an indication that the Board at the time recognized that the PILs model might not be applicable in all respects to utilities paying regular taxes (such as CNPI).

In December 2001, the Board also posted some Frequency Asked Questions ("FAQs") on the APH. These were not produced at the hearing. One question (#15) dealt with PILs:

> Will a deferral account be established for the fourth quarter 2001 and whole year 2002 PILs estimates? Will an interest return be allowed on the deferral account?

The answer says:

> Account 1562, Deferred Payments in Lieu of taxes (PILs) should be used to record the amount resulting from the use of the Board-approved PILs methodology for determining the 2001 Deferral Account Allowance and the PILs proxy amount for 2002 and subsequent years.

During the oral hearing in this proceeding, Board Staff produced a copy of the FAQs issued in April 2003 (which amended those issued in 2001) to read as follows:

> The following guidance with respect to accounting entries in the PILs account also apply to utilities which pay the non-section 93 income and capital taxes and which use the SIMPIL model to determine the amount of income and capital taxes that they can recover from customers. The acronym PILs used in the following guidance stands for 'payments in lieu of taxes', section 93 taxes, and for utilities which actually pay income and capital taxes, PILs may be read to be such income and capital taxes paid to tax authorities."

There was argument during the hearing as to the status of the FAQs as a source of policy guidance to the Board in rendering decisions. Board Staff argued that the Board

could rely on the 2003 FAQs as one of the expressions of Board policy and, in effect, an enhancement of the detail in the APH. SEC also agreed with Board staff that in the December 18, 2009 threshold decision in the Combined PILs Proceeding the Board Panel came to the conclusion that supporting documents, such as FAQs to the APH, regarding Account 1562 were representative of the Board's direction.

Board staff's position was that it is clear from the 2003 FAQs that the Board's policy is applicable to both distributors that pay PILs in accordance with section 93, as well as distributors that pay taxes to tax authorities. Board staff argued that these FAQs clearly indicate the Board's intention that the acronym PILs is applicable to any tax proxy calculation for the purpose of calculating distribution rates, regardless of whether the distributor is subject to section 93 of the *Electricity Act*. Board staff submitted that following the Board's guidance CNPI should have recorded balances in Account 1562.

CNPI argued that the FAQs may have weight to determine the methodology of calculating Account 1562 but have no weight as an instrument of the Board in determining the issue of to whom the account applies. In reply CNPI noted that the FAQs were not issued by an order nor were they amendments to the APH. In addition, CNPI argued that it would have been inappropriate to expand the scope of Account 1562 during the Bill 210 rate freeze, which lasted from November, 2002 until January, 2005. CNPI submitted that if the Board wanted to make a change after Bill 210 was lifted, it should have made the appropriate adjustment through an amendment to the APH or by way of an order. Such explicit adjustments were not forthcoming.

The Board agrees with Board Staff and SEC that FAQs can be referred to as a source of policy guidance, but that they have to be read in the context of the relevant provisions of the APH, and to the extent that they do not support the plain wording of the APH, the APH should be preferred. The Board finds that the decision on the applicability of the FAQs in the Combined PILs Proceeding was with respect to clarifying the methodology and not to whom the account applies. In addition, the Board did not turn its mind to this question in the Combined PILs Proceeding. In this case, the Board is also faced with the practical difficulty that there are two versions of the FAQs. The 2001 FAQs are part of the "package" of guiding documents available at the time rates were initially set and, in the Board's view, are preferred over the later, 2003 version, for the purposes of this decision.

While Board Staff argued that when the Board introduced the PILs tax proxy approach in 2001, there was no regulation, rule or policy statement that privately-held utilities would be exempt from the true-up exercise that the PILs approach entailed, the Board finds that it is not nor has it ever been a standard regulatory principle that costs are a pass through. Variance accounts are established on an exception basis and when the Board accepts that there is significant uncertainty.

As outlined previously, rates were set for electricity companies in 2002 on a historical year basis. MEUs had never paid income tax expenses, so there was no historical tax expense to use in the 2002 rates. The Board therefore developed a PILs proxy and established a variance account to capture both the deferred amount for 2001 and the difference between the PILs proxy and the actual amount paid. As a result, the 2002 filing included both the PILs proxy for 2002 and the deferred payment for October to December 2001, an allowance for 15 months of PILs, with the expectation the amounts would be trued up later.

CNPI, on the other hand, had been paying income taxes for years and therefore had an expense on which to base its 2002 rates. The Board also notes that the amount in rates for 2002 would not, as it did with MEUs, need to contain any amounts for the last 3 months of 2001 as those had already been recovered in CNPI's 2001 rates.

While the Board agrees with Board Staff that the approach of a PILs proxy was new in 2001-2002, the whole concept of taxes was new for the MEUs at the time. It was not for CNPI. The Board finds that if the intention was to fundamentally change the regulatory treatment of an existing expense as one estimated and borne by the utility in the normal course, to an expense to be passed through to ratepayers to be reconciled later, it should have been clearly and unambiguously communicated to all the affected utilities at the time. In the Board's view, there is a significant level of ambiguity in the Board documents relating to the scope of the application of Account 1562. This suggests to us that the Board never clearly turned its mind to this issue at the time.

The Board finds that the description of Account 1562 in the APH as applying to Deferred Payments in Lieu of Taxes is consistent with this new expense for MEUs, but nothing in its wording suggests clearly enough that it also applies to CNPI and others whose taxes were neither deferred, nor payments in lieu of taxes.

The Board finds that the 2001 filing guidelines and 2001 FAQs reinforce this view. It was not until 2003 that the FAQs reference utilities in CNPI's position. However, the Board notes that these were issued during the provincial rate freeze (which lasted from December 2002 to January 2005); as a practical matter, neither utilities nor the Board were likely to revisit their accounting procedures and filings once the 2002 filing had been made. The Board agrees with CNPI that the 2003 FAQs could not have been used to expand the scope of to whom the account applies.

Board Staff also argued other non-section 93 distributors, namely Hydro One Brampton Networks Inc. (Hydro One Brampton) disposed of a balance in Account 1562 in its 2012 IRM rate application as per the direction given in the Combined PILs Proceeding. Board staff referred to Hydro One Brampton's case as an example of the "acceptance in the industry" that distributors not subject to section 93 were also to use Account 1562.

CNPI agreed that while Hydro One Brampton is not subject to section 93, it is subject to section 89 which also provides for PILs, and therefore account 1562 would apply to it.

The Board agrees with CNPI's argument that the term 'industry acceptance' is an irrelevant term and that the Board's rules and policy should be the only considerations in determining Account 1562 applicability to CNPI. Further, the Board agrees that Hydro One Brampton is not indicative that account 1562 applies to all non-section 93 distributors as the company is required to pay PILs, albeit under section 89.

The question then remains, should the Board treat CNPI the same as most other electricity distribution companies that have pass through of PILs or should it treat CNPI the same as other tax paying entities that are required to estimate their tax expenses in rates.

The Board finds that CNPI is not required to apply the methodology from the Combined PILs proceeding with respect to its Fort Erie and Eastern Ontario Power service areas as it is not sufficiently clear to the Board that that the pass through of taxes was intended to apply to those businesses which were already paying taxes without true-up.

SEC argued that if the Board did not agree that Account 1562 applies to all three of CNPI's service areas that the account should at least apply to the Port Colborne service area because during the time in question (2002 to 2006) Port Colborne was a municipally owned distributor.

The Board notes that CNPI has been operating Port Colborne Hydro Inc.'s assets under a lease agreement since April15, 2002. The Board notes that since that date CNPI has paid taxes on the revenues as part of CNPI consolidated taxes. However, during the period prior to April 2002 Port Colborne may have paid PILs to the Ministry of Finance. Notably, in the 2002 rate filing for the Port Colborne service area, there is an amount recorded to Account 1562. Having set up the account and used it in 2002, the Board finds that CNPI must apply the methodology from the Combined PILs proceeding and subsequent Board decisions for the Port Colborne Service Area.

The Board recognizes that it did not hear submissions on the quantum of Account 1562. The Board will require CNPI to dispose of the balance in Account 1562 of the principal amounts recorded to Account 1562 for the Port Colborne service area from October 1 2001 to April 15, 2002 as well as carrying charges to December 31, 2012. These amounts should be refunded to/recovered from customers in the Port Colborne service area. Detailed calculations in support of the amounts must be filed as part of CNPI's draft Rate Order.

Parties may file submissions on the quantum claimed by CNPI as part of any comments on the draft Rate Order.

THE BOARD THEREFORE ORDERS THAT:

1. CNPI shall file with the Board, and shall also forward to intervenors, a draft Rate Order attaching a proposed Tariff of Rates and Charges reflecting the Board's findings in this Decision within **7 days** of the date of the issuance of this Decision. The draft Rate Order shall also include customer rate impacts and detailed supporting information showing the calculation of the final rates including the Revenue Requirement Work Form in Microsoft Excel format.

2. Board staff and intervenors shall file any comments on the draft Rate Order with the Board and forward to CNPI within **7 days** of the date of filing of the draft Rate Order.

3. CNPI shall file with the Board and forward to intervenors responses to any comments on its draft Rate Order within **4 days** of the date of receipt of Board staff and intervenor comments.

4. Intervenors shall file with the Board and forward to CNPI their respective cost claims within **7 days** from the date of issuance of the final Rate Order.

5. CNPI shall file with the Board and forward to intervenors any objections to the claimed costs within **14 days** from the date of issuance of the final Rate Order.

6. Intervenors shall file with the Board and forward to CNPI any responses to any objections for cost claims within **21 days** of the date of issuance of the final Rate Order.

7. CNPI shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings with the Board must quote the file number EB-2012-0112, and be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca.
If the web portal is not available, parties may e-mail their documents to the attention of the Board Secretary at BoardSec@ontarioenergyboard.ca. All other filings not filed via the Board's web portal should be filed in accordance with the Board's *Practice Directions on Cost Awards*.

DATED at Toronto, November 22, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

A-38-06

2007 FCA 198

The Minister of Citizenship and Immigration (*Appellant*)

v.

Daniel Thamotharem (*Respondent*)

and

The Canadian Council For Refugees and **The Immigration Refugee Board** (*Interveners*)

INDEXED AS: THAMOTHAREM v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.A.)

Federal Court of Appeal, Décary, Sharlow and Evans JJ.A.—Toronto, April 16; Ottawa, May 25, 2007.

Citizenship and Immigration — Immigration Practice — Appeal from Federal Court decision setting aside decision of Refugee Protection Division (RPD) of Immigration and Refugee Board (IRB) dismissing respondent's claim for refugee protection — Cross-appeal from Federal Court's finding Guideline 7 of Guidelines Issued by the Chairperson pursuant to the Immigration and Refugee Protection Act (IRPA) 159(1)(h) not invalid on ground depriving refugee claimants of right to fair hearing — Guideline 7 providing that, except in exceptional circumstances, Refugee Protection Officer (RPO) to start questioning claimant in refugee protection claim — Per Evans J.A. (Décary J.A. concurring): (1) Refugee claimants deserving high degree of procedural protection but tailored to fit inquisitorial, informal nature of hearing — Fair adjudication of individual rights compatible with inquisitorial process — Procedure in Guideline 7 not breaching IRB's duty of fairness — (2) Administrative agency not requiring express grant of statutory authority to issue guidelines, policies to structure exercise of discretion or interpretation of enabling legislation — *Although* language of Guideline 7 more than "recommended but optional process", not unlawful fetter on discretion, as long as deviation from normal practice in exceptional circumstances not precluded — Evidence not establishing reasonable person would think RPD members' independence unduly constrained by Guideline 7 — (3) Power granted by IRPA, s. 159(1)(h) to Chairperson to issue guidelines broad enough to include guideline concerning exercise of members' discretion in procedural, evidential or substantive matters — Chairperson's guideline-issuing, rule-making powers overlapping — Not unreasonable for Chairperson to choose to implement standard order of questioning through guideline rather than rule of procedure — Appeal allowed, cross-appeal dismissed — Per Sharlow J.A. (concurring): Chairperson's powers under IRPA to issue guidelines, make rules respecting activities, practice, procedure of Board not interchangeable — Standard procedure outlined in Guideline 7 should have been implemented by means of a rule, but neither procedurally unfair nor unlawfully fettering IRB members' discretion.

This was an appeal from a Federal Court decision granting an application for judicial review to set aside a decision of the Refugee Protection Division (RPD) dismissing the respondent's claim for refugee protection. The respondent cross-appealed the finding that Guideline 7 of the *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act* (IRPA) is not invalid because it deprives refugee claimants of the right to a fair hearing. Guideline 7 was issued in 2003 by the Chairperson of the Board pursuant to the statutory power to "issue guidelines . . . to assist members in carrying out their duties" as outlined in the *Immigration and Refugee Protection Act* (IRPA), paragraph 159(1)(*h*). The IRPA also empowers the Chairperson to make rules for each of the three Divisions of Board but these rules must be approved by the Governor in Council and laid before Parliament. The key paragraphs of Guideline 7 provide that the standard practice in a refugee protection claim will be for the Refugee Protection Officer (RPO) to start questioning the claimant (paragraph 19), although paragraph 23 states that the RPD member hearing the claim may, in exceptional circumstances, vary the order of questioning. Guideline 7 was challenged on the grounds that (1) it deprives refugee claimants of the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel; and (2) even if does not breach the duty of fairness, the Chairperson should have introduced the new standard order of questioning as a rule of procedure under the IRPA, paragraph 161(1)(*a*). While the Federal Court held that Guideline 7 is an unlawful fetter on the exercise of discretion by individual RPD members to determine the order of questioning at a hearing in the absence of a provision in either the IRPA or the *Refugee Protection Division Rules* (Rules), it rejected the respondent's argument that it deprives refugee claimants of the right to a fair hearing and distorts the "judicial" role of the member hearing the claim. It remitted the matter for re-determination on the basis that Guideline 7 is an invalid fetter on the RPD's discretion in the conduct of the hearing.

The respondent is a Sri Lankan Tamil who claimed refugee protection in Canada but his claim was rejected. Before the issue of Guideline 7, which was applied during the respondent's hearing despite the respondent's objection,

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neither the IRPA nor the Rules addressed the order of questioning at a hearing. The order of questioning was within the individual members' discretion and practice thereon was not uniform across Canada.

The main issues in the present case were: (1) whether Guideline 7 prescribes a hearing procedure that is in breach of claimants' right to procedural fairness; (2) whether Guideline 7 is unauthorized by paragraph 159(1)(*h*) because it is a fetter on RPD members' exercise of discretion in the conduct of hearings; and (3) whether Guideline 7 is invalid because it is a rule of procedure and should therefore have been issued under IRPA, paragraph 161(1)(*a*).

Held, the appeal should be allowed, and the cross-appeal should be dismissed.

Per Evans J.A. (Décary J.A. concurring): (1) At a general level, the seriousness of the rights involved in the determination of a refugee claim, as well as the generally "judicial" character of the oral hearings held by the RPD, militate in favour of affording claimants a high degree of procedural protection. However, its details must also be tailored to fit the inquisitorial and relatively informal nature of the hearing established by Parliament as well as the RPD's high volume case load. Although a relatively inquisitorial procedural form may reduce the degree of control over the process often exercisable by counsel in adversarial proceedings, the fair adjudication of individual rights is perfectly compatible with an inquisitorial process where the order of questioning is not as obvious as it generally is in an adversarial hearing. Furthermore, the fact that members question the claimant first when there is no RPO present does not distort the inquisitorial process established by IRPA and would not give rise to a reasonable apprehension of bias on the part of the person who is informed of the facts and has thought the matter through. Guideline 7 does not curtail counsel's participation in the hearing since counsel is present throughout and may conduct an examination of the client to ensure that the claimant's testimony is before the decision maker. The right to be represented by counsel does not include the right of counsel to determine the order of questioning or any other aspect of the procedure to be followed at the hearing. Although fairness may require a departure from the standard order of questioning in some circumstances, the procedure prescribed by Guideline 7 does not, on its face, breach the Board's duty of fairness.

(2) Effective decision making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion. Through the use of "soft law" (policy statements, guidelines, manuals and handbooks), an agency can communicate prospectively its thinking on an issue to agency members and staff as well as to the public at large and to the agency's "stakeholders" in particular. An administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation. Although not legally binding on a decision maker, guidelines may validly influence a decision maker's conduct. The use of guidelines and other "soft law" techniques to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Immigration and Refugee Board (IRB).

Despite the express statutory authority of the Chairperson to issue guidelines under IRPA, paragraph 159(1)(*h*), they do not have the same legal effects that statutory rules can have. In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.

Since the language of Guideline 7 expressly permits members to depart from the standard order of questioning in exceptional circumstances, the Court should be slow to conclude that members will regard themselves as bound to follow the standard order in the absence of clear evidence to the contrary. The Federal Court correctly concluded that the language of Guideline 7 is more than "a recommended but optional process". The fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision maker may deviate from normal practice in the light of particular facts. While RPD members must perform their adjudicative functions without improper influence from others, case law also recognizes that administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions. Evidence that the IRB "monitors" members' deviations from the standard order of questioning does not create the kind of coercive environment that would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. Nor did the evidence establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7.

(3) On its face, the power granted by IRPA, paragraph 159(1)(*h*) to the Chairperson to issue guidelines in writing "to assist members in carrying out their duties" is broad enough to include a guideline issued in respect of the exercise of members' discretion in procedural, evidential or substantive matters. Structuring members' discretion over the order of questioning is within the subject-matter of the guidelines contemplated by section 159. The exercise of the Chairperson's power to issue guidelines is not made expressly subject to paragraph 161(1)(*a*), although a guideline issued under paragraph 159(1)(*h*) that is inconsistent with a formal rule of procedure issued under paragraph 161(1)(*a*) will be invalid. Thus, on procedural issues, the Chairperson's guideline-issuing and rule-making powers overlap. Provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, that the

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subject of a guideline could have been enacted as a rule of procedure issued under IRPA, paragraph 161(1)(*a*) will not normally invalidate it. It was not unreasonable for the Chairperson to choose to implement the standard order of questioning through the guideline, rather than through a formal rule of procedure.

Per Sharlow (concurring): The two powers the IRPA gives the Chairperson to issue guidelines in writing to assist members in carrying out their duties (paragraph 159(1)(*h*)) and to make rules respecting the activities, practice and procedure of the Board, subject to the Governor in Council's approval (paragraph 161(1)(*a*)) differ substantively and functionally and are not interchangeable at the will of the Chairperson. The Chairperson's determination that the standard practice in refugee hearings, barring exceptional circumstances, should be for the RPO or the member to start questioning the refugee claimant should have been implemented by means of a rule rather than a guideline. But the standard procedure outlined in Guideline 7 is not in itself procedurally unfair and Guideline 7 does not unlawfully fetter the discretion of members. Despite Guideline 7, each member continues to have the unfettered discretion to adopt any order of procedure required by the exigencies of each claim to which the member is assigned.

statutes and regulations judicially considered

An Act to amend the Immigration Act and other Acts in consequence thereof, S.C. 1992, c. 49.
Canadian Human Rights Act, R.S.C., 1985, c. H-6, ss. 27(2) (as am. by S.C. 1998, c. 9, s. 20), (3) (as am. *idem*), 49(2) (as am. *idem*, s. 27).
Department of the Environment Act, R.S.C., 1985, c. E-10, s. 6.
Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 74(*d*), 159, 161, 162(2), 165, 170(*a*),(*g*),(*h*).
Inquiries Act, R.S.C., 1985, c. I-11, ss. 4, 5.
Refugee Protection Division Rules, SOR/2002-228, rr. 16(*e*), 25, 38, 69, 70.
Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 25.1(1) (as am. by S.O. 1994, c. 27, s. 56).

cases judicially considered

applied:

Benitez v. Canada (Minister of Citizenship and Immigration), [2007] 1 F.C.R. 107; (2006), 40 Admin. L.R. (4th) 159; 290 F.T.R. 161; 54 Imm. L.R. (3d) 27; 2006 FC 461; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; (1982), 137 D.L.R. (3d) 558; 44 N.R. 354; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; (1990), 68 D.L.R. (4th) 524; 42 Admin. L.R. 1; 90 CLLC 14,007; 105 N.R. 161; 38 O.A.C. 321.

distinguished:

Bell Canada v. Canadian Employees Association, [2003] 1 S.C.R. 884; (2003), 227 D.L.R. (4th) 193; [2004] 1 W.W.R. 1; 3 Admin. L.R. (4th) 163; 109 C.R.R. (2d) 65; 306 N.R. 34; 2003 SCC 36; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; (1992), 88 D.L.R. (4th) 1; [1992] 2 W.W.R. 193; 84 Alta. L.R. (2d) 129; 3 Admin. L.R. (2d) 1; 7 C.E.L.R. (N.S.) 1; 132 N.R. 321.

considered:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104; 121 D.L.R. (4th) 79; 28 Admin. L.R. (2d) 1; 77 O.A.C. 155 (C.A.).

referred to:

Benitez v. Canada (Minister of Citizenship and Immigration), [2008] 1 F.C.R. 155; 2007 FCA 199; *Can-Am Realty Ltd. v. Canada*, [1994] 1 C.T.C. 1; (1993), 94 DTC 6069; 69 F.T.R. 63 (F.C.T.D.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84; (2002), 208 D.L.R. (4th) 107; 37 Admin. L.R. (3d) 252; 18 Imm. L.R. (3d) 93; 280 N.R. 268; 2002 SCC 3; *Sivasamboo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741; (1994), 29 Admin. L.R. (2d) 211; 87 F.T.R. 46 (T.D.); *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250; *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commn.*, [1978] 2 S.C.R. 141; (1977), 81 D.L.R. (3d) 609; 36 C.P.R. (2d) 1; 18 N.R. 181; *Vidal v. Canada (Minister of Employment and Immigration)* (1991), 49 Admin. L.R. 118; 41 F.T.R. 118; 13 Imm. L.R. 118 (F.C.T.D.); *Roncarelli v. Duplessis*, [1959] S.C.R. 121; (1959), 16 D.L.R. (2d) 689; *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146; (1999), 180 D.L.R. (4th) 95; [2000] CLLC 230-002; 176 F.T.R. 161 (T.D.); *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195; (2004), 236 D.L.R. (4th) 485; 11 Admin. L.R. (4th) 306; 34 Imm. L.R. (3d) 157; 316 N.R. 299; 2004 FCA 49; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; (1992), 90 D.L.R. (4th) 609; 3 Admin. L.R. (2d) 173; 136 N.R. 5; 147 Q.A.C. 169.

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Mullan, David. *Administrative Law*. Toronto: Irwin Law, 2001.

APPEAL from a Federal Court decision ([2006] 3 F.C.R. 168; (2006), 40 Admin. L.R. (4th) 221) granting an application for judicial review to set aside a decision of the Refugee Protection Division ([2004] R.P.D. No. 613 (QL)) dismissing the respondent's claim for refugee protection. CROSS-APPEAL from that decision's finding that Guideline 7 of the *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act* is not invalid because it deprives refugee claimants of the right to a fair hearing. Appeal allowed and cross-appeal dismissed.

appearances:

Jamie R. D. Todd and *John Provart* for appellant.

John W. Davis for respondent.

Christopher D. Bredt and *Morgana Kellythorne* for intervener, the Immigration and Refugee Board.

Catherine F. Bruce and *Angus Grant* for intervener, the Canadian Council for Refugees.

solicitors of record:

Deputy Attorney General of Canada for appellant.

Davis & Grice, Toronto, for respondent.

Borden Ladner Gervais LLP, Toronto, for intervener, the Immigration and Refugee Board.

The Law Offices of Catherine F. Bruce and *Ms. Barbara Jackman*, Toronto, for intervener, the Canadian Council for Refugees.

The following are the reasons for judgment rendered in English by

EVANS J.A.:

A. INTRODUCTION

[1] The Chairperson of the Immigration and Refugee Board (the Board) has broad statutory powers to issue both guidelines and rules. Rules have to be approved by the Governor in Council and laid before Parliament, but guidelines do not.

[2] This appeal concerns the validity of Guideline 7 *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act: Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*, issued in 2003 by the Chairperson of the Board pursuant to the statutory

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power to “issue guidelines . . . to assist members in carrying out their duties”: *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), paragraph 159(1)(*h*). The key paragraphs of Guideline 7 provide as follows: “In a claim for refugee protection, the standard practice will be for the R[efugee] P[rotection] O[fficer] to start questioning the claimant” (paragraph 19), although the member of the Refugee Protection Division (RPD) hearing the claim “may vary the order of questioning in exceptional circumstances” (paragraph 23).

[3] The validity of Guideline 7 is challenged on two principal grounds. First, it deprives refugee claimants of the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel. Second, even if Guideline 7 does not prescribe a hearing that is in breach of the duty of fairness, the Chairperson should have introduced the new standard order of questioning as a rule of procedure under IRPA, paragraph 161(1)(*a*), not as a guideline under IRPA, paragraph 159(1)(*h*). Guideline 7 is not valid as a guideline because paragraphs 19 and 23 unlawfully fetter the discretion of members of the RPD to determine the appropriate order of questioning when hearing refugee protection claims.

[4] This is an appeal by the Minister of Citizenship and Immigration from a decision by Justice Blanchard of the Federal Court granting an application for judicial review by Daniel Thamotharem to set aside a decision by the RPD dismissing his claim for refugee protection: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 168 (F.C.).

[5] Justice Blanchard held that Guideline 7 is an unlawful fetter on the exercise of discretion by individual RPD members to determine the order of questioning at a hearing, in the absence of a provision in either IRPA or the *Refugee Protection Division Rules*, SOR/2002-228, dealing with this aspect of refugee protection hearings. He remitted Mr. Thamotharem’s refugee claim to be determined by a different member of the RPD on the basis that Guideline 7 is an invalid fetter on the exercise of decision makers’ discretion.

[6] However, Justice Blanchard rejected Mr. Thamotharem’s argument that Guideline 7 is invalid because it deprives refugee claimants of the right to a fair hearing and distorts the “judicial” role of the member hearing the claim. Mr. Thamotharem has cross-appealed this finding.

[7] The Judge certified the following questions for appeal pursuant to paragraph 74(*d*) of IRPA.

1. Does the implementation of paragraphs 19 and 23 of the Chairperson’s Guideline 7 violate principles of natural justice by unduly interfering with claimants’ right to be heard?

2. Has the implementation of Guideline 7 led to fettering of Board Members’ discretion?

3. Does a finding that Guideline 7 fetters a Refugee Protection Division Member’s discretion necessarily mean that the application for judicial review must be granted, without regard to whether or not the applicant was otherwise afforded procedural fairness in the particular case or whether there was an alternate basis for rejecting the claim?

[8] Immediately after hearing the Minister’s appeal in *Thamotharem*, we heard appeals by unsuccessful refugee claimants challenging the validity of Guideline 7 and, in some of the cases, impugning on other grounds the dismissal of their claim. In the Federal Court, 19 applications for judicial review concerning Guideline 7 were consolidated. Justice Mosley’s decision on the Guideline 7 issue is reported as *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 107 (F.C.). The appeals from these decisions were also consolidated, *Benitez* being designated the lead case.

[9] In *Benitez*, Justice Mosley agreed with the conclusions of Justice Blanchard on all issues, except one: he held that Guideline 7 was not an unlawful fetter on the discretion of Board members because its text permitted them to allow the claimant’s counsel to question first, as, in fact, some had.

[10] For substantially the reasons that they gave, I agree with both Justices that Guideline 7 is not, on its face, invalid on the ground of procedural unfairness, although, as the Minister and the Board conceded, fairness may require that, in certain circumstances, particular claimants should be questioned first by their own counsel. I also agree that Guideline 7 is not incompatible with the impartiality required of a member when conducting a hearing which is inquisitorial in form.

[11] However, in my opinion, Guideline 7 is not an unlawful fetter on the exercise of members’ discretion on the conduct of refugee protection hearings. The Guideline expressly directs members to consider the facts of the particular case before them to determine whether there are exceptional circumstances warranting a deviation from the standard order of questioning. The evidence does not establish that members disregard this aspect of Guideline 7 and slavishly adhere to the standard order of questioning, regardless of the facts of the case before them. Accordingly, I agree with Justice Mosley on this issue and must respectfully disagree with Justice Blanchard.

[12] Nor does it follow from the fact that Guideline 7 could have been issued as a statutory rule of procedure that

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it is invalid because it was not approved by the Governor in Council. In my opinion, the Chairperson's rule-making power does not invalidate Guideline 7 by impliedly excluding from the broad statutory power to issue guidelines "to assist members in carrying out their duties" changes to the procedure of any of the Board's Divisions.

[13] Accordingly, I would allow the Minister's appeal and dismiss Mr. Thamotharem's cross- appeal and his application for judicial review. Although separate reasons are given in *Benitez*, [2008] 1 F.C.R. 155 (F.C.A.) dealing with issues not raised in Mr. Thamotharem's appeal, a copy of the reasons in the present appeal will also be inserted in Court File No. A-164-06 (*Benitez*) and the files of the appeals consolidated with it.

B. FACTUAL BACKGROUND

(i) Mr. Thamotharem's refugee claim

[14] Mr. Thamotharem is Tamil and a citizen of Sri Lanka. He entered Canada in September 2002 on a student visa. In January 2004, he made a claim for refugee protection in Canada, since he feared that, if forced to return to Sri Lanka, he would be persecuted by the Liberation Tigers of Tamil Eelam.

[15] In written submissions to the RPD before his hearing, Mr. Thamotharem objected to the application of Guideline 7, on the ground that it deprives refugee claimants of their right to a fair hearing. He did not argue that, on the facts of his case, he would be denied a fair hearing if he were questioned first by the refugee protection officer (RPO) and/or the member conducting the hearing. There was no evidence that Mr. Thamotharem suffered from post-trauma stress disorder or was otherwise particularly vulnerable.

[16] At the hearing of the claim before the RPD, the RPO questioned Mr. Thamotharem first. The RPD held that the duty of fairness does not require that refugee claimants always have the right to be questioned first by their counsel and that the application of Guideline 7 does not breach Mr. Thamotharem's right to procedural fairness.

