File No. EB-2017-0007

ONTARIO ENERGY BOARD

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 for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269)

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PART I - OVERVIEW

1. By way of a Notice of Intention to Make and Order for Compliance, Restitution and Payment of an Administrative Penalty dated February 9, 2017 ("**Notice**")[1], the Ontario Energy Board ("**OEB**") commenced enforcement proceedings against Planet Energy (Ontario) Corp. ("**Planet Energy**") for various alleged breaches of the *Energy Consumers Protection Act* ("**ECPA**"), Ontario Regulation 389/10 ("**Regulation"**), and Part B of the *Electricity Retailer Code of Conduct* and the *Code of Conduct for Gas Marketers* ("**Codes**") (together, the "**Consumer Protection Regime**").

2. On November 27, 2017, OEB Enforcement Staff ("**Staff**") asked the Panel, with Planet Energy's consent, to amend the Notice to withdraw allegations with respect to four contracts (numbers 93207762G, 93226841E, and two contracts with number 10030038) ("**Amended Notice**"), on the basis that these were either self-enrolments or contracts enrolled for a spouse living with the salesperson at the time. Whether the Amended Notice is approved by this Panel or not, Staff does not intend to pursue any findings of contraventions in respect of those four contracts.

3. During these enforcement proceedings, the Panel heard evidence from OEB staff's assigned inspector in this matter, Birgit Armstrong, as well as two former Planet Energy salespersons, J.M. and K.N. This Panel also heard evidence from a consumer that each salesperson had enrolled: R.H. (enrolled by J.M.) and R.A. (enrolled by K.N.). Finally, this Panel heard from Nino Silvestri, co-CEO of Planet Energy since November 2012, who was called as Planet Energy's only witness.

4. Most of the background facts in this case are not contested. Rather than hire or contract salespersons directly, Planet Energy relied on All Communications Network of Canada Co. ("**ACN**") for its sales force. ACN is a "multi-level marketing company" endorsed by Donald Trump. Through agents that it refers to as "independent business owners" ("**IBOs**"), ACN sells Planet Energy contracts, as well as a host of other products, ranging from telephone contracts to water heaters to home security systems.

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[1] **Notice of Intention**, Agreed Chronology ("Chronology"), Ex. KX1.1, Tab 17.

5. At the relevant times, J.M. and K.N. were both IBOs with no background in the energy industry, who had been recruited by friends or acquaintances to join ACN and sell Planet Energy energy contracts.

6. In total, J.M. and K.N. enrolled 20 consumers[2] – and, in J.M.'s case, four large-volume electricity consumers[3] – into 41 energy contracts with Planet Energy that relate to the allegations in this proceeding ("**Contracts**"), as set out in the Amended Notice.

7. The uncontradicted evidence is that J.M. and K.N. *themselves* completed the online enrolment process for each and every Contract at issue, without the consumers or large-volume consumers participating or even being present.

8. The evidence establishes, on a balance of probabilities, that Planet Energy breached provisions of the Consumer Protection Regime through the following conduct:

(a) Planet Energy salespersons J.M. and K.N. made false and misleading statements to the consumers (and, in J.M.'s case, the four large-volume electricity consumers) who were enrolled in the Contracts, including by promising them savings if they switched to Planet Energy, and by failing to mention the global adjustment, cancellation fees, and additional amounts to be paid under the contract.

(b) Planet Energy's training and testing program was wholly inadequate, both substantively and with respect to how it was delivered. The "Training Manual" failed to address key issues relating to global adjustment rates and cancellation fees, and the test questions included incorrect, misleading and extremely easy question/answer pairings (with one even clearly indicating the correct answer on the test sheet). The training/testing process required nothing more than clicking on the Training Manual for a split second and then writing an open book, online test – all without any kind of supervision or monitoring. The training and testing program was too deficient to achieve its purpose of ensuring that

[2] The term "consumer" throughout these submissions reflects the definition set out in the ECPA and the Regulation, and the definition of "low volume consumer" in the Codes.

[3] The term "large-volume consumer" throughout these submissions denotes a consumer who is not a "consumer" (within the meaning of the ECPA and the Regulation) or a "low volume consumer" (within the meaning of the Codes)

only informed, knowledgeable salespersons were qualified to sell Planet Energy contracts, so that consumers were not misled.

(c) Planet Energy salespersons J.M. and K.N. failed to provide consumers with proper business cards and wear identification badges.

(d) Planet Energy failed to meet the requirements for 'in-person' transactions, including providing text-based copies of the contracts to consumers at the appropriate times, obtaining the required signatures and acknowledgments, and making verification calls. Although the Contract enrolments were technically done online, the requirements for 'in-person' transaction applied because none of the consumers actually participated in the enrolment process, and the agreement to enrol was made in every case after a brief, in-person discussion with the salespersons J.M. and K.N.

(e) Planet Energy sought to impose an improper cancellation fee with respect to consumer R.A., who was told that she had to pay a cancellation fee of $250 plus tax, despite advising the Planet Energy customer service representative ("**CSR"**) of her wish to cancel within 30 days of receiving her first bill. It was her right under the Regulation to cancel without penalty. Planet Energy does not contest this allegation.

9. The evidence proves each of these allegations on a balance of probabilities. Planet Energy is legally responsible for the actions of its salespersons and for the training program designed and carried out on its behalf. At law there is no due diligence defence available to Planet Energy.

10. With respect to penalty, **Staff** submits that an administrative monetary penalty ("**AMP**") of $383,000 is appropriate in this case.

11. Calculated on a per-transaction basis (rather than per-contravention basis, which would result in a higher penalty), the AMP proposed by Staff is comprised of a $15,000 penalty in respect of R.A., a $2,000 penalty for each of J.M.'s four large-volume commercial consumers, and a $10,000 penalty for each of the remaining 36 Contracts. The AMP amount reflects the

application of the five statutory criteria set out in O. Reg. 51/16 made under the *Ontario Energy Board Act, 1998* ("**OEB Act**").[4] In particular:

(a) the deviations from the Consumer Protection Regime were significant, both in terms of the number of deviations and the extent of their departure from the requirements;

(b) the deviations had a significant potential impact on consumers, who were enrolled in the Contracts by poorly trained salespersons, on the basis of false and misleading statements, without receiving any of the required documents beforehand, and without any of the protections to which they were entitled for these 'in-person' transactions;

(c) the mitigation measures taken by Planet Energy were limited to allowing three consumers to cancel without penalty, after those consumers complained to the OEB;

(d) Planet Energy has previously contravened enforceable provisions of the Consumer Protection Regime; and

(e) Planet Energy derived a monetary benefit from its contraventions.

12. The AMP amount is also appropriate because by partnering with ACN Planet Energy chose to sell its energy contracts through a very high-risk sales model. There are several features of the Planet Energy-ACN business model that Planet Energy knew, or ought to have known, would significantly increase the chances of contraventions occurring, including:

(a) Nature and size of the IBO sales force. By using ACN IBOs as its sales force, Planet Energy was relying on people who for the most part had no background in the energy industry, who were selling energy contracts part-time, and who had limited time to devote to learning about energy contracts. Planet Energy had no control over recruitment of IBOs, and the ACN business model offered a huge financial incentive for existing IBOs to sign up anyone they could as new IBOs and to get them selling energy contracts as soon as possible.

[4] S.O. 1998, c. 15 Sch. B..

(b) Relationship of trust with consumers. Given that most IBOs market to people with whom they have an existing relationship, it is not surprising that consumers trust the IBOs they deal with and believe that they have expertise in energy products – even if, according to Mr. Silvestri, Planet Energy apparently does not expect IBOs to, in fact, be "energy experts". This makes it less likely that consumers would doubt or bother to independently confirm any false or misleading information from IBOs.

(c) Lack of oversight over IBOs. Planet Energy sold energy contracts through somewhere between 6,000 to 7,000 IBOs, but had only four people in the department charged with managing issues relating to IBOs. Planet Energy did not track IP addresses associated with enrolments despite having the technological ability to do so, and despite Mr. Silvestri's acknowledgement that multiple enrolments with the same IP address would justify an investigation.

(d) "Hands off" attitude. Planet Energy was content to delegate entirely its responsibilities to ACN in many key respects – including handling issues arising from contracts IBOs sold to consumers, investigating IBO misconduct, and collecting information relating to IBO training and authorization. In addition, Planet Energy had a contractual right to be directly involved in providing training to IBOs, but did not institute any mandatory training sessions before an IBO was authorized to sell Planet Energy products.

13. The AMP amount must also reflect the fact that Planet Energy received – and ignored – prior guidance regarding the need for 'in-person' protections if consumers do not actually enrol themselves in an online contract. Planet Energy was also put on notice about deficiencies in its online testing system, including the fact that IBOs were encouraged to write the test as an "open book" test, and that it was too easy for test writers to share answers with each other.

14. In addition to the AMP, by operation of law, the 37 Contracts with consumers in this case are deemed void and the monies paid under those Contracts must be returned to consumers.

PART II - BACKGROUND FACTS

15. This Part of Staff's submissions sets out the basic background facts of the case, which are largely uncontested. Additional facts will be discussed in Part III of these submissions, in reference to the specific allegations raised in the Amended Notice.

A. Planet Energy

16. Planet Energy is an electricity retailer and natural gas marketer licensed by the OEB. Since November 2012, Nino Silvestri has been the co-CEO of Planet Energy.[5]

17. Planet Energy deals mostly with residential and small-business consumers.[6] Since November 2010, when Planet Energy's relationship with ACN commenced, virtually all of Planet Energy's consumers have been enrolled into contracts online.[7] Large-volume consumers typically enter into their energy contracts through a separate process that involves signing hardcopy paperwork.[8]

18. Planet Energy's relationship with ACN ended in November 2016. Since that time, Planet Energy has ceased marketing to new low-volume consumers, but continues to enter into new agreements with existing consumers over the internet.[9]

19. The facts set out below are based on the time period during which the Planet Energy/ACN contract was in effect, unless stated otherwise.

B. ACN's business model

20. ACN does not hold an OEB licence.[10] It is a multi-level marketing company that sells various products – including contracts for energy, telephone and internet services – through individuals that it characterizes as "Independent Business Owners" or IBOs.[11]

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[5] **Chronology**, Ex. KX1.1, ¶1; **Transcript (Vol. 4)** at p. 64:20-24 (Silvestri)
[6] **Transcript (Vol. 4)** at p. 66:13-17 (Silvestri)
[7] **Transcript (Vol. 4)** at pp. 66:21 to 67:6 (Silvestri)
[8] **Transcript (Vol. 4)** at p. 66:21-27 (Silvestri); **Transcript (Vol. 5)** at p. 47:12-21 (Silvestri).
[9] **Transcript (Vol. 4)** at p. 134:2-20 (Silvestri).
[10] **Transcript (Vol. 4)** at p. 167:2-4 (Silvestri).

21. Planet Energy understood ACN's business model prior to entering into business with ACN.[12] Under that model, IBOs can earn money in two main ways.

22. The first is "personal residual income": IBOs earn commission based on the "points" associated with different products that they sell to customers.[13]

23. The second is "overriding residual income", or money an IBO receives through recruiting other IBOs, including when those IBOs sell products. Every recruit operates "under" the IBO who recruited them, as part of the same "leg" of IBOs.[14] An IBO receives a percentage of commissions from the product sales of anyone whom they recruit to be an IBO, anyone whom *those* IBOs recruit to sign up as an IBO, and so on down the line.[15]

24. J.M. was an IBO and a witness in this proceeding. In his experience, recruiting other IBOs was the main focus when he initially joined ACN, and he felt "a lot of pressure" from others above him in his "leg" to recruit IBOs (although he never did).[16]

25. IBOs within the same leg may share information and sales strategies with each other.[17] In J.M.'s case, his sales routine was based on material and information provided to him by another IBO.[18]

26. Once somebody has signed up as an IBO, they receive access to an online store where customers can go to get information on various products, as well as a "back office" where IBOs can access information about customers, as well as certain material relating to training and testing.[19]

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[11] **Chronology**, Ex. KX1.1, ¶2. Planet Energy apparently takes the position that ACN (and its IBOs) "markets" or "promotes", rather than sells, Planet Energy products. Staff does not accept this characterization, nor is it consistent with the evidence heard in this proceeding. As discussed in Part III.B, regardless of how ACN's role is characterized, it is clear that J.M. and K.N. were "salespersons" as that term is used in the Consumer Protection Regime.

[12] **Transcript (Vol. 5)** at p. 14:27 (Silvestri).

[13] **Transcript (Vol. 2)** at pp. 11:3-8 and 13:14-19 (J.M.).

[14] **Transcript (Vol. 2)** at p. 14:3-8 (J.M.); **Transcript (Vol. 5)** at p. 18:16-28 (Silvestri).

[15] **Transcript (Vol. 2)** at pp. 11:19 to 12:27 (J.M.); **Transcript (Vol. 5)** at pp. 17:22 to 18:12 (Silvestri).

[16] **Transcript (Vol. 2)** at pp. 9:19-25 and 13:20-27 and 14:12-17 (J.M.)

[17] **Transcript (Vol. 2)** at pp. 48:25-28 (J.M.)

[18] **Transcript (Vol. 2)** at pp. 51:26 to 56:26 (J.M.)

[19] **Transcript (Vol. 2)** at pp. 14:26 to 15:17 (J.M.)

27. Although Mr. Silvestri stated repeatedly that IBOs sell energy products only to their "friends and family"[20], the truth (as Mr. Silvestri acknowledged in cross-examination) is that IBOs are authorized to sell to anyone in their "warm network", including "acquaintances, meaning people who are known personally" to the IBO.[21] According to Mr. Silvestri, all that is required to be part of one's "warm network" is that "you know the person to some extent."[22]

C. Planet Energy's relationship with ACN

28. Planet Energy's relationship with ACN is governed by a Sales Agency Agreement dated November 9, 2012 (and similar, previous versions of that agreement).[23]

29. The Sales Agency Agreement was for a two-year term. On January 30, 2014, Planet Energy made the decision to extend the Sales Agency Agreement for a further two-year term.[24]

30. Mr. Silvestri initially testified that the Sales Agency Agreement had "expired" on November 9, 2016.[25] That characterization is misleading. After Mr. Silvestri was confronted with a submission filed by Planet Energy with the OEB that stated "ACN is terminating the Sales Agency Agreement due to the entry into Canada of Xoom Energy"[26], he acknowledged that ACN had communicated to Planet Energy its decision to terminate the Sales Agency Agreement.[27]

D. The salespersons: J.M. and K.N.

31. J.M. was an IBO authorized to sell Planet Energy products from at least April 2012 to June 2015.[28] Before becoming an IBO, J.M. was a sales executive in the insurance and point-of-

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[20] **Transcript (Vol. 4)** at pp. 68:1-16, 71:1-7, 73:8, 74:8-11, 75:12 and 100:4 (Silvestri).
[21] **Transcript (Vol. 5)** at p. 15:12 (Silvestri).
[22] **Transcript (Vol. 5)** at p. 16:5-8 (Silvestri).
[23] **Transcript (Vol. 4)** at p. 136:24 (Silvestri); **Sales Agency Agreement**, Ex. KX1.4, Tab 6B.
[24] **Transcript (Vol. 4)** at p. 137:10-17 (Silvestri).
[25] **Transcript (Vol. 4)** at pp. 71:17-18 and 138:7-9 (Silvestri).
[26] **Transcript (Vol. 4)** at p. 139:18-28 (Silvestri).
[27] **Transcript (Vol. 4)** at pp. 139:21 to 140:27 (Silvestri).
[28] **Chronology**, Ex. KX1.1, ¶5. Planet Energy apparently takes the position that IBOs "promote", rather than sell, Planet Energy products. Staff does not accept this characterization, nor is it consistent with the evidence heard in this proceeding. As discussed in Part III.B, regardless of how an IBO's role is characterized, it is clear that J.M. and K.N. were "salespersons" as that term is used in the Consumer Protection Regime.

purchase business.[29] He was introduced to ACN by a friend, who asked him to attend an introductory meeting at a residence. There, a group of approximately ten people watched an ACN promotional video featuring Donald Trump, and heard from a senior IBO who discussed "the future in ACN, how much money you could make, how much money he was making, and that was about it."[30] J.M. explained that the focus of the meeting "was to join ACN, pay your $500 and go out and sign up as many people as you can" to become IBOs.[31] There was no detailed discussion of the products that IBOs were going to be selling.[32] J.M. paid the $500 fee and signed up to be an IBO that very same night.[33]

32. K.N. was an IBO authorized to sell Planet Energy products from at least February to July 2015.[34] For K.N., ACN was a "side job"; his "main job" was selling and installing home theatre systems.[35] He was introduced to ACN by an IBO named "Claire", who was a friend of his (then) wife.[36] K.N. had never spoken to or met Claire before she spoke to him about ACN.[37] He paid his $500 fee and signed up to be an IBO after the discussion with Claire, without attending any meetings or information sessions.[38]

33. Neither J.M., nor K.N., have any kind of background in the energy industry.[39]

E. Consumers enrolled by J.M.

34. In total, J.M. enrolled 10 consumers, and four large-volume consumers, into 25 of the Contracts that are at issue in this proceeding.[40]

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[29] **Transcript (Vol. 2)** at p. 5:1-12 (J.M.).

[30] **Transcript (Vol. 2)** at pp. 6:1-5 and 7:22 to 8:7 (J.M.).

[31] **Transcript (Vol. 2)** at pp. 8:25 to 9:8 (J.M.).

[32] **Transcript (Vol. 2)** at p. 8:14-22 (J.M.).

[33] **Transcript (Vol. 2)** at p. 6:18-20 (J.M.).

[34] **Chronology**, Ex. KX1.1, ¶6. Planet Energy apparently takes the position that IBOs "promote", rather than sell, Planet Energy products. Staff does not accept this characterization, nor is it consistent with the evidence heard in this proceeding. As discussed in Part III.B, regardless of how an IBO's role is characterized, it is clear that J.M. and K.N. were "salespersons" as that term is used in the Consumer Protection Regime.

[35] **Transcript (Vol. 3)** at pp. 3:21and 5:3-10 (K.N.).

[36] **Transcript (Vol. 3)** at pp. 5:20 to 6:12 (K.N.).

[37] **Transcript (Vol. 3)** at p. 6:16 (K.N.).

[38] **Transcript (Vol. 3)** at p. 8:1-5 (K.N.).

[39] **Transcript (Vol. 2)** at p. 5:25 (J.M.); **Transcript (Vol. 3)** at p. 11:20 (K.N.).

[40] **Planet Energy Updated Q1 Document**, Ex. KX1.2, Tab 10B; **Amended Notice of Intention**, Appendix "A".

35. With the exception of B.D.S., G.G., 219 and 763 – all of whom had electricity consumption in excess of 150,000 kWh[41] – every person enrolled by J.M. in a Contract is a consumer entitled to the protections of the Consumer Protection Regime.[42]

36. One of the consumers enrolled by J.M. was R.H. – a disc jockey and landlord, with no knowledge of the energy market beyond simply buying electricity from his local utility.[43] J.M. was a tenant in one of R.H.'s properties, which is how they met; over time, they became friends and R.H. came to trust J.M. Although R.H. was not looking to switch energy providers, J.M. repeatedly raised the issue of energy contracts with R.H., telling him that he would save money if he enrolled into the fixed-price contracts J.M. was selling.[44] Eventually, R.H. agreed. J.M. did the contract enrolments for all five of R.H.'s properties online, without R.H.'s participation.[45]

37. Shortly after he was enrolled in the Planet Energy contracts, R.H. raised the issue of cancellation fees on a call with a Planet Energy CSR, in order to confirm his understanding that no fees would apply.[46] R.H. was never told that any of his properties exceeded the 15,000 kWh threshold that triggered far higher cancellation fees ($0.015 per kWh of estimated electricity consumption for the remainder of the contract term, as opposed to $50/yr).[47]

38. Around the time R.H. sold one of his properties in December 2015, he received a collection notice advising him that he had a "delinquent account" of almost $1,400, apparently arising from the cancellation fee Planet Energy had charged him for early termination of his contract.[48] More collection notices and multiple phone calls from the collection agency

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[41] **Transcript (Vol. 2)** at pp. 148:11 to 149:3 (J.M.). These four large-volume consumers are associated with the following contract numbers set out in Appendix "A" to the Notice: 10033212 (G.G.), 10033779 (219), 10024558 (763) and 10020679 (electricity only) (B.D.S.).

[42] **Transcript (Vol. 5)** at p. 48:5-15 (Silvestri).

[43] **Transcript (Vol. 4)** at pp. 6:26 to 7:3, 11:4-7 and 37:21-23 (R.H.).

[44] **Transcript (Vol. 4)** at pp. 8:11-26 to 10:6, and 11:15-26 (R.H.).

[45] **Transcript (Vol. 4)** at p. 12:9-22 (R.H.).

[46] **Transcript (Vol. 4)** at p. 48:6-9 (R.H.).

[47] **Planet call to R.H. (May 5, 2015)**, Ex. KX1.4, Tab 139.

[48] **Transcript (Vol. 4)** at pp. 21:20 to 22:16 (R.H.); **Collection Notice dated Dec 21, 2015**, Ex. KX1.2, Tab 32.

followed.[49] Some time later, after discovering that his monthly rates would be lower with the utility, R.H. cancelled all of his contracts with Planet Energy.[50]

F. Consumers enrolled by K.N.

39. In total, K.N. enrolled 10 consumers into 16 of the Contracts that are at issue in this proceeding.[51] All of these consumers are entitled to the protections of the Consumer Protection Regime.[52]

40. K.N.'s consumers were all Persian, and he communicated with them in Farsi.[53] Some could not even speak English.[54] One of the consumers enrolled by K.N. was his spouse, but they did not live together at the time that she was enrolled.[55]

41. R.A. is a consumer who was enrolled by K.N. in April 2015. She is an office manager at a health centre where K.N. is a patient, and has no background in the energy industry.[56] K.N. advised R.A. that the electricity rate with Planet Energy would be fixed at 4.99 cents per kWh.[57] After R.A. expressed an interest in switching from her utility to Planet Energy, K.N. told her to provide him with a recent utility bill and her email address, which would be sufficient for him to complete the enrollment online.[58] R.A. did not visit the ACN website, nor did she participate in the online enrollment.[59]

42. When R.A. received her first bill under the Planet Energy contract in September 2015, she noticed it was "a lot higher" than her previous bills from the utility.[60] On October 5, 2015,

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[49] **Transcript (Vol. 4)** at p. 22:16-24 (R.H.).

[50] **Transcript (Vol. 4)** at pp. 23:18 to 25:2 (R.H.).

[51] **Planet Energy Updated Q1 Document**, Ex. KX1.2, Tab 10B; **Amended Notice of Intention**, Appendix "B"

[52] **Transcript (Vol. 5)** at p. 48:5-15 (Silvestri).

[53] **Transcript (Vol. 3)** at p. 43:3-13 (K.N.).

[54] **Transcript (Vol. 3)** at p. 43:9-10 (K.N.).

[55] **Transcript (Vol. 3)** at p. 49:23-28 (K.N.). K.N. and his wife were physically separated as of October 2014. According to the Updated Q1 Document, her Planet Energy contracts were enrolled on February 27, 2015 and/or March 19, 2015: **Planet Energy Updated Q1 Document**, Ex. KX1.2, Tab 10B.

[56] **Transcript (Vol. 3)** at p.52:12-25 (R.A.).

[57] **Transcript (Vol. 3)** at p. 53:9-28 (R.A.).

[58] **Transcript (Vol. 3)** at pp. 53:27 to 54:13, 56:22-24 and 57:15 (R.A.).

[59] **Transcript (Vol. 3)** at pp. 56:27 to 57:2 (R.A.).

[60] **Transcript (Vol. 3)** at p. 60:26-27 (R.A.). R.A.'s September 2015 bill (her first with Planet Energy) was for $467.87: **R.A. Third Party Documents**, Ex. KX1.2, Tab 40, p. 12. By contrast, R.A.'s May and July 2015 bills were $308.72 and 270.71, respectively: **R.A. Third Party Documents**, Ex. KX1.2, Tab 40, p. 12.

R.A. called Planet Energy to get an explanation. The Planet Energy CSR told R.A. that her bills would be reduced in the months to follow and she should wait another month, as cancelling her contract would result in a cancellation penalty of $250 plus taxes.[61] R.A.'s next bills did not reflect a decrease.[62] She called Planet Energy several more times, and was again told that she would have to pay $250 plus tax in cancellation fees.[63]

43. R.A. refused to pay any cancellation fee and therefore made a complaint to the OEB. Only after this occurred did Planet Energy agree to cancel her contract without penalty.[64]

44. In addition to R.A., two additional consumers enrolled by K.N. also made complaints to the OEB (Dr. A.A. and Dr. B.).[65] One complaint was resolved at the complaint level when Planet Energy agreed to terminate the contract without a penalty.[66] The second complainant was refunded his cancellation fee after his complaint to the OEB.[67]

G. The Inspection

45. On April 25, 2016, following complaints from the consumers R.H. and R.A., the OEB commenced a compliance inspection of Planet Energy ("**Inspection**").[68]

46. On May 27, 2016, the OEB provided Planet Energy with a (revised) Request for Information in connection with the Inspection, which included a request for information relating to "contract enrolments for gas and electricity consumers" for both salespersons J.M. and K.N.[69]

47. OEB staff requires that when licensees respond to requests for information, they provide the OEB with as accurate and complete a response as possible.[70] Planet Energy accepts that it

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[61] **Transcript (Vol. 3)** at pp. 61:12 to 62:13 (R.A.); **R.A. call to Planet Energy (Oct 5, 2015)**, Ex. KX1.2, Tab 41A at p. 8.

[62] **Transcript (Vol. 3)** at p. 63:13-16 (R.A.). For example, R.A.'s January and March 2016 bills from Planet Energy were for $507.94 and $474.86: **R.A. Third Party Documents**, Ex. KX1.2, Tab 40, pp. 9-10.

[63] **Transcript (Vol. 3)** at p. 68:7-9 (R.A.); **R.A. call to Planet Energy (Nov 24, 2015)**, Ex. KX1.2, Tab 41B at pp. 5-6; **R.A. call to Planet Energy (Jan 26, 2016)**, Ex. KX1.2, Tab 41D at p. 3.

[64] **R.A. CCR**, Ex. KX1.2, Tab 1; **Transcript (Vol. 3)** at pp. 69:17 to 70:6 (R.A.).

[65] **Transcript (Vol. 5)** at p. 107:5-26 (Silvestri).

[66] **Transcript (Vol. 1)** at p. 61:3-11 (Armstrong).

[67] **Transcript (Vol. 5)** at pp. 107:21 to 108:3 (Silvestri).

[68] **Chronology**, Ex. KX1.1, ¶23 and Tab 12; **Transcript (Vol. 1)** at p. 74:22 (Armstrong).

[69] **Chronology**, Ex. KX1.1, ¶25 and Tab 12 at p. 3. The original Request for Information was dated May 16th is found at Tab 11 of the Chronology.

has an obligation to provide full, frank and accurate disclosure of information in response to a request from the OEB.[71] That obligation arises from the statutory duty to assist an inspector exercising powers under s 108 of the OEB Act.

48. On June 6, Planet Energy provided information to the OEB in response to the (revised) Request for Information ("**Response**").[72] Planet Energy supplemented the Response with a document sent to the inspector on June 16, which listed the consumers enrolled by J.M. and K.N. ("**Updated Q1 Document**").[73] Mr. Silvestri confirmed that the information in these documents represented Planet Energy's efforts to present the OEB with full, frank and accurate answers to the OEB's request for information.[74]

49. In the course of the Inspection, and prior to the issuance of the Notice, OEB staff conducted interviews with salespersons J.M. and K.N., as well as consumers R.H. and R.A.[75]

50. Although the two initial complaints in this case concerned cancellation fees, the information uncovered during the course of the Inspection led OEB staff to have broader concerns with various aspects of the salespersons' conduct and practices, as well as Planet Energy's training and testing of these salespersons.[76] Ms. Armstrong, in her role as inspector, explored those concerns in her interviews with the salespersons and consumers, and the concerns motivated some of the information sought in the Request for Information[77]; this is entirely consistent with the role of an inspector under the OEB Act.[78] Ultimately, the Inspection uncovered sufficient evidence in respect of OEB staff's broader concerns to include them among the allegations contained in the Notice.

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[70] **Transcript (Vol. 1)** at p. 36:13-18 (Armstrong).
[71] **Transcript (Vol. 5)** at p. 34:16-21 (Silvestri).
[72] **Chronology**, Ex. KX1.1, ¶26 and Tabs 13-15.
[73] **ASF**, Ex. KX1.1, ¶27 and Tab 16. The **Updated Q1 Document** is also found at Ex. KX1.2, Tab 10B.
[74] **Transcript (Vol. 5)** at p. 34:16-21 (Silvestri).
[75] **Transcript (Vol. 1)** at p. 60:19-24, and 61:24 to (Armstrong).
[76] **Transcript (Vol. 1)** at pp. 54:3-17 and 55:18-23 (Armstrong).
[77] **Transcript (Vol. 1)** at pp. 62:1 to 63:5 (Armstrong).
[78] See sections 105 to 108 of the OEB Act.

PART III - THE ALLEGATIONS

51. This Part sets out Staff's submissions on each of the allegations contained in the Amended Notice, with reference to the relevant facts and law.

A. The onus and standard of proof, and credibility

52. Staff accept that they have the onus of proof on a balance of probabilities with respect to the particular allegations set out in the Amended Notice, as has been confirmed by the Supreme Court of Canada and the Divisional Court.[79]

53. Staff submits that there is ample evidence to prove the allegations according to that standard. In summary:

(a) Much of the evidence relied on by Staff is either not controversial at all, or not challenged by Planet Energy.

(b) The salespersons and complainants who were called as witnesses by Staff testified from their own present memory of specific events – most of which occurred within the past two years – which, if believed, prove the allegations of non-compliance on a balance of probabilities.

(c) All four witnesses presented as reliable, truthful and honest. They all gave their evidence in a direct and forthright manner, and Staff submit that nothing was raised in cross-examination that provides a basis to disbelieve any of their accounts. Indeed, Staff's witnesses were not challenged on cross-examination about most of their evidence going to the core of the allegations against Planet Energy.

(d) Their accounts reveal recurring and consistent patterns of similar conduct by both salespersons. There can be no suggestion of collusion between R.A. and R.H. or between J.M. and K.N., who do not even know each other.[80] All of Staff's witnesses were subject to witness exclusion orders.

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[79] ***F.H. v. McDougall***, 2008 SCC 56, as cited in ***Summitt Energy Management Inc. v. Ontario Energy Board***, 2013 ONSC 318 at ¶70 [*Summitt*], Staff's Brief of Submissions and Book of Authorities ("**Staff Brief**"), Tab 1.

[80] **Transcript (Vol. 2)** at p. 91:6 (J.M.).

(e) Neither J.M. nor K.N. stand to gain anything by cooperating with Staff and testifying against Planet Energy. Indeed, their testimony does not paint them in a positive light, and amounts to an admission that they repeatedly (even if unintentionally) misled their friends and family. Neither J.M., nor K.N., have anything to gain by participating in this proceeding.[81] J.M. will actually lose money if the contracts he enrolled are voided, since he continues to receive commissions in respect of those contracts based on ongoing monthly revenues.[82] In contrast, Mr. Silvestri, who was Planet Energy's only witness, is the co-CEO of Planet Energy, which faces a significant financial penalty if the Panel makes findings of non-compliance.

(f) Although R.H. was upset at J.M. for the Planet Energy contracts and wanted J.M.'s assistance to try and deal with the cancellation fees, both men were clear that J.M. was never under any actual financial pressure to assist R.H.[83] J.M. confirmed that the information he provided to the OEB was truthful, accurate and complete.[84]

54. In addition to the *viva voce* evidence called during these proceedings, the parties have agreed as to the authenticity of the calls (and transcripts) filed as part of the record, as well as any correspondence in the record as between the OEB, Planet Energy, consumers and ACN IBOs.[85]

55. Finally, with respect to allegation 7 in the Amended Notice, Planet Energy does not contest that it advised R.A. that she would have to pay a cancellation fee of $250 plus tax, when R.A. was in fact entitled to cancel her contract without any penalty.[86]

56. Staff submit that, on this record and applying the balance of probabilities standard as outlined by the Supreme Court, the OEB ought to find that all of the allegations of non-compliance being pursued in the Amended Notice have been proven to the required standard.

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[81] **Transcript (Vol. 2)** at p. 89:17-20 (J.M.); **Transcript (Vol. 3)** at p. 39:10-12 (K.N.).
[82] **Transcript (Vol. 2)** at pp. 89: 24 to 91:3 (J.M.); **Transcript (Vol. 4)** at p. 75:1-5 (Silvestri).
[83] **Transcript (Vol. 2)** at pp. 143:10-13 and 157:18 (J.M.); **Transcript (Vol. 4)** at p. 28:1-11 (R.H.).
[84] **Transcript (Vol. 2)** at p. 158:6 (J.M.).
[85] **Agreement as to Authenticity dated June 7, 2017**, Ex. KX1.1, Tab 21
[86] **Transcript (Vol. 1)** at pp. 10:25 to 11:3.