[17] In a decision dated August 18, 2004 [[2004] R.P.D.D. No. 613 (QL)], the RPD dismissed Mr. Thamotharem's refugee claim and found him not to be a person in need of protection. It based its decision on documentary evidence of improved country conditions for Tamils in Sri Lanka, and on the absence of reliable evidence that Mr. Thamotharem would be persecuted as a perceived member of a political group or would, for the first time, become the target of extortion.

[18] In his application for judicial review, Mr. Thamotharem challenged this decision on the ground that Guideline 7 was invalid and that the RPD had made a reviewable error in its determination of the merits of his claim. As already noted, Mr. Thamotharem's application for judicial review was granted, the RPD's decision set aside and the matter remitted to another member for redetermination on the basis that Guideline 7 is an invalid fetter on the RPD's discretion in the conduct of the hearing. In responding in this Court to the Minister's appeal, Mr. Thamotharem did not argue that, even if Guideline 7 is valid, Justice Blanchard was correct to remit the matter to the RPD because it committed a reviewable error in determining the merits of the claim.

(ii) Guideline 7

[19] Before the Chairperson issued Guideline 7, the order of questioning was within the discretion of individual members; neither IRPA nor the *Refugee Protection Division Rules*, addressed it. Refugee protection claims are normally determined by a single member of the RPD. The evidence indicated that, before the issue of Guideline 7, practice on the order of questioning was not uniform across Canada. Members sitting in Toronto and, possibly, in Vancouver and Calgary, permitted claimants to be "examined in chief" by their counsel before being questioned by the RPO and/or the member. In Montréal and Ottawa, on the other hand, the practice seems to have been that the member or the RPO questioned the claimant first, although a request by counsel for a claimant to question first seems generally to have been granted.

[20] It is not surprising that the Board did not regard it as satisfactory that the order of questioning was left to be decided by individual members on an *ad hoc* basis, with variations among regions, and among members within a region. Claimants are entitled to expect essentially the same procedure to be followed at an RPD hearing, regardless of where or by whom the hearing is conducted.

[21] There was also a view that refugee protection hearings would be more expeditious if claimants were generally questioned first by the RPO or the member, thus dispensing with the often lengthy and unfocussed examination-in-chief of claimants by their counsel. The backlog of refugee determinations has been a major problem for the Board. For example, from 1997-1998 to 2001-2002 the number of claims referred for determination each year increased steadily from more than 23,000 to over 45,000, while, in the same period, the backlog of claims referred but not decided grew from more than 27,000 to nearly 49,000: Canada, Immigration and Refugee Board, Performance Report for the period ending March 31, 2004.

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[22] Studies were undertaken to find ways of tackling this problem. For example, in a relatively early report, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (Ottawa: Immigration and Refugee Board, December 1993), refugee law scholar, Professor James C. Hathaway, made many recommendations designed to make the Board's determination of refugee claims more effective, expeditious, and efficient. The following passage from the Report (at pages 74-75) is particularly relevant to the present appeal.

The present practice of an introductory "examination in chief" by counsel should be dispensed with, the sworn testimony in the Application for Refugee Status being presumed to be true unless explicitly put in issue. Panel members should initially set out clearly the substantive matters into which they wish to inquire, and explain any concerns they may have about the sufficiency of documentary evidence presented. Members should assume primary responsibility to formulate the necessary questions, although they should feel free to invite counsel to adduce testimony in regard to matters of concern to them. Once the panel has concluded its questioning, it should allow the Minister's representative, if present, an opportunity to question or call evidence, ensuring that the tenor of the Ministerial intervention is not allowed to detract from the non-adversarial nature of the hearing. Following a brief recess, the panel should outline clearly on the record which matters it views as still in issue, generally using the Conference Report as its guide. Any matters not stated by the panel to be topics of continuing concern should be deemed to be no longer in issue. Counsel would then be invited to elicit testimony, call witnesses, and make submissions as adjudged appropriate, keeping in mind that all additional evidence must be directed to a matter which remains in issue. [Footnotes omitted.]

[23] Starting in 1999, the Board worked to develop what became Guideline 7, which was finally issued in October 31, 2003, as part of an action plan to reduce the backlog on the refugee side by increasing the efficiency of its decision-making process. In addition to the order of questioning provisions in dispute in this case, Guideline 7 also deals with the early identification of issues and disclosure of documents, procedures when a claimant is late or fails to appear, informal pre-hearing conferences, and the administration of oaths and affirmations.

[24] In addition to the consultations with the Deputy Chairperson and the Director General of the Immigration Division mandated by paragraph 159(1)(*h*) before the Chairperson issues a guideline, the Board held consultations on the proposed Guideline with members of the Bar and other "stakeholders." Some, however, including the Canadian Council for Refugees, an intervener in this appeal, regarded the consultations as less than meaningful, while others characterized Guideline 7 as an overly "top-down" initiative by senior management of the Board. On the basis of the material before us, I am unable to comment on either of these observations.

[25] From December 1, 2003, the implementation of Guideline 7 was gradually phased in, becoming fully operational across the country by June 1, 2004. Like other guidelines issued by the Chairperson, Guideline 7 was published.

C. LEGISLATIVE FRAMEWORK

(i) IRPA

[26] IRPA confers on the Chairperson of the Board broad powers over the management of each Division of the Board, including a power to issue guidelines.

159. (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson

(*a*) has supervision over and direction of the work and staff of the Board;

. . .

(*g*) takes any action that may be necessary to ensure that the members of the Board carry out their duties efficiently and without undue delay;

(*h*) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons and the Director General of the Immigration Division, to assist members in carrying out their duties; [Underlining added.]

[27] IRPA also empowers the Chairperson of the Board to make rules for each of the three Divisions of Board. The rules, however, must be approved by the Governor in Council and laid before Parliament.

161. (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, the Chairperson may make rules respecting

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(*a*) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, the priority to be given to proceedings, the notice that is required and the period in which notice must be given;

(*b*) the conduct of persons in proceedings before the Board, as well as the consequences of, and sanctions for, the breach of those rules;

(*c*) the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board; and

(*d*) any other matter considered by the Chairperson to require rules.

(2) The Minister shall cause a copy of any rule made under subsection (1) to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the approval of the rule by the Governor in Council. [Underlining added.]

[28] IRPA emphasizes the importance of informality, promptness and fairness in the Board's proceedings.

162. . . .

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[29] In keeping with the inquisitorial nature of the RPD's process, IRPA confers broad discretion on members in their conduct of a hearing.

165. The Refugee Protection Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing. .

[30] Part I of the *Inquiries Act*, R.S.C., 1985, c. I-11, empowers commissioners of inquiry as follows:

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to

(*a*) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and

(*b*) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

[31] The following provisions of IRPA respecting the decision-making process of the RPD are also relevant.

170. The Refugee Protection Division, in any proceeding before it,

(*a*) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;

. . .

(*g*) is not bound by any legal or technical rules of evidence;

(*h*) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;

(ii) Guideline 7

[32] Paragraphs 19 and 23 of Guideline 7, issued by the Chairperson under IRPA, paragraph 159(1)(*h*), are of immediate relevance in this appeal, while paragraphs 20-22 provide context.

19. In a claim for refugee protection, the standard practice will be for the RPO to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.

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20. In a claim for refugee protection where the Minister intervenes on an issue other than exclusion, for example, on a credibility issue, the RPO starts the questioning. If there is no RPO at the hearing, the member will start the questioning, followed by the Minister's counsel and then counsel for the claimant.

21. In proceedings where the Minister intervenes on the issue of exclusion, Minister's counsel will start the questioning, followed by the RPO, the member, and counsel for the claimant. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.

22. In proceedings where the Minister is making an application to vacate or to cease refugee protection, Minister's counsel will start the questioning, followed by the member, and counsel for the protected person. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.

23. The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning. A party who believes that exceptional circumstances exist must make an application to change the order of questioning before the hearing. The application has to be made according to the *RPD Rules*. [Underlining added; endnote omitted.]

D. ISSUES AND ANALYSIS

Issue 1: Standard of review

[33] The questions of law raised in this appeal about the validity of Guideline 7 are reviewable on a standard of correctness: they concern procedural fairness, statutory interpretation, and the unlawful fettering of discretion. The exercise of discretion by the Chairperson to choose a guideline rather than a formal rule as the legal instrument for amending the procedure of any of the Board's Divisions by is reviewable for patent unreasonableness.

Issue 2: Does Guideline 7 prescribe a hearing procedure that is in breach of claimants' right to procedural fairness?

[34] Justice Blanchard dealt thoroughly with this issue at paragraphs 36-92 of his reasons. He concluded that the jurisprudence did not require that, as a matter of fairness, claimants always be given the opportunity to be questioned first by their counsel (at paragraphs 38-53). He then considered (at paragraphs 68-90) the criteria set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 21-28 (*Baker*), for determining where to locate refugee protection hearings on the procedural spectrum from the informal to the judicial. Largely on the basis of the adjudicative nature of the RPD's functions, the finality of its decision, and the importance of the individual rights at stake, he concluded (at paragraph 75) that "a higher level of procedural protection is warranted."

[35] However, recognizing also that the content of the duty of fairness varies with context, Justice Blanchard noted that Parliament had chosen an inquisitorial procedural model for the determination of refugee claims by the RPD, in the sense that there is no party opposing the claim, except in the rare cases when the Minister intervenes to oppose a claim on exclusion grounds. Consequently, in the overwhelming majority of cases, the task of probing the legitimacy of claims inevitably falls to the RPO, who questions the claimant on behalf of the member, and/or to the member of the RPD conducting the hearing, especially when no RPO is present. This is an important reason for concluding that not all the elements of the adversarial procedural model followed in the courts are necessarily required for a fair hearing of a refugee claim: see paragraphs 72-75.

[36] Justice Blanchard also acknowledged that claimants may derive tactical advantages from being taken through their story by their own lawyer before being subjected to questioning by the RPO, who will typically focus on inconsistencies, gaps, and improbabilities in the narrative found in the claimant's Personal Information Form (PIF) and any supporting documentation, as well as any legal weaknesses in the claim. The tactical advantage of questioning first may be particularly significant in refugee hearings because of the vulnerability and anxiety of many claimants, as a result of: their inability to communicate except through an interpreter; their cultural backgrounds; the importance for them of the RPD's ultimate decision; and the psychological effects of the harrowing events experienced in their country of origin.

[37] Nonetheless, Justice Blanchard concluded that these considerations do not necessarily rise to the level of unfairness. Indeed, in addition to shortening the hearing, questioning by the RPO may also serve to improve the quality of the hearing by focusing it and enabling a claimant's counsel to make sure that aspects of the claim troubling the member are fully dealt with when the claimant comes to tell his or her story. Consequently, in order to be afforded their right to procedural fairness, claimants need not normally be given the opportunity to be questioned by their counsel before being questioned by the RPO and/or RPD member.

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[38] Justice Blanchard noted, for example, that RPD members receive training to sensitize them to the accommodations needed when questioning vulnerable claimants, that claimants may supplement or modify the information in their PIF and adduce evidence before the hearing, and that expert evidence indicated that vulnerable claimants' ability to answer questions fully, correctly and clearly is likely to depend more on the tone and style of questioning than on the order in which it occurs.

[39] Moreover, the duty of fairness forbids members from questioning in an overly aggressive and badgering manner, or in a way that otherwise gives rise to a reasonable apprehension of bias. Fairness also requires that claimants be given an adequate opportunity to tell their story in full, to adduce evidence in support of their claim, and to make submissions relevant to it. To this end, fairness may also require that, in certain circumstances, a claimant be afforded the right to be questioned first by her or his counsel. In addition, Guideline 7 recognizes that there will be exceptional cases in which, even though not necessarily required by the duty of fairness, it will be appropriate for the RPD to depart from the standard order of questioning.

[40] I agree with Justice Blanchard's conclusion on this issue and have little useful to add to his reasons. Before us, counsel did not identify any error of principle in the applications Judge's analysis nor produce any binding judicial authority for the proposition that it is a breach of the duty of fairness to deny claimants the right to be questioned first by their own counsel. Criticisms were directed more to the weight that Justice Blanchard gave to some of the evidence and the factors to be considered. I can summarize as follows the principal points made in this Court by counsel.

[41] First, the importance of the individual rights potentially at stake in refugee protection proceedings indicates a court-like hearing, in which the party with the burden of proof goes first: see, for example, *Can-Am Realty Ltd. v. Canada*, [1994] 1 C.T.C. 1 (F.C.T.D.), at page 1. I agree at a general level that the seriousness of the rights involved in the determination of a refugee claim, as well as the generally "judicial" character of the oral hearings held by the RPD, militate in favour of affording claimants a high degree of procedural protection. However, its details must also be tailored to fit the inquisitorial and relatively informal nature of the hearing established by Parliament, as well as the RPD's high volume case load, considerations which reduce the power of the claim to aspects of the adversarial model used in courts, including the order of questioning.

[42] Second, the procedure set out in Guideline 7 is derived from the erroneous notion that the RPD is a board of inquiry, not an adjudicator. Unlike those appearing at inquiries, refugee claimants have the burden of proving a claim, which the RPD adjudicates.

[43] I do not agree. The Board correctly recognizes that the RPD's procedural model is more inquisitorial in nature, unlike that of the Immigration Appeal Division (*Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paragraph 82). I cannot conclude on the basis of the evidence as a whole that the Board adopted the standard order of questioning in the mistaken view that the RPD is a board of inquiry, even though it decides claimants' legal rights in the cases which they bring to it for adjudication and claimants bear the burden of proof. This conclusion is not undermined by a training document "Questioning 101", prepared by the Board's Professional Development Branch in 2004 for members and RPOs, which contains a somewhat misleading reference to the compatibility of the standard order of questioning with "a board of inquiry model."

[44] A relatively inquisitorial procedural form may reduce the degree of control over the process often exercisable by counsel in adversarial proceedings, especially before inexperienced tribunal members or those who lack the confidence that legal training can give. Nonetheless, the fair adjudication of individual rights is perfectly compatible with an inquisitorial process, where the order of questioning is not as obvious as it generally is in an adversarial hearing.

[45] Third, placing RPD members in the position of asking the claimant questions first, when no RPO is present, distorts their judicial role by thrusting them into the fray, thereby creating a reasonable apprehension of bias by making them appear to be acting as both judge and prosecutor. Guideline 7 is particularly burdensome for members now that panels normally comprise a single member, and there is often no RPO present to assume the primary responsibility for questioning the claimant on behalf of the Board.

[46] I disagree. Adjudicators can and should normally play a relatively passive role in an adversarial process, because the parties are largely responsible for adducing the evidence and arguments on which the adjudicator must decide the dispute. In contrast, members of the RPD, sometimes assisted by an RPO, do not have this luxury. In the absence in most cases of a party to oppose the claim, members are responsible for making the inquiries necessary, including questioning the claimant, to determine the validity of the claim: see IRPA, paragraph 170(*a*); *Sivasamboo v. Canada (Minister of Citizenship and Immigration*), [1995] 1 F.C. 741 (T.D.), at pages 757-778; *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250, at paragraph 21. The fact that the member or the RPO may ask probing questions does not make the proceeding adversarial in the procedural sense.

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[47] To the extent that statements in *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.), suggest that a member of the RPD hearing a refugee claim is restricted to asking the kind of questions that a judge in a civil or criminal proceeding may ask, they are, in my respectful opinion, incorrect, especially when no RPO is present.

[48] The fact that members question the claimant first when there is no RPO present does not distort the inquisitorial process established by IRPA and would not give rise to a reasonable apprehension of bias on the part of a person who was informed of the facts and had thought the matter through in a practical manner. Inquisitorial processes of adjudication are not unfair simply because they are relatively unfamiliar to common lawyers.

[49] Fourth, Guideline 7 interferes with claimants' right to the assistance of counsel because it prevents them from being taken through their story by their counsel before being subject to the typically more sceptical questioning by the RPO. I do not agree. Guideline 7 does not curtail counsel's participation in the hearing; counsel is present throughout and may conduct an examination of the client to ensure that the claimant's testimony is before the decision maker. The right to be represented by counsel does not include the right of counsel to determine the order of questioning or, for that matter, any other aspect of the procedure to be followed at the hearing.

[50] Finally, no statistical evidence was adduced to support the allegation that Guideline 7 jeopardizes the ability of the RPD accurately to determine claims for refugee protection. There is simply no evidence to establish what impact, if any, the introduction of Guideline 7 has had on acceptance rates.

[51] In summary, the procedure prescribed by Guideline 7 is not, on its face, in breach of the Board's duty of fairness. However, in some circumstances, fairness may require a departure from the standard order of questioning. In those circumstances, a member's refusal of a request that the claimant be questioned first by her counsel may render the determination of the claim invalid for breach of the duty of fairness.

[52] Consequently, if the Chairperson had implemented the reform to the standard order of questioning at refugee determination hearings in a formal rule of procedure issued in accordance with paragraph 161(1)(*a*), it would have been beyond challenge on the grounds advanced in this appeal respecting the duty of fairness, including bias. The somewhat technical question remaining is whether the Chairperson's choice of legislative instrument (that is, a guideline rather than a formal rule of procedure) to implement the procedural change was in law open to him.

Issue 3: Is Guideline 7 unauthorized by paragraph 159(1)(*h*) because it is a fetter on RPD members' exercise of discretion in the conduct of hearings?

[53] As already noted, Justice Blanchard and, in *Benitez*, Justice Mosley, reached different conclusions on whether Guideline 7 unlawfully fettered the discretion of members of the RPD in deciding the order of questioning at a refugee determination hearing. The records in the two applications were not identical. In particular, there was more evidence before Justice Mosley, comprising some 40 decisions and excerpts from transcripts of RPD hearings, that RPD members are willing to recognize exceptional cases in which it is appropriate to depart from the standard order of questioning.

[54] In the circumstances of these appeals, it is appropriate to consider all the evidence before both judges. From a practical point of view, it would be anomalous if this Court were to reach different conclusions about the validity of Guideline 7 in two cases set down to be heard one after the other. However, I do not attach much, if any, significance to the differences in the records. Justice Blanchard properly based his conclusion, for the most part, on what he saw as the mandatory language of Guideline 7.

(i) Rules, discretion and fettering

[55] Effective decision making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case-by-case basis.

[56] Through the use of "soft law" an agency can communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's "stakeholders" in particular. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation. Indeed, an administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation: *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (C.A.) at pages 108-109 (*Ainsley*).

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[57] Both academic commentators and the courts have emphasized the importance of these tools for good public administration and have explored their legal significance. See, for example, Hudson N. Janisch, "The Choice of Decision Making Method: Adjudication, Policies and Rule Making" in *Special Lectures of the Law Society of Upper Canada 1992, Administrative Law: Principles, Practice and Pluralism*, Scarborough: Carswell, 1992, page 259; David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at pages 374-379; Craig, Paul P., *Administrative Law*, 5th ed. (London: Thomson, 2003), at pages 398-405, 536-540; *Capital Cities Communications Inc. et al. v. Canadian radio-Telivision Commn.*, [1978] 2 S.C.R. 141, at page 171; *Vidal v. Canada (Minister of Employment and Immigration*) (1991), 49 Admin. L.R. 118 (F.C.T.D.), at page 131; *Ainsley*, at pages 107-109.

[58] Legal rules and discretion do not inhabit different universes, but are arrayed along a continuum. In our system of law and government, the exercise of even the broadest grant of statutory discretion which may adversely affect individuals is never absolute and beyond legal control: *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at page 140 (*per* Rand J.). Conversely, few, if any, legal rules admit of no element of discretion in their interpretation and application: *Baker*, at paragrah 54.

[59] Although not legally binding on a decision maker in the sense that it may be an error of law to misinterpret or misapply them, guidelines may validly influence a decision maker's conduct. Indeed, in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, McIntyre J., writing for the Court, said (at page 6):

The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; . . ." does not fetter the exercise of that discretion. [Emphasis added.]

The line between law and guideline was further blurred by *Baker*, at paragraph 72, where, writing for a majority of the Court, L'Heureux-Dubé J. said that the fact that administrative action is contrary to a guideline "is of great help" in assessing whether it is unreasonable.

[60] The use of guidelines, and other "soft law" techniques, to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Board, which sit in panels; in the case of the RPD, as already noted, a panel typically comprises a single member.

[61] It is fundamental to the idea of justice that adjudicators, whether in administrative tribunals or courts, strive to ensure that similar cases receive the same treatment. This point was made eloquently by Gonthier J. when writing for the majority in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at page 327 (*Consolidated-Bathurst*):

It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION]"difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one". [Citation omitted.]

[62] Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administra-tive decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered: see, for example, *Maple Lodge Farms*, at page 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.

[63] In addition, the validity of a rule or policy itself has sometimes been impugned independently of its application in the making of a particular decision. *Ainsley* is the best known example. That case concerned a challenge to the validity of a non-statutory policy statement issued by the Ontario Securities Commission setting out business practices which would satisfy the public interest in the marketing of penny stocks by certain securities dealers. The policy also stated that the Commission would not necessarily impose a sanction for non-compliance on a dealer under its "public interest" jurisdiction but would consider the particular circumstances of each case.

[64] Writing for the Court in *Ainsley*, Doherty J.A. adopted [at page 110] the criteria formulated by the trial Judge for determining if the policy statement was "a mere guideline" or was "mandatory," namely, its language, the practical effect of non-compliance, and the expectations of the agency and its staff regarding its implementation. On the basis of these criteria, Doherty J.A. concluded that the policy statement was invalid. He emphasized, in particular, its minute detail, which "reads like a statute or regulation" (at page 111), and the threat of sanctions for non-compliance. He found this threat to be implicit in the Commission's pronouncement that the business practices it

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described complied with the public interest, and was evident in the attitude of enforcement staff ,who treated the policy as if it were a statute or regulation, breach of which was liable to trigger enforcement proceedings.

(ii) Guideline 7 and the fettering of discretion

(a) Is Guideline 7 delegated legislation?

[65] An initial question is whether guidelines issued under IRPA, paragraph 159(1)(*h*) constitute delegated legislation, having the full force of law "hard law". If they do, Guideline 7 can no more be characterized as an unlawful fetter on members' exercise of discretion with respect to the order of questioning than could a rule of procedure to the same effect issued under IRPA, paragraph 161(1))(*a*): *Bell Canada v. Canadian Employees Association*, [2003] 1 S.C.R. 884, at paragraph 35 (*Bell Canada*).

[66] In my view, despite the express statutory authority of the Chairperson to issue guidelines, they do not have the same legal effects that statutory rules can have. In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate, regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.

[67] However, the meaning of "guideline" in a statute may depend on context. For example, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pages 33-37, La Forest J. upheld the validity of mandatory environmental assessment guidelines issued under section 6 of the *Department of the Environment Act*, R.S.C., 1985, c. E-10, which, he held, constituted delegated legislation and, as such, were legally binding.

[68] In my view, *Oldman River* is distinguishable from the case before us. Section 6 of the *Department of the Environment Act* provided that guidelines were to be issued by an "order" "*arrêté*" of the Minister and approved by the Cabinet. In contrast, only rules issued by the Chairperson require Cabinet approval, guidelines "*directives*" do not. It would make little sense for IRPA to have conferred powers on the Chairperson to issue two types of legislative instrument, guidelines and rules, specified that rules must have Cabinet approval, and yet given both the same legal effect.

[69] Guidelines issued by the Human Rights Commission pursuant to subsection 27(2) [as am. by S.C. 1998, c. 9, s. 20] of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, have also been treated as capable of having the full force of law, even though they are made by an independent administrative agency and are not subject to Cabinet approval: *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.), at paragraphs 136-141; *Bell Canada*, at paragraphs 35-38.

[70] In *Bell Canada*, LeBel J. held (at paragraph 37), "[a] functional and purposive approach to the nature" of the Commission's guidelines, that they were "akin to regulations." a conclusion supported by the use of the word "*ordonnance*" in the French text of subsection 27(2) of the *Canadian Human Rights Act*. In addition, subsection 27(3) [as am. by S.C. 1998, c. 9, s. 20] expressly provides that guidelines issued under subsection 27(2) are binding on the Commission and on the person or panel assigned to inquire into a complaint of discrimination referred by the Commission under subsection 49(2) [as am. *idem*, s. 27] of the Act.

[71] In my opinion, the scheme of IRPA is different, particularly the inclusion of a potentially overlapping rule-making power and the absence of a provision that guidelines are binding on adjudicators. In addition, the word "*directives*" in the French text of paragraph 159(1)(*h*) suggests a less legally authoritative instrument than "*ordonnance*."

[72] I conclude, therefore, that, even though issued under an express statutory grant of power, guidelines issued under IRPA, paragraph 159(1)(*h*) cannot have the same legally binding effect on members as statutory rules may.

(b) Is Guideline 7 an unlawful fetter on members' discretion?

[73] Since guidelines issued by the Chairperson of the Board do not have the full force of law, the next question is whether, in its language and effect, Guideline 7 unduly fetters RPD members' discretion to determine for themselves, case-by-case, the order of questioning at refugee protection hearings. In my opinion, language is likely to be a more important factor than effect in determining whether Guideline 7 constitutes an unlawful fetter. It is inherently difficult to predict how decision makers will apply a guideline, especially in an agency, like the Board, with a large membership sitting in panels.

[74] Consequently, since the language of Guideline 7 expressly permits members to depart from the standard order of questioning in exceptional circumstances, the Court should be slow to conclude that members will regard themselves as bound to follow the standard order, in the absence of clear evidence to the contrary, such as that

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members have routinely refused to consider whether the facts of particular cases require an exception to be made.

[75] I turn first to language. The *Board's Policy on the Use of Chairperson's Guidelines*, issued in 2003 [Policy No. 2003-07], states that guidelines are not legally binding on members: section 6. The introduction to Guideline 7 states: "The guidelines apply to most cases heard by the RPD. However, in compelling or exceptional circumstances, the members will use their discretion not to apply some guidelines or to apply them less strictly."

[76] The text of the provisions of Guideline 7 are of most immediate relevance to this appeal. Paragraph 19 states that it "will be" standard practice for the RPO to question the claimant first; this is less obligatory than "must" or some similarly mandatory language. The discretionary element of Guideline 7 is emphasized in paragraph 19, which provides that, while "the standard practice will be for the RPO to start questioning the claimant" (emphasis added), a member may vary the order [at paragraph 23] "in exceptional circumstances."

[77] Claimants who believe that exceptional circumstances exist in their case must apply to the RPD, before the start of the hearing, for a change in the order of questioning. The examples, and they are only examples, of exceptional circumstances given in paragraph 23 suggest that only the most unusual cases will warrant a variation. However, the parameters of "exceptional circumstances" will no doubt be made more precise, and likely expanded incrementally, on a case-by-case basis.

[78] I agree with Justice Blanchard's conclusion (at paragraph 119) that the language of Guideline 7 is more than "a recommended but optional process." However, as *Maple Lodge Farms* makes clear, the fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision maker may deviate from normal practice in the light of particular facts: see *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195 (F.C.A.).

[79] To turn to the effect of Guideline 7, there was evidence that, when requested by counsel, members of the RPD had exercised their discretion and varied the standard order of questioning in cases which they regarded as exceptional. No such request was made on behalf of Mr. Thamotharem. In any event, members must permit a claimant to be questioned first by her or his counsel when the duty of fairness so requires.

[80] In at least one case, however, a member wrongly regarded himself as having no discretion to vary the standard order of questioning prescribed in Guideline 7. On July 3, 2005, this decision was set aside on consent on an application for judicial review, on the ground that the member had fettered the exercise of his discretion, and the matter remitted for re-determination by a different member of the RPD: *Baskaran v. Canada (Minister of Citizenship and Immigration)* (Court File No. IMM-7189-04). Nonetheless, the fact that some members may erroneously believe that Guideline 7 removes their discretion to depart from the standard practice in exceptional circumstances does not warrant invalidating the Guideline. In such cases, the appropriate remedy for an unsuccessful claimant is to seek judicial review to have the RPD's decision set aside.

[81] There was also evidence from Professor Donald Galloway, an immigration and refugee law scholar, a consultant to the Board and a former Board member, that RPD members would feel constrained from departing from the standard order of questioning. However, he did not base his opinion on the actual conduct of members with respect to Guideline 7.

[82] In short, those challenging the validity of Guideline 7 did not produce evidence establishing on a balance of probabilities that members rigidly apply the standard order of questioning without regard to its appropriateness in particular circumstances.

[83] I recognize that members of the RPD must perform their adjudicative functions without improper influence from others, including the Chairperson and other members of the Board. However, the jurisprudence also recognizes that administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions, a particular challenge for large tribunals which, like the Board, sit in panels.

[84] Most notably, the Supreme Court of Canada in *Consolidated-Bathurst* upheld the Ontario Labour Relations Board's practice of inviting members of panels who had heard but not yet decided cases to bring them to "full Board meetings," where the legal or policy issues that they raised could be discussed in the absence of the parties. This practice was held not to impinge improperly on members' adjudicative independence, or to breach the principle of procedural fairness that those who hear must also decide. Writing for the majority of the Court, Gonthier J. said (at page 340):

The institutionalization of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances.

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The advantages of an institutionalized consultation process are obvious and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of natural justice must have the flexibility required to take into account the institutional pressures faced by modern administrative tribunals as well as the risks inherent in such a practice.

[85] However, the arrangements made for discussions within an agency with members who have heard a case must not be so coercive as to raise a reasonable apprehension that members' ability to decide cases free from improper constraints has been undermined: *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952.

[86] Evidence that the Immigration and Refugee Board "monitors" members' deviations from the standard order of questioning does not, in my opinion, create the kind of coercive environment which would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. On a voluntary basis, members complete, infrequently and inconsistently, a hearing information sheet asking them, among other things, to explain when and why they had not followed "standard practice" on the order of questioning. There was no evidence that any member had been threatened with a sanction for non-compliance. Given the Board's legitimate interest in promoting consistency, I do not find it at all sinister that the Board does not attempt to monitor the frequency of members' compliance with the "standard practice."

[87] Nor is it an infringement of members' independence that they are expected to explain in their reasons why a case is exceptional and warrants a departure from the standard order of questioning. Such an expectation serves the interests of coherence and consistency in the Board's decision making in at least two ways. First, it helps to ensure that members do not arbitrarily ignore Guideline 7. Second, it is a way of developing criteria for determining if circumstances are "exceptional" for the purpose of paragraph 23 and of providing guidance to other members, and to the Bar, on the exercise of discretion to depart from the standard order of questioning in future cases.

[88] In my opinion, therefore, the evidence in the present case does not establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7, particularly in view of: the terms of the Guideline; the evidence of members' deviation from "standard practice"; and the need for the Board, the largest administrative agency in Canada, to attain an acceptable level of consistency at hearings, conducted mostly by single members.

[89] Adjudicative "independence" is not an all or nothing thing, but is a question of degree. The independence of judges, for example, is balanced against public accountability, through the Canadian Judicial Council, for misconduct. The independence of members of administrative agencies must be balanced against the institutional interest of the agency in the quality and consistency of the decisions, from which there are normally only limited rights of access to the courts, rendered by individual members in the agency's name.

(iii) Is Guideline 7 invalid because it is a rule of procedure and should therefore have been issued under IRPA, paragraph 161(1)(*a*)?

[90] On its face, the power granted by IRPA, paragraph 159(1)(*h*) to the Chairperson to issue guidelines in writing "to assist members in carrying out their duties" is broad enough to include a guideline issued in respect of the exercise of members' discretion in procedural, evidential or substantive matters. Members' "duties" include the conduct of hearings "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit": IRPA, subsection 162(2). In my view, structuring members' discretion over the order of questioning is within the subject-matter of the guidelines contemplated by section 159.

[91] In any event, the Chairperson did not need an express grant of statutory authority to issue guidelines to members. Paragraph 159(1)(*h*) puts the question beyond dispute, establishes a duty to consult before a guideline is issued, and, perhaps, enhances their legitimacy.

[92] An express statutory power to issue guidelines was first conferred on the Chairperson of the Board in 1993, as a result of an amendment to the former *Immigration Act* [R.S.C., 1985, c. I-2] by Bill C-86 [*An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49]. Appearing before the Committee of the House examining the Bill, Mr. Gordon Fairweather, the then Chairperson of the Board welcomed this addition to the Board's powers (Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-86*, 3rd Sess., 34th Parl., July 30, 1992, at page 80.):

I'm also pleased that the minister has responded to the need for new tools for managing the board itself. In the board's desire to ensure consistency of decision-making, we welcome the legislative provision allowing for guidelines…. The provision will reinforce my authority, after appropriate consultations, and the courts have been very specific about saying, no guidelines until you have consulted widely with the caring agencies, the immigration bar, and other non-governmental organizations. But the courts have given the green light for such provision provided

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we go through those consultations.

This provision will reinforce my authority, or the chair's authority—that is a little less pompous—after appropriate consultations to direct members toward preferred positions and therefore foster consistency in decisions. [Emphasis added.]

[93] In my view, the present appeal raises an important question about the relationship between the Chairperson's powers to issue guidelines and rules. In particular, are these grants of legal authority cumulative so that, for the most part, the scope of each is to be determined independently of the other? Or, is the Chairperson's power to issue guidelines implicitly limited by the power to make rules of procedure? If it is, then a change to the procedure of any Division of the Board may only be effected through a rule of procedure issued under paragraph 161(1)(*a*) which has been approved by Cabinet and subjected to Parliamentary scrutiny in accordance with subsection 161(2).

[94] The argument in the present case is that Guideline 7 is a rule of procedure and, since it reforms the existing procedure of the RPD, should have been issued under paragraph 161(1)(*a*), received Cabinet approval and been laid before Parliament. The power of the Chairperson to issue guidelines may not be used to avoid the political accountability mechanisms applicable to statutory rules issued under subsection 161(1).

[95] For this purpose, the fact that Guideline 7 permits RPD members to exercise their discretion in "exceptional circumstances" to deviate from "standard practice" in the order of questioning does not prevent it from being a rule of procedure: rules of procedure commonly confer discretion to be exercised in the light of particular facts.

[96] An analogous line of reasoning is found in the Ontario Court of Appeal's decision in *Ainsley*, where it was said that the Ontario Securities Commission's policy statement prescribing business practices of penny stock dealers which would satisfy the statutory public interest standard was invalid, because it was in substance and effect "a mandatory provision having the effect of law" (at page 110). In my opinion, however, *Ainsley* should be applied to the present case with some caution.

[97] First, when *Ainsley* was decided, the Commission had no express statutory power to issue guidelines and no statutorily recognized role in the regulation-making process. In contrast, the Chairperson of the Board has a broad statutory power to issue guidelines and, subject to Cabinet approval, to make rules respecting a broad range of topics, including procedure.

[98] Admittedly, the Board's rules of procedure (as well, of course, as IRPA itself and regulations made under it by the Governor in Council) have a higher legal status than guidelines, in the sense that, if a guideline and a rule conflict, the rule prevails.

[99] Second, the policy statement considered in *Ainsley* was directed at businesses regulated by the Commission and was designed to modify their practices by linking compliance with the policy to the Commission's prosecutorial power to institute enforcement proceedings, which could result in the loss of a licence by businesses not operating in "the public interest." Guideline 7, on the other hand, is directed at the practice of RPD members in the conduct of their proceedings. It does not impose *de facto* duties on members of the public or deprive them of an existing right. Guideline 7 lacks the kind of coercive threat, against either claimants or members, in the event of non-compliance, which was identified as important to the decision in *Ainsley*.

[100] The Commission's promulgation of detailed industry standards, other than through enforcement proceedings against individuals, when it lacked any legislative power, raised rule of law concerns. In my opinion, the same cannot plausibly be said of the Chairperson's decision to introduce a standard order of questioning through the statutory power to issue guidelines, rather than his power to issue rules.

[101] Third, while the Board can only issue formal statutory rules of procedure with Cabinet approval, tribunals often do not require Cabinet approval of their rules. In Ontario, for example, the procedural rules of tribunals to which the province's general code of administrative procedure applies are not subject to Cabinet approval: *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, subsection 25.1(1) [as am. by S.O. 1994, c. 27, s. 56]. Hence, it cannot be said to be a principle of our system of law and government that administrative tribunals' rules of procedure require political approval.

[102] Fourth, while Guideline 7 changed the way in which the Board conducts most of its hearings, it represents, in my view, more of a filling in of detail in the procedural model established by IRPA and the *Refugee Protection Division Rules*, than "fundamental procedural change" or "sweeping procedural reform," to use the characterization in the memorandum of the intervener, the Canadian Council for Refugees.

[103] For example, paragraph 16(*e*) includes the questioning of witnesses in the RPO's duties, but is silent on the precise point in the hearing when the questioning is to occur. Similarly, while rule 25 deals with the intervention of

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the Minister, it does not specify when the Minister will lead evidence and make submissions. Rule 38 permits a party to call witnesses, but does not say when they will testify.

[104] Fifth, the differences in the legal characteristics of statutory rules of procedure and Guideline 7 should not be overstated. Rules of procedure commonly permit those to whom they are directed to depart from them in the interests of justice and efficiency. Thus, rule 69 of the *Refugee Protection Division Rules* permits a member to change a requirement of a rule or excuse a person from it, and to extend or shorten a time period. Failure to comply with a requirement of the Rules does not make a proceeding invalid: rule 70.

[105] Finally, as I have already indicated, the Chairperson's power to issue guidelines extends, on its face, to matters of procedure. Its exercise is not made expressly subject to paragraph 161(1)(*a*), although a guideline issued under paragraph 159(1)(*h*) which is inconsistent with a formal rule of procedure issued under paragraph 161(1)(*a*) will be invalid.

[106] On the basis of the foregoing analysis, I conclude that, on procedural issues, the Chairperson's guideline-issuing and rule-making powers overlap. That the subject of a guideline could have been enacted as a rule of procedure issued under paragraph 161(1)(*a*) will not normally invalidate it, provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, which, for reasons already given, I have concluded that it does not.

[107] In my opinion, the Chairperson may choose through which legislative instrument to introduce a change to the procedures of any of the three Divisions of the Board. Parliament should not be taken to have implicitly imposed a rigidity on the administrative scheme by preventing the Chairperson from issuing a guideline to introduce procedural change or clarification.

[108] I do not say that the Chairperson's discretion to choose between a guideline or a rule is beyond judicial review. However, it was not unreasonable for the Chairperson to choose to implement the standard order of questioning through the more flexible legislative instrument, the guideline, rather than through a formal rule of procedure.

[109] First, Guideline 7 is not a comprehensive code of procedure nor, when considered in the context of the refugee determination process as a whole, is it inconsistent with the existing procedural model for RPD hearings. Second, the procedural innovation of standard order questioning may well require modification in the light of cumulated experience. Fine-tuning and adjustments of this kind are more readily accomplished through a guideline than a formal rule. Parliament should not be taken to have intended the Chairperson to obtain Cabinet approval for such changes.

E. CONCLUSIONS

[110] For these reasons, I would allow the Minister's appeal, dismiss Mr. Thamotharem's cross-appeal, set aside the order of the Federal Court, and dismiss the application for judicial review. I would answer the first two certified questions as follows:

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard? No

2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion? No.

[111] Since I would dismiss the application for judicial review, the third question does not arise and need not be answered.

DÉCARY J.A.: I agree.

* * *

The following are the reasons for judgment rendered in English by

[112] SHARLOW J.A.: I agree with my colleague Justice Evans that this appeal should be allowed, but I reach that conclusion by a different route.

[113] As Justice Evans explains, IRPA gives the Chairperson two separate powers. One is the power in paragraph 159(1)(*h*) to issue guidelines in writing to assist members in carrying out their duties. The other is the power in paragraph 161(1)(*a*) to make rules respecting the activities, practice and procedure of the Board, subject to the approval of the Governor in Council. Both powers are to be exercised in consultation with the Deputy Chairpersons

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and the Director General of the Immigration Division. In my view, these two powers are different in substantive and functional terms and are not interchangeable at the will of the Chairperson.

[114] The subject of Guideline 7 is the order of proceeding in refugee hearings. That is a matter respecting the activities, practice and procedure of the Board, analogous to the subject-matter of the procedural rules of courts. In my view, the imposition of a standard practice for refugee determination hearings should have been the subject of a rule of procedure, not a guideline.

[115] I make no comment on the wisdom of the Chairperson's determination that the standard practice in refugee hearings, barring exceptional circumstances, should be for the RPO or the member to start questioning the refugee claimant. That is a determination that the Chairperson was entitled to make. However, to put that determination into practice while respecting the limits of the statutory authority of the Chairperson, the Chairperson should have drafted a rule to that effect, in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, and sought the approval of the Governor in Council.

[116] Justice Evans notes that some commentators have suggested that the implementation of a rule under paragraph 161(1)(*a*) is more onerous in administrative and bureaucratic terms than the implementation of a guideline under paragraph 159(1)(*h*). That appears to me to be an unduly negative characterization of the legislated requirement for the approval of the Governor in Council, Parliament's chosen mechanism of oversight for the Chairperson's rule-making power under paragraph 161(1)(*a*). It is also belied by the facts of this case, which indicates that the development of Guideline 7 took approximately four years. I doubt that a rule with the same content would necessarily have taken longer than that.

[117] The more important question in this case is whether the Chairperson's erroneous decision to implement a guideline rather than a rule to establish a standard practice for refugee hearings provides a sufficient basis in itself for setting aside a negative refugee determination made by a member who requires a refugee claimant to submit to questions from the RPO or the member before presenting his or her own case.

[118] I agree with Justice Evans that the standard procedure outlined in Guideline 7 is not in itself procedurally unfair and that Guideline 7, properly understood, does not unlawfully fetter the discretion of members. In my view, despite Guideline 7, each member continues to have the unfettered discretion to adopt any order of procedure required by the exigencies of each claim to which the member is assigned.

[119] It may be the case that a particular member may conclude incorrectly that Guideline 7 deprives the member of the discretion to permit a refugee claimant to present his or her case before submitting to questioning from the RPO or the member. If so, it is arguable that a negative refugee determination by that member is subject to being set aside if (1) the member refused the request of a refugee claimant to proceed first and required the refugee claimant to submit to questioning by the RPO or the member before presenting his or her case, and (2) it is established that, but for Guideline 7, the member would have permitted the refugee claimant to present his or her case first. In the case of Mr. Thamotharem, those conditions have not been met.

[120] For these reasons, I would dispose of this appeal as proposed by Justice Evans, and I would answer the certified questions as he proposes.

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No. 32185

December 13, 2007

Coram: Bastarache, Abella and Charron JJ.

BETWEEN:

Daniel Thamotharem

Applicant

- and -

Minister of Citizenship and Immigration

Respondent

- and -

Immigration and Refugee Board

Intervener

JUDGMENT

The application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-38-06, 2007 FCA 198, dated May 25, 2007, is dismissed with costs.

Le 13 décembre 2007

Coram : Les juges Bastarache, Abella et Charron

ENTRE :

Daniel Thamotharem

Demandeur

- et -

Ministre de la Citoyenneté et de l'Immigration

Intimé

- et -

Commission de l'immigration et du statut de réfugié

Intervenante

JUGEMENT

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel fédérale, numéro A-38-06, 2007 CAF 198, daté du 25 mai 2007, est rejetée avec dépens.

J.S.C.C.
J.C.S.C.

2007 CanLII 55338 (SCC)

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0311

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order under sections 112.3, 112.4 and 112.5 of the Ontario Energy Board Act, 1998 for Compliance, Suspension and an Administrative Penalty against Energhx Green Energy Corporation.

BEFORE: Marika Hare
Presiding Member

Paula Conboy
Member

DECISION AND ORDER

On August 25, 2011 the Ontario Energy Board (the "Board"), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act") issued a Notice of Intention to Make an Order (the "Notice") against Energhx Green Energy Corporation ("Energhx").

The Notice provides that the Board intends to make an Order: (i) under sections 112.3 and 112.5 of the Act, requiring Energhx to comply with certain enforceable provisions as defined in section 3 of the Act and to pay an administrative penalty in the amount of $32,500 for breaches of those enforceable provisions; and, (ii) under section 112.4 of the Act, to suspend Energhx's activities with respect to sales, renewals, extensions or amendments of contracts using the following channels: Door-to Door, Exhibitions, Trade Shows and Direct Mail. The Notice describes the allegations of non-compliance as follows:

> *It is alleged that Energhx has contravened sections of Ontario Regulation 90/99, Ontario Regulation 389/10, section 12 of the Energy Consumer Protection Act, 2010… and the Electricity Retailer Code of Conduct and the Code of Conduct for Gas Marketers.*[1]

The particulars in support of the allegations are set out in the Notice, and are reproduced below.

On September 9, 2011, Energhx filed a letter with the Board requesting a hearing on the matter, as it was entitled to do under the Notice and the Act.

On November 11, 2011, the Board issued a Notice of Hearing and Procedural Order No. 1 setting January 23, 2012 and January 24, 2012 as dates for an oral hearing.

On January 18, 2012, Compliance counsel requested adjournment of this proceeding to a later date due to the unavailability of its main witness. The Board approved that request.

On January 20, 2012, the Board issued Procedural Order No. 2 setting February 7, 2012 as the date for the oral hearing.

I. BACKGROUND

A. Energhx's Licences

Energhx initially received a Gas Marketer Licence (GM-2009-0188) and an Electricity Retailer Licence (ER-2009-0189) (collectively, the "Licences") on October 22, 2009, which authorized it, among other things, "to sell or offer to sell" gas or electricity, respectively, to a consumer. The Licences require that Energhx comply with all

[1] The statutory and other references noted in this excerpt from the Notice are as follows: Ontario Regulation 90/99 (Licence Requirements – Electricity Retailers and Gas Marketers) made under the Act, as most recently amended by Ontario Regulation 390/10 filed on October 13, 2010 and effective January 1, 2011; Ontario Regulation 389/10 (General) made under the *Energy Consumer Protection Act, 2010*, also filed on October 13, 2010 and effective January 1, 2011; the *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8, in force on January 1, 2011; Ontario Energy Board *Electricity Retailer Code of Conduct,* as restated November 17, 2010 and in force January 1, 2011; and Ontario Energy Board *Code of Conduct for Gas Marketers,* as restated November 17, 2010 and in force effective January 1, 2011.

applicable provisions of the Act and the regulations made under the Act. The Licences also require that Energhx comply with applicable rules (gas) or codes (electricity), for present purposes these being the Electricity Retailer Code of Conduct (in the case of the Electricity Retailer Licence) and the Code of Conduct for Gas Marketers (in the case of the Gas Marketer Licence) (collectively, the "Codes"). The Licences were issued for a one year period and were to expire on October 20, 2010.

By its terms, the Gas Marketer Licence applies only in relation to marketing activities pertaining to "low volume" consumers. Although the Electricity Retailer Licence applies to retailing activities in respect of all consumers, the allegations in the Notice relate only to retailing activities pertaining to "low volume" consumers.[2]

On June 8, 2010, Energhx filed applications to renew its Licences (the "Licence Applications").[3] The Licences were extended to January 31, 2011.[4] On January 28, 2011 the Board re-opened the record of the Licence Applications proceeding to provide Energhx an opportunity to submit evidence of compliance with the legislative and regulatory requirements, and also extended the Licences until March 31, 2011.[5] Energhx filed the requested evidence on February 4, 2011 and, while the evidence was being considered, on March 24, 2011 the Board ordered that the Licences be extended until "the final determination of the [Licence Applications] or October 31, 2011, whichever is earlier.[6] On October 31, 2011, the Board ordered that, while certain compliance inspections were underway, the Licences be extended until "the final determination of the [Licence Applications] or April 30, 2012, whichever is earlier".[7] The current versions of the Licences state that they are "valid by extension until April 30, 2012."

[2] A "low volume" consumer is, in the case of gas, a consumer that annually uses less than 50,000 cubic meters of gas and, in the case of electricity, a consumer that annually uses less than 150,000 kilowatt hours of electricity. The Board's Code of Conduct for Gas Marketers applies on in relation to low-volume consumers, while the Board's Electricity Retailer Code of Conduct contains provisions that apply only in relation to low volume consumers and others that apply in relation to all consumers.
[3] EB-2010-0236 and EB-2010-0237.
[4] Decision and Procedural Order No. 1 issued in respect of the Licence Applications on October 1, 2010.
[5] Decision and Procedural Order No. 3 issued in respect of the Licence Applications on January 28, 2011.
[6] Decision and Order issued in respect of the Licence Applications on March 24, 2011.
[7] Decision and Order issued in respect of the Licence Applications on October 31, 2011.

B. Compliance Inspection

The *Energy Consumer Protection Act, 2010* (the "ECPA") came into effect on January 1, 2011. It is designed to protect energy consumers by ensuring that retailers and marketers follow fair business practices and that consumers are provided with essential information before they sign energy contracts. The Board's compliance activities which resulted in issuance of the Notice against Energhx were initiated shortly after the ECPA and the restated Codes came into effect on January 1, 2011.

The record indicates that Energhx filed Certificates of Compliance dated December 15, 2010 with the Board in which Dr. Emmanuel Ogedengbe, on behalf of Energhx, certified that, as of January 1, 2011, Energhx will meet all applicable legal and regulatory requirements pertaining to the following in relation to all sales channels that Energhx identified in the Certificates of Compliance as being those that it intended to use: training and testing for salespersons and verification representatives; business cards; identification badges; text-based contracts; disclosure statements; price comparisons; use of verification scripts; and adequate processes and controls to ensure compliance for each of the foregoing, as well as for contract cancellations.

Starting in early 2011, the Board conducted compliance inspections of all retailers and marketers who had filed Certificates of Compliance. Staff from Ernst and Young LLP ("Ernst & Young") were appointed to serve as "inspectors" pursuant to the power set out in section 106 of the Act. Ernst & Young conducted an inspection of Energhx between March 7 and April 13, 2011, covering the period from January 1, 2011 to February 28, 2011. In the process, Ernst &Young attended Energhx's premises, made inquiries and observations, inspected documents, communicated with Energhx representatives and retained copies of certain documents. After the compliance inspection was complete, Ernst & Young provided to the Board its observations, as well as the documents related to those observations.

On August 25, 2011, following the completion of Board Compliance staff's review and validation process regarding the compliance inspection, the Board issued the Notice.

At the commencement of the hearing on February 7, 2012, Compliance counsel indicated that an order to suspend Energhx activities with respect to sales, renewals, extensions or amendments of contracts using all its sales channels was no longer being sought.[8]

II. ALLEGATIONS AND PARTICULARS OF NON COMPLIANCE

As noted above, in the Notice the Board alleges that Energhx has contravened sections of Ontario Regulation 90/99, Ontario Regulation 389/10, section 12 of the ECPA and the Codes.

The particulars set out in the Notice in support of the allegations are described below.

A. Training Materials - Salespersons

Section 7 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that every person acting on behalf of the licensee has successfully completed such training as may be required by a code, rule or order of the Board before meeting in person with a low volume consumer. Section 5 of the Codes requires a retailer or marketer to ensure that salespersons acting on its behalf have successfully completed training (as demonstrated by a minimum 80% pass mark on the required training test), and also requires that the training materials used be adequate and accurate and cover certain specified subject matter.

The Notice indicates that the electricity and gas training material used by Energhx for prospective salespersons was reviewed during the inspection and that, at the time of the inspection, three prospective salespersons had completed the Energhx training. The Notice alleges that the training materials used by Energhx did not include adequate and accurate material in the following areas as they pertain to low volume consumers:

1. How to complete a contract application; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(ii) of the Codes.

2. Use of business cards; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(iv) of the Codes.

[8] Transcript of the oral hearing, page 2, lines 17 to 23.

3. Use of Identification badges; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(v) of the Codes.

4. Disclosure statements; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(vi) of the Codes.

5. Price Comparisons; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(vii) of the Codes.

6. Consumer cancellation rights set out in section 21 of Ontario Regulation 389/10; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(ix) of the Codes.

7. Renewals and extensions; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(x) of the Codes.

8. Persons with whom Energhx may enter into, verify, renew or extend a contract; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(xii) of the Codes.

B. Training Materials - Verification Representatives

The legal and regulatory regime regarding the training of verification representatives is largely the same as that for salespersons as described above (the subject matter to be covered by the training is different in some respects).

The Notice indicates that the electricity and gas training materials used by Energhx for prospective verification representatives were reviewed during the inspection and that, at the time of the inspection, one prospective verification representative had completed the Energhx training. The Notice alleges that the training materials used by Energhx did not include adequate and accurate material in the following areas as they pertain to low volume consumers:

9. Disclosure statements; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(iii) of the Codes.

10. Price comparisons; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(iv) of the Codes.

11. Consumer cancellation rights set out in section 21 of Ontario Regulation 389/10; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(vi) of the Codes.

12. Persons with whom Energhx may enter into and verify a contract; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(viii) of the Codes.

C. Training test

The Notice indicates that the electricity and gas training test questions used by Energhx which are designed to assess the state of the salesperson's or verification representative's knowledge of the required topic areas stated in the Codes were reviewed during the inspection. As noted above, the Codes require a minimum pass mark of 80% on the required training test. Section 5.6 of the Codes also states that a prospective salesperson or verification representative may re-take the training test once, but only after having re-taken the full training required by the Codes.

The Notice alleges as follows:

13. Energhx confirmed with the inspector that it requires a salesperson or verification representative to achieve a minimum 75% pass mark on the training test; contrary to section 5.6(c) of the Codes which requires a pass mark of 80%.

14. In one case reviewed the prospective salesperson (initials A. Z.) attempted the test twice but scored 70% each time however, the individual was considered to have passed the test; contrary to section 5.6(c) and (d) of the Codes.

D. Record retention

Section 5.10 of the Codes requires that complete records relating to training and testing be retained for a period of not less than two years from the date on which a salesperson or verification representative ceases to act on behalf of the retailer or marketer in relation to low volume consumers.

The Notice alleges that Energhx has contravened the following requirements in relation to record retention pertaining to salespersons and verification representatives for electricity and gas:

15. Energhx does not have its salespersons and verification representatives sign a statement that he or she will comply with all applicable legal and regulatory requirements in relation to the activities the person will conduct on behalf of Energhx in relation to low volume consumers. The required records are therefore not retained; contrary to section 5.10(g) of the Codes.

16. Energhx stated during the inspection that it plans on maintaining salesperson and verification representative records for a period of one year; contrary to section 5.10 of the Codes.

E. Business cards

Section 5 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that every person acting on behalf of the licensee offer a business card at every meeting in person with a low volume consumer. That business card must comply with the requirements set out in section 5 of Ontario Regulation 90/99 and with any other requirement as may be set out in a code, rule or order of the Board. Sections 2.1 and 2.2 of the Codes address requirements for business cards.

The Notice indicates that, during the inspection, Energhx confirmed that all business cards issued to salespersons who meet in person with low volume consumers are in the same format and contain the same content. The Notice alleges that Energhx has contravened the electricity and gas business card requirements as follows:

17. During the inspection it was observed that the business card does not state the electricity and gas licence numbers issued to Energhx under the Act nor does it

state Energhx's toll-free telephone number; contrary to section 5 of Ontario Regulation 90/99 and section 2.2(a) and (d) of the Codes.

18. As the content of the business cards provided by Energhx are in breach of section 2.2(a) and (d) of the Codes, it is likely that the use of such business cards by Energhx salespersons in their current form will result in a breach of section 5(6)(ii) of Ontario Regulation 389/10 and sections 1.1(b) and 2.1 of the Codes.

F. Identification badges

Section 6 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that the licensee issue a photo identification badge ("ID badge") to every person who meets in person with a low volume consumer while acting on behalf of the licensee, and that the person at all times prominently display that ID badge. That ID badge must comply with the requirements set out in section 6 of Ontario Regulation 90/99 and with any other requirement as may be set out in a code, rule or order of the Board. Sections 2.3 to 2.5 of the Codes address requirements for ID badges.

The Notice indicates that, during the inspection, Energhx confirmed that ID badges issued to salespersons who meet in person with low volume consumers are in the same format and contain the same content. The Notice alleges that Energhx has contravened the following in relation to the electricity and gas ID badge requirements:

19. During the inspection, it was noted that the ID badge does not state that the salesperson is (a) not associated with any electricity or gas distributor or government, contrary to section 6 of Ontario Regulation 90/99; and (b) not a representative of the consumer's electricity or gas distributor and is not associated with the Ontario Energy Board or the Government of Ontario. It was also observed that the ID badge does not state an expiry date. This is contrary to section 2.4(a) and (g) of the Codes.

20. As the content of the ID badges provided by Energhx are in breach of section 2.4(a) and (g) of the Codes, it is likely that the use of such ID badges by Energhx salespersons in their current form will result in a breach of section 5(6)(i) of Ontario Regulation 389/10 and sections 1.1(c) and 2.3 of the Codes.

G. Contract content requirements for new contracts

Section 12 of the ECPA states that a contract with a low volume consumer must, among other things, contain the information prescribed by regulation. The information required to be contained in a contract is listed in section 7 of Ontario Regulation 389/10.

The Notice indicates that one transaction for electricity and one transaction for gas were reviewed. In respect of both transactions, the Notice alleges that Energhx contravened the following content requirements in relation to electricity and gas contracts:

21. The contract fails to include a statement that if the consumer cancels the contract within the 10-day period, the consumer is entitled to a full refund of all amounts paid under the contract; contrary to section 12 of the ECPA and section 7(1)9 of Ontario Regulation 389/10.

22. The contract fails to include a description of any other circumstances in which the consumer or Energhx is entitled to cancel the contract with or without notice or cost or penalty, the length of any notice period, the manner in which notice can be given and the amount of any cost or penalty; contrary to section 12 of the ECPA and section 7(1)13 of Ontario Regulation 389/10.

23. The contract fails to include the applicable conditions/rights under section 21(a), (b) & (e) of Ontario Regulation 389/10 which provide that the consumer can cancel the contract without cost or penalty; contrary to section 12 of the ECPA and section 7(1)13 of Ontario Regulation 389/10.

24. The signature and printed name of the consumer, or the account holder's agent signing the contract on behalf of the consumer, and of the person signing the contract on behalf of Energhx, is contained below the acknowledgment to be signed and dated by the consumer or account holder's agent that he or she has received a text based copy of the contract. The signature of the person signing

on behalf of Energhx and the acknowledgement of the consumer are therefore in the reverse order to the specified requirements in Ontario Regulation 389/10; contrary to section 12 of the ECPA and section 7(1)17 & section 7(1)18 of Ontario Regulation 389/10.

H. Completion of price comparisons for new contracts

Section 12 of the ECPA states that a contract with a low volume consumer must, among other things, be accompanied by the information or documents prescribed by regulation or required by a code, rule or order of the Board. Under section 8(3) of Ontario Regulation 389/10, a price comparison that complies with the requirements of a code, rule or order of the Board must accompany the disclosure statement that itself is required to accompany a contract. Sections 4.6 to 4.9 of the Codes address requirements for price comparisons, including the requirement that a price comparison be completed using the template approved by the Board and in accordance with the instructions contained in that template.

The Notice alleges as follows:

25. Energhx advised that it has one five-year contract offer available to residential and non-residential electricity and gas consumers. Board staff observed that the price comparison had been completed accurately according to the template instructions with the exception of the document control number box which also includes a date which is not in accordance with instruction number 8; contrary to section 12 of the ECPA, section 8(3) of Ontario Regulation 389/10, and section 4.6(b) of the Codes.

I. Verification call (use of the applicable Board-approved script)

Subject to certain exceptions, under section 15 of the ECPA a contract with a low volume consumer must be verified within the time and in the manner required by the ECPA, Ontario Regulation 389/10 and any applicable code, rule or order of the Board. Sections 4.10 to 4.12 of the Codes address requirements for verification, notably the obligation to use a Board-approved script.