B. Planet Energy is legally responsible for the conduct of its salespersons

57. Staff submits that the evidence proves J.M. and K.N. were Planet Energy "salespersons" at all relevant times, and that Planet Energy is legally responsible for the actions of those salespersons carried out on its behalf. This conclusion is relevant to allegations 1, 4, 5 and 6 in the Amended Notice.

i. IBOs J.M. and K.N. are Planet Energy "salespersons"

58. At the relevant time, J.M. and K.N. were Planet Energy salespersons, as that term is understood in the Consumer Protection Regime. The law is clear that Planet Energy is liable for the conduct of its salespersons, including any false and misleading statements they make to consumers.

59. Section 2 of the ECPA defines "salesperson" as:

> (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

60. There is no dispute that Planet Energy is a gas marketer and electricity retailer for the purposes of the ECPA.

61. ACN IBOs, including J.M. and K.N., meet the definition of "salesperson": they made representations to consumers in order to sell Planet Energy products (see Part III.C., *infra*), they sold Planet Energy products to consumers, and they were Planet Energy's agents for the purpose of selling Planet Energy products to consumers. This conclusion follows not only from the evidence heard from J.M., K.N., R.H. and R.A. at the hearing, but also from the Sales Agency

Agreement, which Mr. Silvestri confirmed accurately captured Planet Energy and ACN's respective roles and responsibilities.[87] The Sales Agency Agreement states:

- *Explanatory statement:* The parties intend… for ACN's network of independent sales representatives (the "IBOs") to act as limited agents for Planet to sell electric commodity and natural gas products and related services (the "Energy Products") to retail residential and commercial consumers.[88]

- *Section 2(a):* ACN shall use its commercially reasonable efforts to cause the IBOs: (i) to sell Energy Products and otherwise promote Planet's retail energy business (the "Business") within the territory, and (ii) to act as agents for the sale of Energy Products within the territory, for and on behalf of Planet.[89]

- *Section 3(d):* Upon termination of this Agreement, the Agreement will enter a wind down phase in which the parties will cooperate to achieve an orderly and gradual cessation (in whatever Agency Period remains) of the IBOs' marketing and making sales of the Energy Products.[90]

- *Section 4:* ACN will use its commercially reasonable efforts to, within the Territory, cause IBOs to sell standard offer contracts of the Business as approved by Planet to pre-approved customer credit classes…[91]

- *Section 5:* Planet shall provide Energy Products for the IBOs to sell in accordance with the following terms…[92]

62. The conclusion that IBOs such as J.M. and K.N. were Planet Energy "salespersons" finds further support in OEB staff's Bulletin dated April 13, 2012, titled "Requirements Related to Network and Multi-level Marketing and the Status of Internet-based Transactions When a

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[87] **Transcript (Vol. 4)** at p. 137:27 (Silvestri); **Transcript (Vol. 5)** at p. 5:5 (Silvestri).
[88] **Sales Agency Agreement**, Ex. KX1.4, Tab 6B, p. 128 (emphasis added)
[89] **Sales Agency Agreement**, Ex. KX1.4, Tab 6B, p. 131 (emphasis added)
[90] **Sales Agency Agreement**, Ex. KX1.4, Tab 6B, p. 133 (emphasis added)
[91] **Sales Agency Agreement**, Ex. KX1.4, Tab 6B, p. 133 (emphasis added)
[92] **Sales Agency Agreement**, Ex. KX1.4, Tab 6B, p. 134 (emphasis added)

Salesperson is Present" ("**Bulletin**").[93] After analyzing the role of "multi-level marketing" firms engaged in the business of selling energy contracts, the Bulletin concludes:

> Based on the foregoing, it is Board staff's view that a supplier using a multi-level marketing business model is engaging in retailing or marketing, and that persons acting on the supplier's behalf are "salespersons" within the meaning of the ECPA and the Codes. Therefore, all legal and regulatory requirements pertaining to the conduct of salespersons apply to such persons.

63. While not binding on the Panel, the Bulletin reflects the considered opinion of OEB staff, who have industry expertise and should be given significant weight. 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."[94]

64. Depriving Planet Energy consumers from key protections on the basis that ACN IBOs are not "salespersons" would be directly contrary to the purpose of the Consumer Protection Regime, which was designed to capture all such arrangements. As the Parliamentary Assistant to the responsible Minister put it when discussing Bill 235 (which would eventually create the ECPA) in the legislature:

> This proposed legislation would also ensure that companies are held to account for their salespeople. Another trick we heard was that they did third party hiring, put them to the side, put their hands up when the complaint came in, and said, "They don't work for us; they're working independently." I know that all of us have said, "That's got to stop," so we're going to make them responsible for who comes to the door representing them. Regardless of whether they're working door-to-door, by phone or online, they're hired by that company, however they do it, and they're responsible.[95]

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[93] **Bulletin**, Ex. KX1.2, Tab 14 at pp. 2-3

[94] ***Thamotharem v. Canada (Minister of Citizenship and Immigration)***, 2007 FCA 198 at ¶55, application for leave dismissed 2007 CanLII 55338 (S.C.C.), Staff Brief, Tab 2.

[95] Ontario legislative proceedings (Session 39:2, third reading on April 13, 2010) at 1630 (*per* Dave Levac): http://hansardindex.ontla.on.ca/hansardeissue/39-2/l014.htm. A copy of the relevant excerpts has been included at Staff Brief, Tab 7.

65. In cross-examination, Mr. Silvestri took the position that IBOs "don't sell products, they direct their potential customer to the website to promote the product and advertise the product."[96] Mr. Silvestri's attempt to downplay and minimize the role of IBOs as merely being a passive conduit to a website is inconsistent with the evidence heard from every other witness at the hearing as to how the sales process unfolded. It is irreconcilable with the terms of the Sales Agency Agreement, which emphasizes the obligation to sell energy contracts. And it is at odds with what ACN IBOs were instructed to do in their ACN IBO Agreements, which was to "place a primary emphasis upon the sale of ACN products [including energy contracts] to customers."[97]

66. Mr. Silvestri admitted that his position was not based on any kind of personal or corporate knowledge about how IBOs actually deal with customers: he conceded that no Planet Energy representative accompanies an IBO making a sale.[98] It follows that his expectation of how IBOs would interact with customers is just that – an expectation.

67. Staff submits that Mr. Silvestri's evidence in this regard is disingenuous; at best, his expectation is naïve. It conflicts with Mr. Silvestri's own expectation that IBOs should talk to prospective customers[99] about the potential benefits of energy products at a "high level".[100] (In fact, IBOs like J.M. and K.N. did communicate a simple, "high level" message to their customers about the benefit of switching to Planet Energy: *you will save money*.) And it does not accord with a common sense understanding of how IBOs would interact with consumers and convince them to switch to Planet Energy, given the incentive to sell products and earn commissions. To Planet Energy's knowledge, ACN's entire business model was based on IBO product sales.

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[96] **Transcript (Vol. 5)** at p. 2:19-22 (Silvestri).

[97] **ACN IBO Agreement**, Ex. KX1.2, Tab 21 at p. 2 at ¶21. See also ¶8 ("I agree that as an IBO, this Agreement with ACN grants me the limited authority to promote and sell products offered by or through ACN…").

Similar characterizations appear in other ACN documents. See, for example, **ACN Policies and Procedures**, Ex. KX1.4, Tab 37 at p. 612 ("ACN only authorizes sales by means of direct, personal solicitation of customers… IBOs may only offer and sell services and products in accordance with rates, terms and conditions established by ACN…"); **ACN Compensation Plan**, Ex. KX1.2, Tab 19 at p. 3 ("[A]ll IBOs must acquire customers in order to meet qualifications and advance through ACN's earned positions"); **ACN Sign-up Document**, Ex. KX1.2, Tab 18.

[98] **Transcript (Vol. 5)** at p. 8:4-13 (Silvestri).

[99] The term "prospective customer" is used to capture any person an IBO interacted with in advance of that person agreeing to be enrolled in a Planet Energy contract (at which point that person becomes either a consumer or a large-volume consumer).

[100] **Transcript (Vol. 5)** at p. 72:21 (Silvestri).

Neither the IBOs nor ACN nor Planet Energy could reasonably expect to carry on a successful business if the role of an IBO was simply to direct prospective customers to ACN's website.

ii. Planet Energy is responsible for the actions of its salespersons

68. Planet Energy is legally responsible for the conduct of all its salespersons, including J.M. and K.N. In the context of regulatory compliance proceedings before this OEB, the Divisional Court has affirmed that suppliers like Planet Energy are liable for the conduct of their salespersons.[101] Moreover, s. 10(2) of the ECPA deems a supplier to be engaging in an unfair practice if "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" (emphasis added).

C. Allegation 1: J.M. and K.N. provided false, misleading or incomplete information to consumers

i. Overview

69. The evidence as to what J.M. and K.N. told the persons they enrolled into the Contracts stands uncontradicted. Mr. Silvestri acknowledged that Planet Energy representatives do not accompany IBOs when interacting with prospective customers.[102] The only people who know what was said in these interactions are the salespersons (such as J.M. and K.N.) and the consumers themselves (such as R.H. and R.A.).

70. The evidence of J.M. and K.N., as confirmed by the evidence of R.H. and R.A., is sufficient to prove allegation 1 in the Amended Notice on a balance of probabilities – with the exception of those allegations involving *knowingly* making false or misleading statement (which Staff is not pursuing, since the evidence is that J.M. and K.N. honestly believed what they told their prospective customers).[103]

71. For ease of reference, allegation 1 states:

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[101] ***Summitt*** at ¶¶24, 27 and 115, Staff Brief, Tab 1.
[102] **Transcript (Vol. 5)** at p. 8:4 (Silvestri).
[103] See ¶128, *infra*.

> Planet Energy has engaged in an unfair practice and breached section 10 of the *Energy Consumer Protection Act, 2010*, sections ~~5(1)(i), 5(1)(v), 5(1)(viii),~~ 5(4), 5(5), and 5(14) of Ontario Regulation 389/10, and sections 1.1(d), (f) and (h) of the Electricity Retailer Code of Conduct and the Code of Conduct for Gas Marketers, Part B, as a result of the actions of its salespersons, J.M. and K.N., acting on behalf of Planet Energy, including by:
>
> a) misleading consumers into believing that they will save money on their electricity or gas bill by entering into a contract with Planet Energy; and
>
> b) failing to discuss or explain all of the charges to be paid under the contract, including the global adjustment. [*Allegations that are not being pursued shown in strikethrough]*.

72. J.M. and K.N. misled consumers by promising them they would save money by switching to Planet Energy. In J.M.'s case, he also made a false and misleading "Before and After" presentation, using two retailer bills that purported to demonstrate savings, but were not a fair comparison at all.

73. Both J.M. and K.N. also misled consumers by failing to mention anything about the global adjustment, cancellation fees, or additional fees and charges (beyond the fixed, advertised rate) prior to enrolment. Finally, J.M. and K.N. did not provide consumers with any of the required documents – much less an opportunity to review them – prior to enrolment. All breaches of the Codes apply to J.M.'s four large-volume electricity consumers as well.

ii. Relevant provisions of the Consumer Protection Regime

74. Section 10(1) of the ECPA states: "No supplier shall engage in an unfair practice" and, as noted above, under s. 10(2) a supplier is deemed to be engaging in an unfair practice if a sales person acting on behalf of that supplier engages in an unfair practice.

75. "Unfair practices" are defined in the Regulation as including:

> (a) Section 5(4): "When making a statement to the consumer about the contract price, whether directly or by way of an advertisement other than a publicly released statement, <u>failing to make clear that additional energy charges would be payable by the consumer if he or she enters into the contract</u>";

(b) Section 5(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"; and

(c) Section 5(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."[104]

76. "Additional energy charges" are defined in s. 2 of the Regulation as:

> "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) penalty, and
>
> (d) any charges and fees referred to in clause 22(1)(a) of the Act."[105]

The global adjustment falls within the definition of "additional energy charges".

77. Finally, Part "B" of the Codes provides that a retailer/gas marketer, or salesperson of a retailer/gas marketer, when retailing/marketing to a consumer or a large-volume consumer[106], shall:

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[104] Emphasis added.

[105] Paragraph 22(1)(a) of the ECPA refers to "cancellation charges, administration charges, or any other charges or fees."

[106] The Codes define "consumer" as a "person who uses, for the person's own consumption, electricity that the person did not generate". The Codes define "low volume consumer" as "a consumer who annually uses less than 150,000 kilowatt hours [50,000 cubic meters] of electricity [gas]".

(a) Subsection 1.1(d): "state the price to be paid under the contract for the supply of electricity [or gas], and state the term of the contract";

(b) Subsection 1.1(f): "allow a consumer sufficient opportunity to read all documents provided"; and

(c) Subsection 1.1(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."

78. The reference in s. 1.1(h) of the Codes to "tak[ing] any measure" would include a presentation to a consumer that omits information, such that the consumer is likely to be misled. This is consistent with the definition of "unfair practice" in s. 10(2)(b) of the ECPA, which includes a salesperson who "fails to do" what is required.

79. The Codes define "marketing" and "retailing" to include any "means by which… a salesperson… interacts directly with a consumer."[107] Interactions between salespersons and consumers after a consumer is enrolled are captured by this definition.

iii. False and misleading statement that consumers will save money

80. J.M. and K.N. made false and misleading statements to all the consumers they enrolled by promising that they would save money if they switched to Planet Energy, thereby violating s. 10 of the ECPA, s. 5(14) of the Regulation, and s. 1.1(h) of the Codes. J.M. made the same false and misleading statements in respect of his four large-volume electricity consumers.

81. J.M. testified that his main focus in discussions with all of the consumers and large-volume consumers he enrolled was simple: "I can save you a lot of money by switching to the ACN products."[108] J.M.'s routine was to look at a prospective customer's utility bill, average the different time-of-use rates, and compare it to the fixed Planet Energy rate (which, in most cases, was 4.99 cents/kWh).[109] J.M. would also show all of his prospective customers letters from managers of The Keg and of Tom & Jerry's Bistro purporting to describe savings on energy

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[107] Codes, Part A, s. 1.2

[108] **Transcript (Vol. 2)** at p. 60:8-9 (J.M.). See also **Transcript (Vol. 4)** at pp. 8:26 to 10:6 (R.H.).

[109] **Transcript (Vol. 2)** at pp. 50:5-13, 58:26 and p. 60:22 (J.M.).

bills, in order to communicate the idea to prospective customers that "well, if these people are saving money, then I must be able to save money."[110]

82. K.N. told the consumers he enrolled that if they switched to Planet Energy, they would pay less than what they were currently paying. He explained that Planet Energy contracts would be fixed for five years, and that the fixed rates would be cheaper than what they are paying to the utility under RPP rates (which K.N. himself believed to be true at the time).[111]

83. Mr. Silvestri acknowledged that a comparison between RPP rates and Planet Energy's fixed rate, without any mention of the global adjustment, is not a fair comparison and does not compare "apples to apples"[112].

84. Indeed, it is false and misleading to make such a comparison. As Ms. Armstrong testified, the global adjustment is the difference between the contracted price of energy and the market price of energy, which is set by the Hourly Ontario Energy Price (or "HOEP"). The global adjustment fluctuates monthly. There is no "cap" or limit to the global adjustment, and it has been steadily rising since 2008.[113] All consumers pay the global adjustment. For consumers who purchase their electricity from a retailer, the global adjustment is an additional energy charge that appears as a separate line item on their electricity bills.[114] For consumers on the Regulated Price Plan ("**RPP**"), however, the global adjustment is blended into the time-of-use rates shown on their electricity bills, and is not shown as a separate line item.[115]

85. Mr. Silvestri also acknowledged that telling consumers they will save money on their energy bills by switching to Planet Energy is false and misleading.[116]

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[110] **Transcript (Vol. 2)** at p. 55:20-27 (J.M.).
[111] **Transcript (Vol. 3)** at pp. 29:23-28 and 31:1-4 (K.N.), and at pp. 53:11-26 and 57:9-11 (R.A.).
[112] **Transcript (Vol. 5)** at p. 73:9-13 (Silvestri).
[113] **Transcript (Vol. 1)** at pp. 63:14 to 64:13 (Armstrong)
[114] **Transcript (Vol. 4)** at pp. 97:25 to 98:16 (Silvestri).
[115] **Transcript (Vol. 1)** at pp. 64:19 to 66:2 (Armstrong); **Transcript (Vol. 4)** at pp. 97:25 to 98:10 (Silvestri).
[116] **Transcript (Vol. 5)** at p. 77:1 (Silvestri).

iv. False and misleading "Before and After" comparison

86. Related to J.M.'s false and misleading statements that consumers will save money, and exacerbating the misleading effect of those misrepresentations, J.M. made false and misleading statements to every person he enrolled using a "Before and After" bill comparison.

87. J.M.'s conduct in this regard violated s. 10 of the ECPA, s. 5(14) of the Regulation and s. 1.1(h) of the Codes.

88. J.M. showed all of the consumers and large-volume consumers he enrolled a "Before and After" comparison between two different retailer electricity bills, where the "After" bill was from Planet Energy.[117] J.M. obtained these bill from another IBO in his group, J.J., who stood to benefit financially from J.M.'s sales. J.J. told J.M. how to use the "Before and After" comparison as a sales tool.[118]

89. Consistent with J.J.'s instructions, J.M. drew the prospective customer's attention to the "amount due" on each bill, with the Planet Energy "After" bill appearing to be approximately $90 cheaper than the "Before" bill. J.M. would present the comparison as an example of a typical residence.[119] What J.M. did not tell any prospective customers – and what J.M. himself did not even think about at the time – was that the amount due on the "After" bill incorporates a credit of $66.26 from the account holder's previous overpayment.[120] (That account holder was J.J.).

90. As Mr. Silvestri acknowledged, it was unfair to compare the "amount due" on each bill in the Before and After comparison, without examining the individual components going into that calculation (including the $66.26 credit).[121]

91. In addition, the "Before and After" comparison was false and misleading because it compared bills from two different retailers, even though the vast majority of consumers with

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[117] **Transcript (Vol. 2)** at p. 53:5 (J.M.); **Before/After Comparison**, Ex. KX1.2, Tab 22
[118] **Transcript (Vol. 2)** at pp. 51:26 to 53:2 (J.M.).
[119] **Transcript (Vol. 2)** at pp. 52:9 to 53:10 (J.M.).
[120] **Transcript (Vol. 2)** at p. 54:19-20 (J.M.).
[121] **Transcript (Vol. 5)** at p. 75:6-14 (Silvestri).

Planet Energy switched from a utility, not another retailer.[122] Mr. Silvestri acknowledged that the comparison would not demonstrate the difference between what someone might pay if they are an RPP customer and switched to a retailer.[123]

v. Failure to mention global adjustment

92. Neither J.M.[124] nor K.N.[125] ever mentioned the global adjustment to any consumer or large-volume consumer who enrolled in the Contracts. For each of the 10 consumers and 4 large-volume consumers enrolled by J.M., and for each of the 10 consumers enrolled by K.N., the failure to mention the global adjustment prior to enrolment constitutes a violation of s. 10 of the ECPA; ss. 5(4), 5(5) and 5(14) of the Regulation; and s. 1.1(h) of the Codes.

93. The importance of bringing the global adjustment to a consumer or large-volume consumer's attention – and explaining its impact accurately – cannot be overstated. Mr. Silvestri acknowledged that the global adjustment is a "very confusing topic for most people".[126] Many consumers – including, in this case, R.A. and R.H. – do not know anything about the global adjustment at all, let alone the details of how it works or how it could impact their energy costs.[127]

vi. False and misleading statements about the global adjustment

94. J.M. and K.N. both made false and misleading statements to certain consumers about the global adjustment after those consumers were enrolled, thereby violating s. 10 of the ECPA, s. 5(14) of the Regulation and s. 1.1(h) of the Codes.

95. J.M. attended two meetings with a consumer he enrolled, who raised questions about the global adjustment. In both meetings, J.M. was accompanied by a different IBO. In both

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[122] **Transcript (Vol. 4)** at p. 155:1-5 (Silvestri).
[123] **Transcript (Vol. 5)** at pp. 75:17 to 76:10 (Silvestri).
[124] **Transcript (Vol. 2)** at p. 51:13-14 (J.M.); **Transcript (Vol. 4)** at p. 10:13-16 (R.H.).
[125] **Transcript (Vol. 3)** at pp. 30:7 (K.N.).and 55:25 (R.A.).
[126] **Transcript (Vol. 4)** at p. 97:25-26; **Transcript (Vol. 5)** at p. 71:27 (Silvestri).
[127] **Transcript (Vol. 3)** at p. 63:23 (R.A.); **Transcript (Vol. 4)** at p. 10:16 (R.H.); **Transcript (Vol. 5)** at pp. 72:3-7 (Silvestri).

meetings, the consumer was told that the global adjustment fluctuates, but that it would average out to 5 cents/kWh.[128]

96. K.N. received calls from "a few" consumers whom he enrolled, who asked him why their bills with Planet Energy were higher than before. K.N. called Claire, who advised him that the global adjustment will never exceed 9.99 cents/kWh.[129] Based on this calculation, K.N. was satisfied that consumers he had enrolled would still save money with Planet Energy, and used this approach for the consumers that complained to him.[130]

97. As Mr. Silvestri acknowledged, it was false and misleading to state that the global adjustment would even out to around 5 cents/kWh over time, or to state any other kind of forecast for the global adjustment.[131]

vii. Failure to mention cancellation fees

98. J.M. and K.N. did not speak to any of the consumers they enrolled about cancellation fees (or their cancellation rights) prior to enrolment.[132] (According to R.H., J.M. may have even stated that there were no cancellation fees.[133]) The omission of this key piece of information in the course of discussions with consumers and large-volume consumers was likely to mislead – and, in the case of both R.A. and R.H. did, in fact, mislead them – into thinking that there were no cancellation fees.

99. This failure to alert consumers to the fact that they might have to pay cancellation fees under their Contracts with Planet Energy violated s. 10 of the ECPA, s. 5(14) of the Regulation, and s. 1.1(h) of the Codes. For the four large-volume electricity consumers enrolled by J.M., the failure to mention cancellation fees amounted to a violation of s. 1.1(h) of the Codes.

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[128] **Transcript (Vol. 2)** at pp. 61:26 to 62:4 (J.M.).
[129] **Transcript (Vol. 3)** at pp. 23:19 to 24:12 (K.N.).
[130] **Transcript (Vol. 3)** at pp. 24:16-22 (K.N.).
[131] **Transcript (Vol. 5)** at p. 73:18-22 (Silvestri). See also **Transcript (Vol. 1)** at pp. 66:7-20 (Armstrong).
[132] **Transcript (Vol. 2)** at pp. 63:27 and 64:22 (J.M.); **Transcript (Vol. 3)** at pp. 30:10-13 (K.N.) and 56:1-3 (R.A.).
[133] **Transcript (Vol. 4)** at pp. 10:20, 21:22-25 and 46:2-3 (R.H.).

viii. Failure to mention additional fees and charges

100. Apart from the fixed advertised price of the energy contracts (usually $4.99/month), neither J.M., nor K.N., discussed with any consumers or large-volume consumers any of the additional fees and charges imposed by Planet Energy in its Terms and Conditions, including the utility registration fee, the administration fee, or the forecasted balancing credit or charge.[134] As the price comparison makes clear,[135] these fees and charges are part of the "price to be paid under the contract for the supply of electricity [or gas]", within the meaning of s. 1.1(d) of the Codes.

101. The failure to advise consumers that they would be paying these additional fees and charges under their contract with Planet Energy violated s. 10 of the ECPA, s. 5(14) of the Regulation, and ss. 1.1(d) and (h) of the Codes. For the four large-volume electricity consumers enrolled by J.M., the failure to mention any additional fees or charges amounted to a violation of ss. 1.1(d) and (h) of the Codes.

ix. No opportunity for consumers to read relevant documents

102. In the case of every person they enrolled, J.M. and K.N. personally completed the online enrolment process to enter the consumer into an energy contract with Planet Energy, without the consumer being present and without their participation.[136] Before enrolling them into an energy contract, J.M. and K.N. never provided any consumer or large-volume consumer with, nor had any of them review, the contract's terms and conditions, a disclosure statement or a price comparison.[137] It follows that none of the consumers or large-volume consumers enrolled in the Contracts were given any opportunity to review these documents prior to enrolment.

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[134] **Transcript (Vol. 2)** at p. 67:21 (J.M.); **Transcript (Vol. 3)** at pp. 30:22 (K.N.) and 56:7 (R.A.); **Transcript (Vol. 4)** at p. 10:10 (R.H.).

[135] **Price Comparison (example)**, Ex. KX1.4, Tab 126, p. 1016.

[136] **Transcript (Vol. 2)** at pp. 75:13 to 76:16, and 147:24-28 (J.M.); **Transcript (Vol. 3)** at pp. 32:5-11, 34:6 (K.N.) and 57:2 (R.A.).; **Transcript (Vol. 4)** at p. 12:9-22 (R.H.).

[137] **Transcript (Vol. 2)** at pp. 76:20-24, 78:12 and 80:19 (J.M.).; **Transcript (Vol. 3)** at pp. 34:14-23 (K,N.), 57:6 and 60:3-4 (R.A.); **Transcript (Vol. 4)** at pp. 12:26 to 13:3 (R.H.).

103. For the Contracts with consumers, this constitutes a violation of s. 10 of the ECPA, s. 5(14) of the Regulation, and s. 1.1(f) of the Codes. For the Contracts with the four large-volume electricity consumers enrolled by J.M., this constitutes a violation of s. 1.1(f) of the Codes.

D. Allegation 2: Planet Energy provided inadequate training for its salespersons

i. Overview

104. The largely uncontroversial evidence as to the substance and delivery of Planet Energy's training program, as well as the unchallenged evidence of J.M. and K.N. as to their experience with the training program, is sufficient to prove allegation 2 in the Amended Notice.

105. For ease of reference, allegation 2 states:

> Planet Energy engaged in an unfair practice, breached the conditions of its licences under section 7 of Ontario Regulation 90/99, and breached section 10 of the ECPA, section 5(14) of the Regulation and sections 5.1 to 5.4 of the Codes by failing to ensure that the training for its salespersons, J.M. and K.N., included:
>
> 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. disclosure statements;
> vii. price comparisons;
> viii. verification;
> 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 enter into, verify, renew or extend a contract; and
> xiii. all relevant Board regulatory requirements not already covered above.

106. Planet Energy's training program fell short in two critical respects.

107. First, the substance of the Training Manual is deficient, particularly with respect to cancellation fees, the global adjustment, price comparisons and disclosure statements, and additional fees and charges to be paid under Planet Energy contracts.

108. Second, and more importantly, the entire Training Manual is deficient as a means of delivering the necessary information to Planet Energy salespersons, since there was no actual requirement for IBOs to actually read or review the Training Manual prior to selling contracts.

ii. Relevant provisions of the Consumer Protection Regime

109. Section 7 of Ontario Regulation 90/99 (passed under the OEB Act) makes it a condition of any licence to a retailer or gas marketer that "every person acting on behalf of the licensee shall, before meeting in-person with a low-volume consumer… successfully complete such training as may be required" by any code, rules or order issued by the OEB.

110. Section 5.1 of the Codes requires Planet Energy to ensure "no salesperson… that acts on its behalf retails [or markets] to a low volume consumer… unless that salesperson… has successfully completed training as set out in this Code."

111. Subsection 5.6(a) specifies that a retailer/gas marketer "shall determine the successful completion of training by means of a training test that is designed to assess the state of the salesperson's knowledge… of the elements listed in section 5.2". Section 5.6(e) requires 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."

112. Subsection 5.2(a) of the Codes requires Planet Energy to ensure that for salespersons such as J.M. and K.N., the training referred to in section 5.1 includes "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."

113. Subsection 5.2(b) of the Codes requires Planet Energy to ensure that for salespersons such as J.M. and K.N., the training referred to in section 5.1 includes "adequate and accurate material covering the following areas as they pertain to low volume consumers":

(i) electricity (gas) 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) disclosure statements;

(vii) price comparisons;

(viii) verification;

(ix) consumer cancellation rights;

(x) renewals and extensions;

(xi) how electricity (gas) pricing works, including the pricing of electricity (gas) supplied by electricity distributors;

(xii) persons with whom a retailer (marketer) may enter into, verify, renew or extend a contract; and

(xiii) all relevant OEB regulatory requirements not already covered above, including those set out in this Code.

iii. Training Manual is inadequate

114. The only training material that these IBOs were supposed to review before taking the training test (discussed below) and becoming authorized to sell Planet Energy contracts was the

so-called "Training Manual", comprised of roughly 100 slides.[138] Planet Energy developed the Training Manual,[139] and it has largely been the same since the ECPA came into force in 2011.[140]

115. The Training Manual was accessible to IBOs online via a link in their ACN back office.[141] IBOs were not given hard copies of the document.[142]

116. In previous cases, this OEB has noted that "[g]auging the adequacy of training materials is necessarily a subjective exercise", but has found violations where those materials are incomplete on key issues, such as cancellation rights.[143]

117. The adequacy of the Training Manual – and, by extension, of Planet Energy's entire training program – must be considered in light of the following uncontested facts:

(a) most IBOs authorized to sell Planet Energy products do not have any background in the energy industry[144];

(b) the vast majority of IBOs selling energy contracts on behalf of Planet Energy do so on a part-time basis,[145] with limited time and resources to devote to learning about energy contracts[146] (on top of learning about other products and how ACN itself works[147]);

(c) IBOs were supposed to review the Training Manual online, on their own. There was no training session where someone from ACN or Planet Energy guided IBOs through the Training Manual;[148]

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[138] **Transcript (Vol. 4)** at p. 78:20-28 and 166:25-26 (Silvestri); **Training Manual**, Ex. KX1.4, Tab 6E. Mr. Silvestri referred to "some pretty detailed write-ups with respect to the global adjustment and early termination charges" that were available in the back office, but in cross-examination acknowledged that these materials were only inserted in late 2015, after the events at issue in this proceeding took place, and have not been produced by Planet Energy: **Transcript (Vol. 4)** at pp. 96:14 to 97:3; **Transcript (Vol. 5)** at pp. 105:27 to 106:4 (Silvestri).

[139] **Transcript (Vol. 4)** at p. 76:12-13 (Silvestri).

[140] **Transcript (Vol. 4)** at p. 80:10-16 (Silvestri).

[141] **Transcript (Vol. 4)** at p. 76:16-17 (Silvestri).

[142] **Transcript (Vol. 4)** at p. 147:2-5 (Silvestri).

[143] ***Re Energhx***, EB-2011-0311 at p. 21 [*Re Energhx*], Staff Brief, Tab 3.

[144] **Transcript (Vol. 5)** at p. 1:27 (Silvestri).

[145] **Transcript (Vol. 4)** at p. 69:2-5 (Silvestri).

[146] For example, K.N. testified that "I didn't spend the time for sitting behind the computer… I didn't focus every day or all the time to this business": **Transcript (Vol. 3)** at p. 15:9-13 (K.N.).

[147] **Transcript (Vol. 5)** at pp. 2:6 and 6:3 (Silvestri).

(d) IBOs were not required to engage in any additional types of training beyond the Training Manual – for example, they were not required to attend events or meetings,[149] nor were they required to "shadow" more experienced IBOs, or anyone from Planet Energy;[150] and

(e) as the OEB has recognized, "[t]he energy market in Ontario is notoriously complex".[151]

118. Particularly when viewed against this backdrop, the content of the Training Manual, on its face, is deficient.

119. **First**, the Training Manual does not state that there is a 15,000 kWh threshold for the imposition of higher cancellation fees for consumers ($0.015 per kWh of estimated electricity consumption for the remainder of the contract term, as opposed to $50/yr). From reading the Training Manual, IBOs would have no way to know the consumption level past which "large residential" consumers are subject to these much higher fees.[152] This is a violation of s. 10 of the ECPA, s. 5(14) of the Regulation, ss. 5.2(a), (b)(ix) and (b)(xiii) of the Codes, and the terms of Planet Energy's licences.

120. **Second**, the Training Manual includes only one slide on the global adjustment,[153] and does not provide IBOs with any indication or examples of what the global adjustment rates have historically been (although there is a website link to the IESO provided in one slide).[154] An IBO reading the Training Manual would not understand that the global adjustment has been – and could potentially be – a major component of monthly energy costs, even exceeding the fixed rate charged by Planet Energy. This is a violation of s. 10 of the ECPA, s. 5(14) of the Regulation, ss. 5.2(a), (b)(xi) and (b)(xiii) of the Codes, and the terms of Planet Energy's licences.

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[148] **Transcript (Vol. 4)** at pp. 156:23 to 157:7 (Silvestri).