The Notice indicates that Energhx had only conducted one verification call during the period covered by the inspection (January 1 to February 28, 2011), and that this was a dual fuel verification call to verify both electricity and gas contracts. The Notice alleges that Energhx contravened the following requirements and deviated from the Board-approved script in the following areas:

26. The verification representative did not introduce her name to the consumer and did not identify herself as calling on behalf of Energhx; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

27. The verification representative did confirm the consumer's name but did not confirm if she was speaking to the account holder or the account holder's agent; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

28. The verification representative did not ask if the customer was comfortable to proceed with the call in English; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

29. The verification representative did not advise the consumer that the call was being recorded; contrary to section 15 of the ECPA, section 13(2) and section 13(3) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

J. Compliance monitoring and quality assurance program

Sections 7.4 and 7.5 of the Codes require that a retailer maintain a compliance monitoring and quality assurance program that enables the retailer or marketer to monitor compliance with the Act, the ECPA, the regulations and all applicable regulatory requirements in relation to retailing or marketing to low volume consumers and to identify any need for remedial action. Such a program must meet the minimum requirements specified in the Code.

The Notice alleges that Energhx contravened the requirement as follows:

30. During the inspection, Energhx confirmed that it does not maintain a compliance monitoring and quality assurance program as required by section 7.4 and section 7.5 of the Codes.

III. BOARD FINDINGS ON ISSUES BEFORE THE BOARD OTHER THAN THE SPECIFIC ALLEGATIONS

The following issues emerged during the oral hearing and in written submissions.

Certificates of Compliance

On December 15, 2010, Energhx filed Certificates of Compliance in the form required, certifying to a variety of matters regarding compliance with "all applicable legal and regulatory requirements" in respect of all sales channels that Energhx indicated it intended to use as of January 1, 2011.[9]

In its submissions, Energhx characterized its certification as follows:

> *The Certificates of Compliance confirm Energhx's obligation to comply with the stated retailing activities, relating to the retailing/marketing channels, recruitment, training and conduct of salespersons, contracts, verification, handling of cancellations, complaints and retractions. These are statements of **intentions** and not **actions**. For example, the certification confirms retailing/marketing activities as "...channels that the gas marketer/retailer intends to use.."*[10]

[9] In the Certificates of Compliance, Energhx indicated that it did not intend to use certain sales channels (Energhx's place of business, internet and telephone renewals). The Certificates of Compliance are available for viewing on the Board's website at: http://www.ontarioenergyboard.ca/OEB/Consumers/Consumer+Protection/Retail+Energy+Contracts/List+of+Retailers+and+Marketers

[10] Energhx written submissions dated February 16, 2012, at page 6.

The Board is of the view that the Certificates of Compliance, by their terms, attest to the state of compliance by the signing retailer or marketer, and do not represent "statements of intentions". For example, the Certificates of Compliance refer to salespersons having undergone training and testing in accordance with all applicable legal and regulatory requirements, to contracts having been revised as required to comply with all applicable legal and regulatory requirements and to the company using only compliant contracts on and after the "Effective Certification Date" (being the later of the date of signature of the Certificate and January 1, 2011). Execution by Energhx of the Certificates of Compliance certified Energhx's compliance with those requirements. The Board agrees with the submission of Compliance counsel that Ontario Regulation 90/99 and the Certificates of Compliance make it clear that Energhx was subject to all applicable legal and regulatory requirements.[11]

All retailers and marketers doing business in Ontario must understand and abide by the statutory and regulatory requirements regardless of whether they are new businesses or established sector participants. The Board notes that the legal and regulatory requirements should have been known and understood by all marketers and retailers in advance of the January 1, 2011 implementation date. The ECPA was tabled in Bill form on December 8, 2009 and received Royal Assent on May 18, 2010. Proposed drafts of Ontario Regulation 389/10 and of the amendments to Ontario Regulation 90/99 were posted for comment on July 2, 2010, and final versions were filed on October 13, 2010. The two Codes, as restated, were issued on November 17, 2010 following a notice and comment process that commenced in August of that year.

As will be discussed in detail later in this Decision, the evidence shows that Energhx was not in full compliance with the ECPA, the relevant regulations and the Codes during the period covered by the compliance inspection. While the evidence also indicates that Energhx later addressed these deficiencies,[12] which is reassuring to the Board, it does not mitigate the fact that at the time of the inspection a number of infractions of the ECPA, the relevant regulations and the Codes were noted.

[11] Compliance counsel written submissions dated February 10, 2012, at pages 9-10.
[12] Letter dated September 9, 2011, Exhibit K, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

Standard of proof

Compliance counsel acknowledges that it bears the burden of proving the allegations set out in the Notice and that this is a civil standard, often referred to as a "balance of probabilities".[13] The Supreme Court of Canada has described the applicable test as "whether it is more likely than not that an alleged event occurred".[14]

Energhx did not comment on who bears the burden of proving the allegations set out in the Notice or on the standard of proof.

There is no dispute, and the Board agrees, that the onus of proving the allegations rests with Compliance counsel, and that the standard is "whether it is more likely than not that an alleged event occurred".

Prescriptive nature of legal and regulatory requirements

Compliance counsel submits that the Act, the ECPA, the relevant regulations and the Codes are highly detailed and prescriptive and thus provide little room for discretion on the part of retailers and marketers.[15] Furthermore, Compliance counsel submits that it is incumbent on the Board to give full effect to the legal and regulatory scheme and to require full compliance with its requirements.[16]

Energhx did not comment on Compliance counsel's submissions as to the prescriptive nature of the legal and regulatory scheme.

The Board agrees that the requirements of the ECPA, the relevant regulations and the Board's Codes are highly prescriptive and detailed, leaving little room for discretion for retailers and marketers. Nonetheless, the Board must consider whether the burden of proof has been met in relation to each allegation, and must then also consider in each case the appropriate enforcement action to be taken.

[13] Compliance counsel written submissions dated February 10, 2012, at page 11.
[14] *F.H. v. McDougall*, [2008] S.C.R. 41 at para. 49.
[15] Compliance counsel written submissions dated February 10, 2012, at page 11.
[16] *Ibid.*

Interim licence versus extension of existing licences

During oral testimony, the Energhx witness spoke to the issue of licence extensions versus interim licences.[17] In its written submissions, Energhx submits that, without an "interim licence", it could not commence its general public offering of its electricity retailing and gas marketing services during the period covered by the compliance inspection.[18]

Compliance counsel submits that, even if there is a distinction between an "interim licence" and an extension of an existing licence, it is irrelevant to the question of whether Energhx was bound to follow the various legislative and regulatory requirements set out in the Notice.[19]

The Board also notes that the record of the Licence Applications proceeding clearly shows that Energhx's existing Licences were extended, which allowed it to continue with any marketing and retailing activities in accordance with those Licences. It is also clear that the Licences issued to Energhx do not themselves contain limitations on the nature of the retailing or marketing activities that can be carried out by Energhx, beyond those that apply by operation of law or that devolve from the Codes. Contrary to the position taken by Energhx, an "interim licence" issued under section 59 of the Act does not inherently confer any additional benefits on the licensee relative to licences issued in the normal course under section 57 of the Act as far as permitted activities go.

In any event, the Board agrees with Compliance counsel that the distinction between an interim licence and a licence extension, if any, is not in any way relevant to the issue of the obligation on Energhx to comply with applicable legal and regulatory requirements.

Whether Energhx engaged in retailing and marketing activities

Compliance counsel submits that Energhx was engaged in "retailing" and "marketing" to "consumers", as those terms are defined in the Codes and the ECPA.[20] In particular,

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[17] Transcript of the oral hearing, page 117, line 16 to page 120, line 8; and page 142, line 18 to page 144, line 14.
[18] Energhx written submissions dated February 16, 2012, at pages 2-3.
[19] Compliance counsel written submissions dated February 10, 2012, at page 10.
[20] *Ibid*, at page 12.

Compliance counsel relies on the following facts, all of which were admitted by Energhx in the course of the proceeding:

(a) Energhx representatives interacted with "acquaintances" and "friends" in order to offer them the opportunity to become Energhx "associates" – which later was understood by the Board to be a synonym for consumer;
(b) A single verification call was made by Energhx; and
(c) At the time of the compliance inspection, Energhx had approximately 10 customers, three of whom were not affiliated with Energhx as employees or sales agents.[21]

During the oral hearing and in its submissions, Energhx submits that it has consistently set its focus on developing a unique supply service which would be marketed as the Green Energy Credit™. According to Energhx, the Green Energy Credit™ was submitted for patent protection in December 2010, and there was a lag in time to market caused by technical development and administrative setup procedures.[22] Energhx asserts that, in the absence of an interim licence, it could not commence its electricity retailing and gas marketing services during the period covered by the compliance inspection, and that it was constrained to "limit its activities to the training of associates, using their accounts for setup implementation procedures".[23]

The Board finds the evidence of Energhx internally contradictory with respect to the degree of retailing and marketing that it carried out during the period covered by the compliance inspection.[24] On the one hand, the witness insisted that Energhx only dealt with "associates", but on the other hand it was clear that a verification call was made and that at least three customers were signed up for the Energhx offer who were not affiliated with the company,[25] and it is not clear how those customers came to be enrolled with Energhx in the absence of some type of sales activity.

[21] *Ibid,* at page 13, referring to various portions of the transcript of the oral hearing.
[22] Energhx written submissions dated February 16, 2012, at page 2.
[23] *Ibid.*, at page 3.
[24] Transcript of the oral hearing, page 120, line 15 to page 124, line 1.
[25] Transcript of the oral hearing, page 138, line 25 to page 139, line 10.

It was, however, evident that at the time of the compliance inspection the company was in a start-up phase and it appears that no marketing and retailing was undertaken beyond friends, family or company employees.[26] The testimony of Energhx's witness to that effect was not challenged by Compliance counsel. However, the Board is mindful that the statutory and regulatory requirements apply in relation to retailing and marketing to all low volume consumers, even those that are friends, family or company employees. There is nothing in the legal and regulatory framework governing the activities of retailers and marketers that diminishes or eliminates the entitlement of friends, family or company employees to the protections that form part of that framework. As a general proposition then, the legal and regulatory framework does not provide for greater tolerance simply because the consumer may be in some way affiliated or associated with the marketer or retailer.

Administrative penalties

Energhx submits that the administrative penalty assessed against a person under section 112.5 of the Act "is designed to follow the Board's Cost Assessment Model".[27] The Board understands Energhx's argument in this regard to be that, in determining the amount of any administrative penalty, the Board should apply the principles of the Cost Assessment Model ("CAM") and consider Energhx as a start up business with no significant record of sales (few electricity customers and no gas customers enrolled during the period covered by the compliance inspection).

Energhx appears to misunderstand the applicability of the CAM. The CAM is the methodology that the Board uses to apportion its costs amongst the persons or classes of persons who pay cost assessments under section 26 of the Act. These persons and classes of persons are identified in Ontario Regulation 16/08 (Assessment of Expenses and Expenditures), and include licensed retailers and marketers. The CAM has nothing to do with the assessment of administrative penalties, in respect of which Ontario Regulation 331/03 (Administrative Penalties) applies.

[26] Transcript of the oral hearing, page 145, line 20 to page 147, line 14.
[27] Energhx written submissions dated February 16, 2012, at page 6.

Energhx also submits that the Board has unjustly imposed a "high-handed barrier to fair competition in the deregulated energy market" and that the administrative penalty "represents an undue burden against new technology-driven competition".[28] The Board does not agree with this characterization.

Compliance counsel submits that any purported benefit Energhx presents to the market in terms of advancing competition or green energy technology as a start up business is irrelevant for the purposes of setting an administrative penalty.[29] The Board agrees.

The Board notes that a number of the allegations set out in the Notice relate to the same underlying subject matter or transaction. For example, four allegations of non-compliance are associated with a single verification call, and 12 allegations are associated with the same training materials. Compliance counsel acknowledges that "the presentation of certain allegations as 'distinct' contraventions may be more a matter of style than substance".[30] Although Compliance counsel submits that, once proven, it is appropriate to consider each allegation as a distinct contravention for the purposes of calculating the appropriate administrative penalty as long as the allegation cites a breach of a unique requirement, Compliance counsel also concedes that the Board may consider at least some of the allegations as a single contravention.[31] For the reasons discussed later in this Decision, the Board believes that this is an appropriate case in which to assess administrative penalties on a transaction-by-transaction basis rather than on the basis of each allegation individually.

The Board also notes that the imposition of an administrative penalty in respect of any given instance of non-compliance is a matter for the discretion of the Board. Specifically, section 112.5(1) of the Act states that, "if the Board is satisfied that a person has contravened an enforceable provision, the Board *may*, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order…" (emphasis added). Where the Board considers it appropriate to impose an administrative penalty, the amount of that penalty must be determined in accordance with the rules set out in Ontario Regulation 331/03 (Administrative Penalties), which sets the minimum penalty at $1,000.

[28] *Ibid.*, at pages 1 and 4.
[29] Compliance counsel written submissions dated February 10, 2012, at page 40.
[30] *Ibid,* at page 34.
[31] *Ibid,* at page 35.

IV. BOARD FINDINGS ON SPECIFIC ALLEGATIONS

During the oral hearing and in its written submissions, Compliance counsel reviewed in detail each allegation in the Notice. The focus of the evidence and hearing was on the compliance inspection of Energhx during the two month period from the beginning of January to the end of February, 2011 and the allegations arising from that inspection. Of interest to the Board however was also to understand the compliance process following the inspection. The two witnesses who were presented were not able to provide evidence of that process or to address the assessment of the severity of the allegations[32]. In cases such as these, the Board expects witnesses who are familiar with the *entire* compliance process, not just the inspection phase, to be available to provide evidence to the Board.

In Energhx's written submissions, comments on the specific allegations were largely restricted to the alleged deficiencies of its training program.[33]

The Board's findings with respect to the specific allegations are set out below.

A. Training of Sales Representatives – Allegations 1 to 8

The Notice contains eight allegations of inadequate training of sales representatives. Deficiencies in the training materials identified by Compliance counsel were presented relative to the power point presentation provided by Energhx to its trainees.

Allegation 1 pertains to training regarding how to complete a contract application, allegation 5 pertains to training regarding price comparisons and allegation 7 pertains to training regarding renewals and extensions. The power point presentation did not contain any information in relation to these topics. The Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in this respect, and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly.

[32] Transcript of the oral hearing, page 111, lines 12 to 20.
[33] Energhx written submissions dated February 16, 2012, at pages 4-5.

Allegations 2, 3, 4, 6 and 8 pertain to training regarding the use of business cards, the use of ID badges, disclosure statements, consumer cancellation rights and persons with whom a retailer or marketer may enter into, verify, renew or extend a contract. These topics are referred to in the power point presentation. In the opinion of Compliance counsel, however, they are not addressed in sufficient detail, and the training material is not adequate in terms of thoroughness.

In his testimony, Dr. Ogedengbe stated that the power point presentation was augmented by an "in-classroom" session for sales representatives.[34] However, in the Board's view, the Code requirement for "adequate and accurate material" that covers certain topics is a requirement for written material. As such, while an oral component may usefully supplement written materials, it is not a substitute for them.

Gauging the adequacy of training materials is necessarily a subjective exercise. The references to the topics referred to in allegations 2, 3, 4, and 8 in the power point presentation are limited to identifying that it is an unfair practice for a retailer or marketer to be in non-compliance with requirements relating to those topics. The Board notes that the Codes require training material on "behavior that constitutes an unfair practice" separate and apart from material on the use of business cards, the use of ID badges, disclosure statements and the persons with whom a retailer or marketer may enter into, verify, renew or extend a contract. With respect to allegation 6, the reference in the power point presentation to consumer cancellation rights is limited to noting the 10-day cooling off period and the "reaffirmation option". The ECPA and Ontario Regulation 389/10 include cancellation rights beyond the 10-day cooling off period, refer to verification and not "reaffirmation", and make it clear that a contract that is not verified as and where required is void. The Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in respect of the topics referred to in allegations 2, 3, 4, 6 and 8, and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly

B. Training of Verification Representatives – Allegations 9 to 12

The training material used by Energhx for verification representatives consists of the same power point presentation as that used for sales representatives. The allegations

[34] Transcript of the oral hearing, page 140, lines 7 to 10.

of inadequate training of verification representatives are therefore similarly based on Compliance counsel's assessment of that power point presentation.

Allegation 10 pertains to the absence of training material on the topic of price comparisons, and allegations 9, 11 and 12 pertain to the inadequacy of training material on the topics of disclosure statements, consumer cancellation rights and the persons with whom a marketer or retailer may enter into, verify, renew or extend a contract. For the reasons noted above, the Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in respect of these topics and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly.

C. Training test – Allegations 13 and 14

Energhx admits that it initially required a passing score of 75% on the training test, contrary to the Code requirement.[35] Energhx also admits that a person was allowed to take the training test twice, scoring 70% on both attempts.[36] As noted by Compliance counsel, there was no evidence that the person re-took the training program.[37] The Board finds that Energhx contravened section 5.6(c) and section 5.6(d) of the Codes.

D. Record retention - Allegations 15 and 16

The Board finds that Energhx has contravened section 5.10(g) of the Codes in relation to the records required to be maintained in relation to salespersons and verification representatives, as set out in allegation 15.

Energhx admits that it advised Ernst & Young that Energhx plans on maintaining records pertaining to salespersons and verification representatives.[38] It is understood that the Codes require that such records be maintained for a period of two years. The Board notes, however, that at the time of the compliance inspection the two-year period had not yet elapsed. As such, a finding of a contravention would necessarily be prospective (i.e., that Energhx is likely to contravene this requirement of the Code). Allegation 16 is not cast in such terms.

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[35] Admitted Fact #4, Document Binder, Exhibit K1 at Tab 6.
[36] Admitted Fact #5, Document Binder, Exhibit K1 at Tab 6.
[37] Compliance counsel written submissions dated February 10, 2012, at page 25.
[38] Admitted Fact #7, Document Binder, Exhibit K1, Tab 6.

The Board notes that it may, under section 112.3 of the Act, make an order requiring a person to comply with an enforceable provision and to take such action as the Board may specify to prevent a contravention in circumstances where the Board is satisfied that a contravention is likely. However, administrative penalties may only be levied where the Board is satisfied that a contravention has occurred.

As noted earlier in this Decision, the evidence indicates that Energhx has addressed this deficiency (as well as all others identified in the Notice).[39] The Board therefore does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 16.

E. Business cards – Allegations 17 and 18

At the time of the Board's compliance inspection, the business cards issued to Energhx salespersons who meet in person with low-volume consumers did not include the numbers of the Licences issued to Energhx, as required by section 5 of Ontario Regulation 90/99 and section 2.2 of the Codes. The business cards also did not include a toll-free number for Energhx, as required by section 2.2 of the Codes. While it is arguable that a toll-free number (i.e., a "1-800" number) should not be required for a company only doing business in one area code, it is a requirement of the Codes. Accordingly, the Board finds there have been breaches of the Codes and of Ontario Regulation 90/99, as set out in allegation 17.

Allegation 18 alleges that the business card deficiencies noted above will result in a breach of section 5(6)(ii) of Ontario Regulation 389/10 and sections 1.1(b) and 2.1 of the Codes. These sections pertain to the use of business cards that fail to meet the requirements of the Codes and Ontario Regulation 90/99. Compliance counsel argues that, given the deficiencies in the business cards, Energhx is likely to contravene these sections, and that the Board may take action accordingly under section 112.3 of the Act.[40]

[39] Letter dated September 9, 2011, Exhibit K4, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".
[40] Compliance counsel written submissions dated February 10, 2012, at pages 27-28.

The evidence indicates that Energhx has addressed the deficiencies in its business cards,[41] and the Board therefore does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 18.

F. Identification badges (ID badges) – Allegations 19 and 20

As with the business cards, it was not disputed that the ID badges did not conform with section 6 of Ontario Regulation 90/99 and sections 2.4(a) and (g) of the Codes. The Board therefore finds that Energhx was in contravention of those sections, as set out in allegation 19.

With respect to allegation 20, for the same reason as noted in relation to business cards the Board does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 20.

G. Contract content requirements for new contracts – Allegations 21 to 24

Energhx did not refute the allegations regarding the format or content of the contracts at issue in the transactions reviewed during the compliance inspection. The Board finds that Energhx's contracts were non-compliant as set out in allegations 21 to 24, and that there have been contraventions of the legal and regulatory requirements set out in those allegations.

H. Completion of price comparisons for new contracts – Allegation 25

The Board notes that, with one exception, the price comparison document used by Energhx is fully compliant with the legal and regulatory requirements. The exception, which Energhx did not refute, is that a date has been included in the place that has been set aside for a document control number. As noted earlier in this Decision, the

[41] Letter dated September 9, 2011, Exhibit K4, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

legal and regulatory framework is highly prescriptive and leaves little room for discretion on the part of retailers and marketers. The Board finds that Energhx has failed to comply with the Board's instructions for completing the price comparison, and that there has been a violation of section 12 of the ECPA, section 8(3) of Ontario Regulation 389/10 and section 4.6(b) of the Codes accordingly.

I. Verification call (use of the applicable Board-approved script) – Allegations 26 to 29

Allegations 26 to 29 all pertain to the same verification call. Dr. Ogedengbe confirmed during oral testimony that this one verification call was to a family friend.[42] As noted previously, the Board is of the view that all low volume consumers, including persons that are friends with or the family of the retailer or marketer, are entitled to the same protections under the legal and regulatory framework that is currently in place. Although the verification script may not lend itself as well to circumstances where the consumer is a friend of or related to the retailer or marketer, the fact remains that strict adherence to the script is required. Allegations 26 to 29 are therefore upheld, and the Board finds that there were contraventions of the legal and regulatory requirements as set out in those allegations.

J. Compliance monitoring and quality assurance program – Allegation 30

The Board finds that Energhx contravened sections 7.4 and 7.5 of the Codes in failing to maintain a compliance monitoring program. This was not disputed.

Administrative Penalties

As also noted earlier in this Decision, the imposition of an administrative penalty in respect of any given instance of non-compliance is a matter for the discretion of the Board. The Board believes that it is appropriate in this case to refrain from imposing an administrative penalty in respect of the contraventions pertaining to the training test, record retention, business cards, ID badges, completion of price comparisons, verification call and compliance monitoring. The evidence is that Energhx has come

[42] Transcript of the oral hearing, page 134, lines 7 to 8.

into compliance in respect of all of these items; that the company had a very limited number of customers at the relevant time and was not offering its product to the public on a widespread basis; that the one salesperson cited with a failing score of 70% did not engage in any sales activities until she achieved a pass score of 90%;[43] and that a sole verification call was made.

The Board emphasizes that its decision not to impose an administrative penalty in this case should not be misunderstood as indicative of a view that violations of these legal and regulatory requirements are unimportant or trivial. The Board also emphasizes that it expects Energhx to take whatever steps are necessary to ensure that it has a comprehensive and accurate understanding of all applicable legal and regulatory requirements and remains fully compliant with them if it intends to continue business operations as a retailer and/or marketer.

Where the Board intends to impose an administrative penalty, the Board must do so in accordance with Ontario Regulation 331/03 (Administrative Penalties). Ontario Regulation 331/03 requires that the Board first determine the following: (a) whether the contravention was a minor, moderate or major deviation from the requirements of the enforceable provision; and (b) whether the contravention had a minor, moderate or major potential to adversely affect consumers, other licensees or other persons. The determination on these two questions then establishes the range of administrative penalties that applies, as set out in the Schedule to Ontario Regulation 331/03. In selecting the appropriate amount from within that range, the analysis involves a consideration of the extent of mitigation by the person that committed the contravention; whether that person is a repeat offender; whether that person derived any economic benefit from the contravention; and any other criteria the Board considers relevant.

The range of administrative penalties for contraventions as per Ontario Regulation 331/03 are shown below.

[43] *Ibid*, pages 141 to 142, lines 27 to 29 and 1 to 3.

	Deviation from the requirements of the enforceable provision that was contravened			
Potential to adversely affect consumers, persons licensed under the Act or other persons		Major	Moderate	Minor
	Major	$15,000 - $20,000	$10,000 - $15,000	$5,000 - $10,000
	Moderate	$10,000 - $15,000	$5,000 - $10,000	$2,000 - $5,000
	Minor	$5,000 - $10,000	$2,000 - $5,000	$1,000 - $2,000

Compliance counsel submits that, at least for certain of the allegations, the appropriate range is from "major" to "moderate" in terms of deviation from the requirement and/or potential adverse affect as set out in Ontario Regulation 331/03.[44]

The onus is on compliance staff to satisfy the Board of the contraventions and the factors leading to the level of administrative penalty proposed. In this case, the Board was not presented with any evidence upon which it could make a determination as to the potential of the contravention to adversely affect consumers. For this reason, the Board finds the potential to adversely affect consumers to be minor. This does not undermine the importance of these contraventions or their impact – the matter is simply one of lack of evidence.

In assessing the administrative penalties the Board also took into consideration that Energhx did not appear to derive any economic benefit from these contraventions and the very limited marketing and retailing that was undertaken beyond friends, family or company employees. It also reflects that Energhx has brought itself into subsequent compliance with all issues as indicated by the Board's letter of September 2011.

The ECPA is designed to protect energy consumers by ensuring that retailers and marketers follow fair business practices, have been adequately trained and that consumers are provided with essential information before they sign energy contracts. Contraventions of the legal and regulatory framework that derogate from these requirements are, in the Board's view, matters of particular concern.

[44] Compliance counsel written submissions dated February 10, 2012, at pages 36 to 39.

As noted earlier in this Decision, the Board has discretion to consider multiple allegations associated with the same transaction or subject matter as one contravention for the purposes of determining the level of administrative penalties to be imposed. The Board believes that it is appropriate to do so in this case, including consolidating all 12 allegations pertaining to training 1 to 8 being in relation to salespersons and 9 to 12 being in relation to verification representatives. In the context of these 12 violations, the Board finds the deviations in training from the requirements of the enforceable provisions that were contravened to be major and because of the lack of evidence as to the potential adverse affect on consumers, a default of "minor adverse impact" is will be used. An administrative penalty of $5,000 is therefore imposed.

The contraventions pertaining to the contract content are considered in this case to be major deviations from the requirements of the enforceable provisions that were contravened but with minor potential adverse effect on consumers, due to the lack of evidence supporting any other finding. It is also noted that there were only 3 customers unaffiliated with the company who had signed contracts during this period, and that marketing and retailing was not undertaken to the general public. The administrative penalty is therefore $5,000.

The Board fixes the amount of the administrative penalties at $10,000.

Costs

Although Compliance counsel submits that this is an appropriate case in which to seek costs against Energhx, Compliance counsel has decided not to do so.[45] The Board makes no order as to costs in this proceeding.

THE BOARD ORDERS THAT:

1. Energhx shall, by December 31, 2012, pay to the Ontario Energy Board an administrative penalty in the amount of $10,000.

[45] *Ibid*, at page 41.

ISSUED at Toronto, March 26, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

COURT OF APPEAL FOR ONTARIO

CITATION: Harvey v. Talon International Inc., 2017 ONCA 267

DATE: 20170331

DOCKET: C61696 & C61697

Blair, Epstein and Huscroft JJ.A.

DOCKET: C61696

BETWEEN

Adrian B. Harvey and Harvey Legacy Holdings Ltd.

Applicants (Respondents)

and

Talon International Inc.

Respondent (Appellant)

DOCKET: C61697

AND BETWEEN

Young Sook Yim and Paul Chung-Kyu Kim

Applicants (Respondents)

and

Talon International Inc.

Respondent (Appellant)

Symon Zucker and Nancy Tourgis, for the appellant

Michael W. Carlson, for the respondents

Heard: October 31, 2016

On appeal from the judgments of Justice Cory A. Gilmore of the Superior Court of Justice, dated January 15, 2016, with reasons reported at 2016 ONSC 371 and 2016 ONSC 370.

Epstein J.A.:

[1] This appeal involves the interpretation of provisions in two statutes – the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act"), and the *Real Property Limitations Act,* R.S.O. 1990, c. L.15 (the "*RPLA*"). This interpretive exercise arises out of two separate applications that were heard together. The applications concern the obligation of the appellant, Talon International Inc., to return deposits that the respondents – Young Sook Yim and Paul Chung-Kyu Kim (collectively "Ms. Yim"),[1] in one application and Adrian B. Harvey and Harvey Legacy Holdings Ltd. (collectively, "Mr. Harvey"), in the other – paid toward the purchase of condominium units in Talon's development known as Trump Tower.

[2] Several years after entering into their respective agreements of purchase and sale (an "APS") with Talon, Ms. Yim and Mr. Harvey each provided written notices to Talon, advising of their intention to "terminate" the transaction. Both stated their basis for doing so as being, in part, what they viewed as material changes to the revised disclosure statement Talon had provided to them. Both requested the return of their deposits. The respondents take the position that their communications constituted valid notices to rescind their respective APS under s. 74(6) and (7) of the Act. Because Talon had not challenged, within the time the Act allows, either Ms. Yim's or Mr. Harvey's right to rescind, the respondents applied to the court for an order that Talon return their deposits. Talon defended on the basis that the respondents' purported notices to rescind did not meet the requirements of the Act.

[3] The application judge allowed both applications. She held that the notices sufficiently complied with the requirements of s. 74(7) of the Act. Each notice therefore triggered Talon's obligation to challenge the alleged material change set out within ten days of receipt, or to accept the claim for rescission. Because Talon did not challenge the respondents' claims for rescission, the application judge ordered Talon to refund Ms. Yim's and Mr. Harvey's deposits, with interest.

[4] In Ms. Yim's case, Talon also argued that she was seeking to amend her notice of application to claim statutory rescission more than two years after the date on which such a claim was discovered. Her amendment was therefore statute-barred, pursuant to s. 4 of the

Limitation Act, 2002, S.O. 2002, c. 24, Schedule B. The application judge disagreed. She held that the ten-year limitation period in s. 4 of the *RPLA* governed claims for the refund of deposits advanced toward the purchase of condominium units. Ms. Yim's claim was, therefore, not out of time.

[5] In this appeal, Talon submits that the application judge erred in over-emphasizing the fact that the Act is consumer-protection legislation, and consequently provided an overbroad interpretation of s. 74(7) of the Act. And, in the case of Ms. Yim, Talon argues that the application judge erred in holding that her claim for the return of her deposit fell within the provisions of the *RPLA*. It further submits that Ms. Yim's application as a whole is statute-barred, as it was brought more than two years after discovery of the claim.

[6] I would dismiss both appeals. I agree with the application judge that it would be contrary to the purpose of the Act, as consumer protection legislation, to adopt a technical approach in interpreting what a purchaser must do to notify the declarant of an intention to rescind under s. 74(7). The section requires that "notice of rescission" be in writing, and that it be delivered to the declarant or his or her solicitor. By implication, the notice also must make it clear that the purchaser seeks to set aside the APS based on an identified material change. In my view, there is no reason to interfere with the application judge's conclusion that the notices delivered by Ms. Yim and Mr. Harvey satisfied these requirements.

[7] I also agree with the application judge that Ms. Yim's claim to recover her deposit fits within the definition of an action for the recovery of land under the *RPLA*. The applicable limitation period is therefore ten years, and Ms. Yim's application is not statute-barred.

STATUTORY PROVISIONS

[8] The main issue in these appeals involves the interpretation of the provisions in the Act that give a purchaser the right to rescind his or her APS. These provisions are found in s. 74 of the Act, which provides that within ten days of receipt of a revised disclosure statement containing a material change or notice of change that is material, a purchaser has the right to

rescind the APS. If the declarant takes the position that no material change has occurred, the declarant may bring an application to the Superior Court under s. 74(8) for a declaration on the question of materiality. Sections 74(9) and (10) require that the declarant refund the purchaser's money with interest within ten days of receipt of the notice of rescission if no application has been made to the court on the issue of materiality, or if an application is made, within ten days of a determination that the change is material. The requirements of the notice of rescission are set out in s. 74(7), which provides:

> (7) To rescind an agreement of purchase and sale under this section, a purchaser or the purchaser's solicitor shall give a written notice of rescission to the declarant or to the declarant's solicitor. 1998, c. 19, s. 74 (7).

BACKGROUND TO THE RESPONDENTS' NOTICES

Ms. Yim v. Talon

[9] On May 4, 2007, Ms. Yim signed an APS to purchase from Talon suite 1702 at Trump Tower for $860,000. Pursuant to the terms of the APS, Ms. Yim provided deposits totalling $172,000 to Talon. She received the required disclosure from Talon.

[10] On February 18, 2012, a representative for Talon sent a letter to Ms. Yim and to her solicitor advising that the Hotel Unit Maintenance Agreement (HUMA) was now available online.

[11] On February 23, 2012, after reviewing the HUMA, Ms. Yim had her solicitor send a letter to Talon's solicitor. This letter provided as follows:

> Further to the letter dated February 9, 2012 received from your client, Talon International Inc., regarding the extension of the proposed occupancy date from February 14, 2012, for above-noted suite, **my clients hereby give notice to terminate the [APS] dated May 4, 2007** and all amendments made thereto, effective immediately, **and to request the return of the deposits forthwith** to our firm made payable to Lee & Ma LLP in trust.
>
> The basis of this notice is premised on paragraph 13 of the underlying [APS], which provides that the Vendor's right to extend the closing date shall not "exceed twenty-four (24) months" in the aggregate. Given that the original occupancy closing date

> was scheduled to be March 20, 2009 (paragraph 2(a) in the [APS]), the Vendor's right to extend the closing date has expired on March 20, 2011, and is therefore no longer applicable.
>
> **In the alternative, the [HUMA], the full copy of which was provided at the last-minute, contains terms that are materially different from that indicated in the Disclosure, not to mention the substantive differences in the projected expenses.**
>
> Given that the condominium prices have surged in the past 4-5 years, I trust that your client is not in any way prejudiced by this notice. **Your prompt response and return of deposits is respectfully requested and expected**. Thank you. [Emphasis added.]

[12] On February 24, 2012, Ms. Yim had her counsel send a follow-up email to Talon's representative, indicating that she was exercising her right to rescind the APS. This email specifically referenced s. 74 of the Act, as well as the change in the HUMA.

[13] Talon took no steps in response to these communications. Ms. Yim issued her notice of application in this proceeding on December 10, 2014. By the time the application was heard, on December 14, 2015, Ms. Yim no longer relied upon the expiration of the vendor's right to extend the closing date, as mentioned in her February 23, 2012 letter. She now relied solely on the alternative position advanced in the letter, with respect to the HUMA's containing materially different terms from the disclosure.

Mr. Harvey v. Talon

[14] By way of an APS dated March 7, 2005, Mr. Harvey agreed to purchase a hotel condominium unit from Talon in Trump Tower for $727, 000. Mr. Harvey provided deposits to Talon totalling $145,400. He received the required disclosure from Talon.

[15] On February 17, 2012, Talon's solicitor sent a letter to Mr. Harvey's solicitor. This letter made reference to the HUMA now being available on the internet.

[16] On February 24, 2012, Mr. Harvey's solicitor faxed a note to Talon's solicitors, indicating that he had been instructed not to proceed with the interim closing. The solicitor

noted that he was no longer acting for Mr. Harvey in any capacity. That evening, Mr. Harvey sent a letter to Talon's representative via email. The letter stated as follows:

> Further to the letter dated February 9, 2012 received from your client, Talon International regarding proposed delivery of possession of the Hotel Unit on February 24, 2012 for the above mentioned Suite, **I hereby give notice to terminate the [APS] dated March 4, 2005** and all amendments effective immediately, **and to request the return of deposits forthwith** to the firm of Groll & Groll LLP payable in trust.
>
> The request is being made on the basis of [Mr.] Harvey never receiving a fully executed, accepted and initialled [APS].
>
> **In the alternative, the [HUMA], the full copy of which was provided at the last minute contains terms that are materially different from that indicated in the Disclosure and substantially different in the projected expenses.**
>
> Given the per square foot selling price achieved in today's market for this development is far in excess of this Unit, I trust Talon International is not in any way prejudiced by this notice.
>
> **Your prompt response and return of deposits is respectfully requested and expected.** [Emphasis added.]

[17] Talon took no steps in response. On February 13, 2014, Mr. Harvey issued a notice of application in this proceeding. By the time of the hearing of the application on December 14, 2015, Mr. Harvey no longer relied upon not having received a fully executed, accepted and initialled APS, as mentioned in his February 24, 2012 letter. Instead, he relied solely on the alternative position advanced in the letter, with respect to the HUMA's containing material different terms from those indicated in the disclosure.

THE APPLICATION JUDGE'S REASONS

Ms. Yim v. Talon

[18] As a preliminary matter, Ms. Yim moved to amend her notice of application to add a request that the court declare that the APS had been rescinded.

[19] Ms. Yim's notice of application, issued on December 10, 2014, made no mention of a claim based on rescission under the Act. Instead, she sought a declaration that Talon was in breach of the APS, a declaration that the APS was terminated and of no force and effect, and an order that Talon return the deposit. In the alternative, she sought an order granting relief from forfeiture of the deposit, and return of the deposit. Before the application judge, Ms. Yim brought a motion to amend her notice of application to add a claim for statutory rescission. Among the arguments raised by Talon in opposing the amendment was that the claim for rescission was statute-barred.[2]

[20] The application judge allowed the amendment. She held that Ms. Yim's claim for rescission fell within s. 4 of the *RPLA*, which provides for a limitation period of ten years. The claim for the return of a deposit pursuant to the Act fell within the *RPLA* as "an action to recover land". In the alternative, the application judge held that the proposed amendment to claim statutory rescission was not a new cause of action, but an alternative remedy based on the exact same facts set out by Ms. Yim in the original notice of application. Additionally, Ms. Yim's e-mail sent on February 24, 2012 had specifically mentioned rescission under the Act. In these circumstances allowing the amendment would cause Talon no prejudice.

[21] The application judge then turned to whether the fact that Ms. Yim's failure to use the word "rescission" in her February 23 letter was fatal to her claim for the return of her deposit.

[22] The application judge started her analysis by noting that the Act was consumer protection legislation, and therefore should be interpreted liberally. The application judge reasoned, at para. 40, that "keeping in mind the legislature's goal of protecting purchasers of condominiums, the court should not read in a requirement that all notices of rescission given under s. 74 of the Act include the precise term 'rescission'."

[23] The application judge went on to hold that all s. 74(7) requires is that the notice of rescission be in writing, delivered to the declarant or its solicitor, and that it contain a ground of material change upon which rescission is based. Accordingly, the application judge concluded,

at para. 46, that "as long as the notice fulfills the statutory requirements and makes clear the purchaser's intention to undo or unmake the agreement, such as by requesting the return of their deposit, the notice should be considered sufficient". There is no requirement that notice be worded perfectly, or that it include the word "rescission".

[24] The application judge then addressed whether Ms. Yim's February 23, 2012 letter complied with this interpretation of s. 74 of the Act. She held that given Ms. Yim's use of the word "terminate" in the letter, there must be "strong evidence" indicating that Ms. Yim's intention in sending the letter was to rescind her APS. The application judge found three indications of the required "strong evidence" of Ms. Yim's intention to rescind. First, the letter referenced a material change, namely the HUMA being "materially different" and containing "substantial differences" from projected expenses. Secondly, the application judge highlighted Ms. Yim's request for the return of her deposit, a request that would restore the parties to their original positions. Such a remedy was consistent with rescission, and not with repudiation of the contract.

[25] Thirdly, the application judge also looked at the e-mail sent by Ms. Yim to Talon on February 24, 2012, the day after the initial letter. This email had specifically referenced s. 74 of the Act. The application judge concluded that Ms. Yim's communications of February 23 and 24, read together, provided sufficient notice under the Act. Finally, in accordance with the requirements of s. 74(7), the letter had been in writing, and sent to the proper person. Given that Talon had not challenged Ms. Yim's right to rescind within ten days of receipt of her notice of rescission, Talon was required to return her deposit, with interest.

Mr. Harvey v. Talon

[26] The first issue the application judge addressed was whether the application was deficient with respect to relief sought. In his notice of application dated February 13, 2014, Mr. Harvey sought a declaration that Talon was in breach of the APS, a declaration that the APS was terminated and of no force and effect, and an order that Talon return the deposit. In the

alternative, he sought an order granting relief from forfeiture of the deposit under the APS and the return of his deposit. Talon argued that the application was fatally flawed because it did not claim the relief of rescission, and therefore the court could not conclude that Mr. Harvey's letter of February 24, 2012 had been a notice of rescission.

[27] The application judge held that it would defeat the purpose of r. 1 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, if Mr. Harvey were precluded from pursuing relief on the basis that the notice of application was not framed exactly in accordance with the legislation or the rules. For nearly a year Talon had been in possession of Mr. Harvey's affidavit, in which he had explicitly taken the position that his February 24, 2012 letter rescinded the APS. Further, Mr. Harvey had sought return of the deposit in his notice of application – relief consistent with the remedy of rescission, and not termination. The application judge reasoned that in such circumstances rescission was implicitly pleaded.

[28] The application judge then addressed whether Mr. Harvey's February 24, 2012 letter could be a proper notice of rescission, despite not using the word "rescind" or "rescission". Relying on the same reasoning as in Ms. Yim's case, the application judge concluded, at para. 43, that "as long as the notice fulfills the statutory requirements and makes clear the purchaser's intention to undo or unmake the agreement, such as by requesting the return of their deposit, the notice should be considered sufficient".

[29] Next, the application judge held that Mr. Harvey's February 24, 2012 letter sufficiently conveyed his intention to rescind his APS. As Mr. Harvey had used the word "terminate" in his letter, the application judge looked for and found "strong evidence" of an intention to rescind. First, the letter made specific reference to the fact that the terms of the HUMA were materially different from the disclosure and substantially different from the projected expenses. Secondly, the request for a return of the deposit made it clear that Mr. Harvey sought to restore both parties to their original positions, and that he sought rescission rather than repudiation. Finally, the letter was in writing and was addressed to the proper person. It therefore complied with the requirements under s. 74 of the Act.

[30] Because Talon had not challenged Mr. Harvey's right to rescind within ten days as required under s. 74(8) of the Act, Mr. Harvey was entitled to the return of his deposit, with interest.

ISSUES

[31] The issues on these appeals can be characterized as follows:

1. What is the standard of review?

2. What is the applicable limitation period?

3. Did Ms. Yim's and Mr. Harvey's communication to Talon constitute notices to rescind for the purposes of s. 74 of the Act?

ANALYSIS

Issue 1 – What is the Standard of Review?

[32] What s. 74(7) of the Act means by the words "notice of rescission" is a question of law, and accordingly is reviewed on the correctness standard. Answering this question requires the interpretation of the Act, and it is well established that questions of statutory interpretation are questions of law (*Canada National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 33). As stated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8-9, when there is a question of law, an appellate court is free to replace the opinion of the application judge with its own.

[33] The question of whether the actual notices provided by the respondents met the requirements of the Act is one of mixed fact and law, and reviewed on the palpable and overriding error standard. In her reasons, the application judge termed this question as one of fact. However, the application judge was applying the legal standard under s. 74(7) of the Act to the facts in front of her, and thus was dealing with a question of mixed fact and law (*Housen*, at para. 26).

[34] In answering this question, the application judge considered all the evidence the law required her to consider. In my view she did not apply an incorrect standard or make an error in principle. Accordingly, her determination that the notices provided in this case were sufficient is entitled to deference, and should not be overturned absent palpable and overriding error (*Housen*, at paras. 26-37).

[35] Whether Yim's application was statute-barred is also a question of law, and thus reviewed by this court on the correctness standard. Leaving aside her alternative analysis, the application judge essentially held that the application as a whole was not brought out of time, as the 10-year limitation period in s. 4 of the *RPLA* applied, and not the 2-year period from the *Limitation Act, 2002*.

[36] Here, there is no factual component to the dispute about whether the application is statute-barred. As analyzed below, I have concluded that the notice provided to Talon by Ms. Yim on February 23, 2012 was a notice of rescission under s. 74(7). Accordingly, the limitation period began to run ten days later, when Talon failed to return the deposit or make an application to Superior Court. Ms. Yim's application was launched more than two years later. The sole issue is thus whether an application for the return of a deposit is covered by the *RPLA*, in which case the application was not brought out of time, or by the *Limitation Act, 2002*, in which case the application was brought out of time. Answering this question requires the interpretation of s. 4 of the *RPLA*, in order to determine whether an application for return of deposit pursuant to s. 74 of the Act fits within the definition of an action for the return of land.

[37] Accordingly, the limitation period issue is a question of law, without a factual component. If Ms. Yim's application for the return of her deposit fits within the ten-year limitation period in s. 4 of the *RPLA*, the same would be true of other applications for statutory rescission pursuant to the Act. Thus, the application judge's determination on this issue is not entitled to deference.

Issue 2: What is the Applicable Limitation Period?

The Parties' Submissions

[38] Talon submits that Ms. Yim's notice of application was issued nearly three years after her cause of action arose. Regardless of whether her communication to Talon was one of termination or one of rescission, Ms. Yim's application was brought out of time. Talon submits that the Act is not one of the statutes listed in Schedule A to the *Limitations Act, 2002*, as retaining specific statutory limitation periods. Therefore, s. 4 of the *Limitations Act, 2002* applies and Ms. Yim's claim is statute-barred for being brought more than two years after the discovery of the claim.

[39] Ms. Yim argues that the application judge correctly held that her claim for rescission was one that fell within the provisions of the *RPLA.* The action was to recover her deposit – a claim for "money laid out in the purchase of land", which is part of the definition of "land" within the *RPLA*. The claim therefore fell within the *RPLA.* Given the ten-year limitation period set out in s. 4 of the *RPLA*, the action was not statute-barred.

Applicable Legal Principles

[40] This is a matter of statutory interpretation. Statutory interpretation is governed by the approach described in Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87, and adopted by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21:

> 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.

Principles Applied

[41] Section 4 of the *RPLA* provides as follows:

> No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person

> through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

[42] When those aspects of s. 4 of the *RPLA* that do not apply to this case are removed, it provides that:

> No person shall bring an action to recover any land, but within ten years after the time at which the right to bring any such action first accrued to the person bringing it

[43] Thus, there are 3 requirements in s. 4: an "action", to "recover" and what must be recovered is "land".

[44] An action is defined in s. 1 of the *RPLA* to include "any civil proceeding".

[45] "Recover" is defined in legal dictionaries as "gaining through a judgment or order". This was the definition adopted for the use of "recover" in s. 4 in *McConnell v. Huxtable*, 2014 ONCA 86, 118 O.R. (3d) 561, at paras. 16-20, specifically, at para. 17, where this Court noted that the English Court of Appeal has held that the expression "to recover any land" in comparable legislation "is not limited to obtaining possession of the land, nor does it mean to regain something that the plaintiff had and lost. Rather, "recover" means to 'obtain any land by judgment of the Court'"

[46] I agree with the application judge's approach on this point. This is clearly an action to recover.

[47] The remaining question is whether what Ms. Yim seeks to recover – her deposit – is "land". The definition of land in s. 1 of the *RPLA* is as follows:

> "land" includes messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest or any of them, are in possession, reversion, remainder or contingency;

[48] In my view, the application judge was also correct in concluding that an application for the return of the deposit was an action for the recovery of "land"; specifically the recovery of "money to be laid out in the purchase of land".

[49] In coming to this conclusion, the application judge relied primarily upon *McConnell*. In that case, a former common-law spouse sought a constructive trust giving her joint ownership of the home she had once shared with her former spouse, with an alternative claim for damages based on unjust enrichment. Rosenberg J.A., at para. 38, explained his conclusion that the *RPLA* applied: "the respondent is making a claim for recovery of land in the sense that she seeks to obtain land by judgment of the court. That the claim might provide her with the alternative remedy of a monetary award does not take away from the fact that her claim is for a share of the property".

[50] Here, the application judge reasoned as follows at para. 12 [Yim]:

> Ms. Yim paid her deposit to secure an interest in land. She seeks to recover the money which represents that interest. I find that such an interest is more easily identified than a constructive trust interest (as in *McConnell, supra*), where the court must intervene and declare such an interest to exist based on certain legally accepted principles… The fact that the remedy is a monetary award should not preclude the court from finding that it is a recovery of land, as in *McConnell,* supra.

[51] In support of this conclusion, I note that several cases have clarified the relationship between claims for damages and claims covered by the *RPLA*. The Supreme Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, defined damages as "a monetary payment for the invasion of a right at common law". In *Toronto Standard Condominium Corp. No. 1487 v. Market Lofts Inc.*, 2015 ONSC 1067, the plaintiff sought damages based off the defendant's failure to meet its obligations under a Shared Services Agreement. Perell J., beginning at para. 49, noted that the fact that real property is incidentally involved in an action does not necessarily mean that the action is governed by the *RPLA*. Among the cases he cited was *Metropolitan Toronto Condominium Corp. No. 1067 v. L. Chung Development Co.*, 2012 ONCA 845. In that case, this Court made the following comment, at para. 7:

> Finally, we do not think that the [*RPLA*] applies to the case as framed by the appellant. In its Statement of Claim, the appellant frames its action as one for damages flowing from the respondents' negligence, breach of contract, conflict of interest, and breach of duty of care, fiduciary duty and statutory duty. None of these relates to the categories of actions encompassed by the [*RPLA*].

[52] Thus, had Ms. Yim's claim been one primarily seeking damages, for example breach of contract, her application would be statute-barred. This would be true even if the claim for damages incidentally related to real property, specifically the condominium that was the subject of her APS. Claims for damages do not fit within the definition of "land" in the *RPLA.*

[53] However, Ms. Yim is not seeking damages. She advances a specific claim under a provision in the Act, a provision that only allows for the return of her deposit and interest, not damages. The Tax Court defined a deposit in *Casa Blanca Homes Ltd. v. R.*, 2013 TCC 338, as "a pool of money retained until such time as it is applied in partial payment or forfeited". As noted by the Alberta Court of Appeal in *Lozcal Holdings Ltd. v. Brassos Development Ltd.* (1980), 111 D.L.R. (3d) 598, "a genuine deposit ordinarily has nothing to do with damages, except that credit must be given for the amount of the deposit in calculating damages".

[54] This leads me to the consideration of "money to be laid out in the purchase of land", a phrase on which there is scant jurisprudence. However, in my view an action for the return of a deposit fits comfortably within its plain meaning. Frankly, I struggle to understand what would fit within this phrase if not an action such as this.

[55] On the basis of the foregoing analysis, I conclude that Ms. Yim's application is not statute-barred. This is also true of the amendment of her initial application to specifically claim statutory rescission. As her application is covered by s. 4 of the *RPLA*, the applicable limitation period is ten years. The application is an action, which is defined as any civil action. She seeks "recovery", which has been defined as "gaining through a judgment or order". And the recovery she seeks is of "land"; namely, her deposit, which is money laid out in the purchase of land.

[56] I would therefore not give effect to this ground of appeal.

Issue 3: Did Ms. Yim's and Mr. Harvey's communications to Talon constitute notices to rescind for the purposes of s. 74 of the Act?

The Parties' Submissions

[57] Talon submits that the application judge ignored the clear wording of the communications sent by Ms. Yim and Mr. Harvey, which both reference "termination" of the APS. In finding that the Act does not prescribe a statutory form of a notice of rescission, the application judge failed to recognize that the Act specifically refers only and repeatedly to a "notice of rescission". There is an important legal distinction between termination and rescission. A party cannot assert inconsistent rights and having terminated the APS, the respondents cannot claim rescission of an agreement they have already terminated. Talon submits that the respondents themselves were in breach of the APS by terminating.

[58] Ms. Yim and Mr. Harvey argue that the application judge correctly interpreted the requirements for rescission under the Act. An examination of the object of the Act and the intention of the legislature supports a liberal interpretation of the phrase "notice of rescission". As long as the notice is in writing, sent to the right person, sets out a ground of material change upon which rescission is based, and makes clear the intention of a purchaser to unmake a transaction, it should be sufficient. A purchaser should not be required to explicitly use the term "rescission", if the notice nonetheless makes it sufficiently clear that this is what is sought.

A. What is required for notice of rescission under s. 74 of the Act?

[59] The next issue to be addressed is what is meant by the term "written notice of rescission" in s. 74(7) of the Act.

Applicable Legal Principles

[60] As in the case of the issue over the appropriate limitation period, this issue is one of statutory interpretation. The principles set out above apply with equal force to this issue.

Principles Applied

[61] The application judge correctly considered this issue through the lens that the Act is consumer protection legislation.

[62] The fact that the Act is consumer protection legislation is well established. In *Ward-Price v. Mariners Havens Inc*. (2001), 57 O.R. (3d) 410 (C.A.), at para. 53, Borins J.A. stated that "it is well recognized that the Act is consumer protection legislation". More recently, in *Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930*, 2010 ONCA 751, 102 O.R. (3d) 737, at para. 49, O'Connor A.C.J.O. stated that "a significant purpose of the Act is consumer protection". Rouleau J.A. cited this case in *Toronto Standard Condominium Corp. No. 2095 v. West Harbour City (I) Residences Corp.*, 2014 ONCA 724, when he acknowledged that "consumer protection is a significant purpose of the *Condominium Act*".

[63] The goal of consumer protection laws is to place consumers, who are average citizens engaging in business deals, on par with companies or citizens who regularly engage in business. This Court and the Supreme Court have identified guidelines for how consumer protection legislation is to be interpreted. The application judge referred to *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, for the proposition that consumer protection legislation must be interpreted generously in favour of the consumer. This proposition comes directly from Binnie J., who was considering the British Columbia *Business Practices and Consumer Protection Act* (the "*BCPCA*"). At para. 37, he noted that the statutory purpose of the *BCPCA* was all about consumer protection. As such, its terms should be interpreted generously in favour of consumers. Another relevant Supreme Court case is *Celgane Corp v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3. In that case, the Court was considering the Federal Court's interpretation of a price-regulating provision in the

Patent Act. Abella J. adopted the majority view of Evans J.A., who had held that because the provision could be interpreted in different ways, the one that best implemented the consumer protection objectives of such price-regulating provisions was the correct interpretation.

[64] There is similar authority emanating from Ontario courts. In *Weller v. Reliance Home Comfort Ltd. Partnership*, 2012 ONCA 360, 110 O.R. (3d) 743, at para. 15, Rosenberg J.A. noted that “the main objective of consumer protection legislation… is to protect consumers”. In *Wilson v. Semon*, 2011 CarswellOnt 15953 (S.C.), aff’d *Wilson v. Semon*, 2012 ONCA 558, Lederer J. noted that “consumer protection legislation, as its name implies, is designed to protect consumers”.

[65] The legislative history of s. 74 of the Act provides further support for the identification of the statutory scheme dealing with rescission as consumer protection legislation. In *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 (C.A.), Robins J.A. discussed s. 52 of the *Condominium Act*, R.S.O. 1990, c. C. 26, which was roughly equivalent to s. 74 under the current Act. This provision allowed a purchaser to rescind an APS within ten days of receiving a material amendment to a disclosure statement, by giving “written notice of rescission” to the declarant or his or her solicitor.

[66] Robins J.A. noted that when the *Condominium Act* was initially enacted in 1967 (S.O. 1967, c. 12), it imposed no disclosure requirements on developers, and provided little protection to purchasers. The predecessor to s. 52 (and thus the ultimate predecessor of the current s. 74) was first enacted as part of the 1974 amendments to the *Condominium Act* (S.O. 1974, c. 133, s. 14). This provision introduced the concept of full disclosure into the Act. However, consumers apparently continued to experience problems. This led to further amendments in 1978 (S.O. 1978, c. 84), introducing s. 52, which was later carried over into the 1990 Act. In introducing the 1978 Act in the Legislature on June 1, 1978, Larry Grossman, the Minister of Consumer and Commercial Relations, described it as a “form of consumer protection legislation”. He stated that the Act would provide purchaser protection to consumers by requiring "tighter standards of disclosure between sellers and purchasers;

allowing time for purchasers to become informed of their responsibilities; and clarifying purchasers' rights during the interim occupancy period".

[67] Later in *Abdool*, in discussing what was required in the disclosure from the declarant, Robins J.A. made the following comments: "the vagueness of the requirements and the absence of statutory guidelines mandate a broad and flexible approach – not a rigid or stringent one – in determining whether a given disclosure statement is adequate". In my view, there is no reason why this reasoning about disclosure required from the vendor should not also be applied to the purchaser, in determining whether a given notice of rescission is adequate.

[68] Further support for the application judge's approach to interpreting what is required for notice of rescission under s. 74 of the Act can be found in how a right to rescind has been interpreted in another statute that has been identified as consumer protection legislation – the *Arthur Wishart Act*, S.O. 2000, c. 3 (the "*AWA*").

[69] To start, it is clear that the *AWA* is consumer protection legislation. In *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2015 ONCA 236, at paras. 49-50, I adopted the comments of the motion judge that "The [*AWA*] itself is in many ways consumer protection legislation… It is remedial legislation, which the Court may broadly apply".

[70] Section 6 of the *AWA* provides franchisees with the right to rescission via a statutory provision not dissimilar to that found in the Act. The franchisee can exercise its right to rescind by providing the franchisor with a "notice of rescission" within specified timeframes, where the franchisor provides late disclosure, or no disclosure. Following reception of such a notice, the franchisor has certain obligations towards the franchisee, which must be fulfilled within 60 days.

[71] Pursuant to s. 6(3), the only requirements for the franchisee's notice of rescission is the following: "Notice of rescission shall be in writing and shall be delivered to the franchisor, personally, by registered mail, by fax or by any other prescribed method, at the franchisor's

address for service, or to any other person designated for that purposes in the franchise agreement". This provision is substantially similar to the rescission provision found in s. 74(7) of the Act.

[72] The issue of what constitutes a "notice of rescission" under s. 6(3) of the *AWA* was considered in detail in *779975 Ontario Ltd. v. Mmmuffins Canada Corp.*, 2009 CarswellOnt 3262 (S.C.), by Strathy J. (as he then was). In that case, the franchisee started an action for common law rescission, based on alleged pre-contractual misrepresentations made by the franchisor. The statement of claim made no mention of the *AWA* or of the statutory rescission remedy. More than two years later the franchisee commenced a second action, asking for a declaration that service of the statement of claim in the earlier action had been a "notice of rescission" under the *AWA*, thus interrupting the limitation period. At para. 45, Strathy J reasoned as follows:

> While s. 6 of the *AWA* does not specify the contents of the notice of rescission, it seems to me that the notice must at least be sufficient to bring home to the franchisor that the franchisee is exercising its statutory rights of rescission under the *AWA*, and to inform the franchisor that the clock has begun to run on the 60-day period in s. 6(6). In light of the very substantial obligations on franchisors to compensate franchisees for breach of the disclosure duty, the franchisor is entitled to know whether a violation of the *AWA* is being alleged and whether the franchisee is claiming remedies under that statute. The franchisor is not able to fulfill its statutory obligations unless the notice is at least adequate to inform it that the franchisee has rescinded the agreement. The notice does not have to be in specific language, but it must at least make it clear that the franchisee is exercising its statutory right to rescind the franchise agreement and demanding the compensation to which it is entitled. [Emphasis added.]

[73] Ultimately, at paras. 49-50, Strathy J. concluded that the statement of claim in the first action was not sufficient to constitute "notice of rescission" to the franchisor within the meaning of the *AWA*. The statement of claim made no reference to the *AWA*, nor to the franchisor's failure to provide a disclosure document or statement of material change in time or at all, and there was nothing to indicate to the franchisor that the franchisee was claiming the relief set out in s. 6(6). The statement of claim did not purport to be an exercise of a

statutory right by the franchisee – on the contrary, it was simply an action for rescission and damages that had nothing to do with the *AWA*.

[74] The *Mmmuffins* case provides support for the application judge's conclusion that a notice of rescission under the Act does not need to include the word "rescind" or "rescission", or reference the relevant section of the Act. As Strathy J. made clear, the notice "does not have to be in specific language". What is required is that the notice indicates that the purchaser is exercising his or her statutory authority to "rescind" or "unmake" the APS based on a material change. Where the notice achieves this, the declarant can decide whether to apply to the Superior Court for a determination of the materiality of the change set out.