[149] **Transcript (Vol. 2)** at pp. 17:23 and 20:14-15 (J.M.); **Transcript (Vol. 4)** at p. 144:11 (Silvestri).

[150] **Transcript (Vol. 2)** at pp. 58:3-6 (J.M.); **Transcript (Vol. 5)** at p. 8:13 (Silvestri).

[151] ***Re Summitt Energy Management Inc.,*** 2010 LNONOEB 304 at ¶17, aff'd 2013 ONSC 318 [*Summitt* (OEB)], Staff Brief, Tab 4.

[152] **Training Manual**, Ex. KX1.4, Tab 6E at p. 249; **Transcript (Vol. 4)** at p. 156:13-18 (Silvestri).

[153] **Training Manual**, Ex. KX1.4, Tab 6E at p. 242; **Transcript (Vol. 4)** at p. 155:12 (Silvestri).

[154] **Transcript (Vol. 4)** at p. 155:18 (Silvestri).

121. **Third**, the Training Manual provides no details on the disclosure statement or price comparison. It simply includes barely legible screenshots of the first page of each document, with text advising that "customers will receive and have to confirm on the online store that they have read and understood this document" and that the document "was created by the OEB cannot be modified in any way".[155] An IBO reading the Training Manual would have no idea what these documents mean, what role they are designed to play, or what information they include. This is a violation of s. 10 of the ECPA, s. 5(14) of the Regulation, ss. 5.2(a) and (b)(v), (vii) and (xiii) of the Codes, and the terms of Planet Energy's licences.

122. **Finally**, the Training Manual does not include information on any of the additional charges or fees to be paid under a Planet Energy contract (apart from the fixed, advertised monthly rate).[156] The Training Manual does not even include a screenshot of the price comparison page that shows these additional charges and fees. This is a violation of s. 10 of the ECPA, s. 5(14) of the Regulation, ss. 5.2(a), (b)(xi) and (xiii) of the Codes, and the terms of Planet Energy's licences.

123. At an even more fundamental level, the entire Planet Energy training program (*i.e.* the Training Manual) is deficient as a means of delivering the necessary information to Planet Energy salespersons, thereby breaching s. 10 of the ECPA, s. 5(14) of the Regulation, ss. 5.1, 5.2(a) and (b) of the Codes, and the terms of Planet Energy's licences.

124. IBOs were able to take the online test without reading the Training Manual.[157] An IBO could simply click on the Training Manual link, and then immediately click out and move on to the next step.[158] That is precisely what appears to have happened with both J.M. and K.N., neither of whom read the Training Manual before selling Planet Energy contracts.[159]

125. In *Re Summitt*, the OEB commented on the adequacy of a supplier's training program, as follows:

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[155] **Training Manual**, Ex. KX1.4, Tab 6E at pp. 259-262.
[156] **Transcript (Vol. 5)** at p. 9:9-27 (Silvestri).
[157] **Transcript (Vol. 4)** at pp. 157:23, 163:19 and 165:13 (Silvestri).
[158] **Transcript (Vol. 4)** at p. 158:17 (Silvestri).
[159] J.M. did not review, or even skim, the Training Manual before selling Planet Energy contracts: **Transcript (Vol. 2)** at p. 104:14 (J.M.). K.N. did not read the Training Manual before selling Planet Energy contracts, although he did flip through it: **Transcript (Vol. 3)** at p. 16:2-4 (K.N.).

> **17.** In most cases, the retail salespersons were given scarcely a few hours of training and mentoring before they were on their own with customers. It seems that no two of the retail salespersons experienced the same training regime. The energy market in Ontario is notoriously complex, containing many somewhat obscure elements that have implications for the price of the respective commodities. There have been important developments in the market over the last few years that have direct relevance for customers being asked to decide on whether to enter into long-term fixed price energy retail contracts. For electricity, the Provincial Benefit is one such development, Smart Meters and time of use rates are another. It was clear from the testimony of Summitt's salespersons that a few hours of training was not an adequate foundation for someone who is expected to go into homes to sell these very significant contracts to relatively uninformed consumers on the basis of price comparisons or promises of lower prices.
>
> …
>
> **67** One of the cornerstones of an effective due diligence defence is the proper training of employees and contractors. It is apparent that the structure of Summitt's training regime was simply not effective. As discussed above, there does not appear to have been a predictable, standard practice for retail salesperson training, but at best it amounted to a few hours of classroom instruction and some limited in-field observation. The amount of training required by Summitt was not an adequate foundation for a retail salesperson who is expected to go into homes to sell these very significant contracts to relatively uninformed consumers on the basis of price comparisons or promises of lower prices. [Emphasis added].

126. Although these comments were made in the pre-ECPA era and in the context of evaluating a due diligence defence (which has since been found to be unavailable in these proceedings[160]), they nevertheless demonstrate how past panels of the OEB have approached the adequacy of a training program.

127. The mandatory features of Planet Energy's training program amounted to a requirement that an IBO click on a link to the Training Manual for a split second before taking the training test. IBOs did not receive even "a few hours of classroom instruction", as the salespersons did in *Re Summitt*. Nor did IBOs receive "some limited in-field observation" or "mentoring", as the

[160] ***Summitt*** at ¶72, Staff Brief, Tab 1.

salespersons did in *Re Summitt.*[161] The more robust training regime in *Re Summitt* was found to be inadequate, then the same conclusion must apply in the present case.

128. If there were any further doubt about the gross inadequacy of Planet Energy's training, the evidence of J.M. and K.N. is that when they became IBOs authorized to sell energy contracts, they:

(a) honestly believed that savings were guaranteed by switching to Planet Energy [162],

(b) were not aware of, or did not understand, the global adjustment[163]; and

(c) were not aware that ending an energy contract could result in cancellation fees.[164]

129. In addition, J.M. did not understand the additional charges and fees outlined in Planet Energy's Terms and Conditions.[165] During the course of his testimony, it became clear that J.M. did not even fully understand basic components of how to read an energy bill, including whether it was being supplied by a utility or a retailer.[166]

130. It is no answer for Planet Energy to claim that its Training Manual was submitted to the OEB in response to the 2015 compliance inspection. Whether Planet Energy failed to ensure that J.M. and K.N. received adequate and accurate training before selling contracts to consumers is for this Panel to decide based on the evidence and the requirements of the Consumer Protection Regime. The 2015 compliance inspection was a different process, with a different focus, and based on different evidence. It is irrelevant to the Panel's task in deciding the allegations set out in the Notice.

131. Moreover, Planet Energy did not disclose all of the relevant details and shortcomings of the online training system to OEB staff during the 2015 inspection. For example, the information Planet Energy provided to the OEB in the course of that inspection stated that:

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[161] **Transcript (Vol. 5)** at p. 8:4-13 (Silvestri).
[162] **Transcript (Vol. 2)** at pp. 60:20 and 155:3-13 (J.M.); **Transcript (Vol. 3)** at p. 29:23-28 (K.N.).
[163] **Transcript (Vol. 2)** at pp. 60:25-26, 106:17-20 and 155:5-7 (J.M.); **Transcript (Vol. 3)** at pp. 23:15-16 (K.N.).
[164] **Transcript (Vol. 2)** at p. 64:8 (J.M.); **Transcript (Vol. 3)** at p. 30:10-13 (K.N.).
[165] **Transcript (Vol. 2)** at p. 66:9-10 (J.M.).
[166] **Transcript (Vol. 2)** at pp. 146:2 to 147:1 (J.M.).

(a) Planet Energy is "entitled to provide training to the IBOs directly"[167], while failing to mention that Planet Energy did not, in fact, provide IBOs with any mandatory, in-person training at all;

(b) "Every ACN IBO is required to be trained" and is "required to review a training manual (approximately 100 pages)"[168], when in fact all an IBO is actually required to do is to *click* on the link to the Training Manual;

(c) "Every ACN IBO is required to be trained and tested… on an annual basis (and after any period of inactivity lasting more than 60 days)"[169], when that did not occur in every case (such as in J.M.'s case)[170]; and

(d) IBOs had to take a training test, *without mentioning it was an open-book test*.

132. Finally, a training program that might seem acceptable on a paper review may in fact have deficiencies that are revealed only after observing how it has been implemented. The evidence of J.M. and K.N., and the documents produced by Planet Energy in this hearing, provide new information, not previously available to the OEB, that demonstrates the deficiencies of Planet Energy's limited training program, in practice.

E. Allegation 3: Planet Energy's training test was deficient

i. Overview

133. As with allegation 2, the evidence as to the substance and delivery of Planet Energy's training program is mostly uncontroversial, J.M. and K.N.'s evidence of their experience with the training program is not seriously challenged. The record from these sources is sufficient to prove allegation 3 in the Amended Notice on a balance of probabilities.

134. For ease of reference, allegation 3 states:

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[167] **Response to OEB Notice of Inspection dated July 29, 2015 ("2015 Response")**, Ex. KX1.4, Tab 6, pp. 114, 117

[168] **2015 Response**, Ex. KX1.4, Tab 6 p. 117

[169] **2015 Response**, Ex. KX1.4, Tab 6 pp. 117-118

[170] **Transcript (Vol. 2)** at pp. 98:22 to 99:10-12 (J.M.). There is no direct evidence to contradict J.M.'s evidence: **Transcript (Vol. 5)** at p. 65:4-8 (Silvestri).

> Planet Energy engaged in an unfair practice, breached the conditions of its licences under section 7 of Ontario Regulation 90/99, and breached section 10 of the ECPA, section 5(14) of the Regulation and sections 5.6(a) and (e) of the Codes, by failing to ensure that that the training test taken by its salespersons, J.M. and K.N., assessed their knowledge of the required elements, and was conducted in a manner that would ensure persons taking the training test would not be able to share questions and answers with one another while taking the training test.

135. Planet Energy's online, unsupervised, open-book testing program was not designed in a way that assessed the state of salesperson knowledge. Given that the test was the only actual safeguard against untrained salespersons becoming authorized to sell Planet Energy contracts to consumers, there was a heightened need for Planet Energy to ensure that it performed this function. The evidence in this proceeding demonstrates that it clearly did not: both K.N. and J.M. passed the test with IBOs by their side, without reading the Training Manual. J.M. did not even write the test himself.

ii. Training test does not adequately assess salesperson knowledge

136. Even if the Training Manual were found to be adequate (which is denied), ss. 5.1 and 5.6 of the Codes require Planet Energy to ensure that salespersons acting on its behalf have "successfully completed training as set out in this Code". This must be done by way of a "training test that is designed to assess the state of the salesperson's knowledge… of the elements listed in section 5.2".

137. Having regard both to the questions on the training test (as discussed in this section) and the manner in which it was delivered (discussed in the following section), Planet Energy has failed to meet this requirement, thereby breaching s. 10 of the ECPA, s. 5(14) of the Regulation, ss. 5.1 and 5.6(a) of the Codes and the terms of Planet Energy's licences.

138. Planet Energy developed the testing material used for IBOs.[171] The OEB does not mandate test questions for licensees.[172] The OEB did not review Planet Energy's testing

[171] **Transcript (Vol. 4)** at p. 76:12-13 (Silvestri).
[172] **Transcript (Vol. 1)** at p. 68:3-4 (Armstrong).

questions before they were used, and did not review the approximately 12-13 questions added to the question bank after November 2012.[173]

139. The adequacy of Planet Energy's training test must be measured in light of the fact that Planet Energy depended on it as the only possible safeguard against salespersons selling energy contracts without proper training.[174] Again, there was no way to ensure that IBOs reviewed the Training Manual prior to taking the test.[175] As soon as they passed the test, IBOs could begin selling Planet Energy contracts.[176] In these circumstances, Planet Energy had to pay particular attention to ensuring the training test was an accurate and adequate tool for assessing salesperson knowledge as required by the Codes.

140. The test failed to meet that standard, for at least seven reasons.

141. **First,** the test created by Planet Energy was an online, open-book test.[177] IBOs were explicitly encouraged to rely on the Training Manual as a resource, with a webpage that all IBOs see prior to writing the test[178] providing the following "Important Reminder": "The certification test is open book! Use the training slides [*i.e.* Training Manual] to help ensure you pass the test."[179] A closed book test would obviously offer a better assessment than an open-book test when it came to testing an IBO's knowledge of the Training Manual.[180]

142. In its 2011 audit report ("**Audit Report**"), Ernst & Young identified this "Important Reminder" (and the open-book nature of the test) as an aspect of Planet Energy's testing process

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[173] **Transcript (Vol. 5)** at pp. 35:14-26 and 36:15 (Silvestri).

[174] Even Mr. Silvestri relied heavily on the training test for this purpose: "In my opinion, I don't believe anyone can pass the test without having reviewed the training manual, unless they had prior experience in the retail energy markets": **Transcript (Vol. 4)** at p. 88:5-7 (Silvestri).

[175] **Transcript (Vol. 4)** at pp. 157:23, 163:19 and 165:13 (Silvestri).

[176] **Transcript (Vol. 2)** at p. 36:28 (J.M.).

[177] **Transcript (Vol. 4)** at p. 90:7-11 (Silvestri).

[178] **Transcript (Vol. 4)** at pp. 81:13-15 (Silvestri).

[179] **ACN Energy Badge Instructions**, Ex. KX1.4, Tab 36; **Transcript (Vol. 5)** at p. 27:15 (Silvestri). That webpage has remained the same in all material respects since January 2011: **Transcript (Vol. 5)** at p. 27:2 (Silvestri).

[180] In cross-examination, Mr. Silvestri refused to accept this basic, common sense proposition. When pressed as to how he could possibly support this conclusion, Mr. Silvestri explained that "open-book tests are very useful to refer to when you are writing the test": **Transcript (Vol. 5)** at pp. 27:19-22 and 28:12 (Silvestri).

that did not meet the regulatory requirements.[181] Despite Ernst & Young's conclusions in the Audit Report, Planet Energy made no changes to this aspect of how the test was delivered.[182]

143. **Second,** the question bank includes several inaccurate and/or extremely easy question/answer pairings. Some of the more egregious examples include:

(a) A question where the correct answer is clearly marked for the test reader, as a result of a comment beside the correct answer reading "hmm make this a little less obvious";[183]

(b) At least two questions on the issue of cancellation fees with a false and misleading answer designated as the correct answer, including:

(i) a question/answer pairing stating that if a consumer cancels a five-year electricity contract after two and a half years, the early termination charges would be $150. In fact, as Mr. Silvestri acknowledged in cross-examination (and as is clear from Planet Energy's own contract terms and conditions) the $50 per year fee will not apply if a residential customer uses more than 15,000 kWh per year (in which case a higher cancellation fee would apply);[184]

(ii) a question/answer pairing stating that if a consumer cancels after the cooling-off period, they may be subject to $50 per year termination charges per year or partial year remaining. In fact, as Mr. Silvestri acknowledged in cross-examination (and as is clear from Planet Energy's own terms and conditions) the $50 per year fee will not apply if a residential customer uses more than 15,000 kW per yr (in which case a

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[181] **Audit Report**, Ex. KX1.2, Tab 15 at pp. 7-8

[182] **Transcript (Vol. 5)** at p. 31:6 (Silvestri).

[183] **Question Bank**, Ex. KX1.4, Tab 35 at p. 598; **Transcript (Vol. 5)** at p. 40:26-27 (Silvestri).

[184] **Question Bank**, Ex. KX1.4, Tab 35 at p. 603: *If a residential customer who cancels a five year electricity contract two and a half years into it and is subject to early termination charges, the early termination charges would be $150 (True)*; **Transcript (Vol. 5)** at p. 46:2-9 (Silvestri).

higher cancellation fee would apply).[185] Moreover, no cancellation fee at all would apply if an electricity consumer sought to cancel within 30 days of receiving their first bill;

(b) At least one question on the issue of cancellation fees that is at odds with Planet Energy's own terms and conditions (without accepting that those terms and conditions are compliant with the Consumer Protection Regime). A question/answer pairing states that early termination charges will not apply if a consumer moves from the premises where energy is being supplied, whereas Planet Energy's terms and conditions stipulate that an early termination charge will apply if the premises is not a "permanent residence";[186]

(c) Questions with obvious answers that do not reasonably require one to study or consult the Training Manual, and do little to improve an IBO's knowledge of relevant concepts, including:

(i) *What is the name of the partner that ACN works alongside to market natural gas and electricity product offerings? (PLANET ENERGY).*[187]

(ii) *A representative should always make statements and representations to a customer that will ensure a sale even if those statements and representations are lies and falsehoods (FALSE).*[188]

(iii) *Taking advantage of vulnerable customers by making representations which the customer cannot understand or comprehend the implications of by virtue of illiteracy, ignorance, mental or physical disability or language*

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[185] **Question Bank**, Ex. KX1.4, Tab 35 at p. 603: *If a residential electricity customer cancels their contract after the 10 day cooling off period they may be subject to the following early termination charges: $50 for each year or partial year remaining on the contract (True)*; **Transcript (Vol. 5)** at p. 46:2-9 (Silvestri).

[186] **Question Bank**, Ex. KX1.4, Tab 35 at p. 602: *Early termination charges will apply if a consumer moves from the premises to which the electricity or gas is provided under the contract (False)*; **Transcript (Vol. 5)** at pp. 44:25 to 45:11 (Silvestri). Planet Energy's terms and conditions can be found at Ex. KX1.4, Tab 125. Staff should not be taken as accepting that these terms and conditions reflect the terms of the Consumer Protection Regime dealing with cancellation rights and, in particular, s. 21(c) of the Regulation.

[187] **Question Bank**, Ex. KX1.4, Tab 35 at p. 597.

[188] **Question Bank**, Ex. KX1.4, Tab 35 at p. 601.

> *barrier is a clean and easy way to gain a customer and should be done at every possible opportunity (FALSE).*[189]

144. **Third**, almost 60% of the question bank (38 of 65 questions) requires the test writer to choose between only two options.[190] Although these types of questions may be appropriate as part of the training test, they ought not to be relied on as the primary means of assessing salesperson knowledge, since they obviously provide salespersons with a better chance of passing the test despite having inadequate knowledge.[191]

145. **Fourth,** because questions are randomly drawn from the question bank, there is no guarantee that someone writing the test would necessarily receive a question on any particular issue, even significant topics like the global adjustment or cancellation fees.[192] Although randomly drawn questions are permissible (though not required) under s. 5.1(b) of the Codes, a set that is entirely random is not appropriate in the circumstances of this case, where Planet Energy had no system in place to ensure that salespersons have even viewed training material on the elements set out in s. 5.2 of the Codes.

146. **Fifth**, the small number of test questions – whether that may be 15 or 20 questions – exacerbates the flaws set out above. Although Mr. Silvestri believed the test contained 20 questions[193], he could not account for how J.M. and K.N. scored 93% on a 20-question test (a percentage that reflects a score of 14 out of 15 questions, but does not match to any integer score out of 20).[194]

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[189] **Question Bank**, Ex. KX1.4, Tab 35 at p. 607.

[190] **Question Bank**, Ex. KX1.4, Tab 35. Mr. Silvestri confirmed that the contents of this tab more or less represents the questions on the test since Planet Energy added more questions (after November 2012), and that the substance of the questions and answers are what a test writer would see: **Transcript (Vol. 5)** at p. 26:10-26 (Silvestri).

[191] Mr. Silvestri confirmed that test questions were drawn at random from the question bank, but later contradicted himself by asserting that the questions were not totally random, since the testing platform would not allow an IBO to receive all true/false or yes/no questions. When pressed, however, he could not offer any details as to what kind of protections were in place to prevent this result, including the maximum allowable number of true/false or yes/no questions an IBO could receive: see **Transcript (Vol. 4)** at p. 92:22-23; **Transcript (Vol. 5)** at pp. 39:3 to 40:7 (Silvestri).

[192] **Transcript (Vol. 5)** at p. 37:7-10 (Silvestri).

[193] **Transcript (Vol. 4)** at p. 92:17-20 (Silvestri).

[194] **Transcript (Vol. 5)** at pp. 33:28 to 34:26 (Silvestri); **Planet Response**, Ex. KX1.2, Tab 9A at p. 2 (Q2).

147. **Sixth**, although IBOs were allowed to take the online test only twice, the second test could be taken directly after the first test and there could be an overlap in the questions between the two tests.[195]

148. **Finally**, the testing process is not set up to allow IBOs to learn from their mistakes. If IBOs writing the test select an incorrect answer for a particular question, they are never advised that they got that particular question wrong – or what the correct answer should be. They are simply told their aggregate score at the very end of the testing process.[196] This is not conducive to being trained, or learning from one's mistakes.

149. That the Planet Energy test did not adequately assess salesperson knowledge of the relevant topics is clear from the fact that both J.M. and K.N. scored 93% on the test without having read or studied the Training Manual,[197] and with both salespersons evidently having an inferior understanding of the energy industry and the Planet Energy products they were selling.[198]

iii. Training test conducted in a manner that allows for sharing of answers

150. Planet Energy failed to ensure that the training test was conducted in a manner that did not permit IBOs to share answers with each other, or to have someone else entirely complete the test, thereby violating s. 10 of the ECPA, s. 5(14) of the Regulation, ss. 5.1 and 5.6(e) of the Codes, and the terms of Planet Energy's licences.

151. In addition to being expressly prohibited, a test conducted in a matter that permits sharing answers is also a concern because it does not allow a proper assessment of the salesperson's knowledge, discussed above.

152. Simply put, Planet Energy's testing, which was delivered entirely online, was not conducted in any kind of controlled environment. IBOs were not supervised or monitored while

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[195] **Transcript (Vol. 5)** at pp. 37:23 to 38:1 (Silvestri).
[196] **Transcript (Vol. 5)** at p. 37:14-19 (Silvestri).
[197] **Transcript (Vol. 2)** at p. 104:14 (J.M.); **Transcript (Vol. 3)** at p. 16:2-4 (K.N.).
[198] See ¶128, *supra.*

they wrote the test.[199] The test could be written anywhere with an internet connection[200], with anyone sitting beside the person writing the test.[201] Mr. Silvestri admitted that there is no way to ensure IBOs are not sharing answers with each other.[202] It is equally clear that there is no way for Planet Energy to ensure the IBO who was supposed to be writing the test actually was the person who wrote the test.[203] Again, in the Audit Report, Ernst & Young identified Planet Energy's online test as failing to meet the regulatory requirements[204], but Planet Energy made no changes to address this problem, apart from having test questions randomized.

153. When asked to explain how Planet Energy maintains the integrity of its testing process, Mr. Silvestri relied on two things: the "attestation" IBOs must make at the outset of the process, and the fact that each IBO would receive a different, random set of questions.[205] Neither of these measures are sufficient to "ensure that the training test is not conducted in a manner" that allows for the sharing of answers between IBOs, or even for an entirely different person to be writing the test instead of the proper IBO.

154. The attestation is nothing more than a box to be checked electronically.[206] As Mr. Silvestri acknowledged, there is no way to ensure an IBO reads the attestation (much less intends to respect it) before the IBO clicks "accept".[207] The attestation might not even be clicked by the same IBO who is supposed to be doing the test;[208] indeed, in J.M.'s case, it was another IBO who clicked the attestation.[209] The attestation is a mechanical, *pro forma* step in the process. At best, the attestation is a version of the "honour system". It is not a meaningful or reliable measure to ensure compliance with ss. 5.1 and 5.6 of the Codes.

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[199] **Transcript (Vol. 4)** at p. 91:6; **Transcript (Vol. 5)** at p. 21:12-19 (Silvestri).
[200] **Transcript (Vol. 5)** at p. 21:22 (Silvestri).
[201] **Transcript (Vol. 5)** at p. 17:16-18 (Silvestri).
[202] **Transcript (Vol. 5)** at p. 22:11-12 and 22:27 (Silvestri).
[203] Mr. Silvestri did eventually concede that a controlled environment would at least give Planet Energy the advantage of ensuring that the IBO who was supposed to be writing the test was actually writing the test: **Transcript (Vol. 5)** at p. 29:1-22 (Silvestri).
[204] **Audit Report**, Ex. KX1.2, Tab 15 at pp. 7-8; **Transcript (Vol. 5)** at p. 31:7-28 (Silvestri).
[205] **Transcript (Vol. 4)** at pp. 91:10-17 and 93:8-10 (Silvestri).
[206] **Attestation**, Ex. KX1.4, Tab 41.
[207] **Transcript (Vol. 5)** at p. 26:10-12 (Silvestri).
[208] **Transcript (Vol. 5)** at p. 26:2 (Silvestri).
[209] **Transcript (Vol. 2)** at p. 100:6-9 (J.M.).

155. The fact that test questions are randomized might make it more difficult for two new IBOs, sitting side by side, to share answers. But it does nothing to stop a new IBO from getting an answer from a more experienced IBO, or a more experienced IBO from writing the entire test.

156. If there were any doubt, the evidence from J.M. and K.N. in this case confirms that Planet Energy has failed to meet the requirements set out in ss. 5.1 and 5.6 of the Codes.

157. J.M. took the online test twice over the 5-year period when he was authorized to sell products as an ACN IBO. The first time around, J.M.'s testing was completed in a coffee shop, where a senior IBO in the same "leg" – who stood to gain financially from J.M.'s sales – answered all the questions, without any involvement from J.M.[210] The second online test was written in identical circumstances, except that it was a different IBO who wrote the test for J.M.[211] After J.M.'s online test was completed, he began approaching customers right away.[212]

158. If J.M. was being tested annually (as s. 5.8 of the Codes requires), then he should have been tested four times.[213] If J.M. was being tested after every 60-day period of inactivity (as s. 5.9 of the Codes requires), then he should have been tested at least <u>five</u> times.[214] There is no direct evidence to contract J.M., and Mr. Silvestri conceded that he did not actually know why J.M. was not re-tested as often as he should have been.[215] Although Staff are not alleging separate contraventions in respect of the fact that J.M. was not tested as often as required by ss. 5.8 and 5.9 of the Codes, Planet Energy's failure to enforce rigorous re-testing aggravates the deficiencies in its testing program because – at least for some salespersons – there was no opportunity to detect and correct misunderstandings stemming from the first 'successful' test.

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[210] **Transcript (Vol. 2)** at p. 34:11 to p. 35:23 (J.M.).

[211] **Transcript (Vol. 2)** at p. 36:3-15 (J.M.).

[212] **Transcript (Vol. 2)** at p. 36:28 (J.M.).

[213] **Updated Q1 Document**, Ex. KX1.2, Tab 10B, shows J.M. was selling Planet Energy contracts from May 2012 to June 2016. This would have required him to write annual tests each May in 2012, 2013, 2014 and 2015.

[214] **Updated Q1 Document**, Ex. KX1.2, Tab 10B, shows that J.M. was inactive between August 2012 to November 2013; November 2013 to January 31, 2014; February 2014 to May 2014; and August 2014 to April 2015.

[215] In cross-examination, Mr. Silvestri initially agreed that multiple tests should have taken place for J.M., but then speculated that perhaps J.M. remained active during some of the periods where he appeared to be inactive, and that the data provided by Planet Energy in the Updated Q1 Document might have excluded "contracts that were enrolled that were rejected, or that didn't flow, or that were not cancelled": **Transcript (Vol. 5)** at pp. 55:1 to 56:16 (Silvestri). After being repeatedly pressed on the issue of whether the Updated Q1 Document included all enrolments for J.M. or only a subset, Mr. Silvestri finally conceded that he simply did not know: **Transcript (Vol. 5)** at pp. 62:24-28 and 64:10-19 (Silvestri).

159. K.N. took the online test once.[216] Although he answered all the questions himself, K.N. wrote the test at a Starbucks, with Claire guiding him through the process and available to offer explanations in case he did not understand a question.[217] Claire was the IBO who recruited K.N. and stood to gain financially if he passed the test and qualified to sell Planet Energy contracts.

F. Allegations 4(a) and (b): Planet Energy failed to meet requirements relating to business cards and badges

i. Overview

160. For ease of reference, allegations 4(a) and (b) state:

> Planet Energy engaged in an unfair practice, breached the conditions of its licences under sections 5 and 6 of Ontario Regulation 90/99, and breached sections 10 and 15 of the ECPA, sections 5(6), 5(7) and 10 of the Regulation, and section 2 of the Codes as a result of the actions of its salespersons, J.M. and K.N., acting on behalf of Planet Energy, because these salespersons enrolled consumers into contracts while retailing to consumers at a place of business other than Planet Energy's place of business, including by physically meeting with consumers during the time they agreed to be enrolled, without:
>
> a) offering a business card in the proper from (or at all), contrary to section 10 of the ECPA, section 5(6)(ii) of the Regulation and section 1.1(b) of the Codes;
>
> b) prominently displaying an identification badge in the proper form (or at all), contrary to section 10 of the ECPA, section 5(6)(i) of the Regulation and section 1.1(c) of the Codes.

161. The evidence from J.M., K.N., R.H. and R.A. on these allegations stands uncontradicated and unchallenged, and clearly proves the allegations on a balance of probabilities.

ii. Failure to provide consumers with business cards

162. Paragraph 5(6)(ii) of the Regulation requires that if "a person acting on behalf of a supplier calls on a consumer in-person", they must offer consumers a business card that complies with s. 2 of the Codes, otherwise it is an unfair practice. Similarly, s. 1.1(b) of the Codes

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[216] **Transcript (Vol. 3)** at p. 20:14-15 (K.N.).

[217] **Transcript (Vol. 3)** at pp. 19:23 to 20:11, and 35:27-28 (K.N.).

requires that a salesperson must provide a business card that complies with the requirements of the Codes "if retailing [marketing] to a low volume consumer in-person at a place other than the retailer's place of business." These provisions of the Regulation and the Codes are echoed in s. 5 of Ontario Regulation 90/99 (passed under the OEB Act).

163. These provisions of the Regulation, the Codes and Planet Energy's licences apply regardless of whether the Contracts in this case are characterized as "internet agreements" or 'in-person' transactions (an issue discussed further in Part III.G, *infra*).

164. K.N. did not give Planet Energy business cards of any kind – and certainly not in the proper form – to any of the 10 consumers he enrolled.[218] J.M. did occasionally give business cards in the proper form to consumers, but testified that "it was kind of hit and miss".[219] At the very least, R.H. did not receive one.[220] Both J.M. and K.N. met with consumers face-to-face, at their home or business.[221]

165. By failing to provide these consumers business cards in the proper form, Planet Energy breached s. 10 of the ECPA, s. 5(6)(ii) of the Regulation, s. 1.1(b) of the Codes, and the terms of Planet Energy's licences.

iii. Failure to wear identification badges

166. Paragraph 5(6)(i) of the Regulation requires that if "a person acting on behalf of a supplier calls on a consumer in-person", they must prominently display a valid identification badge, otherwise it is an unfair practice. Similarly, s. 1.1(c) of the Codes requires that a salesperson must display an identification badge that meets the requirements of the Codes "if retailing [marketing] to a low volume consumer in-person at a place other than the retailer's place of business." These provisions of the Regulation and the Codes are echoed in s. 6 of Ontario Regulation 90/99 (passed under the OEB Act).

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[218] **Transcript (Vol. 3)** at p. 35:6 (K.N.).

[219] **Transcript (Vol. 2)** at p. 72:18-22 (J.M.).

[220] **Transcript (Vol. 4)** at p. 10:28 (R.H.).

[221] **Transcript (Vol. 2)** at pp. 59:1-28 and 75:4-6 (J.M.); **Transcript (Vol. 3)** at p. 29:20 (K.N.); **Transcript (Vol. 4)** at p. 9:12-13 (Silvestri). For three or four contracts, J.M. testified that he did not meet the actual account holder, but met with others in charge of the business: **Transcript (Vol. 2)** at pp. 59:7-28 and 74:17-28 (J.M.)

167. These provisions of the Regulation, the Codes and Planet Energy's licences apply regardless of whether the Contracts in this case are characterized as "internet agreements" or 'in-person' transactions (an issue discussed further in Part III.G, *infra*).

168. Neither J.M., nor K.N., displayed an identification badge when interacting with any of the 23 consumers they enrolled between them.[222] It follows that Planet Energy has breached s. 10 of the ECPA, s. 5(6)(i) of the Regulation, s. 1.1(c) of the Codes, and the terms of Planet Energy's licences.

G. Allegations 4(c), (d) and 5: Planet Energy did not apply protections for 'in-person' transactions

i. Overview

169. There are very few, if any, contested facts relating to this allegation. The main disagreement between the parties appears to be a legal one, as to whether the provisions of the Consumer Protection Regime relating to 'in-person' transactions should apply where a salesperson enrols a consumer into an online contract, without the consumer's presence or participation (as occurred in the case of the Contracts). Planet Energy also appears to argue that it can eschew requirements of the Consumer Protection Regime because salespersons can enrol consumers, as long as they have that consumer's permission.