[75] I agree with the application judge's interpretation that a notice of rescission pursuant to s. 74(7) of the Act does not require the use of the words "rescind" or "rescission". As previously indicated, the Act is well established to be consumer protection legislation. It therefore must be interpreted generously in a manner that protects consumers. Consumers will not always be represented by counsel. Consumers will not always be familiar with words such as rescission and rescind. For consumers to be on a level playing field with developers in accessing the respective rights afforded them under the Act, they must be given considerable leeway in their use of language. As long as the purchaser's intention to undo the transaction based on a material change is clear, that is sufficient. That is all the declarant needs to understand in order to take advantage of the statutory rights then available to it.

A. Did the respondents' correspondence constitute notice of rescission?

[76] Given I agree with the application judge's view of the requirements of s. 74(7) of the Act, the final question to be asked is whether there is any reason to interfere with her conclusion that Ms. Yim's and Mr. Harvey's correspondence met these requirements. For the reasons that follow, I see no reason to interfere with the application judge's determination that the notices provided were sufficient to qualify as "notices of rescission".

[77] It is true that both notices utilized the word “terminate”. However, both also included repeated requests that the deposit be returned. As the application judge noted (para. 56 of Mr. Harvey, 54 of Ms. Yim), return of deposit is a remedy consistent with rescission, and not with repudiation. As well, both notices referred to the materially different terms contained in the HUMA as a basis for undoing the transaction. The HUMA had just been disclosed to Ms. Yim and Mr. Harvey a few days before their respective notices. They were well within the window to claim rescission based on a material change.

[78] Turning first to Ms. Yim, although it is true that she was represented by counsel, I do not see how this factor is relevant to a determination of whether the notice was sufficiently clear that Ms. Yim wanted to undo the transaction based on a material change. Regardless, Ms. Yim’s counsel wrote a follow-up email to Talon the day after the initial notice, making it clear that rescission pursuant to s. 74(7) of the Act was being sought. In my view, considering these factors as a whole, it was reasonable for the application judge to conclude that the notice provided in the case of Ms. Yim was sufficient to meet the requirements of the Act.

[79] I also agree with the application judge (para. 53 of Ms. Yim appeal) that the issue here is not whether the change to the HUMA actually was a material change. That issue does not come into play. Talon received valid notices of rescission under the Act, based on an alleged material change in the HUMA. Talon had ten days to make an application to Superior Court for a determination as to whether the alleged material change was in fact material. Having failed to do so, it is now too late for Talon to argue that the change was not material.

[80] I would therefore not give effect to this argument in the appeal involving Ms. Yim. Her notice was a valid notice of rescission under the Act.

[81] The case of Mr. Harvey warrants a similar analysis and the same conclusion.

[82] Mr. Harvey’s letter of February 24 did not contain the word rescind, and did not reference s. 74 of the Act. Nor did he provide a follow-up communication the next day, unlike Ms. Yim. However, his letter did contain information sufficient to bring home to the declarant

that s. 74 was being engaged. As noted by the application judge, Mr. Harvey both asked for the return of his deposit, and relied on the material differences in the HUMA. Given this, I see no error in the application judge's conclusion that Mr. Harvey's letter met the requirements under s. 74 of the Act. It was a valid notice of rescission.

CONCLUSION

[83] I have concluded that the application judge committed no errors of law in interpreting the Act, nor palpable and overriding errors in applying the law to the facts of this case. Accordingly, her conclusion that the notices provided were sufficient should not be disturbed on appeal. Given that both applications were commenced within the time required, Ms. Yim and Mr. Harvey are both entitled to an order requiring Talon to refund their deposits with interest, in accordance with s. 74(9) of the Act.

DISPOSITION

[84] For these reasons, I would dismiss both appeals. I would order Talon to pay the cost of each respondent – $15,000 in the Yim appeal and $10,000 in the Harvey appeal. These amounts include disbursements and applicable taxes.

Released: March 31, 2017 ("RAB")

"Gloria Epstein J.A."

"I agree. R.A. Blair J.A."

"I agree. Grant Huscroft J.A."

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[1] Ms. Yim's husband Mr. Kim was added as an applicant subsequent to Ms. Yim's commencing her application. For ease of reference, I will refer to the applicants jointly as Ms. Yim.

[2] From the record, it appears that Talon did not take the position, which it now advocates on appeal, that the application as a whole had been brought out of time in the first place.

Tarion Warranty Corporation v. Kozy

[Indexed as: Tarion Warranty Corp. v. Kozy]

109 O.R. (3d) 180

2011 ONCA 795

2011 ONCA 795 (CanLII)

Court of Appeal for Ontario,
Rosenberg, MacPherson and Epstein JJ.A.
December 16, 2011

Sale of land -- New home warranty program -- "Builder" -- Contractor performing most of construction work on new home but owner responsible for installing well and septic system -- Contractor being "builder" within meaning of Ontario New Home Warranties Plan Act despite performance of some work by owner -- Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

The respondent was retained to construct a new home on the owners' property. He performed most of the construction work, but the owners added fireplaces and were responsible for installing the well and septic system. The respondent did not register as a builder under the Ontario New Home Warranties Plan Act. He was charged with violating ss. 6 and 12 of the Act. He was acquitted at trial, and the acquittal was affirmed on appeal to the Court of Justice. The appeal court judge held that the owners' involvement in arranging and paying for the well and septic system took the construction by the respondent out of the definition of "builder" in the Act. The appellant appealed.

Held, the appeal should be allowed. [page181]

The Act is remedial legislation and should be given a fair and liberal interpretation. That approach requires an interpretation of "builder" that would cover persons who build a home but leave some work to be performed by the owner. The Act contemplates that owners will often perform some work; for example, s. 13(2)(a) provides that ONHWP warranties do not cover "work supplied by the owner". It is important not to deny such owners New Home Warranty Program coverage. The respondent was a "builder" within the meaning of the Act despite the performance of some work by the owners.

Cases referred to

Tarion Warranty Corp. v. Boros (2011), 105 O.R. (3d) 401, [2011] O.J. No. 2149, 2011 ONCA 374, 282 O.A.C. 74, 6 R.P.R. (5th) 73, 1 C.L.R. (4th) 307, apld

JRC Developments Ltd. v. Tarion Warranty Corp., [2010] O.J. No. 5089, 2010 ONSC 6205 (Div. Ct.); Ontario New Home Warranty Plan v. McPhail, [1997] O.J. No. 4570 (C.J.); R. v. Boissonneault (July 14, 2004), unreported, North Bay (C.J.); R. v. Segal, [2006] O.J. No. 1034, 2006 ONCJ 80, 52 C.L.R. (3d) 85, 69 W.C.B. (2d) 6, consd

Other cases referred to

Lam (Re), [1997] O.C.R.A.T.D. No. 92 (Comm. Reg. App. Trib.); Ontario (2947-ONHWPA-Claim) (Re), [2006] O.L.A.T.D. No. 54 (Lic. App. Trib.); Ontario (5319-ONHWPA-Claim) (Re), [2009] O.L.A.T.D. No. 363 (Lic. App. Trib.); Staples (Re), [2006] O.L.A.T.D. No. 175 (Lic. App. Trib.)

Statutes referred to

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 [as am.], ss. 1 [as am.], 6, 12, 13(2)(a), 22 [as am.], (1)(b)

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 131

APPEAL from the judgment of Downie J. of the Ontario Court of Justice dated December 31, 2010 dismissing the appeal from the acquittal of the respondent by Justice of the Peace Solursh of the Ontario Court of Justice dated September 9, 2008.

David Outerbridge, for appellant.

Martin J. Prost, for respondent.

2011 ONCA 795 (CanLII)

The judgment of the court was delivered by

MACPHERSON J.A.: --

A. Introduction

[1] The appellant, Tarion Warranty Corporation ("Tarion"), appeals from the decision of Justice Donald Downie of the Ontario Court of Justice dated December 13, 2010. In that decision, Downie J. dismissed an appeal from Justice of the Peace Gerry Solursh's acquittal of the respondent, David Kozy, on two charges under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 (the "ONHWP Act"). Both judges based their decisions on a conclusion that Mr. Kozy was not a "builder" within the meaning of the term in the ONHWP Act. [page182]

B. Facts

(1) The parties and events

[2] Tarion is the corporation designated by regulation to administer the ONHWP Act. The ONHWP Act is consumer protection legislation aimed at protecting purchasers of new homes in Ontario.

[3] In 2006, Joseph and Irena Kobylinski purchased a rural property at 91 Farlain Lake Road East in the Township of Tiny in Simcoe County. In August 2006, they entered into a contract with Mr. Kozy for the construction of a house on the property. The contract provided:

> The Contractor agrees to supply all the materials, and perform all the work . . . as described in the contract documents and as set out below. The Work shall be done on the premises . . . which are owned by the Owner [.]

[4] Mr. Kozy performed the majority of the construction work for a price of $153,594, including GST. The Kobylinskis paid for several items outside the scope of the contract: $6,600 for driveway work and the septic system, $6,254 for the well and water system connected to the house, and $4,458 for two fireplaces.

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[5] Mr. Kozy did not register as a builder under the ONHWP Act. The statute provides that:

> 1. In this Act,
>
> "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner[.]

[6] Because he did not register, Mr. Kozy was charged with two offences under s. 22(1)(b) of the ONHWP Act for violating ss. 6 and 12 of the Act, which provide:

> 6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act.
>
> . . . . .
>
> 12. A builder shall not commence to construct a home until the builder has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation.

(2) The trial

[7] Justice of the Peace Solursh acquitted Mr. Kozy of both charges. For the purpose of this appeal, the parties prepared an [page183] Agreed Statement of Facts which includes this summary of the justice of the peace's decision:

> Justice of the Peace Solursh held that Mr. Kozy did not fall within the definition of "builder" or "vendor". He based his decision primarily on: (a) the fact that the construction contract was silent on the question of who would construct the major structural components of the Residence, and (b) what he described as an absence of evidence as to who performed this work.

(3) The appeal

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[8] Justice Downie dismissed Tarion's appeal from the justice of the peace's acquittal of Mr. Kozy. In the Agreed Statement of Facts, the parties record this description of Downie J.'s decision:

> The issues of statutory interpretation were the same on appeal as they were at trial. Also at issue on appeal was whether the decision of the Justice of the Peace at trial was unreasonable in light of the evidence.
>
> The appeal judge held that the Justice of the Peace at trial had misapprehended the evidence regarding the role played by Mr. Kozy in building the Residence. Downie J. stated at paragraph 20 of his Reasons for Judgment:
>
> > It is clear that the learned Justice of the Peace was in error when he stated on page six of his judgment "There was no evidence before the court as to who performed these services, and at what cost", while he was referring to major structural components of the building such as footings, foundation, framing, plumbing and rough-in electrical. There was evidence before the court by Mr. Kozy and Mr. Kobylinski that it was in fact Mr. Kozy who performed most of these services . . . . It is clear from the evidence . . . that Mr. Kozy's workers did in fact do the majority of the work. It is only the work that was evidenced in Exhibit #21 where Mr. Kobylinski acted as contractor and hired outside persons, other than Mr. Kozy, to do the work. It is clear that Mr. Kozy was not doing the well drilling, the connection of the well to the house, the septic system and the connection of the septic system to the house, as well as certain fireplace work that was contracted out.
>
> The appeal judge went on to consider whether Mr. Kozy qualified as a "builder" and "vendor" for purposes of the ONHWP Act, in light of the roles played by Mr. Kozy and by the Kobylinskis.
>
> The appeal judge held that:

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(a) the addition of fireplaces by the Kobylinskis would not take the construction by David Kozy out of the definition of "builder"; and
(b) the Kobylinskis' involvement in arranging and paying for the well and septic system did take the construction by David Kozy out of the definition of "builder".

(4) Leave to appeal

[9] By order dated March 24, 2011, Winkler C.J.O. granted Tarion's application for leave to appeal pursuant to s. 131 of the [page184] Provincial Offences Act, R.S.O. 1990, c. P.33. In his endorsement supporting the order, the chief justice said, at para. 5:

> The interpretation of the definition of "builder" is a question of law. As to whether it is essential in the public interest, the issue of the definition of "builder" is central to the entire statute. This is consumer protection legislation which affects any potential new home buyer in Ontario.

C. Issue

[10] The sole issue on the appeal is whether the appeal judge erred in his interpretation of the term "builder" as used in the ONHWP Act.

D. Analysis

[11] The appeal judge noted that the definition of "builder" in the ONHWP Act is a person who undertakes the performance of "all the work and supply of all the materials" necessary to construct a completed home. He concluded that the addition of fireplaces by the owners did not remove Mr. Kozy as the "builder". However, he reached the opposite result with respect to the owners' separate arrangements for the installation of septic and well systems. The core of his reasoning is contained in this passage:

> The question in this case is, did Mr. Kozy and his workers do

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all of the work necessary to build a completed home. In the view of the court they did not. They did not do the septic system and they did not do the well. There is no way a home could be described as a completed home that did not have an operational toilet and sewer system, whether connected to a municipal system or to a septic system and there is no way a home could be considered a completed home if it did not have a water system. The Kobylinski's as owners arranged and paid for the installation of these systems. Therefore, to this court it seems that Mr. Kozy is not "a builder" as defined in the Act, even as that term has been expanded by some of the case law.

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[12] With respect, I am not persuaded by this analysis. In my view, the purpose of the ONHWP Act, the leading cases interpreting the term "builder" and the facts of this case suggest that Mr. Kozy is a "builder" within the meaning of the ONHWP Act.

(1) The purpose of the ONHWP Act

[13] Justice MacFarland of this court recently had occasion to consider the purpose of the Act and, specifically, the implication of that purpose for the interpretation of the term "builder" in Tarion Warranty Corp. v. Boros (2011), 105 O.R. (3d) 401, [2011] O.J. No. 2149, 2011 ONCA 374, at paras. 20-22: [page185]

> I begin with the observation of this court in Ontario New Home Warranty Program v. Lukenda (1991), 2 O.R. (3d) 675 (Ont. C.A.), at p. 676;
>
> The major purpose of the Plan Act is to protect purchasers of new homes by requiring that vendors and builders be screened for financial responsibility, integrity and technical competence. To assure public protection, it provides warranties, a guarantee bond and compensation in the event of loss by a purchaser resulting from dealings with a registrant. In order to effect this purpose of the Plan Act, a broad and liberal interpretation of its provisions is appropriate.

This court further observed in Mandos v. Ontario New Home Warranty Program (1995), 86 O.A.C. 382, at p. 383: "The Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O-13 is remedial legislation and should be given a fair and liberal interpretation."

The central issue in this case is whether the respondent meets the definition of "builder" as it is defined in the ONHWP Act. It would appear that this question has not arisen in this court before. However, as outlined above, the prior jurisprudence of this court with respect to the ONHWP Act requires that a broad and liberal approach be taken to interpreting the meaning of the term "builder" in order to reflect the remedial purpose of the Act.

[14] This approach requires an interpretation of "builder" that would cover persons who build a home but leave some work to be performed by the owner. Courts have recognized that the Act contemplates that owners will often perform some work relating to a construction project: see, for example, Ontario New Home Warranty Plan v. McPhail, [1997] O.J. No. 4570 (C.J.), at para. 21, MacDonnell Prov. J. (discussing s. 13(2)(a) of the ONHWP Act, which provides that ONHWP warranties do not cover "work supplied by the owner"). Given the purpose of the Act, it is important not to deny such owners New Home Warranty Program coverage. To hold that a contractor who leaves some work to a homeowner is not a "builder" would therefore be inconsistent with the statutory scheme.

(2) The leading cases

[15] In several cases involving interpretation of the ONHWP Act, courts have articulated tests delineating when a person falls within the term "builder".

[16] In JRC Developments Ltd. v. Tarion Warranty Corp., [2010] O.J. No. 5089, 2010 ONSC 6205 (Div. Ct.), at para. 4, Molloy J. said that whether a contractor is a "builder" involves consideration of "who was responsible for completing the essential elements of the home and who had control over the construction of the home".

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[17] In R. v. Segal, [2006] O.J. No. 1034, 2006 ONCJ 80, at para. 54, Reinhardt J. said: [page186]

> In order to rationalize section 13(2)(a), which contemplates that an owner may provide some work or materials to the construction of the new home, with the definition of a "builder", which refers to the provision of "all" work and materials, the definition of a "builder" has been interpreted as meaning the provision of a significant portion of construction. A home is not taken outside of the purview of the Act only because the owner was responsible for some work or materials.

(Emphasis added)

[18] Applying these tests, a long line of decisions in the courts and before the Ontario Licence Appeal Tribunal and the Ontario Commercial Registration Appeal Tribunal have held that the fact that an owner is responsible for the installation of water and septic systems does not mean that a contractor is not a "builder" under the ONHWP Act: see, for example, Ontario (5319-ONHWPA-Claim) (Re), [2009] O.L.A.T.D. No. 363 (Lic. App. Trib.), affd JRC Developments Ltd. v. Tarion Warranty Corp., supra; R. v. Boissonneault (July 14, 2004), unreported, North Bay (C.J.); Lam (Re), [1997] O.C.R.A.T.D. No. 92 (Comm. Reg. App. Trib.); Ontario (2947-ONHWPA-Claim), (Re), [2006] O.L.A.T.D. No. 54 (Lic. App. Trib.); and Staples (Re), [2006] O.L.A.T.D. No. 175 (Lic. App. Trib.).

[19] The appeal judge was aware of this case law. He said that "[t]he existing cases have purported to try and get around the definition of 'builder'" and "changed the definition" from the one in the statute.

[20] With respect, I do not agree. The interpretation of the definition of "builder" in cases like McPhail, JRC Developments Inc., Segal and Boissonneault is, in my view, consistent with the consumer protection purpose of the ONHWP Act, the wording of the definition of the word "builder" and a contextual reading of the definition with other provisions of the Act, such as s. 13(2)(a).

(2) Application to this case

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[21] Finally, once the proper definition of "builder" is set down, its application in this case is easy. Mr. Kozy did almost all of the construction work on the new Kobylinski home. The contract listed 12 separate categories of exterior work and about 20 separate categories of interior work to be performed by Mr. Kozy. Mr. Kozy was responsible for constructing virtually the entire home. The only work outside Mr. Kozy's responsibility related to the water and septic systems and two fireplaces. The work done by Mr. Kozy cost $153,594. The water and septic system work [page187] cost $12,854. By either yardstick, Mr. Kozy was the "builder". The owners' subsidiary participation in the construction project did not negate warranty coverage for them, nor did it remove the duty on Mr. Kozy to comply with the ONHWP Act.

E. Disposition

[22] I would allow the appeal and order a new trial on both charges. I would not award costs.

Appeal allowed.

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Her Majesty the Queen in Right of Ontario (Travel Industry Council of Ontario) v. Gray o/a All Sport Accommodations

[Indexed as: Ontario (Travel Industry Council of Ontario) v. Gray]

102 O.R. (3d) 475

2010 ONCA 518

2010 ONCA 518 (CanLII)

Court of Appeal for Ontario,
Weiler, Goudge and Simmons JJ.A.
July 22, 2010

Consumer protection -- Travel industry -- "Travel agent" -- Defendant's business consisting of arranging hotel accommodation for sports teams and receiving commission from hotels -- Defendant receiving no remuneration from teams -- Defendant acting as "travel agent" as defined in s. 1(1) of Travel Industry Act -- Definition not limited to selling travel services to consumers as principal -- Definition encompassing sale of travel services as agent for provider of those services -- Travel Industry Act, 2002, S.O. 2002, c. 30, Sch. D, s. 1(1).

The defendant's business arranged hotel accommodations for sports teams and was paid commissions by the hotels where the teams stayed. The business received no remuneration from the teams. The defendant was charged with acting as a travel agent without being registered, contrary to s. 4(1)(a) of the Travel Industry Act, 2002. The justice of the peace acquitted the defendant, finding that because his business received no consideration from the teams, it had no contract with them and therefore was not engaged in selling travel services to them.

That decision was reversed on appeal and a conviction was entered. The defendant appealed.

Held, the appeal should be dismissed.

The definition of "travel agent" in s. 1(1) of the Act is not limited to circumstances in which the person sells as a principal. It also encompasses the selling of travel services to consumers as an agent for the provider of those services.

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Cases referred to
Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, 2004 SCC 54, 242 D.L.R. (4th) 193, 324 N.R. 259, J.E. 2004-1546, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 132 A.C.W.S. (3d) 579
Statutes referred to
Safety and Consumer Statutes Administration Act, 1996, S.O. 1996, c. 19 [as am.]
Travel Industry Act, 2002, S.O. 2002, c. 30, Sch. D, ss. 1(1), 4(1)(a)
Rules and regulations referred to
O. Reg. 26/05 (Travel Industry Act, 2002), s. 1

APPEAL from the decision of Pockele J. of the Ontario Court of Justice dated July 8, 2009 allowing the appeal from acquittal entered on October 21, 2008 by Justice of the Peace Hodgins of the Ontario Court of Justice.

Ted A. Kalnins, for appellant.

Alexandra Lev-Farrell, for respondent. [page476]

The judgment of the court was delivered by

GOUDGE J.A.: --

Introduction

[1] The appellant, David Gray, is a sole proprietor who carries on business as All Sports Accommodations ("ASA"). ASA arranges hotel accommodations for sports teams. In doing so, it is paid commissions by the hotels where the teams stay.

[2] On February 19, 2007, the appellant was charged with acting as a travel agent without first being registered as a travel agent, contrary to s. 4(1)(a) of the Travel Industry Act, 2002, S.O. 2002, c. 30, Sch. D (the "Act"). He was found not guilty by a justice of the peace. On appeal to the Ontario Court of Justice, this was reversed and a conviction entered. Because the case raises the interpretation of the term "travel agent" in s. 1(1) of the Act, MacPherson J.A. granted leave to appeal to this court.

[3] For the reasons that follow, I conclude that, properly interpreted, "travel agent" encompasses the appellant's activities. I would therefore uphold the conviction and dismiss the appeal.

The Facts

[4] The facts are not in dispute. At trial, the appellant explained how his business works and acknowledged that he is not registered as a travel agent under the Act.

[5] ASA has contracts with various hotels, pursuant to which it is authorized to offer rooms to sports teams at the lowest group rate. In return, ASA receives a 10 per cent commission from the hotel on all booked rooms that are occupied.

[6] Typically, a sports team contacts ASA with information about the municipality it is to visit, the number of hotel rooms it needs, the dates of its visit and the approximate price range it seeks. ASA then supplies the team with a list of appropriate hotels together with their cancellation policies. Once the team makes a selection, ASA sends the team an agreement form setting out the details of the reservations to be made. When the agreement is accepted by the team, it supplies ASA with a list of credit card numbers from the team

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members in order to hold the reservation. ASA then forwards that list to the hotel. ASA subsequently supplies each team member with information about the hotel, including rules of the premises and a map to the hotel location. On occupancy, the team members pay the hotel for their rooms with the credit cards used to secure the reservation or by other means. Ultimately, ASA receives a fee from the hotel [page477] equal to 10 per cent of the value of the rooms occupied. ASA receiv es no remuneration from the team or its members.

[7] At trial, representatives of hotels that ASA has contracts with testified that they deal with registered travel agents in the same way as they deal with ASA, and pay those travel agents the same commission on the same basis.

The Judgments Below

[8] Section 1(1) of the Act defines "travel agent" as follows:

> "travel agent" means a person who sells, to consumers, travel services provided by another person.

[9] Section 4(1)(a) of the Act makes it an offence for a person to act as a travel agent who is not registered as such under the Act.

[10] At first instance, the justice of the peace concluded that because ASA receives no consideration from the teams or their members, it has no contract with them and therefore is not engaged in selling travel services to them. He therefore acquitted the appellant.

[11] On appeal, the Ontario Court of Justice also focused on whether the appellant contracted as principal to sell travel services to the sports teams and their members. The court found that the commission flowing from the hotel to ASA constitutes sufficient consideration to support the conclusion that ASA sells travel services to consumers. Accordingly, the appeal was allowed and the appellant was convicted.

Analysis

2010 ONCA 518 (CanLII)

[12] I would dismiss the appeal. While I reach the same conclusion as the Ontario Court of Justice, I do so by a somewhat different route.

[13] The fundamental issue is the interpretation of "travel agent" in the Act. To review, it is defined in s. 1(1) this way:

> "travel agent" means a person who sells, to consumers, travel services provided by another person.

[14] Also relevant is the definition of "travel services" in s. 1(1):

> "travel services" means transportation, sleeping accommodation or other services for the use of a traveller, tourist or sightseer.

[15] There is no doubt that, in the context of this case, the "consumers" are the sports teams and their members. Nor is there any doubt that the hotels are providing "travel services" to them. The question is whether, as a matter of statutory interpretation, the appellant can be said to be selling those services. [page478]

[16] Both courts approached this question implicitly assuming that the statutory definition of "travel agent" is limited to circumstances in which the person sells as a principal. In other words, only one who contracts on his own behalf to sell travel services to consumers meets the definition.

[17] With respect, I think that is too narrow an approach. In my view, the definition also encompasses one who sells travel services to consumers not as principal, but as an agent for the provider of those services. I say this for several reasons.

[18] First, the clear purpose of the Act is to regulate the travel industry in the interest of the travelling public. In that sense, it is consumer protection legislation. Pursuant to companion legislation -- the Safety and Consumer Statutes Administration Act, 1996, S.O. 1996, c. 19 -- the Travel

2010 ONCA 518 (CanLII)

Industry Council of Ontario has been designated by the Crown to carry out the regulation of the travel industry.

[19] The scope of the regulatory regime is significant. The Act prohibits anyone from acting as a travel agent unless the person meets the prescribed requirements and is properly registered under the Act. It sets up a mechanism for receiving and addressing complaints about a travel agent. It regulates the advertising done by those in the travel industry and prohibits the making of false or deceptive statements relating to the provision of travel services. Regulations pursuant to the Act specify the information that the travelling public must receive before paying for travel services.

[20] The Act also establishes and requires participation in the Travel Industry Compensation Fund, which is designed to protect the travelling public against travel agents defaulting on their obligations. Although it is true that a travel agent who does not receive payments from the travelling public presents no risk to this fund, the fund is but one part of a broader set of regulations.

[21] In my opinion, to confine such a comprehensive regulatory regime to the sale of travel services by a person acting as a principal and to exclude the sale of such services by a person acting on behalf of the service provider is to interpret the statutory language too narrowly to achieve its intended purpose. Put another way, since the evidence was clear that many travel agents engage in both kinds of sales, a narrow reading of the statutory definition would provide, at best, only a partial regulation of the travel industry. This would fall short of the legislative intention. It would exclude sales of travel services to consumers by persons acting on behalf of the service provider, in the course of which those persons would perform the very activities that the Act seeks to regulate.

[22] Second, there is the statutory language itself. The Act defines a travel agent as a person who sells "travel services [page479] provided by another person". This language is consistent with the travel agent selling those services on

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behalf of the provider of those services. In addition, the very description of the seller as a "travel agent" suggests a legislative intention to encompass within the definition a person who sells travel services as agent for the service provider.

[23] Finally, the task of statutory interpretation can be assisted by examining O. Reg. 26/05, which was made pursuant to the Act. The Regulation complements the legislative regime by, for example, detailing the kind of information that must be supplied to a customer before payment for travel services can be accepted. The Act and the Regulation form an integrated scheme for the regulation of the travel industry in the interests of the travelling public. In such circumstances, the Regulation can assist in ascertaining the legislature's intention with regard to a particular matter: see Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, at para. 35. In this case, that matter is what is meant by "selling travel services".

[24] Section 1 of the Regulation defines "sales in Ontario" of travel services by a registered travel agent as "the amount paid or to be paid through the travel agent for all travel services sold in Ontario". This clearly includes both sales where the travel agent sells as a principal and receives payment from the consumer in return, and sales where the travel agent effects the sale on behalf of a service provider, where payment is made later to the service provider. The broader interpretation of the statutory definition of "travel agent" ensures conformity between the legislation and the regulation that together form this integrated regulatory scheme.

[25] I therefore conclude that the proper interpretation of "travel agent" in the Act includes a person who sells travel services to consumers as agent for the provider of those services.

[26] Turning to the facts of this case, there is no doubt that the appellant meets that definition. When he, as ASA, contracts with a hotel, he is given authority by the hotel to

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offer its rooms at the lowest group rate. When he does so, the consumer accepts by supplying him with credit card information which he passes on to the hotel, and the sale of the hotel rooms at the specified price for the specified dates is made. The contract includes a cancellation clause under which, if the consumer so chooses, the sale is cancelled. Otherwise, the sale is closed when the rooms are occupied and paid for.

[27] By engaging in this activity, the appellant sells services to consumers as agent for the provider of those services. As such, [page480] he was required to be registered as a travel agent under the Act. Since he was not, he was properly convicted.

[28] The appeal must be dismissed.

Appeal dismissed.

2010 ONCA 518 (CanLII)

CITATION: Dominion of Canada v. Ali, 2016 ONSC 4604
COURT FILE NO.: CV-14-1739-00
DATE: 2016-07-13

2016 ONSC 4604 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
THE DOMINION OF CANADA GENERAL INSURANCE COMPANY and CHIEFTAIN INSURANCE COMPANY Applicant	*Anna-Marie Musson*, for the Applicants
- and -	
MOONIE ALI Respondent	*Kevin D. Toyne*, for the Respondent
	HEARD: February 17, 2016, at Brampton, Ontario

Price J.

Reasons For Order

NATURE OF MOTION

[1] Moonie Ali ("Ms. Ali") elected, under the terms of her automobile insurance policy, to have disputes regarding her claim for accident benefits arising from two collisions in which she had been involved decided by an

arbitrator appointed by the Financial Services Commission of Ontario ("FSCO"). On April 23, 2014, the day before the arbitrator was to resume a pre-hearing conference in the case, Ms. Ali's insurer, The Dominion of Canada General Insurance Company ("Dominion"), applied to this court for a declaration that Ms. Ali had entered into a binding settlement with the insurer a month earlier. At the pre-hearing conference, the arbitrator stayed those proceedings pending the resolution of the insurer's application to the court. He stated, "If the Court determines that FSCO is the proper body to deal with the settlement issue, either party may contact FSCO and a preliminary issue hearing will be set."