170. For ease of reference, allegations 4(c), (d) and 5 state:

> 4. Planet Energy engaged in an unfair practice, breached the conditions of its licences under sections 5 and 6 of Ontario Regulation 90/99, and breached sections 10 and 15 of the ECPA, sections 5(6), 5(7) and 10 of the Regulation, and section 2 of the Codes as a result of the actions of its salespersons, J.M. and K.N., acting on behalf of Planet Energy, because these salespersons enrolled consumers into contracts while retailing to consumers at a place of business other than Planet Energy's place of business, including by physically meeting with consumers during the time they agreed to be enrolled, without:
>
> c) providing a text-based copy of the contract, disclosure statement and price comparison at the time the contract was entered into or immediately

[222] **Transcript (Vol. 2)** at p. 70:25 (J.M.); **Transcript (Vol. 3)** at pp. 22:3-6 and 35:10 (K.N.); **Transcript (Vol. 4)** at p. 10:24 (R.H.).

thereafter, contrary to sections 11 and 12(1)(a) of the ECPA, and sections 5(7) and 10(1) of the Regulation;

d) verifying the contracts, contrary to section 15 of the ECPA.

5. Planet Energy breached sections 11 and 12(2) of the ECPA, and sections 7(1)17, 7(1)18, 8(1)(d), 8(3)(d) of the Regulation as a result of the actions of its salespersons, J.M. and K.N., acting on behalf of Planet Energy, because these salespersons enrolled consumers using contracts, disclosure statements and price comparisons that did not require signatures by consumers and that were not, in fact, signed by consumers

171. The statutory text and purpose of the Consumer Protection Regime leads to only one reasonable conclusion: a salesperson that meets with consumers and obtains their permission to enrol them into an energy contract, and then completes that enrolment without the consumer's participation or involvement, has concluded an 'in-person' transaction. This interpretation of the Consumer Protection Regime is consistent with guidance previously provided by OEB staff, and is the only logical conclusion flowing from Planet Energy's own position in previous submissions to the OEB.

ii. Contracts enrolled by J.M. and K.N. are subject to rules for 'in-person' transactions

172. The statutory text, context and purpose of the ECPA and the Regulation support the conclusion that the Contracts were not "internet agreements" or "contracts entered into over the internet", but rather normal contracts (albeit online contracts) subject to the ordinary protections for door-to-door sales. This interpretation of the statute finds further support in OEBstaff's Bulletin, as well as in Planet Energy's own submissions on when protections for 'in-person' transactions should apply.

1. Statutory text requires consumers to enrol themselves online

173. During the period when J.M. and K.N. enrolled consumers online, s. 17(1) of the ECPA exempted "internet agreements within the meaning of Part IV of the *Consumer Protection Act,*

2002" from verification call requirements.[223] But Part IV of the *Consumer Protection Act, 2002* ("**CPA**") is clear that it is a consumer[224] himself or herself that must review, access and ultimately accept an internet agreement online. For example, s. 38 of the CPA states:

> **38** (1) Before a consumer enters into an internet agreement, the supplier shall disclose the prescribed information to the consumer.
>
> (2) The supplier shall provide the consumer with an express opportunity to accept or decline the agreement and to correct errors immediately before entering into it.
>
> (3) In addition to the requirements set out in section 5, disclosure under this section shall be accessible and shall be available in a manner that ensures that,
>
> (a) the consumer has accessed the information; and
>
> (b) the consumer is able to retain and print the information.[225]

174. Similarly, pursuant to s. 10(2) of the Regulation, "contracts entered into over the internet" do not require consumers to be provided with a text-based copy of the contract at the time the contract is entered into, or that the consumer sign an acknowledgment at the end of the contract. Once again, however, the Regulation is clear that it is consumers themselves who must access, review and accept a "contract entered into over the internet". Section 9 of the Regulation states:

> **9.** If a contract is entered into over the internet, the supplier shall ensure,
>
> …
>
> (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

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[223] See subsection 17(1)3 of the ECPA (as it was on December 31, 2016), accessible at: https://www.ontario.ca/laws/statute/10e08/v7#BK22

[224] Section 1 of the CPA defines "consumer" as "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes."

[225] Emphasis added.

> (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;
>
> …
>
> (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;
>
> (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.[226]

175. In the case of each and every Contract, J.M. and K.N. personally completed the online enrolment process to enter the consumer into an energy contract with Planet Energy, without the consumer being present and without their participation.[227] Before enrolling them into the Contracts, J.M. and K.N. never provided any consumers with, nor had any consumer review, the contract's terms and conditions, a disclosure statement or a price comparison.[228]

176. Based on the statutory text of the relevant provisions, the Contracts were not "internet agreements" within the meaning of (what was then) s. 17(1) of the ECPA, nor are they "contracts entered into over the internet" for the purposes of s. 10(2) of the Regulation.

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[226] Emphasis added.

[227] **Transcript (Vol. 2)** at pp. 75:13 to 76:16, and 147:24-28 (J.M.); **Transcript (Vol. 3)** at pp. 32:5-11, 34:6 (K.N.) and 57:2 (R.A.).; **Transcript (Vol. 4)** at p. 12:9-22 (R.H.).

[228] **Transcript (Vol. 2)** at pp. 76:20-24, 78:12 and 80:19 (J.M.).; **Transcript (Vol. 3)** at pp. 34:14-23 (K,N.), 57:6 and 60:3-4 (R.A.); **Transcript (Vol. 4)** at pp. 12:26 to 13:3 (R.H.).

2. Purposive reading requires that 'in-person' protections be applied

177. As OEB staff notes in the Bulletin, the rationale for exempting "internet agreements" from the verification requirement is that "the consumer is entering into a contract having had the opportunity to consider the matter at his or her own leisure, absent any pressure or influence that may arise by virtue of the presence of a salesperson or the expectation of a salesperson returning imminently after the consumer completes the transaction."[229]

178. The same rationale explains why "contracts entered into over the internet" can be delivered after the contract is entered into (rather than at the time the contract is entered into) and are deemed to be acknowledged upon receipt of certain documents by email (rather than requiring a signed acknowledgment). Again, the working premise is that the consumers have already had a chance to carefully consider these documents by themselves, for themselves and in their own time, before enrolling themselves into an energy contract.

179. In other words, the arguments in favour of consumers receiving a verification call[230], being given a copy of the contract at the time they enter into that contract, and signing an acknowledgment, are mitigated when consumers are able to access an online process, review all of the required documents for themselves, and then independently decide whether to accept a contract.

180. But the consumers enrolled by J.M. and K.N. had none of those opportunities. Before enrolling them into the Contracts, J.M. and K.N. never provided these consumers with, nor had them review, the contract's terms and conditions, a disclosure statement or a price comparison.[231] Instead, these consumers simply agreed to be enrolled after hearing a brief, in-

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[229] **Bulletin**, Ex. KX1.2, Tab 14 at p. 4.

[230] As of January 1, 2017, even internet agreements are now subject to verification calls.

[231] **Transcript (Vol. 2)** at pp. 76:20-24, 78:12 and 80:19 (J.M.); **Transcript (Vol. 3)** at pp. 34:14-23 (K.N.), and 57:6 and 60:3-4 (R.A.); **Transcript (Vol. 4)** at pp. 12:26 to 13:3 (R.H.).

person presentation from J.M. and K.N.[232], replete with false and misleading information, at either the consumer's residence or place of business.[233]

181. In every meaningful respect, the practices followed by J.M. and K.N. in getting consumers to agree to sign up with Planet Energy amounted to an 'in-person' sale. The fact the sale was paperless does not change its substance. To conclude that these transactions are "internet agreements" or "agreements entered into over the internet" – and thus excluded from the protections that would otherwise be in place for 'in-person' sales – would be a triumph of form over substance, and would undermine the consumer protection purpose at the heart of the Consumer Protection Regime.

182. Such a result would also be contrary to the basic principle of statutory interpretation governing all consumer protection legislation (including the Consumer Protection Regime): it must be "interpreted generously, in favour of consumers."[234]

183. Ultimately, suppliers can choose to sell energy contracts by way of traditional 'in-person' paper transactions, or by relying on online enrolments initiated by consumers, or by some combination of the two. But suppliers like Planet Energy – which elect to combine aggressive 'in-person' salesperson activities with a paperless enrolment process – must assume the risks of that model when it comes to the requirements of the Consumer Protection Regime.

184. One such risk is that the consumer may not be the one who is doing the online enrolment. As the evidence heard in respect of each and every Contract in this case demonstrates, having a series of checkboxes and acknowledgments to be clicked does not ensure that consumers are protected by reviewing, acknowledging and understanding the necessary information offered through an online enrolment process. If suppliers are willing to take on the potentially significant risks of a hybrid salesperson-online enrolment model, then they must also be willing to provide the necessary protections in the event that the model does not work as intended.

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[232] Consumers met with J.M. for an average of 15 minutes before agreeing to enrol with Planet Energy: **Transcript (Vol. 2)** at p. 58:21-23 (J.M.). Consumers met with K.N. for an average of 5-10 minutes: **Transcript (Vol. 3)** at pp. 31:28 to 32:1 (K.N.).

[233] **Transcript (Vol. 2)** at pp. 59:1-28 and 75:4-6 (J.M.); **Transcript (Vol. 3)** at p. 29:20 (K.N.); **Transcript (Vol. 4)** at p. 9:12-13 (R.H.). For three or four contracts, J.M. testified that he did not meet the actual account holder, but met with others in charge of the business: **Transcript (Vol. 2)** at pp. 59:7-28 and 74:17-28 (J.M.).

[234] ***Harvey v. Talon International Inc.,*** 2017 ONCA 267 at paras. 61-64, Staff Brief, Tab 5.

3. Statements of OEB staff and Planet Energy support applying 'in-person' protections

185. Although neither OEB staff's Bulletin, nor Planet Energy's 2011 memorandum to the OEB addressing similar issues ("**Memorandum**"), explicitly address the question of salespersons directly enrolling consumers into energy contracts, the underlying logic of both the Bulletin and the Memorandum firmly support the conclusion that the Contracts in this case were completed as a result of 'in-person' transactions.

186. The Bulletin states:

> Board staff believes that, where a consumer is completing an internet contracting transaction in the presence of a salesperson, the transaction is properly treated as an 'in-person' transaction… [T]his will be the case even if the supplier's salesperson absents himself or herself from the premises while the consumer is completing the internet transaction, if the salesperson indicates that he or she will return to the premises on or immediately after completion of the transaction…
>
> Board staff considers this view to be consistent with the purpose and intent of the overall legislative framework that governs the activities of suppliers, and ensures that the form of the transaction (over a computer, as opposed to on paper) is not allowed to diminish the protections given to consumers under that framework.

The Bulletin applies to <u>all</u> transactions effected while a salesperson is present, regardless of whether the consumers in question are "friends and family" or otherwise.[235]

187. If such transactions are to be subject to 'in-person' protections when completed "in the presence of" a salesperson or where a salesperson "indicates that he or she will return to the premises", then the same conclusion must apply with even greater force where the salespersons <u>themselves</u> are the ones actually completing the transactions – and especially where the consumer is not even present.

188. But it is not just OEB staff whose position leads to this conclusion. The Memorandum, which still represents Planet Energy's position today,[236] states:

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[235] **Bulletin**, Ex. KX1.2, Tab 14 at pp. 1 and 4.

[236] **Transcript (Vol. 5)** at p. 93:21 (Silvestri).

> …Planet Energy recognizes the potential need for additional consumer protection measures to ensure that marketers and retailers do not try to circumvent the in-person sales protection provided by the legislation/regulations by using electronic means to disguise as "internet agreements" what are in essence in-person high-pressure sales situations. An obvious example of this would be a cold calling door-to-door agent showing up at a residence with an iPad or a similar device. If this agent takes all the customer data and simply hands the iPad to the customer to accept the contract, this contract, while technically being an internet agreement, would likely warrant the protections provided for in-person agreements.[237]

189. The Memorandum contrasts this scenario with an example of a "legitimate internet scenario", such as one where "a representative meets with a customer, advertises the supplier's product and then later directs the customer to a website where the customer can access further product information and (if they wish), sign up online while not in the presence of the representative" (emphasis added).

190. By Planet Energy's own logic, this can mean only that J.M.'s and K.N.'s practices of themselves enrolling consumers online warrant the protections provided for 'in-person' agreements. If Planet Energy agrees that those protections are appropriate where a salesperson takes all of the customer's data and lets the customer just hit "accept" at the very end, then surely they are appropriate where a salesperson does not even give the customer the chance to take that very last step.

191. The fact that the Memorandum refers to an example involving "cold calling", rather than selling to a "warm network", is of little import. It does not change the fundamental fact that the consumers enrolled by J.M. and K.N. were not given an opportunity to decide whether to enrol by themselves, for themselves, after a proper review of the documents and material that the enrolment portal provides so as to allow for an informed decision.[238] Even assuming all of the consumers are friends or family of J.M. and K.N., they are entitled to the same protections as everyone else. As the OEB put it in *Re Energhx*:

> There is nothing in the legal and regulatory framework governing the activities of retailers or marketers that diminishes or eliminates the entitlement of friends, family or company employees to the protections that form part of that network. As a general proposition then, the legal and regulatory framework does not

[237] **Planet Energy December 2011 Memo**, Ex. KX1.4, Tab 11, p. 476 (emphasis added).

[238] **Transcript (Vol. 5)** at pp. 85:14 to 86:2 (Silvestri).

> provide for greater tolerance simply because the consumer may be in some way affiliated or associated with the marketer or retailer.[239]

192. Moreover, ACN's concept of a "warm network" stretches so wide that it is effectively the close cousin of the cold call: one need look no further than the distant relationship between K.N. (patient) and R.A. (clinic office manager) to see this. Thus, even if the closeness of the relationship between salesperson and consumer did somehow make a difference in the analysis (which is denied), ACN's sales model offers no reliable parameters in this regard.

iii. Planet Energy did not make verification calls

193. There is no dispute that Planet Energy did not make verification calls to any of the consumers enrolled by J.M. and K.N. (or any other consumers).[240] The "quality assurance" calls that Planet Energy conducted on a random basis for some consumers do not replace the OEB-mandated verification calls. For the reasons explained above, the enrolments for the Contracts at issue in this case arose from 'in-person' transactions, not "internet agreements", and so verification calls were required. Accordingly, Planet Energy breached s. 15 of the ECPA.

iv. Planet Energy did not provide consumers documents at the necessary time

194. Section 11 and s. 12(1)(a) of the ECPA require Planet Energy to provide consumers with "such information or documents as may be required by regulation… under the prescribed circumstances, if any." Subsection 5(7) of the Regulation requires salespersons to provide consumers "a text-based copy of the contract, including the disclosure statement, before the consumer enters into the contract" and "a text-based copy of the signed contract, including the disclosure statement, immediately after the consumer has entered into the contract" (emphasis added). Similarly, s. 10(1) of the Regulation requires salespersons to provide consumers with "a text-based copy of the contract at the time the contract is entered into" (emphasis added).

195. Neither J.M. nor K.N. ever provided to the consumers they enrolled the contract, the disclosure statement or the price comparison before or during enrolment – much less had them

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[239] ***Re Energhx*** at p. 18, Staff Brief, Tab 3.

[240] **Transcript (Vol. 5)** at p. 95:23-26 (Silvestri).

sign any of those documents.[241] This omission was consistent with Planet Energy's online enrolment model for low-volume consumers, which never involved any signatures on any document, or any paper documents at all (apart from the welcome letters, sent post-enrolment).[242]

196. For the reasons explained above, J.M. and K.N.'s interactions with consumers were 'in-person' transactions, and so requirements concerning delivery of contracts and disclosure statements apply. Those requirements were not met. Accordingly, Planet Energy has breached ss. 11 and 12(1)(a) of the ECPA, as well as ss. 5(7) and 10(1) of the Regulation.

v. Planet Energy did not obtain the required signatures and acknowledgments

197. Section 11 and subsection 12(2) of the ECPA require Planet Energy to "ensure that the consumer provides such acknowledgments and signatures as may be prescribed, in such form or manner as may be prescribed". Subsections 7(1)17 and 7(1)18 of the Regulation require consumers (or the account holder's agents) to sign the contract, as well as to sign and date an acknowledgment that they have received a text-based copy of the contract. Paragraphs 8(1)(d) and 8(3)(d) of the Regulation require consumers (or the account holder's agents) to sign in order to acknowledge receipt of the disclosure statement – both on the disclosure statement and on the price comparison.

198. As set out above, J.M. and K.N. did not provide the consumers they enrolled in the Contracts with the contract itself, the disclosure statement or the price comparison before or during enrolment, and thus could not have had them sign any of those documents.[243] Accordingly, Planet Energy has breached ss. 11 and 12(2) of the ECPA, as well as ss. 7(1)17, 7(1)18, 8(1)(d) and 8(3)(d) of the Regulation.

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[241] **Transcript (Vol. 2)** at pp. 77:18 to 78:12, and 82:4 (J.M.); **Transcript (Vol. 3)** at pp. 34:11-17 (K.N.) and 57:6 (R.A.); **Transcript (Vol. 4)** at p. 12:1 (R.H.).

[242] **Transcript (Vol. 4)** at pp. 67:3-6 and 73:17-26; **Transcript (Vol. 5)** at pp. 46:21-47:1 (Silvestri).

[243] **Transcript (Vol. 2)** at pp. 77:18 to 78:12, and 82:4 (J.M.); **Transcript (Vol. 3)** at pp. 34:11-17 (K.N.) and 57:6 (R.A.); **Transcript (Vol. 4)** at p. 12:1 (R.H.).

vi. A salesperson cannot be an account holder's agent in the same transaction

199. Proof of these allegations is not negated by the fact that J.M. and K.N. obtained permission from consumers to enrol them into Planet Energy contracts.[244] Staff acknowledge there is no allegation that the consumers were enrolled without their knowledge or consent. During the hearing, Mr. Silvestri suggested that the consumers' permission might somehow insulate Planet Energy's salespersons from breaching aspects of the Consumer Protection Regime.[245] The exact basis for, and extent of, Planet Energy's argument in this regard remains unclear, and so Staff may need to address the issue further in oral reply submissions.

200. What is clear, however, is that as Planet Energy salespersons, J.M. and K.N. can never also be the "account holder's agent" for the consumers they enrolled in the Contracts.

201. Subsection 11(4) of the ECPA states: "No supplier shall enter into, renew or extend a contract with such persons or classes of persons acting on behalf of an account holder as may be prescribed." Section 6 of the Regulation allows for suppliers to enter into agreements with "the account holder's agent at the time the action is taken". Finally, s. 2 of the Regulation defines "account holder's agent" to include "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."

202. To conclude that an "account holder's agent" and a supplier's salesperson can be the same person for a given transaction (as Planet Energy suggests) would create a host of absurd consequences, particularly for 'in-person' transactions. For example:

(a) it would contravene the Regulation for a salesperson not to sign the contract – both as the person signing on behalf of the consumer, and as the person signing on behalf of the supplier (s. 7(1)17);

(b) a salesperson would have to sign an acknowledgment that they received a contract (qua account holder's agent) from themselves (qua salesperson) (s. 7(1)18) – and the same is true for disclosure statements (ss. 8(1)(d), (2)(d), (3)(d)); and

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[244] **Transcript (Vol. 2)** at p. 149:10-13 (J.M.); **Transcript (Vol. 3)** at pp. 33:20-22 (K.N.) and 55:3-18 (R.A.).
[245] **Transcript (Vol. 5)** at pp. 78:1-6 and 80:3-8 (Silvestri).

(c) a salesperson for a supplier would receive a verification call from that same supplier (s. 13).

203. Even more importantly, allowing a salesperson to also act as agent for account holders in the very same transaction would compromise fundamental aspects of the Consumer Protection Regime. The actual account holder would no longer be required to receive the contract or disclosure statement.[246] For "contracts entered into over the internet", the entire arrangement could be done by the salesperson, without the actual account holder having the opportunity to review any of the key documents, acknowledgments, or contract terms and conditions for themselves prior to enrolment.[247]

204. As Mr. Silvestri conceded, when customers do not enroll themselves, they are deprived of the opportunity to review the documents, statements and acknowledgments that allow customers to make an informed decision about switching to Planet Energy, prior to enrolment.[248] That is precisely what happened in this case – and precisely what would be authorized to occur in future cases if a salesperson can also be an account holder's agent in the same transaction. The Consumer Protection Regime's objective of ensuring consumers have the information necessary to make educated decisions about complicated energy products would be seriously undermined.[249]

205. The difficulty arises because the roles of salesperson and account holder's agent raise an inherent and unavoidable conflict of interest. Salespersons are naturally motivated to make sales and earn revenue; they normally act for a given supplier in respect of multiple transactions. By contrast, an account holder's agent should be motivated exclusively to look out for an account holder's best interests: obtaining and reviewing all relevant information for that account holder, and ensuring that account holder's informed decision (if one can be made) is properly executed. These two positions cannot co-exist in a single individual, with respect to a single transaction.

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[246] Regulation, ss. 7(1)17 and 18.

[247] Regulation, s. 9(c).

[248] **Transcript (Vol. 5)** at pp. 85:14 to 86:2 (Silvestri).

[249] Ontario legislative proceedings (Session 39:2; third reading on April 13, 2010) at 1610 (*per* Hon. Brad Duguid, Minister of Energy): http://hansardindex.ontla.on.ca/hansardeissue/39-2/l014.htm. A copy of the relevant excerpts is included in Staff Brief, Tab 7.

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, Staff Brief, Tab 6.

206. Such an arrangement would invite all manner of mischief. In this case, for example, the salespersons involved paid no attention to the acknowledgments or check boxes they needed to answer throughout the enrolment process – they simply clicked what was necessary to complete the enrolments.[250] That is fundamentally inconsistent with someone acting in an agency role for an account holder. But it is not surprising coming from a salesperson rushing through the process to earn a commission.

207. It is telling that Planet Energy's legal position, as expressed by Mr. Silvestri, is at odds with its "very strict policy" that customers must be allowed to review the enrolment documents by themselves, for themselves.[251] Indeed, the Training Manual states that it is a "very serious offence" for IBOs to be enrolling consumers on their own, under any circumstances.[252] When asked to reconcile these statements with its newly formed position that IBOs can enrol consumers with their "authorization", Mr. Silvestri explained that he understood a "very serious offence" to mean a violation of the online attestation[253] – a highly strained interpretation that does not accord with common sense.

H. Allegation 6: In the alternative, Planet Energy failed to meet requirements for contracts entered into over the internet

208. In the alternative, even if the Panel concludes that the Contracts should be considered "contracts entered into over the internet" (which Staff denies), the manner in which consumers were enrolled in those Contracts – i.e. through Planet Energy salespersons J.M. and K.N. – constitute breaches of the Consumer Protection Regime.

209. In this regard, allegation 7 states:

> In the alternative, even if the consumers enrolled by J.M. and K.N. are considered to have entered into contracts over the internet (which is denied), Planet Energy breached sections 11 and 12(2) of the ECPA, and sections 9(c), 9(e), 9(f), and 9(h) of the Regulation, as a result of the actions of its salespersons, J.M. and K.N., acting on behalf of Planet Energy, because these internet contracts did not include

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[250] **Transcript (Vol. 2)** at p. 116:10-12 (K.N.); **Transcript (Vol. 3)** at pp. 47:3-5 and 48:1-16 (K.N.).
[251] **Transcript (Vol. 4)** at pp. 71:8-12 (Silvestri).
[252] **Training Manual**, Ex. KX1.4, Tab 6B at p. 247.
[253] **Transcript (Vol. 5)** at p. 78:15-23 (Silvestri).

> any opportunities for consumers to review, print, check-off boxes on, or accept the contracts.

210. Section 11 and subsection 12(2) require that "[i]f 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."

211. For contracts entered into over the internet, s. 9 of the Regulation sets out that suppliers must ensure:

> (a) "the web page includes statements with boxes to be checked off by the consumer in order to proceed with the transaction" (s. 9(c));
>
> (b) "that, as part of the transaction, the consumer is required to review the applicable disclosure statement and price comparison and indicate that he or she has read and understood it by checking a box" (s. 9(e));
>
> (c) "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" (s. 9(f)); and
>
> (d) "that below the signature contemplated in clause (g), two boxes are displayed with a request that the consumer check only one…" (s. 9(h)).

212. All of these provisions were breached in respect of the Contracts. Again, J.M. and K.N. personally completed the online enrolment to enter into the Contracts, without the consumers being present and without their participation.[254] Since they did not participate in the enrolment process, these consumers did not have the opportunity to check off any boxes, review any statements, or download or print any documents, while entering into their Contracts.

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[254] **Transcript (Vol. 2)** at pp. 75:13 to 76:16 (J.M.); **Transcript (Vol. 3)** at pp. 32:5-11 and 34:6 (K.N.), and 57:2 (R.A.); **Transcript (Vol. 4)** at p. 12:9-22 (R.H.)

I. Allegation 7: Planet Energy imposed an improper cancellation fee with respect to consumer R.A.

213. The evidence conclusively establishes, and Planet Energy does not contest,[255] allegation #7 (with the exception of the allegation that the unfair practice was done knowingly).

214. For ease of reference, allegation 7 states:

> Planet Energy engaged in an unfair practice, breached section 19(4) of the ECPA and sections ~~5(1)(xi) and~~ 21(d) of the Regulation when, on or about October 5, 2015, a Planet Energy representative advised consumer R.A. that she would have to pay a cancellation fee of $250 plus tax, when in fact R.A. was entitled to cancel her contract with Planet Energy without any penalty within 30 days of receiving her first bill (which was on September 11, 2015). *[Allegations that are not being pursued shown in strikethrough]*.

215. On October 5, 2015, after receiving her first bill from Planet Energy, R.A. called Planet Energy to get some kind of explanation for the unexpected, significant increase on her energy bill.[256] As it turned out, this increase was caused in large part by the global adjustment, which K.N. never mentioned or explained to her.[257]

216. On R.A.'s October 5, 2015 call with Planet Energy, a Planet Energy CSR wrongly advised R.A. that she would have to pay a cancellation fee of $250 plus tax.[258] In fact, R.A. was entitled at that time to cancel her contract with Planet Energy without penalty, since the call occurred within 30 days of receiving her first bill on September 11, 2015.[259] Given that R.A. explicitly mentioned that date to the CSR on their call,[260] the most favourable explanation for Planet Energy was that the CSR was uninformed about the basic rules for no-cost cancellation under the Consumer Protection Regime. At worst, the CSR told R.A. she would have to pay a cancellation charge knowing that she was entitled to terminate without penalty, though Staff is not pursuing the allegation that this unfair practice was engaged in knowingly.

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[255] **Transcript (Vol. 1)** at pp. 10:25 to 11:3.
[256] **Transcript (Vol. 3)** at p. 61:8-14 (R.A.).
[257] **Transcript (Vol. 3)** at p. 55:25 (R.A.).
[258] **Transcript (Vol. 3)** at pp. 61:12 to 62:13 (R.A.); **R.A. call to Planet Energy (Oct 5, 2015)**, Ex. KX1.2, Tab 41A at p. 8.
[259] **Transcript (Vol. 1)** at p 60:23 (R.A.); **R.A. Third Party Documents**, Ex. KX1.2, Tab 40, p. 12.
[260] **R .A. call to Planet Energy (Oct 5, 2015)**, Ex. KX1.2, Tab 41A at p. 2.

217. Over the next few months, R.A. called Planet Energy several more times, and was again told that she would have to pay $250 plus tax in cancellation fees.[261] Her contract was eventually cancelled without penalty only after she made a complaint to the OEB.

218. This amounts to a violation of s. 19(4) of the ECPA, as well as s. 21(d) of the Regulation. Together, these provisions require Planet Energy to cancel a contract "without cost or penalty… not more than 30 days after receiving the first bill under the contract".

219. Poorly informed CSRs exacerbate the impact of problems in Planet Energy's sales process, including problems of poorly trained salespersons who are able to enrol consumers on their own. CSRs are a possible (albeit inadequate) line of defence for consumers in the post-enrolment period, but only if they are able and willing to properly advise consumers of their rights.

PART IV - PENALTY

A. Administrative monetary penalty

220. The contraventions discussed in Part III stem both from Planet Energy's own conduct (*i.e.* inadequate training and testing, and a failure to meet the requirements for 'in-person' transactions) and the conduct of its salespersons J.M. and K.N., for which Planet Energy is responsible at law.[262]

221. In assessing the appropriate AMP for the contraventions set out in Part III, Staff has considered the five statutory criteria set out in O. Reg. 51/16 (made under the OEB Act). The contraventions in this case represent a significant deviation from key requirements of the Consumer Protection Regime, with a significant potential impact on consumers. Planet Energy deserves little, if any, credit for its modest mitigation measures. Finally, Planet Energy has a history of prior contraventions, and profited from the contraventions in this case.

222. Staff has also considered other relevant criteria. Prior guidance was available to, and ignored by, Planet Energy on issues relating to testing and the need for 'in-person' protections if

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[261] **Transcript (Vol. 3)** at p. 68:7-9 (R.A.); **R.A. call to Planet Energy (Nov 24, 2015)**, Ex. KX1.2, Tab 41B at pp. 5-6; **R.A. call to Planet Energy (Jan 26, 2016)**, Ex. KX1.2, Tab 41D at p. 3.

[262] ***Summitt*** at ¶¶24, 27 and 115, Staff Brief, Tab 1; ECPA, s. 10(2).

consumers do not enrol themselves. Even more importantly, Planet Energy knew, or ought to have known, that its sales model with ACN brought a very high risk of contravening the Consumer Protection Regime.

i. Significant deviations from the Consumer Protection Regime

223. The extent to which the contraventions associated with each transaction deviated from the requirements of enforceable provisions in this case was significant. Many of the relevant facts have already been set out above, but can be summarized as follows.

224. ***False and misleading statements***. It is difficult to imagine a more false and misleading sales presentation to consumers than the message conveyed by J.M. and K.N., which was as deceptive as it was simple. They promised consumers they would save money by switching to Planet Energy – without telling them anything about the global adjustment or cancellation fees prior to enrolling them into the Contracts. J.M. and K.N. did not provide consumers an opportunity to review the necessary documents prior to enrolment.

225. ***Inadequate training and testing***. Planet Energy's training and testing process fell far short of what was required by the Consumer Protection Regime. The Training Manual did not cover all the necessary material, particularly vis-à-vis cancellation fees, the global adjustment, price comparisons and disclosure statements, and additional fees and charges beyond the advertised monthly rate. The question bank contained inaccurate question/answer pairings, extremely easy questions (including one with the answer clearly noted), and a majority of questions with binary answer options.

226. Aside from the deficiencies in the content of the training and testing material, there was no system of oversight in place to ensure IBOs actually reviewed the Training Manual, or that the IBOs wrote the test themselves, without outside assistance. The end result of Planet Energy's training and testing model was that IBOs could be authorized to sell Planet Energy products without reading a word of the Training Manual, and without even writing the training test themselves, just as J.M. did.

227. ***No business cards or identification badges***. Neither J.M., nor K.N., wore an identification badge. K.N. did not hand out any business cards in the proper form, and for J.M. it was "hit and miss".

228. ***No protections for 'in-person' transactions***. Planet Energy did not put in place any of the key protections for 'in-person' transactions. Consumers did not receive text-based copies of the necessary documents prior to enrolment, or verification calls after enrolment. They were not required to sign any contracts or acknowledgments.

229. ***Improper imposition of a $250 cancellation fee***. On October 5, 2015, Planet Energy advised consumer R.A. that she would have to pay a $250 cancellation fee, even after R.A. advised the CSR that she received her first bill on September 11, 2015. This incorrect information was repeated in subsequent calls with Planet Energy. R.A. finally had her contract cancelled without penalty, but only after lodging a complaint with the OEB.

230. Many of these contraventions go right to the heart of the Consumer Protection Regime. As the OEB observed when assessing the matter of penalty in *Re Energhx*:

> 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.[263]

231. Taken individually – and certainly when considered together – the extent to which Planet Energy's conduct (including the conduct of its salespersons) for each transaction at issue in this proceeding deviated from the requirements of the Consumer Protection Regime is a factor militating strongly in favour of an elevated administrative monetary penalty.

ii. Significant potential impact on consumers

232. Planet Energy's contraventions of the Consumer Protection Regime had a significant potential to adversely affect consumers.

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[263] ***Re Energhx*** at p. 27, Staff Brief, Tab 3.

233. The OEB has previously recognized that "[t]he consequences of entering into a long-term fixed-price contract can be very serious. This element of household expense can be virtually doubled as a result of the energy price protection plans, especially those respecting the supply of electricity."[264] The consumers enrolled by J.M. and K.N. were entered into these types of contracts after being given false and misleading information by salespersons who had not been properly trained, without reviewing the necessary documents in advance, and without the benefit of the protections applied to 'in-person' transactions.

234. The evidence in this proceeding showed that as a result of Planet Energy's contraventions, both J.M. and K.N.:

(a) honestly but erroneously believed that consumers were guaranteed savings if they switched to Planet Energy [265], and advised their consumers accordingly[266];

(b) were not aware of, or did not understand, the global adjustment[267], and did not mention it to consumers prior to enrolment[268]; and

(c) were not aware that ending an energy contract could result in cancellation fees[269], and did not mention those fees to their consumers, or the circumstances in which those fees would or would not likely apply.[270]

235. Particularly when taken together with Planet Energy's failure to provide consumers with the required protections for 'in-person' transactions, this conduct had the potential for a direct, and significant, negative impact on consumers enrolled by J.M. and K.N.

236. The evidence heard in this proceeding confirms this to be true.

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[264] ***Summitt*** **(OEB)** at ¶206, Staff Brief, Tab 4.

[265] **Transcript (Vol. 2)** at pp. 60:20 and 155:3-13 (J.M.); **Transcript (Vol. 3)** at p. 29:23-28 (K.N.).

[266] **Transcript (Vol. 2)** at p. 60:8-9 (J.M.); **Transcript (Vol. 4)** at pp. 8:26 to 10:6 (R.H.); **Transcript (Vol. 3)** at pp. 29:23-28 and 31:1-4 (K.N.), and at pp. 53:11-26 and 57:9-11 (R.A.).

[267] **Transcript (Vol. 2)** at pp. 60:25-26, 106:17-20 and 155:5-7 (J.M.); **Transcript (Vol. 3)** at pp. 23:15-16 and 63:28 to 64:1 (K.N.).

[268] **Transcript (Vol. 2)** at p. 51:13-14 (J.M.); **Transcript (Vol. 4)** at p. 10:13-16 (R.H.); **Transcript (Vol. 3)** at pp. 30:7 (K.N.).and 55:25 (R.A.).

[269] **Transcript (Vol. 2)** at pp. 64:8, 108:7-9 and 156:6-10 (J.M.); **Transcript (Vol. 3)** at pp. 18:10 and 30:10-13 (K.N.).

[270] **Transcript (Vol. 2)** at pp. 63:27 and 64:22 (J.M.); **Transcript (Vol. 3)** at pp. 30:10-13 (K.N.) and 56:1-3 (R.A.).

237. R.H. (who was enrolled by J.M.) was taken by surprise when he found out he had to pay a $1,400 cancellation fee. His reaction was one of "disbelief".[271] R.H. testified that his ordeal with Planet Energy has been very upsetting and frustrating, and has had an impact on his friendship with J.M.[272] R.H. began receiving collection letters almost immediately upon selling one of his properties. Since then, the collection agency has sent multiple letters and made multiple phone calls.[273] R.H. continues to receive letters and calls, which is very upsetting for him.[274]

238. R.A. (who was enrolled by K.N.) testified as to the impact Planet Energy's contraventions have had on her:

> I feel that I was misled, and taken advantage [of], to be pushed in a false contract which caused me financially -- which caused me loss financially and emotionally.
>
> Number two, I just called so many times to get cancellation, okay. They didn't let me go; every time I got rejected. So many phone calls, so much waste of time, too much stress and frustration for me. It's not the money. It is the frustration.
>
> And number three, my family did not approve and did not -- did not approve nor appreciate that I got involved in this contract. So kind of I feel that I am a failure. I cannot make good decisions, even though I am the one who makes financial decision with my husband always. Okay.
>
> And so my family, so I just think they kind of lost their trust to me because I did this. And just that gave me sometimes depressed mood. I didn't -- every time I got this, the bill, like for couple of weeks before and after, I was angry with myself.
>
> And my last word, I don't want this happen to anybody in this beautiful and peaceful country, especially for people whose second language or third language is English and they are hardworking people, they can hardly find time to go after these contracts.[275]

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[271] **Transcript (Vol. 4)** at p. 21:20 (R.H.).

[272] **Transcript (Vol. 4)** at p. 28:24-28 (R.H.).

[273] **Transcript (Vol. 4)** at p. 22:14-24 (R.H.); **Transcript (Vol. 2)** at pp. 86:27 to 87:13 (J.M.); **Collection Letter dated December 21, 2015,** Ex KX1.2, Tab 32

[274] **Transcript (Vol. 4)** at p. 29:1-12 (R.H.).

[275] **Transcript (Vol. 3)** at p. 29:1-12 (K.N.).

239. In addition to R.A., two additional consumers enrolled by K.N. also made complaints to the OEB (Dr. A.A. and Dr. B.).[276] One complaint was resolved at the complaint level when Planet Energy agreed to terminate the contract without a penalty.[277] The second complainant was refunded his cancellation fee after his complaint to the OEB.[278]

240. Although they might not have taken the step of launching a complaint to the OEB, other consumers enrolled by K.N. were upset that they were paying higher energy prices than before.[279] Several consumers enrolled by J.M. also experienced significant, unexpected rate hikes in their energy rates, due to the global adjustment.[280]

241. Notably, the relevant consideration under this criterion is the *potential* impact on consumers. The fact that only two consumers came forward to testify about their complaints in this case does not detract from the baseline level of potential adverse impact caused by the number and nature of Planet Energy's contraventions in this case, as buttressed by the evidence heard in the proceeding. However, as will be discussed further below, the specific evidence relating to the impact of these contraventions on R.A. calls for a higher administrative monetary penalty with respect to that particular transaction.

242. The suggestion that Planet Energy's business model has attracted a low number of complaints is not determinative in assessing the criterion of potential impact on consumers, and in any event is not borne out in the evidence.

243. In his testimony, Mr. Silvestri stated that Planet Energy had a "complaint ratio" of only 0.12% in respect of electricity contracts for the years 2011 to 2013, based on the OEB's assessment from April 2014.[281] While this is true, it is only part of the story. More recent statistics paint a very different picture of the number of complaints received by Planet Energy. In 2015 and 2016, Planet Energy's complaint ratio for electricity consumers was much higher than the figure referenced by Mr. Silvestri (0.25% and 0.35% respectively) and well above the

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[276] **Transcript (Vol. 2)** at pp. 140:26 to 141:3 (J.M.).
[277] **Transcript (Vol. 1)** at p. 61:3-11 (Armstrong)
[278] **Transcript (Vol. 5)** at pp. 107:21 to 108:3 (Silvestri)
[279] **Transcript (Vol. 3)** at p. 37:12-14 (K.N.).
[280] **Transcript (Vol. 2)** at p. 61:1-5 (J.M.).
[281] **Transcript (Vol. 4)** at p. 133:8-14 (Silvestri); **Assessment (April 1, 2014)**, Ex. KX1.4, Tab 18.

industry average (0.20% and 0.22%). The difference in complaint ratios for those years was even larger for natural gas consumers: in 2016, Planet Energy's complaint ratio of 0.19% was almost three times the industry average of 0.07%.[282]

244. Mr. Silvestri stated that the complaint figures in the assessments are inflated because they include complaints relating to the global adjustment.[283] But some complaints about the global adjustment – for example, complaints that it was ignored, misrepresented or inaccurately explained by the salesperson – would be legitimate complaints vis-à-vis Planet Energy. In any event, the same dynamic with consumer complaints about the global adjustment would be expected to impact all retailers in the industry (since all consumers must pay the global adjustment and therefore all retailers must cope with it), and so a relative comparison of complaint ratios still gives a reliable indication of Planet Energy's performance as compared to the industry as a whole.

iii. Limited mitigation measures

245. The onus is on Planet Energy to raise and prove any mitigation measures. At best, the only indication of any mitigation measures taken by Planet Energy is that it allowed three consumers enrolled by K.N. to cancel their contracts without penalty, after those consumers had already made a complaint to the OEB.

246. In the case of R.A., cancellation without penalty cannot be deemed mitigation – it was her right under the Regulation and her contract was cancelled without penalty four months after it ought to have been (and her contract with Planet Energy continued to flow for another 3 months). R.A. raised the issue repeatedly with Planet Energy, to no avail. She made no progress until she filed a complaint with the OEB. R.A. has never been reimbursed the difference between her contract price and the utility price up to the time she was switched back to her utility.

247. Mr. Silvestri testified that Planet Energy would reimburse a consumer for the difference between the contract price and the utility price if Planet Energy believed "that a contract was not

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[282] A chart of all the complaint ratios for the years 2011-2016 is included at Schedule "B" of these submissions.

[283] **Transcript (Vol. 4)** at p. 133:20-26 (Silvestri).

entered into properly, and the customer did not want to continue or re-enroll"[284]. Despite now being aware of the sworn testimony of J.M. and K.N. (and their anticipated testimony through witness statements delivered months ago), there is no evidence that Planet Energy made any inquiries with respect to any of the consumers enrolled by J.M. and K.N., beyond the "quality assurance" calls made to a subset of those consumers (which elicited coached responses, as J.M. and R.H. explained). Mr. Silvestri confirmed that there have been no reimbursements of any amounts to the consumers enrolled in the Contracts.[285]

248. The termination of ACN and Planet Energy's relationship was initiated by ACN, and is not a mitigation measure for which Planet Energy deserves any credit.

iv. Track record of previous contraventions

249. Planet Energy has previously contravened enforceable provisions of the Consumer Protection Regime.

250. On January 25, 2011, the OEB issued a Notice of Intention to Make an Order for Compliance and to Impose an Administrative Penalty. The Notice alleged violations of the Consumer Protection Regime by failing to meet the requirements for identification badges and business cards, as well as providing written confirmation of cancellation.[286]

251. On September 12, 2011, Planet Energy entered into an Assurance of Voluntary Compliance, whereby it admitted to certain violations of the Consumer Protection Regime with respect to identification badges, business cards, and providing written confirmation of cancellation. Planet Energy agreed to pay an administrative monetary penalty of $30,000.[287]

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[284] **Transcript (Vol. 5)** at pp. 110:28 to 111:4 (Silvestri).
[285] **Transcript (Vol. 5)** at p. 1:27 (Silvestri).
[286] **Notice of Intention to Make an Order for Compliance and to Impose an Administrative Penalty (Jan 25, 2011)**, Ex. KX1.2, Tab 16
[287] **Assurance of Voluntary Compliance**, Ex. KX1.2, Tab 17

v. Planet Energy derived a monetary benefit

252. Planet Energy's relationship with ACN was profitable for Planet Energy. For every ACN IBO who sold a Planet Energy product to a consumer – including the Contracts at issue in this proceeding – Planet Energy received a share of the gross margin.[288]

vi. Other relevant criteria: Planet Energy chose a very high-risk sales model

253. In assessing the appropriate AMP for the contraventions in this case, it is relevant to consider that Planet Energy elected to sell energy contracts by means that carried a very high risk of the Consumer Protection Regime being contravened.

254. Set out below are several features of the Planet Energy-ACN business model that Planet Energy knew, or ought to have known, would significantly increase the chances of contraventions occurring.

255. ***Salespersons with no prior knowledge of the energy industry.*** Most IBOs had no background in the energy industry,[289] meaning that the training and testing they received was their first exposure to these topics, they were more likely to misunderstand (or simply miss) information relating to these topics, and they were more likely to pass on that incorrect or incomplete information to consumers.

256. ***Salespersons with limited time and much to learn.*** The vast majority of IBOs selling energy contracts on behalf of Planet Energy did so part-time[290], meaning they had less time to invest in learning about the complicated energy products they were in charge of selling. New IBOs also had to learn about a host of different products beyond energy contracts (including phone plans, Internet services, water heaters and security systems[291]), as well as how ACN

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[288] **Transcript (Vol. 5)** at p. 95:7-11 (Silvestri).

[289] **Transcript (Vol. 5)** at p. 107:9 (Silvestri).

[290] **Transcript (Vol. 4)** at p. 69:2-5 (Silvestri). As K.N. put it when discussing whether online training was available for IBOs, "I didn't spend the time for sitting behind the computer… I didn't focus every day or all the time to this business": **Transcript (Vol. 3)** at p. 15:9-13 (K.N.).

[291] **Transcript (Vol. 5)** at p. 2:6 (Silvestri).

works (including its somewhat byzantine compensation system, the organization's hierarchy, how to use the back office and online store, etc.[292]).

257. Of all products sold by ACN IBOs, only Planet Energy contracts were subject to a unique consumer protection regime. IBOs who focussed primarily on other products might understandably forget or be indifferent to the rigorous regulatory regime that had to apply once they dealt in Planet Energy contracts.

258. ***No control over IBO recruitment.*** The recruitment of IBOs who sold Planet Energy products was left entirely to ACN.[293] IBOs did not undergo interviews, reference checks or background checks of any kind by ACN or Planet Energy[294] and were recruited mostly by existing IBOs.[295] ACN allows IBOs to recruit random individuals with whom they have no personal, business, social or acquaintance relationship, and even permits IBOs to engage in "cold calling" to recruit other IBOs.[296]

259. ***Consumers trust IBOs.*** IBOs are in a relationship of trust with most of the consumers they enrol,[297] making it less likely that those consumers would doubt or bother to independently confirm any false or misleading information they received from those IBOs. This dynamic makes it critical that IBOs be accurately informed through reliable and adequate training and testing procedures, and that consumers be provided with key documents before signing.

260. ***Consumers believe IBOs have expertise.*** Whether they are actually experts or not, the relationship of trust set out above leads consumers to <u>believe</u> IBOs are experts in the energy contracts they are selling. As R.H. put it, "eventually [J.M.] convinced me that he knew what he was talking about, he had been informed by Planet Energy, and I went ahead with it… I do rely on other people's expertise. Like I say, I am not a hydro salesman."[298]

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[292] **Transcript (Vol. 5)** at p. 6:3 (Silvestri).
[293] **Transcript (Vol. 4)** at p. 167:17-20 (Silvestri).
[294] **Transcript (Vol. 4)** at pp. 167:28 to 168:6 (Silvestri).
[295] **Transcript (Vol. 4)** at p. 167:23-25 (Silvestri).
[296] **ACN Policies and Procedures**, Ex. KX1.4, Tab 37, p. 619; **Transcript (Vol. 4)** at p. 168:11-13 (Silvestri).
[297] **Transcript (Vol. 5)** at p. 15:6 (Silvestri).
[298] **Transcript (Vol. 4)** at pp. 37:20 to 38:7 (R.H.).

261. ***Other IBOs are motivated to have new IBOs start selling energy contracts.*** Given the "overriding residual income" compensation structure at ACN, many IBOs in a particular "leg" will have a financial incentive to see a new IBO get qualified and start selling energy products.[299] This increases the risk that existing IBOs will do whatever is necessary to have a new IBO authorized to start selling – including writing their training test or providing new IBOs with false and misleading information to pass onto consumers.

262. ***Planet Energy had no control over information being shared between IBOs.*** Planet Energy understood that IBOs within the same "leg" share sales tips and strategies for how to sell products.[300] Mr. Silvestri recognized the serious consequences of IBOs sharing strategies, tips and information with each other, even suggesting that "if one IBO were to inform another IBO to commit an unfair practice to a consumer, then that would be a violation of the [Code of Conduct]."[301] Yet neither Planet Energy nor ACN had any process in place to determine what selling tips, strategies and information were being shared amongst IBOs.[302] Nor is there any evidence that they discouraged the sharing of such sales tips.

263. As a result, new IBOs were more susceptible to influence from other IBOs in respect of selling strategies, and/or making false and misleading statements to consumers (even if the IBOs honestly believed those statements to be true at the time). This happened to both J.M.[303] and K.N.[304]

264. ***Enormous size of salesforce.*** Planet Energy sold energy contracts through somewhere between 6,000 to 7,000 IBOs.[305] Yet only four individuals at Planet Energy were in the

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[299] **Transcript (Vol. 5)** at p. 18:27-28 (Silvestri).

[300] **Transcript (Vol. 5)** at p. 19:12-13 (Silvestri).

[301] **Transcript (Vol. 5)** at p. 20:26-28 (Silvestri).

[302] **Transcript (Vol. 5)** at pp. 19:22 to 20:5 (Silvestri).

[303] J.M. was told by another ACN IBO to enroll consumers himself: **Transcript (Vol. 2)** at pp. 82:16-27, pp. 116:20-22, and 120:28 to 121:2 (J.M.).. He was also told to coach consumers on how to answer questions: **Transcript (Vol. 2)** at pp. 83:3 to 84 (J.M.). He was also told not to review the Training Manual, and to have another IBO write his training test: **Transcript (Vol. 2)** at pp. 102:10-18, 104:4-6 and 121:9-12 (J.M.). Finally, J.M. was told to tell consumers they would save money and not to worry about the global adjustment**: Transcript (Vol. 2)** at pp. 154:24 to 155:13 (J.M.).

[304] K.N. was told by another ACN IBO (Claire) that the global adjustment would never exceed 9.99 cents per kWh: **Transcript (Vol. 3)** at p. 24:7-18 (K.N.).

[305] **Transcript (Vol. 5)** at p. 109:7-11 (Silvestri).

department charged with addressing and managing issues relating to IBOs.[306] With this degree of oversight, it is less surprising that salespersons would contravene the Consumer Protection Regime, and that Mr. Silvestri, as co-CEO of the company, far removed from the on-the-ground activities of IBOs, would be unaware of those contraventions.

265. ***Misguided and inaccurate view of an IBO's role.*** Mr. Silvestri conceptualized the role of IBOs as essentially conduits to a website (the enrolment portal), rather than the true salesperson role contemplated by the Sales Agency Agreement, incentivized by ACN's compensation structure, and confirmed in the evidence of every other witness in this proceeding. This led Mr. Silvestri to state on several occasions that IBOs did not need to be "energy experts", but rather just have a "high-level knowledge of the retail energy markets".[307]

266. If this evidence truly reflects Mr. Silvestri's (and Planet Energy's corporate) understanding of the role of IBOs, it suggests that part of the problem was that Planet Energy itself had a naïve and inaccurate view of exactly what its IBOs were doing in order to sell energy contracts and receive the rewards of the ACN Compensation Plan.

267. ***"Hands off" attitude.*** In many key respects, Planet Energy relied on ACN, rather than taking direct responsibility for managing and overseeing matters related to the sale of energy contracts. For example:

(a) If IBOs had any issues relating to Planet Energy contracts they sold to consumers, they were instructed and required to call ACN – not Planet Energy;[308]

(b) In the course of investigating or disciplining an IBO, it is ACN that would have direct contact and interactions with the IBO.[309] Neither J.M. nor K.N. were ever disciplined[310];

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[306] **Transcript (Vol. 5)** at p. 8:13 (Silvestri).

[307] **Transcript (Vol. 4)** at p., 74:3-4; **Transcript (Vol. 5)** at pp. 2:14-15, 6:19 and 7:16-17 (Silvestri).

[308] **Transcript (Vol. 4)** at p. 97:12-20 (Silvestri).. Apart from calls he received in respect of his own energy contracts, J.M. did not have any contact with Planet Energy representatives until years after he became an IBO, when he reached out to them to deal with R.H.'s cancellation fees (in or around December 2015): **Transcript (Vol. 2)** at p. 87:22-23 (J.M.). K.N. did not speak to anyone from Planet Energy before he took the online test: **Transcript (Vol. 3)** at p. 17:2 (K.N.).

[309] **Transcript (Vol. 4)** at p. 109:18-22; **Transcript (Vol. 5)** at p. 8:16-22 (Silvestri).

(c) Much of the information or data relating to salespersons came directly from ACN and Planet Energy took it at face value.[311] Even where the information did not appear to make any sense – such as in the case of K.N.'s testing date, as compared to the date when he began enrolling consumers in energy contract[312] – Planet Energy did not always investigate the matter.[313]

268. ***Extremely limited role in providing training.*** Pursuant to their contract with ACN, Planet Energy had the right to be directly involved in providing training sessions to IBOs at ACN events,[314] including the weekly Saturday rallies that attracted thousands of new and prospective IBOs.[315] Instead, Planet Energy's involvement was limited to making monthly presentations at events scheduled on Friday evenings – which IBOs were not required to attend – and setting up a kiosk at quarterly ACN conferences.[316]

269. ***No monitoring of IP addresses associated with enrolments.*** During the course of its relationship with ACN, Planet Energy had the ability to determine the IP addresses associated with particular enrolments, but it never tracked that information.[317] Mr. Silvestri explained IP addresses were not part of Planet Energy's "red flag" system for potential compliance concerns because he understood they were unreliable.[318] When pressed, however, he conceded that this information came from Planet Energy's own Vice-President of Information Technology, and was

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[310] **Transcript (Vol. 2)** at p. 89:13 (J.M.); **Transcript (Vol. 3)** at p. 38:10 (K.N.).

[311] **Transcript (Vol. 5)** at p. 70:19-22 (Silvestri).

[312] In the R.A. Consumer Complaint Response, the information provided by Planet Energy for K.N. – which Planet Energy originally obtained from ACN – shows a "Date of Initial Training" and a "Date Agent Active" of April 17, 2015: **R.A. CCR**, Ex. KX1.2, Tab 1, p. 4; **Transcript (Vol. 5)** at pp. 69:4-8 and 70:14 (Silvestri).. Yet, according to the Updated Q1 Spreadsheet provided by Planet Energy to the Board, K.N. was selling energy contracts as of at least March 2015: **Transcript (Vol. 5)** at pp. 69:20 to 70:14 (Silvestri). This means that either K.N. was permitted to sell Planet Energy contracts before he successfully passed his test, or Planet Energy obtained misinformation from ACN as to the dates of his testing and active status, and did not question or investigate that information before providing it to the Board: **Transcript (Vol. 5)** at pp. 70:9 to 71:1 (Silvestri). All Mr. Silvestri could offer by way of an explanation was that this "appears to be an error": **Transcript (Vol. 5)** at p. 70:25-26 (Silvestri).

[313] **Transcript (Vol. 5)** at p. 71:1 (Silvestri).

[314] **Transcript (Vol. 4)** at p. 142:21 (Silvestri).

[315] **Transcript (Vol. 2)** a p. 16:13-20 (J.M.).

[316] **Transcript (Vol. 4)** at pp. 94:27 to 95:10, and 142:25 to 143:8 (Silvestri).

[317] **Transcript (Vol. 5)** at pp. 89:12-15 and 91:17-19 (Silvestri).

[318] **Transcript (Vol. 5)** at p. 91:25-26 (Silvestri).

only provided at some point after Planet Energy received notice in May 2016 that the OEB was conducting the Inspection.[319]

270. Despite his concerns about the reliability of IP addresses, Mr. Silvestri acknowledged that cases such as J.M.'s – where the same IP address was used to enrol four different consumers in four different cities – called, at the very least, for an investigation.[320] Had Planet Energy been monitoring IP addresses, that investigation might have occurred early in J.M.'s tenure as an IBO, and many of the contraventions in this case could have been avoided.

271. ***Conclusion.*** Ultimately, Planet Energy could have sold energy contracts in any number of ways. It chose to partner with ACN, under a system with the features set out above. The resulting sales model gave rise to a very high risk of Consumer Protection Regime violations occurring in practice. That is a factor militating in favour of a higher administrative monetary penalty.

vii. Other relevant criteria: Planet Energy ignored prior guidance

272. Planet Energy has received, and chosen to ignore, prior guidance directly related to many of its contraventions in this case.

273. The Bulletin, which was sent to Planet Energy in April 2012,[321] contained the clear message that if a salesperson actually did the work of enrolling a consumer online (rather than the consumer doing the enrolment themselves), then the 'in-person' transaction requirements would apply. Despite being aware of this guidance for more than five years, Planet Energy forged ahead under a sales model where there was no way to guard against salespersons doing the enrolments themselves (and, in fact, there was an elevated risk of that occurring), and did not put in place any of the protections for 'in-person' transactions.

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[319] **Transcript (Vol. 5)** at p. 92:7-14
[320] **Transcript (Vol. 5)** at pp. 90:26 to 91:14.
[321] **Transcript (Vol. 1)** at p. 69:6-8.

274. As noted above, Planet Energy similarly ignored guidance it received following a 2011 audit by Ernst & Young to assess compliance with the ECPA. The resulting Audit Report,[322] which was provided to Planet Energy,[323] states:

> 4) Training tests – On review of the training process, EY observed that the following requirements were not met:
>
> > i. Important Reminders section, stated that the test is an open book test where the salespersons and verification representatives could refer to the training material to ensure they pass the test.
> >
> > ii. As the training test for salespersons was given online, the requirement that the training test is conducted in a manner that would not permit the persons taking the test to share questions and answers with one another while taking the training test was not met.[324]

275. Despite being alerted to Ernst & Young concerns that the "open-book" instruction and the manner of the training test failed to meet the requirements of the Consumer Protection Regime, Mr. Silvestri confirmed that there have been no material changes to Planet Energy's business practices with regards to IBO training and testing processes, apart from having test questions randomly drawn from a question bank.[325]

viii. Follow-up emails and quality assurance calls do not address risks

276. It is anticipated that Planet Energy may rely on its 'follow-up emails' and welcome letters to consumers, as well as its random "quality assurance calls", to argue that it was diligent in guarding against the above-mentioned risks of its business model with ACN.

277. In fact, neither measure goes very far in addressing those risks, and should not reduce the appropriate AMP in this case. At best, any reduction should be minimal.

278. Providing consumers with follow-up emails and welcome letters does not materially mitigate the risk created through Planet Energy's partnership with ACN. As can be seen from the consumers R.H. and R.A. in this case, the reality is that after hearing a simple and convincing

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[322] **Audit Report**, Ex. KX1.2, Tab 15.
[323] **Transcript (Vol. 5)** at p. 30:2 (Silvestri).
[324] **Audit Report**, Ex. KX1.2, Tab 15 at pp. 7-8.
[325] **Transcript (Vol. 4)** at p. 117:28; **Transcript (Vol. 5)** at p. 31:6-28 (Silvestri).

(albeit false and misleading) sales pitch from someone they trust, consumers do not pay close attention to these documents.[326]

279. The script for the "Quality Assurance" calls made by Planet Energy did not address key issues such as global adjustment, cancellation rights or additional fees beyond the fixed rate advertised by Planet Energy.[327] By Mr. Silvestri's own admission, these calls were merely designed to "confirm the customer was aware of the enrolment."[328] And they did not even do that, since consumers gave inaccurate answers to the leading questions posed by Planet Energy CSRs, as they were told to do by J.M.[329]

280. Moreover, when consumers like R.H. did raise important issues – such as cancellation fees – the information provided was, at best, incomplete and misleading. (In particular, R.H. was left without any understanding of whether his energy consumption was above the 15,000 kWh threshold, so as to trigger an increased level of cancellation fees.[330])

ix. AMP calculation

281. In total, Staff seeks an AMP of **$383,000.**

282. Most of Planet Energy's contraventions occurred for each one of the 37 transactions leading to each one of the 37 Contracts with consumers. There were a few rare exceptions – for example, the failure to hand out business cards (which does not apply for some of the Contracts enrolled by J.M.) and the false and misleading statements concerning the "Before and After" comparison (which were made by J.M., but not K.N.).

283. Apart from the transaction involving R.A. (dealt with separately below), it is useful to consider the remaining 36 Contracts with consumers as being in the same category for the purposes of calculating an appropriate AMP, given the similar nature of the contraventions and how the criteria set out above apply to these transactions.

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[326] **Transcript (Vol. 3)** at pp. 58:5 to 59:4, and p. 73:28 (R.A.); **Transcript (Vol. 4)** at pp. 33:19-20 (R.H.).
[327] **Transcript (Vol. 5)** at pp. 96:14 to 97:6 (Silvestri); **Quality Assurance call script**, Ex. KX1.4, Tab 11B, p. 491.
[328] **Transcript (Vol. 5)** at p. 96:23-28 (Silvestri).
[329] **Transcript (Vol. 2)** at pp. 83:6 to 84:7 (J.M.); **Transcript (Vol. 4)** at pp. 19:9-20 (R.H.).
[330] **Transcript (Vol. 4)** at pp. 17:26 to 18:13 (R.H.).

284. Taken together, these considerations lead Staff to seek an AMP of **$10,000** for each of these 36 transactions leading to Contracts with consumers.

285. Although this figure has been calculated on a per-transaction basis, it must be recognized that Planet Energy's contraventions involving a failure to adequately train and test IBOs stands separate and apart from, but also underpins, each of the individual transactions. It also reveals a far broader and deeper problem in Planet Energy's operations.[331] Mr. Silvestri's evidence was that over the course of Planet Energy's relationship with ACN, between 6,000 and 7,000 IBOs – all of whom went through a similar if not identically flawed training and testing process – enrolled approximately 24,000 low-volume consumers (other than themselves).[332]

286. In the case of the four large-volume electricity consumers enrolled by J.M., Planet Energy has breached the ss. 1(d), 1(f) and 1(h) of the Codes (which apply to large-volume consumers), but has not contravened the ECPA or the Regulation. For these four transactions, Staff seeks an AMP of **$2,000** per transaction.

287. Finally, in the case of R.A., there is an additional unique contravention in that Planet Energy provided her with the wrong information relating to her cancellation rights and did not allow her to cancel her contract when she had the statutory right to do so. The extent of this particular contravention was significant: it was completely improper for Planet Energy to advise R.A. that a cancellation fee applied, particularly because R.A. gave the CSR clear information to allow him to recognize that her right was engaged to cancel without penalty within 30 days of her first bill. R.A. also has provided direct evidence of the serious impact Planet Energy's conduct had on her financially and emotionally. In the circumstances, the OEB Enforcement Team seeks an AMP of **$15,000** in respect of the transaction with R.A.

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[331] Mr. Silvestri's repeated references to the fact that "the only IBO that we ever became aware of [not answering test questions himself] was Mr. MacArthur" do not support the conclusion that this was an isolated incident: **Transcript (Vol. 4)** at p. 93:8-20 (Silvestri). As he admitted in cross-examination, Mr. Silvestri has no personal knowledge of how IBOs completed their tests, and is in no position to say that other IBOs did not engage in the same conduct as Mr. MacArthur in terms of having someone else complete their online, unsupervised test: **Transcript (Vol. 5)** at p. 23:12-16. If anything, the fact that Mr. MacArthur followed instructions from other IBOs in terms of getting his online test complete suggests that this was not an isolated incident: **Transcript (Vol. 2)** at pp. 102:10-18, 104:4-6 and 121:9-12 (J.M.).

[332] This figure is calculated as 20% of the 120,000 total enrolments: **Transcript (Vol. 4)** at pp. 99:26 to 100:4; **Transcript (Vol. 5)** at p. 17:11-18 (Silvestri).

x. AMP sought is fair and proportionate

288. The total AMP sought is fair and proportionate, given the vast number and serious extent of the contraventions in this case, as well as the other criteria canvassed above. The AMP is designed to be "protective and preventive"[333], and will achieve that objective by sending a clear message to Planet Energy – and any other retailers considering engaging in a similarly risky business model with a multi-level marketing firm – that they must take appropriate precautions.

289. The AMP is not of such a magnitude that it could be considered penal or punitive in nature.[334] On the contrary, it is generally aligned with – and arguably, in view of the contraventions that occurred in each case, even more modest than – the AMP the OEB has ordered in the only other comparable case, *Re Summitt*.

290. In that decision, the OEB ordered Summitt to pay $9,000 for each of the 15 contraventions where a salesperson made false and misleading representations regarding price comparisons (which was an unfair practice under what was then s. 88.5 of the OEB Act) – and a further $9,000 for each of the eight instances where Summitt failed to deliver a written copy of the contract to the consumer within the prescribed period (under what was then s. 88.9 of the Act).[335]

291. In this proceeding, the Staff has adopted a transaction-based (rather than contravention-based) approach, just as the OEB did in *Re Energhx*.[336] Rather than seek an AMP of close to $10,000 per contravention – which would result in a much higher total penalty – Staff seeks a global figure of $10,000 (or less, with the exception of R.A.'s Contract) for each transaction in which multiple contravention occurred and without any additional lump sum for the deficiencies in Planet Energy's training and testing.

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[333] ***Summitt*** at ¶67, Staff Brief, Tab 1.

[334] ***Summitt*** at ¶¶68-69, Staff Brief, Tab 1.

[335] ***Summitt* (OEB)** at ¶¶212-213, Staff Brief, Tab 4.

[336] ***Re Energhx*** at pp. 19 and 28, Staff Brief, Tab 3. The OEB Enforcement Team does not take the position that a contravention-based approach would never be appropriate.

B. Restitution

292. By operation of law, the 37 Contracts with consumers are deemed void, pursuant to:

(a) s. 12(2) and 16(1)(a) of the ECPA, since these consumers did not provide the acknowledgments and signatures required; and

(b) ss. 13 and 16(1)(b) of the ECPA and s. 10(1)(a) of the Regulation, since these consumers did not receive a text-based copy of the contract when they entered into the contract. (Even if they did, the contracts would be void under s. 15(1) of the ECPA, since these consumers did not receive verification calls).