[2] For the reasons that follow, I find that FSCO is the proper body to decide whether a binding settlement of Ms. Ali's claims was reached. In summary, s. 281(1) of the *Insurance Act*[1] authorizes the insured to choose the body that will make decisions regarding his or her claim. It is an undisputed fact that Ms. Ali, pursuant to s. 282 of the Act, selected the FSCO arbitrator to make the decisions in relation to her claims. Section 20(2) of the Act provides that, in those circumstances, the arbitrator has exclusive jurisdiction to exercise the powers conferred upon him or her under the Act, and to determine all questions of fact or law that arise in any proceeding before him or her. Section 282(3) of the Act provides that the arbitrator shall determine all issues in dispute, whether they are raised by the insured person or the insurer.

[3] Dominion's application, launched a day before the pre-hearing conference before the arbitrator, has delayed the resolution of Ms. Ali's claims by

1 I note at the outset that the dispute resolution mechanisms which are central to this application were dramatically altered on April 1, 2016, when the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, S.O. 2014, c. 9, came into force. That Act amended the *Insurance Act*, R.S.O. 1990, c. I-8, in part, by transferring responsibility for the resolution of accident benefits disputes from FSCO to the Licence Appeal Tribunal. However, a FSCO arbitration that was commenced but not completed before April 2016 is continued after that date: see R.R.O. 1990, Reg. 664, s. 21. For that reason, my discussion of the *Insurance Act* relates to its pre-April 2016 form.

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almost two years. It prevented the implementation of the Act, which is a form of consumer protection legislation, by preventing the insured's claims from being dealt with in the most just, expeditious, and least costly manner on their merits. The costs order made will reflect this, and will indemnify Ms. Ali fully for the costs she has incurred.

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BACKGROUND FACTS

a) First collision

[4] On October 21, 2009, Ms. Ali was driving her car along a highway in Mississauga when another vehicle struck her car from behind ("the first collision"). Ms. Ali, who had standard benefit coverage under her auto insurance policy at the time of the collision, submitted a claim to Dominion for accident benefits. She hired a paralegal, Rodolfo Higuera, to represent her with respect to her claim.

[5] Ms. Ali submitted a series of disability certificates ("OCF3s") to Dominion, which indicated that she suffered soft tissue sprains and strains, whiplash, anxiety, depression, headaches, and dizziness, as a result of the collision. She submitted claims for non-earner benefits, medical benefits, housekeeping expenses, attendant care benefits, and clothing and visitation expenses.

b) Termination of benefits arising from first collision

[6] Dominion paid the following amounts to Ms. Ali in response to her claim:

1. $24,975 in medical benefits;
2. $8,591 in housekeeping expenses;
3. $28,740 in attendant care benefits;
4. $24,969 in non-earner benefits;

5. $598 in clothing expenses; and

6. $867 in visitation expenses.

[7] Additionally, Dominion paid Ms. Ali non-earner benefits, at the statutory rate of $185 per week, from April 26, 2010 (after the 26 week deductible period) to May 31, 2012, at which time it terminated the benefits based on the following reports of insurer's examinations conducted pursuant to section 44 of the *Statutory Accident Benefits Schedule,* O Reg. 34/10, under the *Insurance Act*:

1. Report of Mr. Lurie, a Kinesiologist, dated April 23, 2012;

2. Report of Dr. West, a Psychologist, dated May 8, 2012; and

3. Report of Dr. Gwardjan, a physiatrist, dated May 9, 2012.[2]

c) Mediation of claims arising from first collision

[8] Ms. Ali disputed Dominion's denial of her claims for non-earner benefits and medical rehabilitation benefits. She did not dispute her entitlement to the remaining accident benefits, including attendant care and housekeeping benefits. She retained a lawyer, Christopher Schiffman of McLeish Orlando, to represent her in her dispute with Dominion.

[9] Mr. Schiffman submitted an Application for Mediation on Ms. Ali's behalf to FSCO on July 22, 2011. Ms. Ali claimed entitlement to non-earner benefits in the weekly amount of $185, the cost of an orthopaedic assessment, and medical benefits for three treatment plans. The three treatment plans in dispute amounted to a total of $13,225.90.

[2] *Statutory Accident Benefits Schedule*, O Reg. 34/10 pursuant to the *Insurance Act*

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[10] The parties attended a mediation session at FSCO on January 10, 2012, and July 11, 2012, but were unable to resolve their dispute. Mr. Schiffman represented Ms. Ali throughout the mediation. On October 19, 2012, Ms. Ali submitted an Application for Arbitration, seeking accident benefits in relation to the first collision.

[11] In order to qualify for ongoing non-earner benefits, Ms. Ali was required to prove that she continued to suffer a complete inability to carry on a normal life as a result of the injuries she had sustained in the collision. Dominion took the position, based on the reports of the section 44 assessors, that her injuries did not satisfy this requirement. According to Dominion, Ms. Ali did not provide medical documentation to support her claim that she met the test for non-earner benefits after May 31, 2012.

d) Second collision

[12] On August 9, 2012, Ms. Ali was making a left turn when the car she was driving was struck by another vehicle ("the second collision"). Dominion sent a letter dated August 15, 2012, to Ms. Ali in which it advised her of the potential benefits available to her. It later advised her, by means of an Explanation of Benefits form (OCF 9) dated September 7, 2012, of the benefits she qualified for, including purchased optional benefits. Ms. Ali purchased the optional benefit coverage for attendant care and medical rehabilitation benefits available in relation to the second collision. She was automatically entitled to similar benefits in relation to the first collision, under the standard coverage that her policy provided at the time of that collision.

[13] Ms. Ali's counsel, McLeish Orlando, submitted a claim on her behalf to Dominion for accident benefits in relation to the second collision, including the purchased optional benefits available to her under her OCF 9 dated September

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7, 2012. Ms. Ali submitted a series of OCF3's, indicating that she suffered cervical disc disorders, soft tissue sprains and strains, chronic post-traumatic headaches, mood and sleep disturbances, chronic pain syndrome, anxiety, depression, headaches, and dizziness, as a result of the collision. She submitted claims for medical benefits, housekeeping expenses, attendant care benefits, and non-earner benefits in relation to the second collision.

[14] Dominion paid $11,510 in medical benefits and $11,174 in non-earner benefits under Ms. Ali's claim for the second collision. It accepted her claim for non-earner benefits in relation to the second collision, and began paying her benefits as of February 8, 2013. It paid her benefits at the rate of $185 per week up to the date of the alleged settlement on March 18, 2014.

[15] Under the policy, Ms. Ali is entitled to non-earner benefits at the rate of $185 per week, or $9,620 per year, for an additional 12 years, until she reaches age 65, provided she continues to meet the test for disability. At age 65, her benefit would decline to approximately $55.50 per week, or $2,886 per year, payable for the remaining years of her life, provided she continues to meet the test for disability.

[16] Ms. Ali submitted a claim for attendant care benefits following the second collision. Dominion accepted her claim at the policy maximum rate of $3,000 per month for non-catastrophic injuries, subject to confirmation that the expenses were incurred, as provided for in section 3(7) of the *Statutory Accident Benefits Schedule* ("SABS").

e) Refusal of claims arising from second collision

[17] Ms. Ali was entitled to attendant care benefits for non-catastrophic injuries for two years, pursuant to section 20(2) of the *SABS*. Her maximum potential entitlement was $72,000 if she proved that she incurred the expenses in

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accordance with section 3(7) of the *SABS*. Dominion says that Ms. Ali failed to provide the necessary documentation or information confirming that she had incurred the expenses, in accordance with section 3(7) of the *SABS,* with the result that Dominion did not pay those benefits.

[18] Ms. Ali did not purchase optional benefits pursuant to section 28(1)(2)(ii) of the *SABS,* with the result that she was not entitled to housekeeping benefits.

[19] Ms. Ali retained new counsel, Charles Stitz, of Fireman Steinmetz, who submitted an Application for Mediation on her behalf to FSCO on June 24, 2013, in relation to the second collision. Ms. Ali claimed entitlement to non-earner benefits in the weekly amount of $185, attendant care benefits of $3,000 per month, housekeeping expenses in the amount of $100 per week, and medical benefits for eight treatment plans, in the total amount of $9,636.40.

f) Mediation of claims arising from second collision

[20] The parties participated in a mediation session with a mediator appointed by FSCO on September 13, 2013, in relation to the second collision, but were unable to resolve their dispute. Ms. Ali was represented by Mr. Stitz at that mediation. Mr. Stitz submitted an Application for Arbitration on Ms. Ali's behalf on September 24, 2013, seeking the payment of benefits in relation to the second collision.

g) Appointment of Arbitrator

[21] FSCO appointed Alec Fadel as Arbitrator to arbitrate Ms. Ali's claims.

h) The first pre-hearing conference

[22] Ms. Ali and Dominion made an appointment with Mr. Fadel for a pre-hearing conference to take place by telephone on February 10, 2014. Ms. Ali

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was represented by Mr. Stitz at the conference. Dominion was represented by its lawyer, Anna-Marie Musson. Ms. Ali joined the call after it had begun.

[23] Ms. Ali states that she believed that the call on February 10, 2014, was going to be a mediation, and that she would talk about whether she would receive payment of some of her expenses. She was surprised that the lawyers did not discuss her expenses on the call, and says that most of the call was in legal language she did not understand. At the conference, Arbitrator Fadel ordered the two outstanding Applications for Arbitration to be combined pursuant to Rule 30 of the *Dispute Resolution Practice Code*.

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i) Settlement meeting

[24] Ms. Ali later received a letter from Mr. Stitz, telling her about a mediation that would take place on March 18, 2014. When she received the letter, she called Mr. Stitz's office and asked to meet with him before the mediation so that they could discuss her expenses, and so that Ms. Ali could give him her receipts. She says that she made this request because she thought that they would be meeting with Ms. Musson to discuss getting some of those expenses paid. Mr. Stitz told her that she could meet with him at 11 a.m. on the day of the mediation.

[25] On March 18, 2014, the parties attended a settlement meeting at the offices of Fireman Steinmetz. Ms. Ali says that she did not take any of her pain medication before leaving for the meeting because she has trouble focusing, concentrating and understanding when she is on the medication. She says that she wanted to be able to understand what Mr. Stitz was saying to her at the mediation.

[26] Ms. Ali arrived at Mr. Stitz's office late, at around 11:45 a.m. She was in a lot of pain and was crying. She told Mr. Stitz that she had brought all of her receipts and wanted to discuss them with him before the mediation began. She

showed him her hand and wrist brace, and told him that she needed his help and wanted him to be stern with Ms. Musson. She says that Mr. Stitz asked her some questions about what had been paid and what had been denied. She says that he did not explain to her what would be happening at the mediation.

[27] Ms. Ali says that her understanding, based on her discussions with Mr. Stitz, was that they would be discussing getting some of her expenses paid to tide her over until the arbitration took place. Before the meeting, Mr. Stitz had informed her that he would be asking for a special award at the arbitration to cover her accommodation expenses. Ms. Ali resides with her daughter, and her bedroom is on the second floor. She uses a cane and glasses. She has trouble walking up and down stairs because of her injuries, and she had slipped on the stairs and hit her head. Mr. Stitz told her that they would take the insurance company to the arbitration so that she could get some money to get her new, less dangerous, accommodation.

[28] Around noon, when Ms. Musson arrived, Mr. Stitz left the room where Mr. Ali was and went to speak with Ms. Musson. Ms. Ali thought that he was only leaving to greet Ms. Musson. However, he was gone a long time. He eventually returned and asked Ms. Ali to come see Ms. Musson. Ms. Ali was expecting Mr. Fadel to arrive also, but Mr. Stitz told her that Mr. Fadel was not coming to the meeting.

[29] When Ms. Ali entered the meeting room, she greeted Ms. Musson. She showed Ms. Musson her hand and wrist brace, and told her that she had submitted expenses for it, and for some dental work. Ms. Musson told her, according to Ms. Ali, that the insurance company does not pay for everything, but that she was there “to try to settle some of the issues” in Ms. Ali’s claims “to get [Ms. Ali] some money today”.

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[30] Mr. Stitz escorted Ms. Ali back to his office, and returned to speak with Ms. Musson. He took Ms. Ali back to see Ms. Musson briefly several times, and they talked about her expenses, such as for her medications, therapy, brace, and dental work. Ms. Ali's medications cost her approximately $1,000 per month, and she needed money for a range of therapies.

[31] Ms. Ali believed they were discussing getting her some money for those expenses, to tide her over until the arbitration took place. Mr. Stitz and Ms. Musson spoke with each other in Ms. Ali's presence, but they used legal language that Ms. Ali says she did not understand.

[32] The meeting took much longer than Ms. Ali had expected. Her pain grew worse, and she was crying more. She told Mr. Stitz that she wanted to go home to take her medication, but he replied that it would soon be over and that she should stay, so she did.

[33] Mr. Stitz eventually returned to his office and told Ms. Ali that he was getting her $165,000 and that she could walk away with $117,000. He told her that he would take the rest of the money as part of his fee, so that she would owe him less money down the road. Ms. Ali asked him to round the amount up to $120,000 and he said he would.

[34] Mr. Stitz took Ms. Ali back in to see Ms. Musson. He went to hand Ms. Ali some documents and said that she needed to sign them to receive the money from Ms. Musson. Mr. Spitz represented Ms. Ali throughout the settlement meeting, and the release stated that she had sought legal advice.

[35] Ms. Ali says that she was having trouble focusing, owing to her pain, and that she accidentally dropped the documents on the floor. As she picked them up from the ground, she noticed the second bullet point on the first page talked

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about legal and medical advice. She asked Mr. Stitz what it meant. Mr. Stitz told her that the documents were standard FSCO documents and that she needed to sign them to receive her money from Ms. Musson.

[36] Ms. Ali says that she was in so much pain that all she wanted to do was to go home and take her medication. She was not told that she should read the documents before signing them. She says that she trusted Mr. Stitz, and signed the documents without reading them. She states that even if she had tried to read them at the meeting, she was in so much pain, and was crying so much, that she would have been unable to understand them.

[37] After Ms. Ali signed the documents, Mr. Stitz led her from the room. He told her that he would give her a copy of what she had signed for her records, but she was not, in fact, given a copy of the documents to take when she left. She went downstairs, and says that she cried from the pain while she waited for her ride to take her home.

[38] Dominion states that, at the meeting, the parties agreed to resolve Ms. Ali's two claims for accident benefits on a full and final basis, for the all-inclusive sum of $165,000. At the settlement meeting, Dominion signed a Full and Final Release and a Settlement Disclosure Notice.

[39] Between the dates of the first and second collision, Dominion's automobile insurance policy changed with the proclamation of Regulation 34/10 under the *Insurance Act*. At the time of the first collision, the policy had a base limit of $100,000 for non-earner benefits. At the time of the second collision, the policy had a base limit of $50,000 with an optional benefit of a further $50,000 available. It is not disputed that Ms. Ali exercised her option for this benefit, which extended her coverage under the second policy to $100,000.

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[40] The Full and Final Release referred to both the first and second claim. ***However, the Settlement Disclosure Notice did not refer to the two claims, or differentiate between them. Dominion says that it encompassed Ms. Ali's claims for accident benefits in relation to both the first and the second collision. However, the Settlement Disclosure Notice contains a box to be checked if there are optional benefits, and that box was not checked***.

j) Aftermath of the settlement meeting

[41] Ms. Ali states that when she checked her bag the next day and did not find a copy of the documents she had signed, she telephoned Mr. Stitz and told him that she did not have a copy of the documents. Mr. Stitz said that he had better send her a copy of them in the mail. She says that the only other thing he told her was that she should call him before 5:00 p.m. the following day.

[42] Later that day, a package from Mr. Stitz arrived. Ms. Ali did not open it immediately, because she had taken her pain medication and was in too much pain and under too much stress from the mediation.

[43] On March 20, 2014, Ms. Ali telephoned Mr. Stitz at 4:00 p.m. She asked him why he had asked her to call him. Mr. Stitz said that out of courtesy, he would like to contact Ms. Musson before 5:00 p.m. Ms. Ali says that she did not understand, and asked Mr. Stitz, why he wanted to contact Ms. Musson. He did not tell her why, but said he wanted Ms. Ali to say "yes" to the offer. Ms. Ali was not sure what he was talking about, because she was in pain, so she just said "okay". Mr. Stitz told her that "okay" was not good enough, and that she needed to say "yes". Ms. Ali kept saying "okay", and he kept telling her to say "yes". She finally said, "Okay, okay, okay. Yes". She asked Mr. Stitz when the next date with the arbitrator was, and he told her that they were not going back to the arbitrator. Ms. Ali says that she was in too much pain to ask why not.

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[44] Ms. Ali states that after dinner that evening, she opened the package that she had received from Mr. Stitz the previous day. She had not taken her night time pain medication yet, so she could try to focus and understand the documents. The package contained two documents: a letter dated March 19, 2015, and the Settlement Disclosure Notice and Full and Final Release.

[45] Ms. Ali says that she tried to read and understand the documents, and that while she had trouble understanding them (she says that she still has trouble understanding them without help), she saw the word "settlement" and became very anxious. She saw the word "rescind" and says that she was not familiar with that word. She looked it up in the dictionary and saw that both of her collisions were mentioned in the Full and Final Release, which she found confusing because she had understood that the meeting was only about her first accident.

[46] On the Settlement Disclosure Notice, the box for optional benefits was not checked. Ms. Ali had optional benefits at the time of her second accident. She did not understand, she says, why Mr. Stitz had not explained all of this to her at the meeting, or when they spoke on the telephone twice following the meeting. She says that Mr. Stitz never told her what was written in his letter dated March 19, 2014.

[47] Ms. Ali states that she thought she was receiving some money to tide her over until they went to arbitration, and that was why she signed the documents. She says that she did not know that the documents she was signing meant that she was settling her case. If she had known that she was settling her entire case, she says, she would not have taken all of her receipts to Mr. Stitz's office.

[48] Ms. Ali says that if Mr. Stitz or Mr. Musson had told her that she was settling both her claims on a final basis, she would never have signed the documents. If Mr. Stitz had explained to her on the telephone what was going

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on, she says, she would have told him that she was not settling, and that he should reject the settlement offer.

[49] Ms. Ali states that because it was late at night and one of the bullet points said she could reject the settlement, Ms. Ali telephoned Ms. Musson and left her this voicemail:

> Hello Miss Anna-Marie Musson, this is Moonie. I know it is probably you left the office already. I am under a lot of duress and mental and emotional stress and I am not thinking right. I just want to let you know that I would like to reject the offer and I am going to be calling Mr. Charles Stitz and leaving him a message and to let him know that I am rejecting the offer, so I thought I would let you know as well, so I am under a lot of mental, emotional and physical stress and duress right now and I just can't think straight, so I am sorry. I have to turn down that offer at this time. I hope you understand. Thanks. I am going to leave Mr. Charles Stitz a message now. Thanks. Bye.

[50] Ms. Ali says that after leaving that voicemail message for Ms. Musson, she left a similar message on Mr. Stitz's voicemail. She further states that on March 21, 2014, she telephoned Mr. Stitz, who was very angry with her when he picked up the phone. He told her that Ms. Musson was not happy that she had rejected the settlement, and that Ms. Musson would take her to court to enforce the settlement. They argued and Ms. Ali terminated Mr. Stitz's retainer a few days later.

[51] Dominion says that after she received Ms. Ali's voicemail, Ms. Musson telephoned Mr. Stitz, who told her that he did not have "clear instructions" to rescind the settlement. A few days later, Dominion sent the $165,000 to Mr. Stitz, who still has it in his trust account. Ms. Ali says that she expected that Mr. Stitz would follow her instructions and do whatever was necessary to rescind the alleged settlement.

[52] It is not disputed that Ms. Ali has not personally received any of the funds that Dominion sent to Mr. Stitz.

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k) Resumption of pre-hearing conference and Dominion's application

[53] Eighteen days after her argument with Mr. Stitz, Ms. Ali, representing herself, wrote a letter dated April 9, 2014, to FSCO, in which she requested a resumption of the pre-hearing conference to set aside the settlement she said she had rejected. FSCO forwarded her letter to Dominion's counsel on April 10, 2014.

[54] On the day before the pre-hearing conference was to resume, Dominion made the present application to this court to enforce the settlement it says was reached on March 18, 2014. At the resumption of the pre-hearing conference on April 24, 2014, Arbitrator Fadel stayed proceedings on Ms. Ali's claims pending the resolution of Dominion's application to the court. He made an order which provided that "If the Court determines that FSCO is the proper body to deal with the settlement issue, either party may contact FSCO and a preliminary issue hearing will be set."

l) Ms. Ali's response to Dominion's application

[55] On May 2, 2014, Arvin Gupta of Mathew & Gupta advised Dominion that he was retained by Ms. Ali to respond to its Application. On November 7, 2014, Brauti Thorning Zibarras LLP advised Dominion that they had been retained to represent Ms. Ali in relation to her claims for accident benefits. Brauti Thorning LLP represented Ms. Ali on February 17, 2016, at the hearing of Dominion's Application before this court.

[56] On July 22, 2014, Ms. Ali's physician, Jeffrey Neumann, completed an OCF-19 (Application for Determination of Catastrophic Impairment) in which he stated that Ms. Ali was catastrophically impaired. He stated that Ms. Ali had

been in his care for 14 years and that she was catastrophically impaired as a result of severe chronic pain, depression, anxiety disorder, and fibromyalgia.

[57] There is no dispute that if Ms. Ali meets the test for catastrophic impairment, she would be entitled to benefits that far exceed the $165,000 that Dominion has paid pursuant to the alleged settlement of her claims.

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ISSUES

[58] The Application requires the court to determine the following issues:

1. Does the Court have jurisdiction?
2. Was a settlement reached?
3. Was the settlement rescinded?
4. Should the settlement be enforced?

POSITIONS OF THE PARTIES

a) Does the Court have jurisdiction?

[59] Dominion submits that the exclusive jurisdiction of the FSCO arbitrator is limited to issues of entitlement to, or quantum of, specific benefits. It submits that insurers may proceed by court actions when the issue to be resolved does not concern entitlement to, or quantum of, benefits.

[60] Ms. Ali submits that the Court lacks jurisdiction to hear the application. Section 281 of the *Insurance Act* gives the insured the right to select her forum. Ms. Ali says that she selected a FSCO arbitrator, and the Act thereupon gives the arbitrator exclusive jurisdiction to decide whether a settlement was reached, whether Ms. Ali rescinded the alleged settlement, and whether the alleged settlement should be enforced.

b) Was a Settlement reached?

[61] Dominion submits that the parties reached a full and final settlement of Ms. Ali's claims for accident benefits at the March 18, 2014, meeting. It relies on the following:

1. Dominion had no notice of any limitation of the authority of Ms. Ali's counsel and there is no evidence that his authority was, in fact, limited.

2. Ms. Ali was able to read, question, and request clarification of, the settlement documents. She did not ask for more time to consider the documents.

3. Ms. Ali's conduct in asking her lawyer to explain a bullet point in the documents and negotiating a larger share of the settlement amount suggests that she understood the nature of the agreement and participated actively in the negotiation.

4. Ms. Ali received the documents within the cooling-off period and she was capable of reading them and making decisions concerning them.

[62] Ms. Ali submits that a settlement was not reached because there was no mutual intention to create a binding settlement. She relies on the following:

1. She did not know that the March 18, 2014, meeting was a settlement meeting. She believed that its purpose was to address the payment of her interim medical expenses.

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2. She was not present for most of the meeting. She did not know what she was signing, and Mr. Stitz failed to explain what the $165,000 was for.

3. Mr. Stitz did not tell her to read the Final Release or Disclosure Settlement Notice and she did not read them. Mr. Stitz did not adequately explain the documents. He described them as standard FSCO documents that she needed to sign in order to receive her money.

4. She was in such extreme pain and was so desperate to conclude the meeting that she would not have understood the documents even if she had tried to read them.

5. She did not understand the nature or effect of the documents she signed.

6. She was unaware of the alleged settlement until after the statutory cooling-off period had expired. When she did read them, she immediately notified Dominion that she rejected the settlement.

c) Did Ms. Ali rescind the settlement?

[63] Dominion submits that section 9.1 of *Automobile Insurance*, O. Reg. 664 (the "*Settlement Regulation*") governs the settlement of accident benefit claims. Under this regulation, the insured can rescind a settlement: (1) for any reason, in writing, within two business days, or (2) at any time, if the insurer has not complied with either section 9.1(2) or (3).

[64] It is not disputed that Ms. Ali did not rescind the settlement in writing within two business days. It is also not disputed that section 9.1(2) was complied with. The issue is therefore whether section 9.1(3) was complied with.

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[65] Section 9.1(3) stipulates what must be contained in a Settlement Disclosure Notice. Dominion submits that the only information required by 9.1(3) at issue is a description of the benefits that may be available to the insured person under the *Statutory Accident Benefits Schedule*.

[66] Dominion submits that the standard and optional benefits available to Ms. Ali were summarized on page 4 and 5 of the Settlement Disclosure Notice. It says that the Notice provided meaningful information to Ms. Ali regarding the benefits available to her, and complied with the *Settlement Regulation*. In the alternative, it submits that any breach was a non-material technical breach, which did not reasonably affect Ms. Ali's decision to settle.

[67] Ms. Ali submits that section 9.1(3) of the *Settlement Regulation* was not complied with because the Notice failed to indicate that she was entitled to optional benefits. The box for optional benefits on the Settlement Disclosure Notice was not checked, with the result that the Notice, on its face, could be interpreted as indicating that Ms. Ali was accepting $50,000 for non-earner benefits under both policies combined, in addition to the $24,969 paid under the first policy and the $11,174 paid under the second policy before the settlement meeting. If this was so, then the settlement amount represented more than half (57.42%) of total benefits of $150,000 available (being the $100,000 base coverage under the first policy and $50,000 under the second policy). In reality, the settlement amount represented less than half (43.07%) of the total benefits available (being the $100,000 base coverage under the first policy, the $50,000 base coverage under the second policy, and the $50,000 optional coverage which Ms. Ali had purchased under the second policy).

[68] Dominion acknowledges that the box for optional benefit was not checked on the Notice, but states that the Settlement Disclosure Notice is a form

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that the Superintendent approved, pursuant to the regulation, and that it does not contemplate a settlement of claims under two policies, where an optional benefit is available under one but not under the other. It submits that the box on page four was left blank because the first policy did not provide optional benefit coverage. It says that if the box had been checked, Ms. Ali could have argued that the Notice was not compliant because the first policy had standard benefit coverage only. It also submits that Ms. Ali's lawyer was aware of the optional benefit available to her under the second policy and that Ms. Ali had exercised her option to purchase it.

[69] Ms. Ali submits that Dominion could have inserted a reference to the second policy in the Notice, or could have provided two separate Settlement Disclosure Notices, one for each claim. She submits that whatever Dominion's explanation, it cannot be disputed that the Settlement Disclosure Notice does not comply with the Act, because it fails to disclose all the benefits available, including the optional benefits that she had purchased.

[70] Additionally, Ms. Ali says that she believed that the discussion on March 18, 2014, related to only one of her claims, and that there would still be an arbitration in the future. She submits that she learned only later that the amount which Dominion had offered was for the final settlement of both her claims.

[71] In these circumstances, having regard to the ambiguity of the Settlement Disclosure Notice and its non-compliance with the Act, Ms. Ali submits that she was entitled to rescind any settlement beyond the two days within which a settlement can be rescinded where there has been compliance with the *Settlement Regulation*. She says that she did so by leaving voicemail messages for her lawyer and for Dominion's lawyer and by filing the responding material in this Application.

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d) Should the settlement be enforced?

[72] Dominion submits that where an insured was represented throughout settlement discussions, the court may infer that she was properly informed of her rights. Dominion submits that the finality of settlements is an important principle and that the court should apply the presumption that informed settlements will be upheld.

[73] Ms. Ali submits that enforcing the settlement would be unfair to her, and asks the court to exercise its discretion to decline to enforce it. She states that Dominion will not suffer prejudice if the settlement is not enforced, as the funds advanced under the settlement remain in Mr. Stitz's trust account. Additionally, she says that declining to enforce the settlement will not negatively impact any third parties.

[74] Ms. Ali submits that she mistakenly signed the settlement. She did not intend to settle her claim, and made efforts to rescind it shortly after the cooling-off period expired. She submits that especially if she is catastrophically impaired, the settlement is unreasonable and there is a real risk of injustice if it is enforced.

ANALYSIS AND EVIDENCE

a) Does the court have jurisdiction?

[75] Section 281(1) of the *Insurance Act* gives the insured person the right to select, from among three available forums, a decision-maker to determine his/her claim for statutory accident benefits: 1) the court, 2) a FSCO arbitrator, or 3) a non-FSCO arbitrator. Section 281(1) provides:

> 281(1) Subject to subsection (2),
>
> (a) The insured person may bring a proceeding in ***a court of competent jurisdiction***;

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> (b) The insured person may refer the issues in dispute to ***an arbitrator under section 282***; or
>
> (c) The insurer and the insured person may agree to submit any issue in dispute to ***any person for arbitration*** in accordance with the Arbitration Act, 1991. 1996, c. 21, s. 37.
>
> Limitation
>
> (2) No person may bring a proceeding in any court, refer the issues in dispute to an arbitrator under section 282 or agree to submit an issue for arbitration in accordance with the *Arbitration Act, 1991* unless mediation was sought, mediation failed and, if the issues in dispute were referred for an evaluation under section 280.1, the report of the person who performed the evaluation has been given to the parties. 1996, c. 21, s. 37.
>
> 280.1 (1) If mediation fails, the parties jointly or the mediator who conducted the mediation may, for the purpose of assisting in the resolution of the issues in dispute, refer the issues in dispute to a person appointed by the Director for an evaluation of the probable outcome of a proceeding in court or an arbitration under section 282.[3]

[76] There is no dispute, in the present case, that in relation to each of Ms. Ali's collisions and claims, mediation was sought, mediation failed, and the issues in dispute were not referred for an evaluation under section 282. There is also no dispute that Ms. Ali elected to have her claims determined by a FSCO arbitrator.