293. Pursuant to s. 16(3) of the ECPA and s. 14(2) of the Regulation, as a result of those Contracts being deemed void, "the supplier must refund to the consumer the money paid by the consumer under the contract" within "60 days after the day the contract is deemed void." None of the consumers enrolled in the 37 Contracts at issue in this case have been reimbursed any of the funds they paid under their contracts with Planet Energy.[337]

294. Consistent with the views expressed in a OEB staff Bulletin on the issue,[338] the "money paid by the consumer under the contract" would include all amounts that the contract required or committed the consumer to pay with respect to the supply or delivery of the energy commodity under the contract, and that were in fact paid by the consumer. However, any amounts paid by the consumer on account of the global adjustment or as a final RPP variance settlement amount ought to be excluded. These are amounts that are payable by a consumer in accordance with regulations or the Board's regulatory requirements, and are thus not properly considered as amounts "paid… under the contract."

C. Costs

295. Staff submits that the issue of costs should be dealt with, in writing, following the release of this Panel's Decision and Order, and reserves its right to make submissions at that time.

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[337] **Transcript (Vol. 5)** at pp. 106:23 to 107:9; **Transcript (Vol. 3)** at pp. 11:13 to 12:27.

[338] **Board Staff Bulletin re "Refund Payable to a Low-Volume Consumer Following Cancellation of a Contract" (Mar 15, 2012)**, available at: https://www.oeb.ca/oeb/_Documents/Compliance/Bulletin_Refunds_20120315.pdf

PART V – ORDER REQUESTED

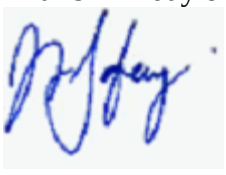
296. Staff respectfully requests an order:

a) requiring Planet Energy to pay an administrative monetary penalty in the amount of $383,000;

b) declaring the contracts set out in the Appendices to the Amended Notice of Intention to be void, with the exception of Contract Numbers 10032212, 10033779, 10024558 and 10020679 (electricity only) (*i.e.* the large-volume commercial accounts); and

c) for every contract declared void, requiring Planet Energy to refund the low-volume consumer all amounts paid under the contract.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of December, 2017.



Andrea Gonsalves and Justin Safayeni

Stockwoods LLP
Lawyer for OEB Enforcement Staff

SCHEDULE "A"
LIST OF AUTHORITIES

TAB	CASE LAW
1.	*Summitt Energy Management Inc. v. Ontario Energy Board*, 2013 ONSC 318
2.	*Thamotharem v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 198
3.	*Re Energhx*, EB-2011-0311
4.	*Re Summitt Energy Management Inc.*, 2010 LNONOEB 304
5.	*Harvey v. Talon International Inc.,* 2017 ONCA 267
	TEXTS
6.	Sullivan on Statutes (6th ed.)
	HANSARD
7.	Ontario legislative proceedings (Session 39:2, third reading on April 13, 2010)

SCHEDULE "B"

PLANET ENERGY VS INDUSTRY COMPLAINT RATIOS

ELECTRICITY						
Year	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
PE customers	28,688	32,965	36,305	43,081	39,731	33,682
Total customers	498,690	389,921	318,067	287,414	251,581	210,310
PE complaints	66	16	35	63	99	118
Total complaints	1,209	713	719	469	497	471
PE %	0.230%	0.049%	0.096%	0.146%	**0.249%**	**0.350%**
Industry %	**0.242%**	**0.183%**	**0.226%**	**0.163%**	0.198%	0.224%
NATURAL GAS						
Year	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
PE customers	16,443	16,108	19,092	21,632	20,820	17,690
Total customers	651,186	476,688	386,770	340,461	271,630	203,677
PE complaints	21	4	20	33	33	34
Total complaints	1,515	583	465	311	239	142
PE %	0.128%	0.025%	0.105%	**0.153%**	**0.159%**	**0.192%**
Industry %	**0.233%**	**0.122%**	**0.120%**	0.091%	0.088%	0.070%

CITATION: Summitt Energy Management Inc. v. Ontario Energy Board, 2013 ONSC 318
DIVISIONAL COURT FILE NO.: 624/10
DATE: 20130409

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT
KITELEY, DUCHARME, DALEY J.J.

B E T W E E N:	)	
Summitt Energy Management Inc.	)	*W. Burden, S. Selznick & J. I. Knol*, for the Applicant
Appellant	)	
- and -	)	
Ontario Energy Board	)	*M. Philip Tunley, A. Gonsalves & M. A. Helt*, for the Respondent
Respondent	)	
	)	**HEARD at Toronto: December 11, 2012**

REASONS FOR JUDGMENT

BY THE COURT

I. INTRODUCTION

[1] Pursuant to s. 33 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B (the "Act") Summitt Energy Management Inc. ("Summitt") appeals from an order of the Ontario Energy Board ("Board"), dated December 14, 2010, in which a Hearing Panel of the Board ("Hearing Panel") assessed and imposed an administrative mandatory penalty, issued a compliance order and directed that compensation and restitution be made by Summitt in favour of certain consumer complainants. Summitt requests that the Court quash the order of the Board and stay any further proceedings by it.

[2] For the reasons that follow, the appeal is dismissed.

II. THE HEARING

[3] Summitt is a retail energy marketer that offers fixed-priced natural gas and electricity programs to homeowners and businesses in Ontario. As such, it is licensed and regulated by the Board.

[4] On June 17, 2010, following its investigation of several consumer complaints regarding Summitt's business activities, the Board issued a Notice of Intention to make an Order for Compliance, Suspension and Administrative Penalty against Summitt.

[5] In the Notice of Intention, the Board alleged that 5 of Summitt's sales agents had contravened various sections of the Act, Ontario Regulation 200/02 (the "Regulation") and the Code of Conduct of Gas Marketers and the Electricity Retailer Code of Conduct (the "Codes") in relation to 28 consumer contracts.

[6] These consumer complaints were the subject of a hearing before a two member Panel of the Board. Compliance Counsel called Christine Marijan to give evidence about the investigation that had begun in the fall of 2009 and which included direct communication with complainants who had contacted the Board to complain about their contact with Summitt. In addition, 19 of the 28 complainants listed in the Notice of Intention were called with respect to the contraventions alleged including the allegations against 5 salespersons.

[7] In the course of the hearing, Compliance Counsel sought to establish that from August, 2008 to January, 2010 Summitt had contravened:

> Subsection 88.4(2)(c) and 88.4(3) of the Act in 19 instances through the actions of 5 of its sales agents by engaging in unfair practices as defined in Section 2 of Ontario Regulation 200/02;
>
> Sections 2.1 of the Code of Conduct for Gas Marketers and the Electricity Retailers Code of Conduct respectively (the "Codes") through the actions of 5 of its sales agents who engaged in unfair marketing practices as defined in section 2.1 of the Codes; and
>
> Subsection 88.9(1) of the Act in 10 instances by failing to deliver a written copy of the contract to the consumer within the time prescribed by regulation.

[8] It was also urged by Compliance Counsel that Summitt would likely contravene the above-mentioned provisions again in respect of its ongoing door-to-door sales activities.

[9] Summitt called as witnesses each of the five sales agents whose conduct was the subject of the complaints as well as the supervisor of the agency who provided one of those agents and Summitt's own Director of Compliance and Regulatory Affairs.

III. THE DECISION OF THE BOARD

[10] The Board issued its Decision and Order on November 18, 2010, which was followed by a clarifying Order on December 13, 2010. In its Decision and Order, the Hearing Panel noted that the proceeding was the Board's first opportunity to hear, under oath, testimony of customers of an energy retailer with respect to the practices of door-to-door retail sales persons in the energy retail market.

[11] In its reasons, the Board expressed the view that the investigation was carried out in such a fashion as to ensure that no person at the Board, "who might be engaged in the adjudication of any compliance action would be exposed in any manner whatsoever to conduct or the fruits of the investigation."

[12] It was also noted that the Board's staff had no knowledge of any aspects of the investigation leading up to the filing of the Notice of Intention, and that the Hearing Panel had no knowledge of any aspect of the investigation prior to the publication of the Notice. Rather, from the time of the publication of the Notice of Intention, all of the information that was available to, or was considered by the Board, was on the public record.

[13] In considering the allegations made against Summitt in the Notice of Intention, the Board examined several key components of Summitt's door-to-door sales activity namely: (a) the nature of Summitt's sales force; (b) Summit's two-part contract; (c) the representations regarding comparative pricing; (d) the representation of the "Provincial Benefit"; and (e) the nature of and the role of the "reaffirmation" call.

A. The nature of Summitt's sales force

[14] The Board noted that Summitt's retail sales staff was made up of employees and/or independent contractors or subcontractors. Summit provided its subcontractors with training materials but left the actual training of the salespersons to the subcontractor. It was noted that in most cases, the retail salespersons were given scarcely a few hours of training and mentoring before they were sent out to meet customers. The Board concluded that it was clear from the testimony of Summitt's salespersons that a few hours of training was not adequate training for sales persons expected to sell very significant contracts to relatively uninformed consumers.

B. *Summitt's two-part contract*

[15] The Board noted that it was beyond the scope of the proceeding to make any specific determination with respect to the actual contractual effect of the sales effort engaged in by Summitt's retail sales persons; however, the Board did find that the presentation of the two-part contract document to the customer, referred to by its retail sales persons as a "brochure," fell short of reasonable notice of the contents and the significance of the contractual documents.

[16] The Board considered the ambiguity it found in the two-part contract form used by Summitt when considering the evidence of the consumer complainants in this proceeding.

C. *The representations regarding comparative pricing*

[17] The Board had serious concerns with respect to representations made by Summitt's retail salespersons and in Summitt's brochures. In particular, it found that the brochures misrepresented the actual market price of the commodities at the time the sale was being made and illustrated a fixed price that was lower than what the customer was actually being offered under the Summitt program. As a result, the price comparison dramatically overstated the potential benefit of a fixed price contract.

D. *The representation of the Provincial Benefit*

[18] The Board also found that Summitt's comparative pricing information was misleading. It did not adequately inform electricity consumers that when a customer, who is supplied electricity by the local distribution company, changes to an electricity supplier such as Summitt, the Provincial Benefit, established by the provincial government for the purpose of collecting a variety of costs from consumers, is added to the energy retailer's contract price as a separate line item on the bills. Further, the comparative pricing information did not take into account the additional charge payable by a customer in respect of the Provincial Benefit.

E. *The nature of and the role of the reaffirmation call*

[19] Section 88.9(4.1) of the Act provides for a cooling off period for retail energy contracts, which consists of a 10 day period after which the customer can "reaffirm" the original contract.

[20] The Board concluded that the reaffirmation call method used by Summitt, as a genuine consumer cooling-off device, was fatally undermined. The retail salespersons represented to the customers that the calls were for the purpose of confirming that the retail salesperson had in fact attended at their home or that the calls were for the purpose of quality assurance.

[21] The Board also addressed the standard of proof imposed on Compliance Counsel. During the hearing the Board and counsel referred to the alleged violations and non-compliance by Summitt as "offences". The Board concluded that it was dealing with strict liability offences and accordingly the standard of proof was the balance of probabilities. The Board also held that the defence of due diligence was available with respect of the alleged violations and with respect to penalty.

[22] The Board considered the testimony of the consumer complainants, and assessed their credibility and reliability. The Board concluded that the evidence offered by the complainants and the tendered documentary evidence satisfied the Board that compliance counsel had proven the contraventions by Summitt on a balance of probabilities.

[23] In its reasons for decision, the Board examined the investigation of Summitt's business practices. Summitt had expressed concerns with respect to the fairness of that investigation; however, the Board concluded that there was no evidence that the compliance staff had acted inappropriately in the manner in which they investigated the consumer complaints.

[24] The Board held that Summitt was liable for the acts of 5 agents in respect of 43 distinct contraventions of the Act and the Codes in their dealings with 17 of the 28 consumer contracts.

[25] In considering the evidence of the consumer complainants, the Board did so with regard to the statutory provisions contained in Part V.1 of the Act, which generally deal with unfair practices by a retail electricity or gas marketer.

[26] Contraventions of these provisions trigger the Board's authority under ss. 112.1, 112.2, 112.3, 112.4, and 112.5 of the Act to impose penalties. These include suspension or revocation of licenses, and the imposition of monetary penalties. The Board concluded that its authority to impose these penalties flowed from s. 112.5 and Ontario Regulation 331/03.

[27] Having found that Summitt, through its retail salespersons, had contravened the Act and the Codes, the Board also considered its authority in respect of legislative compliance found in ss. 112.3 and 112.4 of the Act. The Board ordered Summitt to thereafter take all necessary steps to ensure compliance with ss. 88.4 and 88.9 of the Act, and s. 2.1 of the Codes.

[28] Although Compliance Counsel sought an order suspending Summitt's door-to-door sales activities pending the completion of an audit of its operations and processes relating to these activities, the Board determined that a suspension order was not appropriate. It required that Summitt undertake a review and audit of its sales practices on terms specified by the Board.

[29] Compliance Counsel also sought compensatory and restitutionary orders as a result of Summitt's violations. It was Summitt's position that compensatory or restitutionary orders were beyond the jurisdiction of the Board.

[30] The Board concluded that its statutory jurisdiction was sufficiently broad and clear to permit it to make orders to remedy a contravention by providing compensation and restitution in accordance with the provisions of s. 112.3 (1) of the Act.

[31] The Board ordered that Summitt cancel, without penalty or cost, the electricity or natural gas supply contracts entered into by 17 of the complainants, and to compensate those customers in accordance with the formula set forth in the Decision. Summitt was also ordered to repay 17 customers any liquidated damages relating to the cancellation of their electricity or natural gas supply contracts. Summitt was also directed to provide to 2 of the customers a letter indicating unequivocally that Summitt had no claim with respect to them and to take steps necessary respecting any collection agency and credit rating issues with respect to those 2 customers.

[32] As to the imposition of administrative penalties, the Board concluded that Summitt committed the contraventions with a view to economic gain, both on the part of the retail salespersons and the organization. The Board concluded that the contraventions fell into the high end of the moderate category of contraventions. The unfair practices achieved a higher level of turpitude: the nature of the contraventions fell within the major category and the effect into the moderate category.

[33] Further, the Board concluded that the 8 contraventions of s. 88.9 of the Act fell into the moderate category and the administrative penalty for these violations was set at $9,000 for each contravention.

[34] The Board concluded that the 15 violations of s. 88.4 of the Act were in the moderate category and warranted an administrative penalty of $9,000 per contravention while 2 major contraventions of s. 88.4 resulted in a penalty of $13,500.

[35] In the result, Summitt was ordered to pay administrative penalties totalling $234,000.

IV. ISSUES IN THE APPEAL

[36] The following issues are raised on this appeal:

(a) Applicable standard of review - Certain grounds of appeal call for a standard of review of correctness while others call for a reasonableness standard;

(b) Motion for the admission of fresh evidence on appeal - and if granted, whether a reasonable apprehension of bias is established. Summitt brought a motion at the appeal hearing seeking an order allowing for the admission of fresh evidence, and for leave to file an Amended Notice of Appeal asserting that there was a reasonable apprehension of bias on account of the Board's choice of independent legal counsel;

(c) Standard of proof - the Board applied the civil standard of proof. It is Summitt's position that the criminal standard of proof beyond a reasonable doubt was the standard that ought to have been applied;

(d) Due diligence – whether due diligence is available as a defence to the allegations or in the penalty phase;

(e) Requirement of separate penalty hearing - Summitt contends that the liability and penalty phases of the hearing before the Board should have been kept separate, so that matters relating only to penalty were not known or considered by the Board prior to determination of Summitt's liability;

(f) Restitution – Summit takes the position that the Board does not have jurisdiction to grant the equitable remedy of restitution in favour of the complainants;

(g) Abuse of process - Summitt argues that the proceeding was an abuse of process because the Board had led Summitt to believe that it was compliant with its regulatory obligations;

(h) Procedural Fairness – Summitt submits that it was denied procedural fairness in the conduct of the proceeding by the failure to disclose all relevant documents, including the 2009 Retail Compliance Plan; by the compressed timetable; and by reliance on a binder offered by Compliance Counsel to the Board that contained additional complaints which binder was not properly in evidence.

V. STANDARD OF REVIEW

[37] Various standards apply. First, if the Appellant establishes bias, an abuse of process or a breach of procedural fairness then there must be a new hearing. Second, the Board's ruling on the standard of proof and its treatment of due diligence are

subject to a standard of review of correctness. They are issues of general law that are both central to the legal system as a whole and outside the Board's specialized area of expertise. Third, as for the failure to have a separate penalty hearing and whether the Board had jurisdiction to order restitution, the appropriate standard of review is reasonableness.

VI. FRESH EVIDENCE

[38] In its motion, Summitt seeks leave to: (i) adduce fresh evidence on its appeal; and (ii) revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias by reason of Patrick Duffy of Stikeman Elliott LLP ("Stikeman Elliott") having acted as the independent legal counsel ("ILC") retained to advise the Board in the compliance proceeding. The fresh evidence is relevant only to the ground of bias.

[39] Section 134(4)(b) of the *Courts of Justice Act*, RSO 1990, c C.43 permits this Court to admit fresh evidence on appeal in a proper case. It provides:

> 134 (4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case, ...
>
> > (b) receive further evidence by affidavit, ... or in such other manner as the court directs;...
>
> to enable the court to determine the appeal.

[40] In its written submissions, the Board argues that we should apply the four-part test for admission of fresh evidence on appeal as set out by the Supreme Court of Canada in *R v. Palmer* as follows:

> (a) The evidence should generally not be admitted if, by due diligence it could have been adduced at trial; (this general principle will not be applied as strictly in a criminal case as in civil cases);
>
> (b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (c) The evidence must be credible in the sense that it is reasonably capable of belief; and,

(d) It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[1]

[41] Their position is that the fresh evidence is inadmissible because Summit was not duly diligent; because the evidence is not relevant as it does not relate to bias on the part of the Board; and because the admission of the new evidence cannot affect the result unless it gives rise to a reasonable apprehension of bias.

[42] In response, Summitt relies on the decision of the Ontario Court of Appeal in *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Limited Partnership*[2] for the proposition that the *Palmer* test does not apply where, as here, the material "is not directed at a finding made at trial, but instead challenges the very validity of the trial process."

[43] In his oral submissions, Mr. Tunley indicated that he was not opposed to the Court considering the fresh evidence and we shall do so. This evidence would be admissible under *Leader Media Productions Ltd.* as it is directed at the validity of the hearing process itself.

VII. REASONABLE APPREHENSION OF BIAS

[44] As mentioned above, Summitt seeks leave to revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias by reason of Patrick Duffy of Stikeman Elliott LLP ("Stikeman Elliott") having acted as the independent legal counsel ("ILC") retained to advise the Board in the compliance proceeding below. Summitt bases its argument of reasonable apprehension of bias entirely on the following two facts:

(a) Stikeman Elliott's representation of certain of the Appellant's competitors during the period 2008 - 2011, including involvement by Stikeman Elliott in other proceedings before the Board and/or other regulatory agencies on behalf of such parties; and

(b) Stikeman Elliott's Membership in the Ontario Energy Association (OEA), of which the Appellant and Appellant's counsel are also members, and involvement by Stikeman Elliott in certain OEA Committees.

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[1] *R v. Palmer*, [1980] 1 SCR 759 at 13

[2] (2008), 90 O.R. (3d) 561 (C.A.); see also *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323 (C.A.), at p. 325 *and R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.), at p. 169.

Having admitted the fresh evidence with respect to this issue, we also granted leave to Summitt to revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias.

[45] Bias is "a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues."[3] In this case there is no allegation of actual bias and there is no suggestion of reasonable apprehension of bias on the part of the decision-maker itself. Rather the submission is that there is a reasonable apprehension of bias because of the participation of the ILC for the two reasons set out above. We accept that an apprehension of bias can be created by issues that relate only to those assisting the actual decision-maker.[4]

[46] The test for reasonable apprehension of bias was set out in the dissent of Justice de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, and has since been confirmed by the Supreme Court, as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. According to the Court of Appeal, the test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly?" (Emphasis added)[5]

[47] This means that the reasonable person would understand: (1) the role of a member of the Ontario Energy Board, a quasi-judicial function. In particular, she would understand the obligation of Board Members to base their decisions on the evidence before them and the applicable law; (2) the ethical restraints and rules of professional conduct that govern lawyers and the fiduciary relationships they have with their clients. In particular, she would understand the rules relating to a lawyer's relationship to clients, quality of service, confidentiality, avoidance of conflicts of interest;[6] and encouraging respect for the administration of justice; (3) the nature of the industry, in particular the nature of the retail energy marketing sector; (4) the nature of the Ontario Energy Association, including its scope of activities and membership.

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[3] *R v. R.D.S.*, [1997] 3 SCR 484 (S.C.C.) at para. 105.

[4] *The King v. Sussex Justices, Ex Parte McCarthy*, [1924] 1 K.B. 256; *Hutterian Brethren Church of Starland v. Starland No. 47 (Municipal District)* (1993), 9 Alta. L.R. (3d) 1 (Alta. C.A.); *Mitchell v. Institute of Chartered Accountants of Manitoba*, [1994] M.J. No. 65 at para. 17, 18, 24 (Q.B.); aff'd [1994] M.J. No. 551 (C.A.)

[5] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 (S.C.C.). *R v. R.D.S.*, *supra*, note 3.

[6] The Law Society of Upper Canada, *Rules of Professional Conduct*, in particular rules 2.02, 2.03, 2.04 and 4.06.

[48] We shall consider the two bases for the allegation of a reasonable apprehension of bias separately. At the outset we note that the factual record is understandably sparse given the ruling of Perell J. quashing the subpoenas obtained by Summitt against Marika Hare, a member of the Board and Patrick Duffy, the ILC. We also must take note of the Board's comment at pg. 3 of the decision that since the publication of the Notice of Intention to Make an Order for Compliance, Suspension and Administrative Penalty against Summitt "all of the information that has been made available to or considered by the Board has been on the public record." [Emphasis added.]

A. The fact that the ILC's law firm had acted for competitors of Summitt

[49] Here Summitt raises two concerns about the fact that Stikeman Elliott, the ILC's law firm, was acting for Summitt's competitors at the same time that the ILC was advising the Board. First, they point out that Summitt operates in a very small and highly competitive industry sector. Its competitors stood to benefit from any difficulties encountered by Summitt, such as large monetary fines, suspension of its license, and/or loss of reputation. They submit that the ILC, as a result of his duty of loyalty to other clients, would have an incentive to encourage an adverse result for Summitt in order to benefit his other clients. Second, they point out that they had brought a motion for an order providing for the exchange and filing of written interrogatories. They suggest that if this motion had been granted they would have sought information about their competitors, including other clients of the ILC.

[50] We conclude that neither of these arguments supports a finding of a reasonable apprehension of bias. The other cases relating to legal advisers to decision-makers are readily distinguishable as the adviser has a direct association or interest with one of the parties in the actual *lis*. In this case, all we have is the fact that the ILC's law firm acted for competitors in the same industry in completely unrelated matters.

[51] To find a reasonable apprehension of bias would require the reasonable, right minded and informed person mentioned in *Committee for Justice and Liberty v National Energy Board* to assume that (1) the members of the Board ignored their duty to base their decision on the evidence before it and the applicable law; and (2) that Mr. Duffy, the ILC, acted unethically in advising the Board. At a minimum, he would be breaching his duty of honesty and candour to his client, the Board; his obligation to avoid conflicts of interest and his obligations to the administration of justice. We also reject the submission that a reasonable, right minded and informed person would think that his duty of loyalty to other clients would move the ILC to seek an outcome in this case that would comparatively advantage his other clients by encouraging a result that negatively affects Summitt. This submission is based on a misunderstanding of a lawyer's duty of loyalty to a client.

[52] It should also be emphasized that Summitt does not claim that the ILC actually did anything improper. While the factual record is understandably sparse there is no basis to assume that the ILC did anything improper. Moreover, given the Board's

statement that "all of the information that has been made available to or considered by the Board has been on the public record" there can be no suggestion that the ILC surreptitiously gave information to the Board that worked to Summitt's detriment.

[53] Finally, the reasonable, right minded and informed person would understand that when the Ontario Energy Board retains independent legal counsel it should retain counsel with relevant experience and expertise. There is no question that Mr. Duffy had that expertise and given that fact, it is not a surprise that he or his firm may have acted for other parties in the same sector of the energy industry. Indeed, the only surprise is the claim by Summitt and its counsel that they were unaware of this fact. Given the small size of this particular sector of the energy industry, the pool of counsel with relevant experience is likely to be small. This is another factor that rebuts any suggestion of reasonable apprehension of bias.

B. <u>The fact that the ILC was a member of the OEA</u>

[54] Here Summitt claims that, as a result of their involvement in the OEA, Stikeman, Elliott was in a position to know, prior to the hearing, (1) the strengths and weakness of the training materials used by Summit and others in the industry, as well as details concerning the manner in which the training materials had been prepared; and (2) the strategic comments submitted by industry, including Summitt, concerning the new government regulations governing the industry, and of Summitt's interpretation of the new regulations.

[55] Of course, we do not know what Stikeman, Elliott did know. But accepting for the sake of argument that they might have had access to the foregoing information, it does not create a reasonable apprehension of bias. As for the strengths and weaknesses of the training materials, the Board made the determinations it did based on the record before it and expressly affirmed that everything it considered was on the public record. Therefore, while we do not regard any prior knowledge of (1) the strengths and weaknesses of these materials or (2) the development of these materials to be particularly significant, we reject the suggestion that any such prior knowledge created a reasonable apprehension of bias. As for the industry's lobbying with respect to the new regulations or Summitt's understanding of them, this is irrelevant. The Board did not consider the new regulations but based its decision on Summitt's procedures and their sufficiency with respect to each of the various infractions.

[56] Here again, the Board's need for qualified independent legal counsel would be understood by the reasonable, right minded and informed person. Thus, it would be no surprise that the Board's ILC or his firm might be active in the OEA. It would be more surprising if they were not. In this regard we note that Summitt's counsel are also members of the OEA.

C. A closing observation on bias

[57] Given the Board's need for expertise it is likely that any ILC retained by a Board will have had prior practice experience in the energy sector. Parties before the Board can take comfort from the fact that any lawyer retained as an ILC has a duty under Rule 2.04 of the *Rules of Professional Conduct* to avoid conflicts of interest. However, should any party or their counsel have any concerns about the scope of the proposed ILC's prior practice or her membership in professional or industry organizations, etc. they would be well-advised to raise them at the outset. The ILC can respond in a manner consistent with his or her professional responsibilities as directed by the Board. Where this is not done, this type of allegation of bias will likely not be well received on appeal. We do not make this observation because of any concern with bias in this case. Rather we do so as a means of lessening the number of similar allegations of bias arising for the first time on appeal.

VIII. STANDARD OF PROOF: WAS SUMMITT CONVICTED OF "STRICT LIABILITY OFFENCES"?

[58] Summitt submits that the matters before the Board are strict liability offences and, relying on *R. v. Sault Ste. Marie*[7] counsel argue that the prosecution has the burden of proving beyond a reasonable doubt that the defendant committed the *actus reus* of the offence. In the present case, the Board applied the civil standard of a balance of probabilities. Therefore Summitt submits that it was improperly convicted on a lower standard of proof than the law requires.

[59] Counsel for the Board, relying on *R. v. Wigglesworth*,[8] rejects the contention that these are quasi-criminal, strict liability offences. Instead they submit these are merely regulatory compliance proceedings. Thus, this is a civil matter, where proof is on the civil standard.

[60] The resolution of this question is complicated by how the matter was dealt with before the Board. All counsel at the hearing referred to these matters as offences and seemed to accept that the classification of offences in *Sault Ste. Marie* as "absolute liability", "strict liability" and full "mens rea" applied to these compliance proceedings. Summitt argued that these were strict liability offences while Compliance Counsel argued that they were absolute liability offences. Relying on the presumption of strict liability in *Sault Ste. Marie*, the Board concluded that the "enforceable provisions engaged in this proceeding" were strict liability offences. In reaching this conclusion the Board expressed the view that the overall legislative regime and the subject matter of the Act were not amenable to an absolute liability regime. The Board also considered that the imposition of absolute liability would be unjust given: (1) the fact

[7] [1978] 2 S.C.R. 1299
[8] [1987] 2 S.C.R. 541 at para. 23.

that Summitt was vicariously liable for the actions of its sales persons; and (2) the potential size of the monetary penalties as well as the possibility of suspension or revocation of Summitt's licence. Consequently the Board concluded, "The Board will apply a strict liability standard, and will consider the due diligence defence advanced by Summitt as a defence to liability per se."

[61] Despite this apparent acceptance of *Sault Ste. Marie* before the Board neither counsel for Summitt nor Compliance Counsel made any reference to the requirement in *Sault Ste. Marie* that, for strict liability offences, "the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act."[9] Instead Compliance Counsel referred the Board to *F.H. v. McDougall* where the Supreme Court confirmed that the balance of probabilities standard applies in all civil cases, and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." At para 49 of *McDougall* the Court clarified that:

> in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

During the hearing, Summitt did not dispute this reliance on *McDougall* nor the applicability of the civil standard for proof, but rather endorsed this position. Consequently, the Board noted that it was "not controversial that Compliance Counsel has the obligation to prove on a balance of probabilities each of the allegations upon which it seeks a finding of non-compliance."

[62] Despite the fact that all parties agreed at the hearing that the appropriate standard of proof was the civil standard of balance of probabilities, the appropriate standard of review on this question of law is correctness and, if the Board applied the incorrect standard of proof, the decision cannot stand.

[63] Not surprisingly, given how this matter unfolded before the Board, in their written submissions counsel for Summitt offered little in the way of argument to support the conclusion that *Sault Ste. Marie* applies to these proceedings. However, that matter was squarely raised before this Court by the Respondent. In considering this issue we will review: (a) the language and scheme of the Act; (b) the nature of the proceedings; and (c) the available penalties.

A. The scheme of the Act

[64] Section 126 of the Act sets out the offences as follows:

> 126. (1) A person is guilty of an offence who,

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[9] *Sault Ste. Marie* at p. 1325

(a) undertakes an activity without a licence for which a licence is required under this Act and for which a person has not been granted an exemption from the requirement to hold a licence;

(b) knowingly furnishes false or misleading information in any application, statement or return made under this Act or in any circumstances where information is required or authorized to be provided under this Act;

(c) fails to comply with a condition of a licence or an order of the Board made under this or any other Act;

(c.1) fails to comply with an assurance of voluntary compliance given under section 112.7;

(c.2) fails to comply with an assurance of voluntary compliance entered into under section 88.8 before that section was repealed;

(d) contravenes this Act, the regulations or a rule made under section 44; or

(e) contravenes the *Energy Consumer Protection Act, 2010* or the regulations made under it.

[65] Summitt was not charged with any of the foregoing offences. Rather the proceeding before the Board was commenced by a Notice of Intention to Make an Order for Compliance, Suspension, and Administrative Penalty issued on the Board's own motion, as authorized by ss. 112.2(1) and (2) of the Act. The Notice of Intention sought remedies under ss. 112.3, 112.4 and 112.5 of the Act. All of these provisions appear in Part VII.1 of the Act, entitled Compliance. Section 126 of the Act is in Part IX of the Act entitled Miscellaneous.

[66] Thus, the language and scheme of the Act suggest that these are not offences but rather are compliance proceedings.

B. <u>The nature of the proceeding</u>

[67] That conclusion is further supported by the nature of the proceedings. These proceedings are neither criminal nor quasi-criminal. Rather, they are protective and preventative rather than penal in nature. They concern economic, contractual activity with a focus on regulatory compliance and consumer protection. We accept the Respondent's submission that these proceedings are "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity." [10] They are also "proceedings of an administrative nature instituted for the protection of the public

[10] *Wigglesworth*, at para. 23.

in accordance with the policy of a statute."[11] This is supported by the language of s. 112.5(1.1) of the Act which provides that "The purpose of an administrative penalty is to promote compliance with the requirements established by this Act and the regulations." These proceedings are analogous to disciplinary or regulatory proceedings under the *Law Society Act*, R.S.O. 1990, c. L.8; the *Securities Act*, R.S.O. 1990, c. S.5 or the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18. According to the analysis in *Wigglesworth*, these are not offences within the meaning of s. 11 of the *Canadian Charter of Rights and Freedoms*. This is another reason to reject Summit's contention that they were convicted of quasi-criminal offences.

C. Nature of the penalties

[68] As was made clear in *Wigglesworth*, one indicia of a quasi-criminal offence is that a conviction may lead to a "true penal consequence."[12] The relevant provisions in this case are ss. 112.3, 112.4 and 112.5 of the Act. Section 112.3 empowers the Board to order a person to comply with an enforceable provision of the Act and to take such action as necessary to remedy a contravention or prevent a future contravention. Section 112.4 empowers the Board to suspend or revoke the licence of a person who has contravened an enforceable provision. Section 112.5 empowers the Board to impose an administrative penalty. The Board ordered Summitt, among other things, to procure a review and audit of the sales practices of its retail sales persons, to pay an administrative penalty in the amount of $234,000, and to make restitution to certain of the complainants.

[69] Summitt points to the size of the fine and the fact that its licence could have been suspended or revoked which would have effectively put it out of business. The size of the fine does not constitute a true penal consequence. First, the highest administrative penalty assessed against Summit for an act of non-compliance was $13,500.[13] Second, and more importantly, as the Court of Appeal in *Rowan v. O.S.C.* held, much greater administrative monetary penalties are not *prima facie* penal.[14] Also, *Rowan* makes clear that the nature of the penalty is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible.[15] Thus, the mere possibility of the suspension or revocation of Summit's license is not a true penal consequence and does not make these proceedings quasi-criminal.

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[11] *Supra*, at para. 23.
[12] *Supra*, at para. 21.
[13] The Board set the administrative penalties as follows: (1) $9,000 for each of 15 moderate violations of s. 88.4 of the *Act*; (2) $13,500 for two major contraventions of s. 88.4 of the *Act*; (3) $9,000 for each of eight moderate violations of s. 88.9 of the *Act*.
[14] 2012 ONCA 208 at para. 52.
[15] *Supra*, para. 46.

D. Conclusion

[70] For all of these reasons, we conclude that these compliance proceedings are not quasi-criminal offences. Rather these are regulatory compliance matters that aim to regulate professional standards within the limited private sphere of energy retailing. Thus, the classification of criminal and quasi-criminal offenses into categories of "absolute liability", "strict liability" and full "mens rea" as defined in *Sault Ste. Marie* is irrelevant to compliance proceedings under Part VII.1 of the *Act*.[16] These are not quasi-criminal offences and do not require proof beyond a reasonable doubt. Rather, they are a civil matter, where proof is on the civil standard of a balance of probabilities.

IX. DUE DILIGENCE DEFENCE

[71] Summitt submits that the Board made several errors in law with respect to Summitt's "due diligence defence." First, the Board unreasonably rejected Summitt's due diligence defence before it determined whether the *actus reus* of the offences had been proven. Second, the Board unreasonably put Summitt's training and compliance programs as a whole on trial rather than assessing whether Summitt was duly diligent with respect to the specific charges at issue. Third, the Board improperly relied on Summitt's "14 Point Compliance Program" when it determined Summitt was not duly diligent.

[72] The short answer to all of these complaints is that the only error the Board made was to accept that the defence of due diligence was available to Summitt at the liability phase of these proceedings. As explained in Part VIII, *supra*, this was not a quasi-criminal standard of proof and hence no such defence is available for compliance proceedings such as this. Due diligence is only relevant to the determination of penalty. Obviously, however, this error redounded to the benefit of Summitt and does not assist them on appeal. While it is not necessary to consider Summitt's other complaints, we can do so briefly as they are without merit.

[73] The Board did not improperly consider and reject Summitt's due diligence defence before determining whether the alleged non-compliant acts had occurred. In the Decision and Order, it simply made sense, "[b]efore dealing with the specific allegations" of non-compliance, to first describe the organization of Summitt's door-to-door sales activities. This provided context to explain and understand the testimony of the individual complainants about their encounters at the door with the sales agents, and why each complainant felt he or she was misled. The Board's review of the evidence in this order was reasonable. It does not mean that the Board assessed the issues in the same order. To the contrary, the Board clearly heard the evidence of the

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[16] A similar conclusion was reached in *Gordon Capital Corp. v. Ontario (Securities Commission)*, (1991), 50 O.A.C. 258 (Ont. Div. Ct.) at p. 265 with respect to regulatory proceedings under s. 26(1) of the *Securities Act*, R.S.O. 1980, c. 466.

complainants and found their evidence sufficient to establish the contraventions and then called on Summitt to establish its due diligence defence.

[74] Similarly, the Board did not unreasonably put Summitt's training and compliance programs as a whole on trial. Rather the Board considered Summitt's general program and related it to the individual infractions that had been established.

[75] Summitt's complaint about the Board's references to its "14 Point Compliance Plan" is that the Board should not have considered it with respect to liability because: (1) it was tendered by Summitt only with respect to penalty; and (2) this plan was developed after the issuance of the Notice by the Board and was not relevant to the standard of care required at the time of the contraventions. Neither complaint has merit. The Board said the following about the plan:

> **78** To this point we have described what we have found to be deficiencies in the Summitt due diligence program. It is perhaps as important to provide our opinion on what we consider to be a conforming due diligence approach.
>
> **79** To identify the components of such a program we need look no farther than the proposal made by Summitt at the conclusion of the hearing, referred to as its "14 Point Program". In the Board's view with the exception of the deficiency highlighted above with respect to the retail salespersons' obligation to state that Summitt is not the consumer's natural gas or electricity distributor, it is the Board's view that the 14 points represent a reasonable and comprehensive due diligence program. Of course as also noted above, a due diligence program is only as good as it is effective. And the components of the program are of no independent value unless they form part of an operational due diligence activity.
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> ...
>
> **81** The timing of the implementation of the 14 Point Program is noteworthy. None of it was adopted prior to the issuance of the Notice in June 2010. It cannot therefore serve in any degree as a defence to the allegations made in this proceeding. Quite to the contrary, the adoption of this comprehensive due diligence program after the Notice was issued really highlights the deficiencies of the system existing at the relevant time. This is even more telling when one considers that Summitt was involved in the development of better and more comprehensive practices through its involvement in the Ontario Energy Association working group from about 2008. The system in place governing the actions of the retail salespersons described in this proceeding was, or should have been, known to Summitt to be deficient in its content and its operationality.
>
> **82** It is also to be noted that the Board's acceptance of the 14 Points as a viable due diligence program is rooted in the current regulatory regime and its requirements. Changes to the regulatory requirements, as

> are expected to be implemented in the near future will require a re-examination and possible re-calibration of the due diligence program.

[76] It is clear from the foregoing that the Board's findings of deficiencies in Summitt's compliance plan were made independently of their consideration of the 14 Point Compliance Plan. Contrary to Summitt's submission, their "due diligence defence" was not rejected because it did not comply with the later standards reflected in the 14 Point Compliance Plan. The Board's subsequent reference to the 14 Point Compliance Plan was illustrative only and meant to "provide [the Board's] opinion on what we consider to be a conforming due diligence approach." In that context, this reference to the Plan was a proper exercise of the Board's function as a proactive regulator, offering guidance to the industry and the public, generally. The references to the Plan played no part in their determination of liability. With one exception,[17] all of the other references to the 14 Point Compliance Plan were all in the part of the decision dealing with the appropriate penalty just as Summitt anticipated.

X. LACK OF A SEPARATE HEARING ON PENALTY

[77] The Supreme Court has made it clear that a separate penalty hearing is not required as an element of procedural fairness in administrative proceedings. In *Therrien*, the Court held that the Quebec Conseil de la Magistrature "was fully justified, out of concern for efficiency, in refusing to hold a separate hearing."[18] Where the tribunal gave the appellant an opportunity to be heard on the issue of sanctions, the requirements of procedural fairness were met.

[78] Here, the Board did give Summitt the opportunity to be heard on the issue of the appropriate remedies. That included the opportunity to make submissions as to whether further evidence *or submissions* should be received on that issue. Summitt did not object when that approach was proposed at the conclusion of the hearing, or when it was confirmed in Procedural Order No. 4. Rather, Summitt made submissions on remedy without objection, and even tendered additional evidence on that issue, in the form of its "14 Point Compliance Plan".

[79] Given the foregoing facts it is not surprising that Mr. Burden abandoned most of this argument in oral argument. However, Mr. Burden maintained that the Board improperly used the "14 Point Compliance Plan," which Summitt had tendered with respect to possible penalties, on the liability phase.

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[17] At para. 112, the Board mentioned the 14 Point Compliance Plan when discussing the dealings that Retail Salesperson, M.G. had with J.G. However, the Board simply noted that the failings they had identified were addressed in the 14 Point Compliance Program implemented by Summitt in June 2010. The Board did not base any finding of liability on this fact.

[18] *Re: Therrien*, [2001] 2 SCR 3 at para. 89.

[80] The excerpt from the decision in paragraphs 78 – 82 above makes it apparent that this assertion is incorrect.

XI. DID THE BOARD HAVE JURISDICTION TO ORDER RESTITUTION TO CERTAIN COMPLAINANTS?

[81] In the Decision and Order, the Board ordered Summitt to make restitution to the complainants in respect of whose contracts the Board made a finding of non-compliance. Despite the Board's statement that it was making "no finding" as to whether the contracts were enforceable[19] the Board ordered Summitt to, among other things:[20]

> (a) Cancel without penalty or cost the electricity or natural gas supply contracts entered into by the complainants, in those cases where Summitt had not already done so;
> (b) Compensate the complainants who were subject to the contracts in an amount equivalent to the difference between the sums paid by them pursuant to the contracts and the prevailing prices, together with interest; and
> (c) Repay any liquidated damages that were paid by the complainants who canceled their contracts and pay such liquidated damages to Summitt, together with interest.

Summit submits that the Board exceeded its jurisdiction in making the restitutionary orders.

[82] In this regard Mr. Burden relies on *Garland v. Consumers' Gas Company*[21] in which the plaintiff brought a class action for the recovery of late payment amounts charged by Consumers' Gas under a Board Order, which the courts found to be in violation of the criminal interest rate provisions of the *Criminal Code*. The Supreme Court stated that the plaintiff's claim for restitution was "a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought." This statement relates to the nature of the suit in that case, being a civil claim for recovery of monies based on unjust enrichment. The Court's analysis does not apply where the Board clearly has jurisdiction in a compliance proceeding initiated on its own motion against one of its own licensees, and exercises the express remedial authority under s. 112.3 of the Act.

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[19] Decision and Order, p. 8 [AB & C, Tab 3]
[20] Decision and Order, p. 52 [AB & C, Tab 3]
[21] [2004] 1 S.C.R. 629

[83] Mr. Burden argues that the Board erroneously relied on the Supreme Court of Canada's decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*[22] in holding that section 112.3(1)(a) of the Act gave it the jurisdiction to make a restitutionary order. He notes that the *Canada Labour Code*, the statute being considered in that case, specifically gave the Labour Board the jurisdiction to order an equitable remedy. As the Act does not specifically give the Board the jurisdiction to order an equitable remedy, he submits that the Board exceeded its jurisdiction when it ordered restitution.

[84] It is certainly correct that the Act does not expressly speak of equitable remedies. Section 112.3(1)(a) of the Act provides that the Board "**may make an order** requiring the person to comply with the enforceable provision and to **take any such action** as the Board may specify to remedy a contravention that has occurred." By any measure this is a clear and broad grant of remedial powers.

[85] In *Toronto Hydro-Electric System Limited v. Ontario Energy Board*[23] the Ontario Court of Appeal has confirmed the Board's statutory power to determine the scope of its own jurisdiction in circumstances such as those raised in this case, stating that:

> Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers... **If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal.** Its substance may still be reviewed for other reasons – on either a reasonableness or correctness standard – but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". [Emphasis added]

[86] The Board should be able to interpret its own statute in deciding remedies appropriate to ensure compliance, under the broad discretion given to it. Summitt's argument, which relies on the distinction between equitable and common law remedies, is a technical point that runs counter to the principle of deference to the tribunal, and contrary to the purposes of the *Act*. It also ignores the clear instruction in Re *Rizzo & Rizzo Shoes Ltd.* that:

> 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.[24]

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[22] [1996] 1 S.C.R. 369

[23] (2010), 99 OR (3d) 481 (CA) at para. 24

[24] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21

[87] In our view the Board had express authority under s. 112.3 of the Act to "remedy a contravention" of any of the enforceable provisions in issue, which the Board found had occurred. The Board's interpretation of this authority to include the specific remedial orders made in this case was a reasonable one, based upon the Board's specialized expertise in the regulation of retail energy marketing, and is entitled to deference on this appeal. Even if a standard of correctness is applied, that standard affords no basis to read down the plain wording of s. 112.3 of the Act to preclude such remedies, as Summitt suggests on this appeal.

XII. ABUSE OF PROCESS

[88] In its factum, Summitt submitted that the entire proceeding was an abuse of process and as a result, the order should be quashed and the charges should be stayed. Summitt took the position that the Board led Summitt to reasonably believe that it was in compliance with its regulatory obligations and that it would work with Summitt if any perceived deficiencies arose. Summitt based this assertion on the following:

> (1) The settlement on January 30, 2009 of a prior Notice of Intention against Summitt in connection with allegations that Summitt's reaffirmation calls were non-compliant and that Summitt was thereby engaging in unfair marketing practices;
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> (2) On August 11, 2009, the Board released its RCP. In this report the Board inspected and assessed sales agent training and monitoring and contract management of the five most active licensed energy retailers in Ontario, including Summitt. Part of the Executive Summary included the following statement "[T]he inspections completed as part of Phase 1 provided validation that the licensees operating in the gas and electricity retail markets of Ontario are, for the most part, doing so in accordance with applicable legal and regulatory requirements pertaining to consumer protection;
>
> (3) The Board had previously closed the files in relation to 17 of the 19 consumer complaints for which it led evidence at the hearing; and
>
> (4) The Board previously concluded that the complaint by K.S. and R.S. was without merit.

[89] Further Summit submitted that while it was working co-operatively with the Board on compliance-related issues, the Board commenced a secret investigation of Summitt, and then issued the Notice of Intention without any warning and without giving Summitt a reasonable opportunity to address any concerns and, if relevant,

rectify any perceived deficiencies. The Board led Summitt to believe that its programs and materials were compliant with the Act, the Regulation and the Codes and that they met the standards required. To then commence fresh enforcement proceedings was vexatious, unfair and oppressive such as to constitute an abuse of process.

[90] During oral submissions, counsel for Summitt observed that he was not advancing the issue of abuse of process because he conceded that the circumstances did not meet the requisite threshold but he observed that it gave context to his other submissions. When pressed as to whether abuse of process was or was not an issue in this appeal, counsel for Summitt said that he was not abandoning it but he would make no oral submissions.

[91] Summitt raised the issue of abuse of process with Compliance Counsel at various times prior to the hearing, but never brought a motion or otherwise sought relief from the Board in that regard. In anticipation of such a motion, Compliance Counsel called Ms. Christine Marijan, whose investigation led to the proceeding. Counsel for Summitt cross-examined her at length, but in closing submissions did not argue abuse of process. Summitt raised that issue for the first time on appeal.

[92] Having raised the issue with Compliance Counsel and having cross-examined the Board's witness, we conclude that Summitt deliberately did not argue any abuse of process during the proceedings before the Board. It thereby denied the Board any opportunity to lead evidence in response to such allegations. It also denied the Board any opportunity to rectify the alleged abuse before the conclusion of its proceedings. The Board made no ruling on any alleged abuse of process, from which appeal can be taken under s. 33 of the Act. As such, these issues should not now be raised for the first time on appeal.

[93] In any event, we are not persuaded that the enforcement proceedings constituted vexatious, unfair or oppressive conduct. We agree with Compliance Counsel that the earlier proceedings did not, and could not, limit the Board's ability to seek compliance remedies in respect of Summitt's door-to-door sales activities, or the ability of a duly constituted Hearing Panel to make findings in that regard. Furthermore, this is not one of those "clearest cases" where a stay would be an appropriate remedy. It cannot be said that anything done in this case "would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious".[25]

[25] *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 118, adopting *R. v. Young* (1984), 40 CR (3d) 289 (CA).

XIII. PROCEDURAL FAIRNESS

[94] In its factum and in submissions, Summitt raises four issues which it says undermined procedural fairness: (a) inadequate disclosure; (b) the Board's use of the 2009 Retail Compliance Plan; (c) the compressed schedule of the proceeding; and (d) reliance by the Board on the binder that contained complaints from additional consumers.

[95] Counsel agree that a duty of fairness applies to administrative decisions that affect the rights, privileges or interests of a defendant. The following factors are relevant to a determination of the content of the duty of procedural fairness: the nature of the decision being made; the nature of the statutory scheme; the importance of the decision to those affected by it; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the tribunal.[26] Based on those factors, Summitt argues that the doctrine of legitimate expectations supports its assertion that the content of the duty of fairness owed to it was at the high end of the spectrum, akin to a judicial proceeding.

A. Inadequate Disclosure

[96] After receiving the Notice of Intention and before the hearing date was set, Summitt asked Compliance Counsel to agree to a procedural timetable that included disclosure and written interrogatories. In the absence of agreement, Summitt brought a motion before the Hearing Panel. The motion to set a timetable (including an "issues conference" and a "technical conference") as well as for specific disclosure was dismissed with reasons, except for one item to which Compliance Counsel consented.

[97] In dismissing Summitt's motion, the Board followed recent appellate decisions holding that the strict *Stinchcombe* standard, developed in the context of true criminal proceedings, does not apply to regulatory proceedings, because

(a) no individual rights are at stake;

(b) the sanctions available are administrative rather than penal in nature; and

(c) "To require a Board to disclose all possibly relevant information gathered in the course of regulatory activities could easily impede its work from an administrative standpoint."[27]

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[26] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 23 to 28; *Shooters Sports Bar Inc. v. Ontario (Alcohol & Gaming Commission)*, [2008] O.J. No. 2112 at para. 40.

[27] *Re Toronto Hydro-Electric Systems Ltd.*, EB-2009-0308, October 14, 2009 at paras. 12-21.

[98] Furthermore, the Supreme Court held in *May v. Ferndale Institution*:

> The *Stinchcombe* principles do not apply in the administrative context. In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon.[28]

[99] As Compliance Counsel pointed out, on June 24, 2010 Summitt was given an extensive disclosure package and further disclosure was made over time. Counsel has failed to persuade us that Summitt was prejudiced as a result of the inability to obtain the increased disclosure. Simply because the motion was dismissed does not constitute inadequate disclosure. The decision by the Board was reasonable. Summitt has failed to establish that the lack of further disclosure constituted a denial of natural justice or led to a failure of procedural fairness.

B. The Board's use of the 2009 Retail Compliance Plan ("RCP")

[100] In August 2009, the Board released its Retail Compliance Plan which was a non-binding Board staff report, based on an inspection of the offices, records and compliance systems of Summitt and four other retail energy marketers. Its express purpose was to focus Board Staff's future compliance activities.

[101] Summitt objects to the fact that the RCP was not disclosed to it until the day before the hearing commenced. Furthermore, counsel argues that if Summitt had known that the Board was going to use the RCP, Summitt would have sought disclosure of all the data underlying the Report.

[102] Summitt concedes it did not ask for a copy of the RCP when it was referenced in the first witness statement and never requested the underlying data. It submits that a failure to request does not excuse a failure to disclose.

[103] When counsel for Summitt objected to the request to make the RCP an exhibit at the hearing, Compliance Counsel redacted objected parts. However, as Compliance Counsel pointed out, in cross-examination of Summitt's Compliance Manager on the issue of due diligence, the Panel accepted that the RCP had broader relevance and admitted the whole Report. Summitt claims that any reliance on the RCP was unfair because it is hearsay and because Summitt was denied the chance to test the contents.

[104] We are not persuaded that the approach by the Board to the RCP constituted procedural unfairness. Summitt was aware of the 2009 Report because it was mentioned in a witness statement, but more importantly, because it had been one of the subjects of the survey and analysis. Yet Summitt made no request for disclosure when it was referred to in an early witness statement, nor was it included in its motion

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[28] *May v. Ferndale Institution*, [2005] 3 S.C.R. 809 at paras. 91-92.

for disclosure. When the Board asked for an unredacted copy and thereby showed interest in its contents, Summit made no request for an adjournment. Summitt's lack of due diligence is a significant factor in determining whether the earlier non-disclosure affected the fairness of the hearing process.[29]

C. Compressed schedule

[105] Summitt referred to the Board's Rules of Practice and Procedure in sections 14, and 27 to 33 to support its contention that it had legitimate expectations that it was entitled to make written interrogatories, access alternative dispute resolution procedures and technical, issues and pre-hearing conferences. Instead, the Board forced Summitt to an early hearing without the opportunity to explore those expectations.

[106] On June 17, 2010, the Board issued the Notice of Intention which provided 15 days within which Summit could request a hearing, failing which the Board could proceed with making an order. Also on June 17, 2010, the Board issued an Interim Order for Compliance which required Summitt to take all necessary steps to ensure that its sales agents complied with the Act, the Regulation and the Codes. On June 24, 2010, Summitt requested an extension of time to request a hearing. On June 28th, the Board issued Procedural Order No. 1, in which it extended the time for Summitt to request a hearing to July 9 and ordered Summitt to provide written assurance that it would take steps to ensure its sales agents were complying with the Interim Compliance Order. On June 30th and July 7th, Summitt wrote letters to the Board detailing the response to the Interim Compliance Order. On July 8th, Summitt requested a hearing. On July 9th, the Board ordered an oral hearing to commence the week of August 23rd.

[107] On August 4th, Summitt served a notice of motion seeking disclosure, written interrogatories, an order directing that the parties participate in a technical conference, an issues conference, facilitated mediation or alternative dispute resolution and a pre-hearing conference; a timetable that would incorporate the pre-hearing steps; and an adjournment of the hearing. On August 23rd, the Board denied Summitt's motion in its entirety, with the exception of ordering Compliance Staff to produce some consumer data that had been requested by Summitt's expert, and the Board ordered that the hearing commence on August 30th.

[108] The hearing occurred over the six days of August 30 to September 3 and September 8, 2010.

[109] In comparison with the typical course of litigation, that does represent a compressed schedule. However, that is not the proper comparison. The Board has its own Rules of Practice and Procedure and has experience in their application. As counsel agree, this was a matter of first instance in that it was the first hearing of the

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[29] *R. v Dixon* [N.S.C.C. sub nom *R. v. McQuaid*] [1998] 1 S.C.R. 244

Board at which consumer complainants would give evidence. But that does not mean that Summitt was entitled to expect that all of the Rules of Practice and Procedure would be available. All of the decisions challenged by Summitt are within the discretion of the Board. The Appellants have not demonstrated that any of these decisions were unreasonable or that they adversely affected the procedural fairness of the hearing.

D. Use of the binder

[110] At the conclusion of the oral hearing, Compliance Counsel submitted to the Board a binder containing allegations of additional consumer complaints against Summitt. Compliance Counsel asked the Board to consider the additional allegations when imposing penalty. Summitt strongly objected to the admission of these additional allegations. The Board directed the parties to make submissions concerning the admissibility of the binder of additional complaints as part of its written closing submissions. In the Decision and Order the Board made no mention of whether it decided to admit the binder of additional allegations into evidence, or whether it relied on any of the additional allegations in its determinations that violations had been established and/or penalty.

[111] Summitt submits that the Board's broad sweeping comments and conclusions concerning Summitt's due diligence program strongly suggest that the Board did consider the additional allegations in its determinations that violations had been established and penalty, as such comments and conclusions extended well beyond the conduct of the 5 agents in respect of the 28 consumer contracts that formed the subject of the charges in the Notice of Intention.

[112] We reject that contention. The Board's findings about the deficiencies in Summitt's systems were based on the evidence before it. Nothing in the reasoning suggests that the evidence was buttressed by the other allegations in the binder.

[113] The Board made no mention of the binder in their reasons. There is no reason to consider that this was an oversight. Compliance Counsel and Summitt made written submissions on the admissibility of that material. The Board could not have considered the materials without first ruling on their admissibility. As the Board made no such ruling, the only proper inference is that it did not admit, consider, or in any way rely on that material.

E. Conclusion on procedural fairness

[114] We are not persuaded that the doctrine of legitimate expectations supports Summitt's submission that it was owed a duty of fairness at the high end of the spectrum. Without establishing precisely where on the spectrum the duty lay in this case, none of the grounds for challenging the procedural fairness of the hearing have been established.

ORDER TO GO AS FOLLOWS:

[115] The appeal is dismissed. As confirmed by counsel in correspondence dated January 17, 2013, the Appellant shall pay to the Board costs on a partial indemnity scale in the amount of $25,000 all inclusive.

KITELEY J.

DUCHARME J.

DALEY J.

Date of Reasons for Judgment: Heard at Toronto: December 11, 2012

Released: APRIL 9, 2013

CITATION: Summitt Energy Management Inc. v. Ontario Energy Board, 2013 ONSC 318
DIVISIONAL COURT FILE NO.: 624/10
DATE: 20130409

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT
KITELEY, DUCHARME, DALEY J.J.

B E T W E E N:

Summitt Energy Management Inc.

Appellant

- and -

Ontario Energy Board

Respondent

REASONS FOR JUDGMENT

Kiteley, Ducharme, Daley J.J.

Released: April 9, 2013

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,

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

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.

authors cited

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Janisch, Hudson N. "The Choice of Decisionmaking Method: Adjudication, Policies and Rulemaking" in *Special Lectures of the Law Society of Upper Canada, 1992*: *Administrative Law: Principles, Practice and Pluralism*. Scarborough: Carswell, 1992, at p. 259.

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

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

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.

[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

(*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.

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.

[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.

[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*).

[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

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

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.

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

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

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

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.

Ontario Energy Board
Commission de l'énergie de l'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,

[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.

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[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.

[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

Case Name:

Summitt Energy Management Inc. (Re)

**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 for Compliance,
Suspension and an Administrative Penalty
against Summitt Energy Management
Inc.**

2010 LNONOEB 304

No. EB-2010-0221

Ontario Energy Board

Panel: Paul Sommerville, Presiding Member; Marika Hare, Member

Decision: November 18, 2010.

(217 paras.)

Tribunal Summary:

The Board issued a Notice of Intention to Make an Order for an Administrative Penalty, Compliance and Suspension against Summitt, under section 112.3, 112.4 and 112.5 of the Act (the "Notice"). The allegations against Summitt were set out as:

1. Summitt contravened section 88.4(2)(C) and 88.4 (3)(C) of the Act in 19 instances through the actions of five of its sales agents, by engaging in unfair practices as defined in Section 2 of Ontario Regulation 200/02;

Summitt contravened section 2.1 of the Code of Conduct for Gas Marketers and the Electricity Retailers Code of Conduct through the actions of five of its sales agents who engaged in unfair marketing practices as defined in section 2.1 of the Codes; and Summitt contravened section 88.9(1) of the Act in 10 instances by failing to deliver a written copy of the contract to the consumer within the time prescribed by regulation.

An oral hearing was commenced and the Board heard the evidence of 23 members of the public with respect to the alleged 19 incidents of Summitt's door-to-door sales agents making false and misleading statements. Summitt, in its defence, introduced evidence through the five sales agents named in the Notice, a sales manager, Summitt's Vice President of Regulatory Affairs and an expert. Details of the evidence are set out in the Decision.

The Panel considered arguments made by the parties and found that Summitt did not exercise the due diligence required to ensure that its door-to-door sales agents acted in a manner that was compliant with their legal and regulatory obligations. The Panel also went on to find several deficiencies with respect to the organization of Summitt's door-to-door sales activity.

The Board ordered Summitt to procure a review and audit of the sales practices of its retail salespeople in accordance with certain terms set out in the Decision (at p. 50), including that the audit be conducted by an independent third party auditor and the product of the audit be a report which will be filed with the Board and compliance staff. If the conclusion of the audit is that Summitt was not in substantial compliance with its 14 point compliance program (as set out in the Decision at p. 20-23), the Board will reconvene to receive submissions re: next steps.

The Board also found that it has significant flexibility in crafting an appropriate order to remedy a contravention. The Board found that "the evidence in this case shows that customer after customer was misled into signing contracts that provided an economic benefit to Summitt at the expense of the customer. To permit Summitt to retain that money is inappropriate by any measure." Accordingly, the Board directed Summitt, where a contravention was found, to cancel contracts and compensate customers so they would be in the same position they would have been in, had they not entered into a contract with Summitt.

The Panel also ordered Summitt to pay an administrative penalty and costs, in the amount of $299,000.

DECISION AND ORDER

Introduction

1 The Ontario Energy Board (the "Board"), issued a Notice of Intention to Make an Order for Compliance against Summitt Energy Management Inc. ("Summitt") under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act") on June 17, 2010. On July 8, 2010, Summitt gave notice to the Board requiring the Board to hold a hearing on this matter. The Board assigned the proceeding file No. EB-2010-0221.

2 On July 9, 2010, the Board issued a Notice of Hearing and Procedural Order No. 2 which set the date for an oral hearing.

3 On August 23, 2010, the Board heard oral submissions on a request by the University of Western Ontario's Community Legal Services ("CLS") for intervenor status in this proceeding and a Motion by Summitt for an order of the Board requiring Compliance Staff to provide further disclosure, and seeking the scheduling of a number of pre- hearing procedures. The Motion also sought an adjournment of the hearing to a later date. After hearing submissions, the Board made a decision on the Motion and denied CLS's application for intervenor status.

4 The Oral hearing commenced on August 30, 2010 and concluded on September 8, 2010. The parties filed final submissions in accordance with Procedural Order No. 4 which was issued on September 9, 2010.

5 In this proceeding Compliance Counsel is seeking to establish that during the relevant period (August 2008 to January 2010), Summitt contravened:

1. Subsections 88.4(2)(c) and 88.4(3)(c) of the Act in nineteen instances through the actions of five of its sales agents by engaging in unfair practices as defined in Section 2 of Ontario Regulation 200/02;

2. Sections 2.1 of the Code of Conduct for Gas Marketers and the Electricity Retailers Code of Conduct respectively (the "Codes") through the actions of five of its sales agents who engaged in unfair marketing practices as defined in section 2.1 of the Codes; and

3. Subsection 88.9 (1) of the Act in ten instances by failing to deliver a written copy of the contract to the consumer within the time prescribed by regulation.

6 Compliance Counsel also seeks to establish that Summitt "is likely" to contravene these provisions again in respect of its ongoing door-to-door sales activities.

7 Compliance Counsel seeks the following Board Orders against Summitt:

1. an Order under section 112.3 of the Act, requiring Summitt to comply with all enforceable provisions, and to take such further actions as the Board may specify to remedy the contraventions and prevent further contraventions;

2. an Order under section 112.4 of the Act, suspending Summitt's door-to-door sales activities pending completion of an audit of its door-to-door sales process, and the implementation by Summitt of any recommendations resulting from the audit; and

3. an Order under section 112.5 of the Act, requiring Summitt to pay an administrative penalty in respect of each contravention found, in the amount set by the Board.

Background

8 This proceeding presents the Board with its first opportunity to hear, under oath, the testimony of customers of an energy retailer.

9 The advent of energy retailing in Ontario has had a troubled history. From its inception there have been waves of complaints respecting the practices of door-to-door retail salespersons in the industry. This has resulted in a series of legislative and regulatory changes, all designed to minimize the potential for misunderstanding, misrepresentation, and harm to consumers.

10 During this proceeding, the Board heard evidence that an in-depth investigation of consumer complaints relating to the conduct of Summitt and its retail salespersons began in the fall of 2009. The investigation examined and re-examined these complaints with a view to determining whether specific noncompliance situations could be identified. The investigation consisted of direct contact with complainants who had on their own motion contacted the Board to complain about one aspect or another of their contact with Summitt.

11 This investigation was undertaken in such a fashion so as to ensure that no person at the Board who might be engaged in the adjudication of any compliance action would be exposed in any manner whatsoever to the conduct or the fruits of the investigation. Board staff and legal counsel that were engaged in the investigation, referred to in this decision as "Compliance Staff" and "Compliance Counsel", were effectively isolated from all other elements of the Board in this regard. Board staff as a whole had no knowledge of any of the aspects of the investigation leading up to the filing of the Notice, and the Board panel had no knowledge of any aspect of the investigation prior to the publication of the Notice. From that time forward, all of the information that has been made available to or considered by the panel has been on the public record.

Organization of Summitt's Door-to-Door Sales Activity

12 Before dealing with the specific allegations outlined in the Notice of Intention to Make an Order for Compliance against Summitt (the "Notice"), the Board will provide some general background respecting the organization of the sales activity undertaken by Summitt during the period covered by the specific complaints.

13 It is necessary to appreciate various aspects of Summitt's door-to-door energy sales in order to understand the extent to which the individual retail salespersons met the statutory and regulatory obligations. There are several key components which have important implications for the Board's consideration of the allegations in this proceeding:

* the nature of Summitt's sales force;

* Summitt's two-part contract;

* the representation of comparative pricing;

* the representation of the "Provincial Benefit"; and

* the nature of and the role of the "reaffirmation" call.

Summitt's Sales Force

14 The retail salespersons whose actions are at the centre of this proceeding were employees or independent contractors of subcontractors to Summitt. These subcontractors provide sales forces to the various energy retailers and other sales companies from time to time.

15 The Board notes that a number of the salespersons involved in this case have at some time in their career sold contracts for an energy retailer other than Summitt. The transition of employees from one energy retailer to another seems to have been common and was often driven by a change in the subcontracting relationship between their employer and the energy retailer. A subcontractor who had been providing retail salespersons to one energy retailer this month, could well be providing retail salespersons to another energy retailer next month. Notably, while the salespersons whose conduct is at issue are no longer selling for Summitt, a number of them continue to work for the same subcontractor and are now selling other products door-to-door, such as rental contracts for waterheaters. This demonstrates that the move from one energy retailer to another (or to other door-to-door sales) is considered by the participants to be an easy transition.