[77] Once the insured chooses the FSCO arbitrator as the decision-maker, the Act gives the arbitrator the exclusive jurisdiction to determine all questions of fact or law that arise in the proceeding, and the arbitrator's decision is final and conclusive for all purposes. Section 20 of the Act provides, in that regard:

> 20.(2) A person referred to in subsection (1) has exclusive jurisdiction to exercise the powers conferred upon him or her under this Act and to determine all questions of fact or law that arise in any proceeding before him or her and, unless an appeal is provided under this Act, his or her decision thereon is final and conclusive for all purposes.

[3] *Insurance Act*, R.S.O. 1990, c. 1.8.

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[78] The *Insurance Act* is consumer protection legislation which must be interpreted in a purposive manner to achieve the objectives of protecting an insured's rights to statutory accident benefits.[4] The choice of decision-maker is an integral element of the statutory regime and of the means of achieving the Act's objectives.

[79] The Court of Appeal, in *Liberty Mutual Insurance Co. v. Fernandes*, in 2006, stated:

> ***By leaving the choice of forum always with the insured, the legislature has guaranteed that the insured maintains control of the process including its timing and cost***. See *Baron v. Kingsway General Insurance Co.*, [2006] O.J. No. 1067, 35 C.C.L.I. (4th) 180 (S.C.J.), at para. 29. ***Arbitration under the Act is an expeditious and much less costly process than a court action, but the court option is open to an insured***. …[5]
> [Emphasis added]

[80] Dominion submits that Insurers can proceed by way of court actions when the issue to be resolved does not concern entitlement or quantum of benefits. It relies, for this proposition, on the same Court of Appeal decision in *Liberty Mutual*. I find no support for Dominion's proposition in the Court of Appeal's decision. On the contrary, the Court, in the passage cited above, is unequivocal in stating that the legislature has left the choice of forum always with the insured.

[81] The Court of Appeal, in *Liberty Mutual*, gave a purposive interpretation to the *Insurance Act*. It held that by leaving the choice of forum with the insured, the Legislature guaranteed that the insured would maintain control of the process, including its timing and cost.

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[4] *Smith v. Co-operators General Insurance Co.*, 2000 CanLII 4138 (Ont. C.A.), at para. 9, rev'd on other grounds 2002 SCC 30, and *Mcnaughton Automotive Ltd. v. Co-Operators General Insurance Co.*, 2001 CanLII 21203 (Ont. C.A.), at para. 20.

[5] *Liberty Mutual Insurance Co. v. Fernandes* (2006), 82 O.R. (3d) 524 (C.A.), at para. 15.

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[82] In its earlier decision in *Citadel General Assurance Co. v. Gogna*, in 1992, the Court of Appeal held that "at common law an insurer has a right of action for repayment of amounts paid to a person through error or fraud", and found that the common law right was not expressly or impliedly removed by the dispute resolution provisions of the *Insurance Act*. However, in *Liberty Mutual,* the Court limited the application of *Citadel* to cases involving the court's common law jurisdiction to provide a remedy for fraud or mistake. Feldman J.A., with whom Labrosse and Moldaver JJ.A. concurred, stated:

> In my view, ***the reasoning in Citadel must be limited to actions involving the repayment of benefits obtained through fraud or error; to extrapolate from that case that insurers also have an absolute right to bring a court proceeding to determine statutory accident benefits entitlement issues is erroneous***.[6] [Emphasis added]

[83] Dominion argues that the present case falls within the exception in *Citadel* because it involves the enforcement of a settlement, not an issue of entitlement or quantum. I disagree. Section 20 of the Act gives the FSCO arbitrator, if chosen by the insured, exclusive jurisdiction over all questions of fact and law. It does not limit the arbitrator's jurisdiction to issues of entitlement or quantum.

[84] In any event, the issue of whether a settlement was reached which precludes the insured from further entitlement is an issue of entitlement. The question of whether a settlement was reached, or was rescinded, and whether the settlement is binding on the parties is a question of fact and law upon which the determination of Ms. Ali's entitlement to benefits under the Act may depend. To permit the insured to apply to the court for this determination would substantially erode the insured's control over the form of decision-making in her case. This result would be inconsistent with the objectives of the legislation.

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[85] The determination in *Liberty Mutual* as to whether the insured had suffered a catastrophic injury was similarly one upon which the insured's entitlement to benefits depended. The Court of Appeal did not permit the insurer to apply to the court for the determination of this issue, which the Act gave to a CAT DAC, subject to the decision of the arbitrator. Feldman J.A. stated, in this regard:

> I conclude that although there is historical arbitral and judicial case law that suggests that an insurer may have the right to commence a court proceeding to determine statutory accident benefits entitlement issues, when that case law is read in its proper context, it is apparent that it evolved without consideration of the entire legislative scheme provided in s. 281. As discussed above, once the entire scheme is considered, it is clear that insurers are not left without a remedy to ensure that statutory accident benefits entitlement issues are adjudicated following a CAT DAC. ***There is therefore no need to read into the legislation a court remedy for insurers that is not provided by the legislation***.[7] [Emphasis added]

[86] Dominion asserts that in *Wu Estate v. Zurich*, in 2006, the trustee of an insured's estate applied to the court to enforce an accident benefits settlement,[8] and in *Co-operators General Insurance Co. v. Tagaoussi*, in 2002, the insurer applied to the court to enforce the terms of an accident benefits settlement, and that the Court of Appeal did not consider the court's jurisdiction to be an issue in either case.[9]

[87] *Wu Estate v. Zurich* is distinguishable on two grounds. The first is that the insured, who was cognitively impaired and represented by her mother as her litigation guardian, commenced an action claiming tort damages against the tortfeasor, and claiming statutory accident benefits against Zurich pursuant to the

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[6] *Liberty Mutual*, at para. 24.

[7] *Liberty Mutual*, at para. 28

[8] *Wu Estate v. Zurich*, [2006] O.J. No. 1939 (C.A.).

[9] *Co-operators General Insurance Co. v. Tagoussi*, 2000 CarswellOnt 5011, [2000] O.J. No. 5059, (Ferguson J.), aff'd [2002] O.J. No. 403 (C.A.).

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Insurance Act. She therefore brought herself under the provisions of s. 280(1)(a) of the Act, which states that "The insured person may bring a proceeding in a court of competent jurisdiction."

[88] Second, the parties had entered into a settlement of the insured's Accident Benefits that was explicitly "subject to necessary court approval". The court stated:

> The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is 'founded on necessity, namely the need to act for the protection of those who cannot care for themselves….to be exercised in the 'best interest' of the protected person…for his or her 'benefit' or 'welfare': *Eve, Re*, [1986] 2 S.C.R. 388 (S.C.C.) at para. 73.[10]

[89] The court noted that the requirement for court approval of settlements involving parties under disability is codified in Ontario in Rule 7.08(1):

> No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.[11]

[90] In *Co-operators General Insurance Co. v. Tagaoussi*, the Court of Appeal upheld the decision of this court granting an application by an insurer to enforce a settlement. Dominion submits that Mr. Tagaoussi made a claim for Accident Benefits, some of which were denied. Co-operators took the position that the parties had settled the claim and applied to the court to enforce the settlement.

[91] I have carefully reviewed the decisions of both this court and the Court of Appeal in *Co-operators v. Tagaoussi.* I find no evidence in either decision that

[10] *Wu Estate*, at para. 10.

[11] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 7.08.

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Mr. Tagaoussi ever elected to have his claims determined by an arbitrator. If he elected to have his claim determined by the court, as was his right, or had not elected to have his claim determined by an arbitrator, the insurer properly applied to the court for a declaration that a settlement had been reached which the court should enforce. This would explain why jurisdiction was not raised as an issue, either in this court or in the Court of Appeal.

[92] For these reasons, I find that the decisions in *Wu Estate v. Zurich* and *Co-operators v. Tagaoussi* do not support the proposition for which Dominion relies on them.

[93] In cases where the insured has elected to have disputes related to their accident benefits resolved by an arbitrator, the arbitrator has commonly determined the enforceability of settlements that are alleged to have been made in relation to the claims. The authorities which the Insurer itself relied upon afford the following examples:

1. *Jetty v. ING Insurance Co. of Canada*, 2010 ONSC 1091 (Div. Ct.): The parties settled a claim for accident benefits. The FSCO arbitrator allowed the settlement to be rescinded, as the settlement notice signature was typed by counsel and the notice did not contain a proper description of benefit entitlements. The Insurer's appeal was dismissed by the Director's Delegate, and the Insurer's application for judicial review was dismissed by the Divisional Court.

2. *Aviva Canada Inc. v. Parveen*, 2012 CarswellOnt 16980 (FSCO): The Director's Delegate dismissed an appeal from the FSCO arbitrator's decision holding that the insured was entitled to rescind a settlement reached after the two day cooling-off period on the

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ground that the Insurer had not complied with paragraph 9.1(3)3 of the *Settlement Regulation*.

3. *Rahman v. TD General Insurance Co.*, 2008 CarswellOnt 2010, [2008] O.F.S.C.D. No. 50, 61 C.C.L.I. (4th) 306 (FSCO): The Director's *Delegate* allowed an appeal by the Insured from the FSCO arbitrator's decision holding that a final and binding settlement had been reached. The Delegate held that the insured had not personally signed the release, as required by the *Settlement Regulation*, with the result that the settlement was not binding.

4. *Ogbuke v. Kingsway General Insurance Co.*, 2007 CarswellOnt 8426 (FSCO): *The* FSCO arbitrator held that the issues in the arbitration were the subject of a binding settlement reached by the parties.

5. *Persaud v. State Farm Mutual Automobile Insurance Co.*, 2007 CarswellOnt 8420 (FSCO): The FSCO arbitrator held that the insured was precluded from proceeding to arbitration on the issues because he had settled his claims with the insurer on a full and final basis.

6. *Wachmenko v. Primmum Insurance Co.*, 2007 CarswellOnt 604 (FSCO): The Director's Delegate dismissed an appeal by the Insured from the decision of the FSCO arbitrator, who found that the settlement agreement the parties had signed was valid and enforceable, as the Regulations were properly followed and no defect existed *in* the forms used, and the Insured had not rescinded the agreement within the two day cooling-off period.

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[94] For the foregoing reasons, I find that FSCO is the proper body to determine whether a binding settlement was reached in the present case, and if so, whether it was rescinded, and if not rescinded, whether it should be enforced.

[95] As I have previously noted, the dispute resolution mechanisms provided by the *Insurance Act* were amended in April 2016. Arbitrations of new accident benefits claims are no longer handled by FSCO, but by the Licence and Appeal Tribunal. FSCO arbitrations that have already commenced under the Act shall continue by virtue of O. Reg. 664. Since pre-hearing conferences were held in the present case, where Arbitrator Fadel made an order consolidating Ms. Ali's claims arising from the two collisions, and provisionally staying the arbitration until Dominion's application to the court was resolved, I find that the arbitration has commenced. As a result, this dispute should be determined by FSCO rather than by the Licence and Appeal Tribunal.

b) Costs

[96] If Dominion had permitted the settlement issue to be determined by FSCO, that issue, and Ms. Ali's claims, could have been dealt with two years ago. It was unfair and unreasonable of Dominion to block the arbitrator's determination, on the eve of the pre-hearing conference, by applying to the court.

[97] As a result of Dominion's actions, Ms. Ali was forced to incur substantial costs that the *Insurance Act*, by empowering an insured to choose to have her claims determined by an arbitrator, was designed to avoid. In these circumstances, Dominion should be required to indemnify Ms. Ali fully for her costs of responding to the application.

[98] Ms. Ali's actual costs in responding to the application were $21,596.70, according to the Costs Outline which she tendered at the hearing. I find that the

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time Ms. Ali's lawyers say they spent was reasonable, having regard to the complexity of the facts and the issues involved.

[99] The time Ms. Ali's lawyers spent cannot readily be compared to the time spent by Dominion's lawyers, as Dominion's lawyers have allocated their time to different categories of tasks in their Bill of Costs than Ms. Ali's lawyers did in their Costs Outline. However, where the lawyers for each of the parties used the same categories (for example, the preparation for and attendance at cross-examination), the time spent by them was the same (13 hours in each case).

[100] The total amount of the actual costs incurred by Ms. Ali ($21,596.70) is approximately half the amount of the actual costs ($40,649.67) that Dominion incurred. On this basis, the costs claimed by Ms. Ali are very modest. I find the costs claimed by Ms. Ali to be reasonable and fix her costs in the amount claimed.

CONCLUSION AND ORDER

[101] For the foregoing reasons, it is ordered that:

1. Dominion's application is dismissed.

2. Dominion shall forthwith pay Ms. Ali's costs, which I fix at $21,596.70, inclusive of fees, HST, and disbursements.

_____

Price J.

Released: July 13, 2016

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2016 ONSC 4604 (CanLII)

CITATION: Dominion of Canada v. Ali, 2016 ONSC 4604
COURT FILE NO.: CV-14-1739-00
DATE: 2016-07-13

2016 ONSC 4604 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY and CHIEFTAIN INSURANCE COMPANY

Applicant

- and –

MOONIE ALI

Respondent

REASONS FOR ORDER

Price J.

Released: July 13, 2016

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Lewis v. Economical Insurance Group also known as
Economical Mutual Insurance Company et al.

[Indexed as: Lewis v. Economical Insurance Group]

103 O.R. (3d) 494

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Court of Appeal for Ontario,
Laskin, Feldman and Gillese JJ.A.
July 26, 2010

Insurance -- Automobile insurance -- Unidentified motorist coverage -- Interpretation and construction -- Insured suffering serious head injury as result of walking into nearly invisible steel pole protruding from parked truck -- Insured "struck by" truck within meaning of s. 265(2)(c)(ii)(B) of Insurance Act and s. 1.6(a)(iii) of OPCF 44R Family Protection Coverage Endorsement and "hit by" truck within meaning of s. 5.3.1 of Ontario Automobile Policy -- Insured entitled to coverage -- Insurance Act, R.S.O. 1990, c. I.8, s. 265(2)(c)(ii)(B).

The plaintiff suffered a serious head injury when she walked into a nearly invisible steel pole protruding from a parked truck. Since the truck could not be identified, she sued her own insurer for damages for personal injuries. As she was not an occupant of an automobile when she was injured, she was entitled to coverage only if she was "struck by" an unidentified automobile (as required by s. 265(2)(c)(ii)(B) of the Insurance Act and s. 1.6(a)(iii) of the OPCF 44R Family Protection Coverage Endorsement) or "hit by" an unidentified automobile (as required by s. 5.3.1 of the Ontario Automobile

Policy). The defendant moved for summary judgment to dismiss the claim. The motion judge found that the plaintiff was not struck or hit by the truck, or the pole that protruded from it, because the truck was not moving at the time. Rather, it was the plaintiff who struck or hit the pole. The motion was granted. The plaintiff appealed.

Held, the appeal should be allowed.

The motion judge erred by interpreting the coverage provisions too narrowly. The words "struck by" and "hit by" should be interpreted broadly. The plaintiff was "struck by" or "hit by" the truck. She was entitled to coverage.

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Cases referred to

Strum and Co-Operators Insurance Assn. (Re) (1974), 2 O.R. (2d) 70, [1973] O.J. No. 2230, 42 D.L.R. (3d) 52, [1973] I.L.R. 1-572 at 747 (H.C.J.); [page495] Talbot v. GAN General Insurance Co. (1999), 44 O.R. (3d) 252, [1999] O.J. No. 1741, 96 O.T.C. 95, 46 M.V.R. (3d) 211 (S.C.J.); Tucci v. Pugliese (2009), 98 O.R. (3d) 151, [2009] O.J. No. 2956, 75 C.C.L.I. (4th) 277, [2009] I.L.R. I-4872 (S.C.J.), consd

Other cases referred to

Barton v. Aitchison (1982), 39 O.R. (2d) 282, [1982] O.J. No. 3510, 139 D.L.R. (3d) 627, [1982] I.L.R. 1-1584 at 1110, 16 A.C.W.S. (2d) 430 (C.A.); Chambo v. Musseau (1993), 15 O.R. (3d) 305, [1993] O.J. No. 2140, 106 D.L.R. (4th) 757, 65 O.A.C. 291, 19 C.C.L.I. (2d) 66, 49 M.V.R. (2d) 111, 42 A.C.W.S. (3d) 727 (C.A.); Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co., [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. 1-1176 at 595, 1 A.C.W.S. (2d) 169

Statutes referred to

Insurance Act, R.S.O. 1990, c. I.8, s. 265 [as am.], (1), (a), (2)(c)(ii)(B)

Rules and regulations referred to

Statutory Accident Benefits Schedule -- Accidents on or after

November 1, 1996, O. Reg. 403/96, s. 2(1)

APPEAL from the summary judgment of Eberhard J., [2009] O.J. No. 2853, 75 C.C.L.I. (4th) 254 (S.C.J.) dismissing the claim.

John R. McCarthy, for appellant.

Gerard T. Tillmann, for respondent.

The judgment of the court was delivered by

LASKIN J.A.: --

A. Overview

[1] On a spring day in 2003, Bonnie Lewis walked out of a variety store and struck her head on a steel pole protruding from a truck parked the wrong way on the street in front of the store. The pole was unmarked, gray and nearly invisible. Ms. Lewis did not see the pole until she hit it. The pole struck her above her right eye, near her temple. She fell to the ground, unconscious. She suffered a serious head injury, which has left her cognitively impaired.

[2] Since the truck could not be identified, Ms. Lewis sued her own insurance company, Economical Mutual Insurance Company, for damages for personal injuries. Both her automobile policy and the OPCF Family Protection Endorsement, which was additional insurance she had purchased, provided coverage for personal injuries resulting from an accident involving an unidentified or uninsured automobile. As Ms. Lewis was not an occupant of an automobile when she was injured, she was entitled to coverage only if she was "struck by" or "hit by" an unidentified automobile. [page496]

[3] Economical moved for summary judgment to dismiss Ms. Lewis' claim. It contended that she was not struck or hit by the truck, or the pole that protruded from it, because the truck was not moving at the time. Instead, Economical argued

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that it was Ms. Lewis who struck or hit the pole. The motion judge agreed and dismissed Ms. Lewis' claim.

[4] On her appeal, Ms. Lewis submits that the motion judge erred by interpreting the coverage provisions too narrowly. I agree with her submission. She is entitled to coverage. Whether she is entitled to damages depends on her being able to prove that the unidentified owner or driver of the truck was negligent. I would allow the appeal, set aside the motion judge's order and dismiss Economical's motion for summary judgment.

B. Insurance Coverage

(1) The Insurance Act

[5] Section 265(1)(a) of the Insurance Act, R.S.O. 1990, c. I.8 requires every car insurance policy to cover insured persons who are injured in an accident involving an unidentified or uninsured automobile:

> 265(1) Every contract evidenced by a motor vehicle liability policy shall provide for payment of all sums that,
>
> (a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile

[6] Section 265(1)(a) mandates coverage. But an insurer, such as Economical, is liable only for those damages an insured person is "legally entitled" to recover from the owner or driver of an unidentified automobile. Legal entitlement requires an assessment of fault or negligence.

[7] An insured person injured while a pedestrian is covered only if "struck by" an unidentified automobile. Section 265(2)(c)(ii)(B) defines a "person insured under the contract" to mean:

> 265(2)(c) in respect of a claim for bodily injuries or death,
>
> . . . . .

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(ii) the insured and his or her spouse and any dependant relative of either,

. . . . .

(B) while not the occupant of an automobile . . . who is struck by an uninsured or unidentified automobile [page497]

[8] This appeal turns on the interpretation of this provision and similarly worded provisions in Ms. Lewis' automobile insurance policy and the family protection endorsement.

(2) The Ontario Automobile Policy

[9] The terms and conditions of every motor-vehicle liability policy in Ontario are prescribed by regulation under the Insurance Act. The policy is known as the Ontario Automobile Policy. Section 5.2.1 of the Policy in effect when Ms. Lewis was injured sets out the extent of coverage for injuries resulting from an accident with an unidentified automobile. Section 5.3.1 addresses who is covered under the Policy and specifies that if a person was not the occupant of an automobile when injured, coverage extends only if the person was "hit by" an unidentified automobile:

5.3.1 Who is covered?

The following are insured persons for bodily injury or death:

-- Any person who is an occupant of the automobile.

-- You, your spouse and any dependant relative of you

-- when an occupant of an uninsured automobile, or

-- when not in an automobile, streetcar or railway vehicle if hit by an unidentified or uninsured automobile.

(3) OPCF 44R Family Protection Endorsement

[10] Ms. Lewis bought this additional uninsured and unidentified automobile coverage. The superintendent of

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financial services approved the terms of this Endorsement. Under s. 1.6(a)(iii) [of the OPCF 44R Family Protection Coverage Endorsement], Ms. Lewis was only covered for her personal injuries claim if she was "struck by" an unidentified automobile:

> 1.6 "insured person" means
>
> (a) the named insured and his or her spouse and any dependant relative of the named insured and his or her spouse while
>
> . . . . .
>
> (iii) not an occupant of an automobile who is struck by an automobile[.]

[11] Thus, all three coverage provisions -- the Insurance Act, the Ontario Automobile Policy and the Family Protection Endorsement -- raise the same issue: was Ms. Lewis struck or hit by the truck, or the pole protruding from it, as she left the variety store? If the answer is yes, she is an insured person [page498] entitled to coverage for her injuries; if the answer is no, then Economical is justified in denying her coverage.

C. Analysis

[12] The motion judge correctly found that the legislative intent of s. 265 of the Insurance Act was to alleviate the plight of motorists injured by drivers of uninsured and unidentified automobiles: see Barton v. Aitchison (1982), 39 O.R. (2d) 282, [1982] O.J. No. 3510 (C.A.), at p. 287 O.R. As s. 265(2)(c)(ii)(B) covers the insured "while not the occupant of an automobile", logically the same legislative intent extends to the plight of pedestrians injured by drivers of uninsured and unidentified automobiles. The trial judge also correctly noted the principle that because unidentified and uninsured motorist coverage is remedial, it must be interpreted broadly and liberally: see Chambo v. Musseau (1993), 15 O.R. (3d) 305, [1993] O.J. No. 2140 (C.A.), at p. 308 O.R.

[13] Nevertheless, the motion judge concluded that Ms. Lewis could not invoke her insurer's unidentified automobile coverage because the truck was not moving when she hit the protruding

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pole. The essence of the motion judge's reasoning is found at paras. 8-10 of her endorsement:

> The meaning of "hit" or "struck" is not ambiguous. It is not necessary to specifically exclude individual circumstances that do not fall into that particular meaning such as an individual injured by walking into a parked vehicle. It is no different than walking into any stationary object. The fact of its being an automobile (or a protuberance from an automobile) is irrelevant to the occurrence.
>
> This is quite unlike the circumstance of being hit/struck by something hit by an automobile or falling out of a moving vehicle as it is the movement of the vehicle that applies the force that gives rise to the hit/strike.
>
> It is also unlike the interpretation of "hit/struck" where a moving automobile created a peril which caused the insured to take evasive action which resulted in his injury. There, the visual impact of the automobile caused the injury. In the present case the Plaintiff did not see the pole and walked into it. Nothing about the automobile impacted upon the situation.

[Footnotes omitted]

[14] Although the motion judge stated the principle that coverage provisions should be interpreted broadly, I do not think that she applied this principle. Instead, she took quite a narrow or restrictive view of the words "struck by" or "hit by". In my opinion, these words should be interpreted broadly, and a broad interpretation entitles Ms. Lewis to coverage for her injuries. I say this for the following reasons.

[15] First, the words "struck by" or "hit by" must be interpreted in the context of the dominant purpose of this type of [page499] insurance coverage: to compensate victims injured as a result of an accident involving an unidentified automobile. Ms. Lewis was injured in an accident with an unidentified automobile. Indeed, Economical has recognized as much by paying her statutory accident benefits. Section 2(1) of

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the Statutory Accident Benefits Schedule -- Accidents on or after November 1, 1996, O. Reg. 403/96 ("SABS") defines "accident" to mean "an incident in which the use or operation of an automobile directly causes an impairment . . .". In other words, Economical has already accepted that Ms. Lewis was involved in an incident where the use or operation of an automobile directly caused her injuries.

[16] Second, in ordinary parlance, the words "struck by" or "hit by" generally connote simply "coming into contact with" and do not specifically ascribe movement to either object involved. For example, the Canadian Oxford Dictionary, 2nd ed., defines "strike" as "subject to an impact" and defines "hit" as "strike against, crash into, collide with". Accordingly, we do not normally differentiate between "Ms. Lewis was struck by the pole"; "Ms. Lewis struck her head on a pole"; and "the pole struck Ms. Lewis above her right eye".

[17] Third, although the usual case of coverage would involve an automobile that was moving, I do not think that the legislature intended to exclude coverage for injuries resulting from contact with a stationary automobile. If that was the legislature's intent, it could have said so by, for example, limiting coverage to a person "while not an occupant of an automobile who was struck by an automobile, excluding a stationary automobile".

[18] Fourth, the literal interpretation relied upon by Economical is inappropriate because its application brings about an unrealistic result or a result that was not contemplated in the "atmosphere in which the insurance was contracted": see Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co., [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133, at p. 901 S.C.R. I find it hard to see any rational distinction between an accident where a person is struck by a protruding pole on a very, very slow-moving truck and an accident where a person is struck by a protruding pole on a stationary truck. In either case, an insured would expect coverage and I seriously doubt the legislature contemplated a scheme that includes one scenario within the ambit of coverage but excludes the other. A literal interpretation, however,

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would lead to exactly this result.

[19] Fifth, the existing case law shows that courts have extended coverage to persons who were not in any literal sense struck or hit by an automobile. Three cases illustrate this point. [page500]

[20] In Talbot v. GAN General Insurance Co. (1999), 44 O.R. (3d) 252, [1999] O.J. No. 1741 (S.C.J.), Mr. Talbot, a cyclist, had to take sudden evasive action to avoid colliding with a car that almost struck him and then left the scene. Mr. Talbot suffered injuries and claimed under his unidentified automobile coverage. As in this case, the insurer brought a summary judgment motion on the ground that Mr. Talbot was not "struck" or "hit" by the unidentified automobile. Fleury J. rejected the insurer's position because it called for a restrictive interpretation. He wrote, at pp. 255-56 O.R.:

> I am therefore drawn to the inescapable conclusion that the words "if hit by an unidentified or uninsured automobile" are intended to qualify when other insured persons will be covered and that they not impose any restrictions on the named insured.
>
> . . . I am satisfied that where, as here, the offending vehicle came within inches of colliding with the responding party's bicycle, thereby causing a situation of danger where the responding party was forced to take evasive action in order to extricate himself from the perilous conditions created by the offending vehicle, that those words should be interpreted in a broad and generous fashion to include the visual impact visited on Dennis Talbot. I therefore hold that Dennis Talbot was "hit" or "struck" by the unidentified motor vehicle and that he was a right to recover from the defendant[.]

In short, Fleury J. rejected the insurer's position because it would have yielded an unrealistic result.

[21] In Tucci v. Pugliese (2009), 98 O.R. (3d) 151, [2009] O.J. No. 2956 (S.C.J.), Mrs. Tucci was seated at her breakfast table when the uninsured car of the defendant ran into the wall

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of her house. The resulting sudden loud bang and the violent shaking of the house caused Mrs. Tucci to suffer shock, as well as physical and psychological damage. On the insurer's motion to dismiss her claim, it argued that she was not "stuck by" an automobile. Langdon J. refused to strike the claim because Mrs. Tucci's "injuries arguably resulted from the proximate, sensory invasion, the notional equivalent of being struck".

[22] In Strum and Co-Operators Insurance Assn. (Re) (1974), 2 O.R. (2d) 70, [1973] O.J. No. 2230 (H.C.J.), a pedestrian was standing on a street corner when a car mounted the curb and struck a street sign, bending it over and causing it to strike the pedestrian. Osler J. held that the pedestrian was "struck by the described automobile". He said, at pp. 72-73 O.R.:

> The words "struck by the described automobile", if taken to mean only that there must be direct physical contact between the automobile and the person of the claimant, could make the possibility of recovery depend upon minute differences in the circumstances, entirely unpredictable, such as, for example, whether the claimant had been able to interpose between himself [page501] and the automobile some article he was carrying such as a suitcase, a box of tools or unusually thick clothing. In such cases, the force of the impact is transmitted directly to the person of the injured party, regardless of the fact that he has not been "struck by" the automobile in that there is no direct physical contact between himself and it.
>
> . . . Here the force of the impact was transmitted directly to the person of the claimant by an object which was and which remained for the critical period in contact with the automobile. The force was thereby transmitted directly from the automobile to the deceased. This, in my view, amounted to a striking within the meaning of the policy.

[23] In all three cases, a narrow interpretation of the words "struck by" or "hit by" would have disentitled the claimant to coverage, whereas a broad interpretation entitled each claimant to coverage. In all three cases, the court recognized that a narrow or literal interpretation of the words "stuck by"

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would produce a result contrary to common sense and the legislative intent of s. 265(1) of the Insurance Act. So too is the case with Ms. Lewis' claim. Strum (Re) is particularly instructive; indeed, I agree with counsel for Ms. Lewis that there is no appreciable difference between being struck by a street sign moved by an automobile and being struck by a steel pole protruding from an automobile.

[24] Sixth, my interpretation of these words would not open the floodgates to injury claims by persons who walk into unidentified parked cars. This is a case about coverage, not liability or negligence. If the owner or driver of a parked car was not negligent, the claimant would have no legal entitlement to damages.

D. Conclusion

[25] For the above reasons, I would set aside the motion judge's order and dismiss Economical's motion for summary judgment. Ms. Lewis is entitled to the costs of the motion and the appeal, each fixed, on the agreement of counsel, in the amount of $5,000, inclusive of disbursements and GST.

Appeal allowed.

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