16 When a retail salesperson begins selling Summitt's contract, they are required to take part in a training program. Summitt provides its subcontractors with training materials, but leaves the actual training of salespersons to the subcontractor. As a result, there did not appear to be a predictable, standard practice for retail salesperson training.

17 In most cases, the retail salespersons were given scarcely a few hours of training and mentoring before they were on their own with customers. It seems that no two of the retail

salespersons experienced the same training regime. The energy market in Ontario is notoriously complex, containing many somewhat obscure elements that have implications for the price of the respective commodities. There have been important developments in the market over the last few years that have direct relevance for customers being asked to decide on whether to enter into long-term fixed price energy retail contracts. For electricity, the Provincial Benefit is one such development, Smart Meters and time of use rates are another. It was clear from the testimony of Summitt's salespersons that a few hours of training was not an adequate foundation for someone who is expected to go into homes to sell these very significant contracts to relatively uninformed consumers on the basis of price comparisons or promises of lower prices.

Summitt's Two-part Contract

18 The contractual relationship relied upon by Summitt consisted of a two-part contract.

19 The initial contractual document was curiously entitled "Registration Form". This is the document that was signed by the prospective customer at the doorstep. In Summitt's view, the execution of this "Registration Form" creates a complete contractual nexus with the customer once the separate Customer Agreement with Terms and Conditions document was delivered. It is noteworthy that this initial document is ambiguous as to its status as a binding contractual document. Certainly the title of the document seems to create an impression that the prospective customer is merely registering for a program, or signing up to receive further information, rather than entering into a long-term fixed-price contract for the provision of electricity, natural gas, or both.

20 The Registration Form references the "Customer Agreement with Terms and Conditions" and directs the customer to this additional document. At other points, the Registration Form refers to itself as the "Agreement" as a defined term and then again as an "agreement" apparently not as a defined term. The Registration Form also refers to itself as the "Comprehensive Energy Price Protection Program" It would appear that the "comprehensive" energy protection program is "comprehensive" even where it only applies to supply of one of the commodities, that is one of electricity or natural gas.

21 The "Customer Agreement with Terms and Conditions" that the Registration Form refers to is also presented in a very ambiguous manner. The document looks like a promotional brochure intended to encourage parties to enter into a contractual relationship, and not as an integral, indeed critical, element of an existing contractual relationship. There are numerous examples of "brochures" used over the relevant period in the record, but in every case the document appears to be more sales tool than contractual document. The exterior panels of the brochure contain the price comparison information relied upon by the retail salesperson to sell the customer on the attractiveness of Summitt's product. Only when the customer unfolds the panels of the brochure will they find the terms and conditions written on an inside panel. It is the type of document that a customer could easily have discarded without realizing that it contained the terms and conditions.

22 This ambiguity was made even more pronounced when one considers the conduct of Summitt's retail salespersons. From the evidence before the Board, it appears that the retail salespersons did not refer to the Registration Form as a binding contractual document when selling to customers and instead referred to it as an "application" or "registration". The Board heard repeatedly that the retail salesperson would fill in all of the information on the form, often in advance of the door-to-door visit. In many cases, customers clearly had no appreciation of the impact of signing the Registration Form until well after their interaction with the retail salesperson was over. Moreover, the retail salespersons repeatedly described the document containing the terms and conditions as a "brochure" during their evidence and appear to have used that term when speaking with the customers. Most tellingly, none of the retail salespersons specifically referred the prospective customers to any of the specific terms or conditions contained in the "Customer Agreement with Terms and Conditions" even though it contained important details of the contractual arrangement, including terms relating to liquidated damages and termination of the contract that strongly favoured Summitt.

23 Standard form contracts, offered on a "take it or leave it" basis, are a pervasive and indispensible feature of modern commercial life but the basic principle concerning the incorporation of unsigned documents (such as the "brochure" proffered by Summitt agents) was established long ago in the 19th century "ticket" cases.[1] The use of standard forms does give rise to a number of potential concerns as the forms are unlikely to be read, or if read, understood by the parties signing them and the classic model of *consensus ad idem* is lacking. Furthermore, there is the risk that such standard form contracts or "contracts of adhesion" may contain terms that are harsh or unfairly oppressive to the person who wishes to obtain a particular commodity or service. The common law has, to an extent, responded to the phenomenon of unfair terms in standard forms by refusing to incorporate written terms that may operate unfairly and to the surprise of one of the parties.[2]

24 In a case where the person receiving the document actually knows that the paper contains a set of conditions that the offering party intends to be the terms of their agreement, assent is easily established, whether or not the recipient actually reads the document and becomes familiar with the terms.[3] In other cases, where the recipient does not have actual knowledge of the nature of the document, the question is whether the person issuing the document can reasonably assume that the other party is aware that the document contains conditions either because of the nature of the transaction or because reasonable steps have been taken to give the other party notice of this fact.[4]

25 In cases where it is not obvious that the document is contractual in nature the test to be met is whether the party relying on the document has given sufficient notice to the other party that the document contains conditions. If the proffering party "did what was reasonably sufficient to give the plaintiff notice of the condition"[5] the parties would be bound by the conditions whether or not they took the trouble to read the document. However, if, in the circumstances of a particular case, the person receiving the document might reasonably assume that the document has some purpose other than communicating contractual terms, courts incline to the view that reasonable notice has not been given[6]

26 In the present case, the organization of the sale by Summitt and the presentation of the contracts by the retail salespersons could be seen as falling short of reasonable notice of the contents and significance of the documents that were presented to them as a Registration Form and "brochure".

27 It is beyond the scope of this proceeding to make any specific determinations with respect to the actual contractual effect of the sales effort engaged in by the Summitt retail salespersons in the cases before us. Accordingly, the Board makes no finding as to whether the organization of the sales actually resulted in binding contractual relationships with the customers, or if some or all of the specific terms are enforceable.

28 It is certainly not necessarily the case that a two-part contract must inevitably be misleading. There are many contracts which are comprised of different parts, usually incorporated by reference. A two-part contract properly presented and described could create a clear and unequivocal contractual offer. However, the Board does consider this ambiguity with respect to the nature of the contractual documents as devised by Summitt as a factor in its consideration of the cases before it.

Representation of Prices

29 A key part of the sales exercise undertaken by the Summitt retail salespersons was the comparison of current market prices to the offering being made by Summitt.

30 Price comparisons were generally made using the brochure described earlier in this decision. The brochures, and there were a number of versions of them, typically presented on its glossy exterior a graphic representation of price trends for natural gas and electricity. In both instances the graphic representation showed steep increases. This trendline was pointed to by the retail salespersons as representing the likely direction either electricity or natural gas prices would follow. It may be the case that under the current legislative framework neither Summitt, nor its retail salespersons had any obligation to embark on any form of price comparison discussion as part of these sales. But they chose to do so, and in so doing took on a responsibility to ensure that their representation of price and pricing trends was accurate and not misleading.

31 The Board has serious concerns with the price representations contained in Summitt's brochures. The trendlines in these brochures typically misrepresented the actual market price of the respective commodities at the time the sale was being made and illustrated a fixed price that was lower than what the customer was actually being offered under Summitt's program. The result was that the price comparison dramatically overstated the potential benefit of a fixed price contract with Summitt.

The Provincial Benefit

32 Another shortcoming of Summitt's comparative pricing information is that it did not take into account the Provincial Benefit.

33 The Provincial Benefit is a creation of the provincial government which has had the effect of collecting from electricity consumers a variety of costs that are not recoverable through the wholesale market. The cost of the Provincial Benefit is included in the prices set by the Board under the Regulated Price Plan ("RPP"). Customers who are supplied electricity by their local distribution company are charged the RPP. When customers switch their electricity supply to a retailer such as Summitt, the Provincial Benefit is added on to their energy retailer contract price as a separate line item on their bill. While the Provincial Benefit can be either a debit or credit to customers, since 2007 there has been only been one month during which the Provincial Benefit operated as a credit to customers. On all other occasions it was a debit.

34 Therefore, a comparison of an RPP customer's electricity bill, which includes the Provincial Benefit, with a retailer's price offering which does not include any reference to the Provincial Benefit is inherently misleading. The most notable example of this appeared on some versions of Summitt's Registration Form, which set out Summitt's fixed price and the applicable RPP prices, but did not disclose that a customer would also have to pay the Provincial Benefit if they signed up with Summitt. In fact, some of the Registration Forms contained language that suggested that the customer might "...be entitled to the...Provincial Benefit Rebate. Under this program you keep these rebates, if any." Whatever else this language may convey, it does not alert the customer to the likelihood, or even the possibility, that the Provincial Benefit would add to the Customer's electricity bills.

35 From the evidence provided by a number of the complainants, it is apparent that Summitt's retail salespersons did not generally inform customers that they would have to pay the Provincial Benefit in addition to Summitt's fixed charge. This is supported by the evidence of two retail salespersons that they made no reasonable attempt to accurately represent the likely effect of the Provincial Benefit to their prospective customers. In one case, a complainant testified that the retail salesperson indicated that she was now "eligible" for the Provincial Benefit and was misled into believing that the Provincial Benefit would have the effect of reducing her energy charges, when in fact during that period the Provincial Benefit operated to increase electricity bills. Only later when her bill from Summitt arrived did she learn that the Provincial Benefit for which she was now "eligible" actually added significantly to her expected household expense for energy.

The Reaffirmation Call

36 The Legislature has made provision in subsection 88.9 (4.1) of the Act for a cooling off period for energy contracts which consists of a 10 day period after which the customer can "reaffirm" the original contract.

37 Pursuant to subsection 88.9(3) of the Act, a contract ceases to have effect unless it is reaffirmed by the consumer before the 61st day following the day on which the written copy of the contract is delivered to the consumer. The consumer may not reaffirm a contract before the 10th day after a written copy of the contract is delivered to the consumer.(See 88.9(4.1) of the Act)

38 Ontario Regulation 200/02 prescribes the means by which a consumer can reaffirm a contract. Generally, a consumer may reaffirm a contract or give notice to not reaffirm a contract by giving written notice to the retailer of electricity or gas marketer. A consumer can reaffirm a contract by telephone only if a voice recording of the telephone call is made and given to the consumer on request.

39 Summitt utilizes a telephone reaffirmation process. Summitt calls the consumers who have signed the Registration Form within the prescribed timelines with the intent of having them reaffirm the contract for natural gas, electricity or both depending on what the consumer had signed at the door. As is required by Ontario Regulation 200/02, Summitt records the reaffirmation calls and the transcripts of these calls were filed as evidence in this proceeding by Summitt.

40 Interestingly, the reaffirmation call was characterized in a variety of ways by the retail salespersons when conducting door-to-door sales. In some instances the reaffirmation call was represented to be a confirmation that the retail salespersons had in fact attended at the house of the prospective customer. In other instances it was described as a quality assurance kind of exercise where the performance of the agent would be vetted by the head office. It was rarely described as what it was intended to be -- an opportunity for the consumer to review the contractual terms and reaffirm or not reaffirm a long term fixed price contract for the supply of electricity and/or natural gas.

41 It appears to the Board that the effectiveness of the reaffirmation call as a genuine cooling off device was fatally undermined by the fundamental misunderstanding created by the retail salesperson during the sale. Further, little or no effort was made during the reaffirmation call to determine if the customer understood its purpose and, where necessary, to correct any misconception. It is also noteworthy that in some instances the reaffirmation call appeared to be in the nature of a sales effort, and not a simple reaffirmation.

42 Further, the ambiguities in the contractual documents noted above infect the reaffirmation calls and make them of questionable value in a number of the cases before us.

43 For the reasons noted above, it is not clear to the Board that customers understood they had agreed to a fixed price contract or that the glossy brochure they had received contained detailed terms and conditions which they needed to review. When the transaction is viewed as a whole, it is understandable that customers receiving a brief reaffirmation call would often answer "yes" without truly appreciating the significance of what they were being asked.

Characterization of the Offences

44 Compliance Counsel and Summitt are sharply divided on how the enforceable provisions which are the subject matter of this proceeding ought to be characterized. Compliance counsel urges the Board to consider the offences to be offences of absolute liability, while Summitt contends that the proper characterization is that they are offences of strict liability.

45 The distinction is important. If the Board concludes that the offences are to be considered absolute liability offences there is effectively no defence open to Summitt once the facts establishing the *actus reus* of the offence have been proven. On this construction due diligence would only operate in possible mitigation of sentence. On the other hand, if the offences are strict liability offences, then Summitt would be entitled to have its defence of due diligence considered by the Board at the liability stage. If the Board were to find that Summitt's defence of due diligence met the requisite standard, it would be entitled to be acquitted and would not be subject to any penalty.

46 The distinction between offences of strict liability and absolute liability respectively derives from the seminal Supreme Court of Canada decision in *R. v. Sault Ste Marie*[7].

47 The parties agree that the Supreme Court of Canada in that case established that a presumption exists in favour of the characterization of offences as strict liability offences. This presumption can be rebutted by reference to the language used by the legislature in the charging statute and consideration of a number of primary factors enumerated by the Supreme Court. Specifically, the Court said that the offences that will be held to be ones of absolute liability are those "in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act."[8] The court listed four factors that should be considered when making this determination:

* consideration of the overall regulatory pattern adopted by the Legislature;

* the subject matter of the legislation;

* the importance of the penalty; and

* the "precision of the language used" by the legislature.[9]

48 To rebut the presumption of strict liability, Compliance Counsel points to the language of subsections 88.4 (2) and (3), which read as follows:

> (2) A gas marketer **shall be deemed** to be engaging in an unfair practice if,
>
> (c) a salesperson acting on behalf of the gas marketer does or fails to do anything that would be an unfair practice if done or if failed to be done by the gas marketer.
>
> 88.4 (3) a retailer of electricity **shall be deemed** to be engaging in unfair practice

if:

(c) a sales person acting on behalf of the retailer of electricity does or fails to do anything that would be an unfair practice if done or failed to be done by the retailer. (Emphasis added)

49 Compliance Counsel argues that the emphasized language of these provisions establishes vicarious liability for the electricity retailer with respect to the actions of its retail salespersons and is determinative of the question as to how the offences ought to be characterized.

50 The Board agrees with Compliance Counsel that in this case the language of the provisions are of primary importance in the consideration of this issue and so will begin its analysis with the fourth factor of the *Sault Ste. Marie* test.

51 The Board does not agree with Compliance Counsel that the phrase "shall be deemed" is a statutory direction that is determinative as to how these enforceable provisions ought to be characterized. The term "deem" is common in legislative drafting and has been the subject of considerable judicial scrutiny. In *Hickey v. Stalker*[10] an Ontario appeal court ruled the word "deem" may mean either "deemed conclusively" or "deemed until the contrary is proved." Similarly, in *St. Peter's Evangelical Lutheran Church v. Ottawa*, the Supreme Court of Canada recognized "that the words deemed' or deeming' do not always import a conclusive deeming into a statutory scheme. The word must be construed in the entire context of the statute concerned."[11] In the more recent case of *Manitoba Chiropractors Assn. v. Alevizos*, the court interpreted the phrase "shall be deemed" in the context of a professional misconduct case as providing a respondent with an opportunity in some circumstances to displace "the statutory presumption ... by evidence to the contrary."[12]

52 Further, while the provisions do establish that a retailer is vicariously liable for the actions of its sales persons as Compliance Counsel notes, that alone is not a definitive indication that the offences are absolute liability offences. A whole host of regulatory regimes including environmental protection, health and safety standards, and product liability are founded on the vicarious liability of corporations for the actions of their employees or agents. However, these regulatory regimes still allow for the advancement of due diligence defences in those cases.

53 The question therefore is whether the Legislature intended to create conclusive or rebuttable presumptions with the language of subsections 88.4(2) and (3). As noted above, this exercise requires a consideration of the "entire context of the statute concerned", which effectively encompasses the first two factors under the *Sault Ste. Marie* test.

54 In the Board's view, the overall legislative regime at issue in this case and its subject matter (the regulation of an economic, contractual activity) are not amenable to a finding of absolute liability. For good reason, many of the regulatory regimes governing important societal values such as environmental protection are notoriously strict liability regimes. Part of the regulatory

architecture is the development by responsible companies of effective, comprehensive and evolutionary due diligence systems. It is thought by many regulators that the most important attribute within the regulatory regime is a strong incentive for regulated entities to develop and implement such due diligence systems. Such systems are particularly relevant when they can substantially limit or eliminate the contraventions of regulatory standards. In this way, the incentive of having the ability to defend oneself against charges through the use of a due diligence defence is considered an important element of overall public safety and the public interest.

55 By contrast, apart from traffic violations and technical noncompliance with licensing requirements, absolute liability tends to be imposed only in circumstances where the consequences of noncompliance can be extremely serious and hazardous. In that context, it may well be appropriate to impose absolute liability without recourse to a due diligence defence.

56 When subsections 88.4(2) and (3) are viewed in light of the entire regulatory regime and its subject matter, it is appears that the construct more closely resembles strict liability regulatory regimes than absolute liability regimes. This observation is not intended to disregard the harmful consequences that may ensue where consumers are improperly induced to enter into retail energy contracts which have the effect of increasing their household expenses significantly. There is no doubt that noncompliance can have devastating effects for families trying to make ends meet. But this kind of damage and consequence can be dealt with within the context of a strict liability regime.

57 The remaining factor of the *Sault Ste. Marie* test is the importance of the penalty. An important element of our system of justice is that serious penalties ought not to be imposed without a commensurate opportunity for the defendant to mount a defence. Not only are the monetary penalties in this case potentially very substantial, but the sanctions that can be imposed by the Board for contravention can include cancellation of the retailer's license or suspension of its license privileges. The cancellation or suspension of a license effectively terminates the business for the company and all of its employees and subcontractors. It also places in doubt the ability of the company to continue to provide its service to its existing customers.

58 In the Board's view, absent precise direction from the Legislature, it would not be just to impose absolute liability on an energy retailer for the actions of its sales persons in light of the potentially significant consequences. Support for this view can be found in the jurisprudence on the interpretation of the word "deem", which provides that in the event of ambiguity where one construction will do injustice and the other will avoid the injustice, "it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions."[13]

59 It must also be noted that administrative expediency or convenience with respect to enforcement is not one of the factors enumerated in *Sault Ste. Marie.* While the ability of the regulatory body to enforce compliance is a consideration, it cannot be the governing factor in characterizing the nature of an offence.

60 In conclusion, it is the Board's view the presumption of strict liability enunciated by the

Supreme Court in *Sault Ste. Marie* has not been rebutted with respect to the enforceable provisions engaged in this proceeding. Accordingly, the Board will apply a strict liability standard, and will consider the due diligence defence advanced by Summitt as a defence to liability per se.

Onus of Proof

61 It is not controversial that Compliance Counsel has the obligation to prove on a balance of probabilities each of the allegations upon which it seeks a finding of non-compliance. Similarly, it is settled that the onus of establishing due diligence as a defence to the charges, or as a factor in mitigating symptoms lies with Summitt.

Due Diligence Defence

62 As indicated above, the Board will consider Summitt's due diligence defence in assessing its liability for the infractions of its retail salespersons. In addition to challenging the specific allegations of noncompliance on an incident-by-incident basis, Summitt has sought to persuade the Board that the system that it had in place during the relevant period was sufficiently detailed, comprehensive, and effective in protecting the public from noncompliance with the legislation, the regulations, and the Codes. This system touches on the training of agents, response to complaints and the correction of errors among its retail salespersons.

63 The Supreme Court of Canada in the *Sault Ste. Marie* case emphasized that when a due diligence defence is raised the question is not simply whether the accused established "a proper system to prevent commission of the offence" but also whether it took "reasonable steps to ensure the effective operation of the system."[14] The standard when judging due diligence is whether the accused took reasonable care in the circumstances.

64 In order to meet the standard of reasonable care, a due diligence program must be responsive to the circumstances it is intended to address. This means where the activity sought to be controlled is complex, highly varied, and dynamic, the compliance plan, or the due diligence system, must be equally complex, varied, and dynamic. It must take into account the known weaknesses and areas for potential noncompliance and must deal with them aggressively and definitively.

65 The standard is also increased in a context where the consequences for customers may be serious. Entering into a long-term fixed priced energy retail contract is not a trivial event in the life of a household. The Board heard evidence to the effect that these contracts, and in some instances, the liquidated damages demanded to cancel them, represented hardship for families in meeting their day-to-day obligations. In this kind of context it is absolutely essential that in order to qualify as a competent and operational compliance plan the system must be very acute in avoiding misunderstandings and reducing the potential opportunities for misrepresentations by salespersons.

66 It is the Board's view that the company has failed in many respects in meeting the standard and the defence of due diligence is of no avail to Summitt in this proceeding.

67 One of the cornerstones of an effective due diligence defence is the proper training of employees and contractors. It is apparent that the structure of Summitt's training regime was simply not effective. As discussed above, there does not appear to have been a predictable, standard practice for retail salesperson training, but at best it amounted to a few hours of classroom instruction and some limited in-field observation. The amount of training required by Summitt was not an adequate foundation for a retail salesperson who is expected to go into homes to sell these very significant contracts to relatively uninformed consumers on the basis of price comparisons or promises of lower prices.

68 Further, while on paper the training materials used by Summitt seemed adequate (with the one exception noted below), it is difficult to believe that materials could be adequately covered in a few hours. Indeed, one of Summitt's subcontractors acknowledged that while he received Summitt's training materials, he did not provide them to the retail salespersons he trained and did not expect them to review these materials in a four-hour training session. This highlights that the efforts to impart the relevant information to the retail salespersons was not consistent or predictable. Training was left to Summitt's subcontractors and the Board saw scant evidence of any steps taken by Summitt to monitor the effectiveness of this training either by observing training sessions or conducting in-field reviews of its agents. In the Board's view, in order to establish an effective and operational due diligence program the company needed to ensure that the prospective retail salespersons were well conversant with the fundamentals of the energy market in Ontario, especially if they were being directed to engage in price comparisons as part of their sales technique. The training required by Summitt was clearly inadequate.

69 The one exception referred to above concerns the fact that the Summitt training materials do not require the retail salespersons to clearly stipulate that the company they represent, that is Summitt Energy Management Inc., is an energy retailer which is not the consumer's natural gas or electricity distributor. This is inconsistent with Subsection 2.1 (a) of the Codes.

70 Summitt also adopted an organization for the sale of energy contracts which was predicated on at best ambiguous, and at worst misleading, contractual documents. No due diligence system would be complete or reasonable that did not emphasize the importance to the retail salespersons of ensuring that prospective customers understood unequivocally the nature of the arrangement they were entering into at the time they were entering into it. Having created a materially ambiguous context for the interaction with the customer through the use of the Registration Form and a "brochure", it was incumbent upon Summitt to ensure that the retail salespersons convincingly, effectively, and in every case demonstrated to the prospective customer the nature of the arrangement that was being entered into.

71 In addition, as in the "ticket" cases discussed above, there was an obligation on the part of the retail salespersons, which Summitt was obliged to require and enforce, to ensure that particular terms of the arrangement were unequivocally brought to the attention of the prospective customers. In fact, the sales activity as sponsored by and created by Summitt's own organization of the sale

obfuscated the nature of the contractual relationship and much of its detail. The effective operation of the compliance system could only be accomplished if this important element of the sales interaction was effectively scripted, monitored, and enforced by Summitt. This it failed to do.

72 As noted earlier in this decision, there were further deficiencies with respect to the price comparison materials provided by Summitt to its retail salespersons. It was incumbent upon Summitt to ensure that price comparison information was current, accurate, and appropriately nuanced to enable prospective customers to make informed decisions about retail energy contracts. In case after case before us the actual price of the natural gas commodity and the supply of electricity were misrepresented. In order for an effective compliance plan to qualify as a genuine due diligence effort, Summitt needed to demonstrate that it took its obligations with respect to price comparisons seriously. This would entail ensuring that the message delivered by its retail salespersons was clear, unequivocal and accurate as at the date of its utterance. In order to accomplish this, not only did it need to be communicating this information directly to the retail salespersons force on a current basis, but it also needed to monitor its sales force and its interaction with prospective customers to ensure that accurate comparisons were being represented. In this, Summitt failed.

73 As a subset of the price comparison strategy, Summitt needed to address, and ensure that its retail salespersons addressed, the role of the "Provincial Benefit" in the electricity market place. When making price comparisons in its sales materials and contractual documentation, Summitt had an obligation to ensure that the Provincial Benefit was properly disclosed. There was no evidence that Summitt took adequate steps to ensure that its retail salespersons understood the Provincial Benefit, described it accurately, and represented its effect on potential Summitt customers. An effective compliance plan would have ensured that the retail salespersons consistently expressed in an unequivocal and accurate way the likely effect of the Provincial Benefit on prospective electricity retail customers. This it did not do.

74 In the context of the fundamental misunderstanding experienced by customers as to the nature of the contractual relationship they had entered into, the reaffirmation call was in many instances meaningless and cannot be relied upon to support a due diligence defence. As noted above, not only was the implication and effect of the reaffirmation call misrepresented by the salesperson in many instances, it was fundamentally undermined by the completely understandable lack of appreciation of the prospective customers as to the kind of contractual relationship they were about to cement. Summitt has a positive obligation as part of its compliance plan to ensure that it's reaffirmation callers were alert to indications of misunderstanding on the part of the prospective customer, and that it really represented nothing more than a simple, unequivocal, and direct confirmation by the customer that the customer understood and accepted the complex contractual arrangement Summitt wished to rely upon.

75 In relying on its due diligence defence, Summitt references a series of cases which can be generally characterized as "rogue employee" cases and points to its compliance program and the

compliance measures taken against the five salespersons involved in this case. The basic proposition is that notwithstanding that a company has an acute and effective compliance program, there will always be rogue employees who refuse to comply with the company's requirements.

76 The Board does not find this is to be a case of five rogue agents. As detailed above, a substantial contributor to the misunderstanding of prospective customers about the true nature of the contractual arrangement they were entering was not rooted in the actions of the retail salespersons, but rather directly in the organization of the sale devised and designed by Summitt itself.

77 Further, the Board finds that while Summitt may have had, on paper, a compliance program, in all of the circumstances it fell far short of any reasonable standard in its operation. The company's compliance plan substantially failed to provide for appropriate re-training, monitoring, scripting, correction, sanction, and redress. Given the absence of forceful and direct engagement by Summitt to ensure that the necessary elements were addressed on a door-to-door basis, it cannot rely on the failure of its retail salespersons to respond to a compliance plan that was inadequate and poorly enforced. The claw-back of commission for noncompliance was only imposed in one case. It also appears from the cases that so long as Summitt was able to cull "yes" answers from the customer on the reaffirmation call, the company felt that all was well with the sale. This approach completely overlooked the possibility that the reaffirmation call had been substantially undermined through misrepresentation by the retail salesperson as to its effect.

78 To this point we have described what we have found to be deficiencies in the Summitt due diligence program. It is perhaps as important to provide our opinion on what we consider to be a conforming due diligence approach.

79 To identify the components of such a program we need look no farther than the proposal made by Summitt at the conclusion of the hearing, referred to as its "14 Point Program". In the Board's view with the exception of the deficiency highlighted above with respect to the retail salespersons' obligation to state that Summitt is not the consumer's natural gas or electricity distributor, it is the Board's view that the 14 points represent a reasonable and comprehensive due diligence program. Of course as also noted above, a due diligence program is only as good as it is effective. And the components of the program are of no independent value unless they form part of an operational due diligence activity.

80 The 14 Point Program provides for the following incidents surrounding door-to-door sales. In providing this description of the 14 points, the Board has purposely omitted language such as "continuation" or "continued" which was used in Summit's description of the program.

1. Summit will issue to each energy salesperson a business card that incorporates its own EB license numbers, Summitt energy's name, the name of the sales person, the salesperson ID number, Summitt's toll-free number, and Summitt's website address. Summit agrees to adopt recommendations of the Board with respect to the sizing of the business

card.

2. Summitt will issue to its salespersons and will require them to wear an ID badge that includes, in addition to the information currently reflected on the badge, a statement that Summitt Energy does not represent the local distribution gas or electricity utility, a yearly expiry date, and the issuance of a new ID badge will be dependent upon the completion of annual recertification training and the test. This means of course that each salesperson would be subject to annual recertification training.

3. Summitt will employ a point-of-sale quality assurance call program, identical to the one that it put in place on June 30, 2010 in response to the Board's interim compliance order. Pursuant to this quality assurance call program, the customer must positively confirm all the points on the call in order for the contract to be sent for reaffirmation and processed for enrollment with the utility. The points covered by the call include the following: confirmation that the representative was wearing a Summitt energy ID badge and had identified him or herself as being from Summitt energy, not the local distribution utility, the government or the Board. Further, the call must confirm that the customer has been provided with a copy of the agreement. In addition the call needs to elicit a response from the customer that the price and duration of the agreement is understood by the customer and a clear, unequivocal statement of understanding by the customer that the contract provides for price stability and does not guarantee cost savings. Finally the quality assurance call program will confirm that the contract has been entered into voluntarily, that the customer is not a minor, and that if the customer is a senior that additional disclosure will be provided to ensure that the customer appreciates the nature of the arrangement entered into. This quality assurance call is to be made at the time of sale.

4. Summitt will employ a revised reaffirmation call script which will include each of the applicable topics proposed in attachment D to the OEB's August 12, 2010 proposed code of conduct amendments.[15]

5. Summitt will employ a revised disclosure form, which was implemented in response to the Board's interim compliance order on June 30, 2010. The customer signature as an acknowledgment on that disclosure form is

required before the contract will be processed. That disclosure form acknowledgment that must be signed by the customer confirms the customer's understanding that the agreement entered into is with Summitt Energy not with the local gas or electricity utility, the Ontario government or the OEB, that the agreement is being entered into voluntarily and that the customer will continue to be supplied with natural gas and or electricity even if they don't sign the agreement. In addition, the disclosure form acknowledgment confirms that the customer appreciates that the disclosure of the global adjustment, formerly known as the Provincial Benefit, as a separate line on the utility bill and that it may be either a credit or charge, and that consistently since 2007 it has resulted in a charge to electricity customers. The disclosure form shall also confirm the customer's understanding that the customer may be required to pay Summitt Energy exit fees for early termination of the agreement, and that the price quoted is for the commodity only and the other regulated charges will be required to be paid. Summitt will further revise its disclosure form to include the applicable topics listed in attachment C (proposed disclosure statements) to the OEB's August 12, 2010 Proposed Code of Conduct Amendments.

6. In response to the Board's interim compliance order, Summitt Energy implemented the use of a new combined agreement format on June 30, 2010 that incorporates the registration form and the terms and conditions (the "brochure") into one agreement. In addition this new format discontinues use of a natural gas AECO price chart, and includes a statement that a global adjustment charge or credit may apply, that Summitt energy is not affiliated with the utility, the government or the Board, and that financial savings are not guaranteed.

7. Summitt agrees to cancel its contract without an exit fee if a customer is already on a contract with an existing retailer.

8. Summitt agrees to implement new code of conduct training for all its salespersons consistent with its response to the Board's interim compliance order. Summitt agrees to further redesign its training and testing modules to ensure that they meet the requirements of section 5 of the OEB's new proposed code of conduct as reflected in the August 12, 2010 Proposed Code of Conduct Amendments.

9. Summitt agrees to enhance its training and testing modules with respect to reaffirmation agent training to meet the requirements of sections 4 and 5 of the August 12, 2010 Proposed Code of Conduct Amendments.

10. Summitt agrees to cause amendments to be made to its contractual arrangements with its sales agency and salesperson independent contractor agreements. These amendments will outline a specific sales agent compliance monitoring program which will be further described below, and a definitive remedial action schedule.

11. Summitt agrees to enhance its process and procedures respecting the management and handling of low-volume consumer agent conduct complaints by implementing the requirement appearing in section 7.2 of the proposed OEB August 12, 2010 Proposed Code of Conduct Amendments. These amendments provide that if a complaint is not resolved to the consumer's satisfaction, Summitt Energy will provide to the consumer the OEB's Consumer Relations Center contact information.

12. In addition to its current practice, Summitt agrees to augment its compliance monitoring program by developing a new agent complaint point system; and to employ an agent complaint system report and a complementary remedial action schedule. The agent complaint point system consists of assigning points to the number of complaints and type of agent complaints in order to identify trends. In addition, Summitt agrees to include in its compliance monitoring program a requirement that salespersons sign off and review each low-volume consumer complaint report alleging agent misconduct respecting the individual sales person involved. In addition, Summitt agrees to automate the process of the distribution of the weekly agent complaint reports to facilitate their early consideration by management. Once a salesperson reaches any of the remedial action phases identified in the remedial schedule, the sales person will be subject to complete retraining with one of Summitt's compliance department employees.

13. Summitt agrees to conduct a process audit, and to implement the recommendations of that process audit. Summitt's proposal in this regard relates specifically to the allegations of noncompliance made in this proceeding. The Board construes Summit's proposal to include its

acceptance of the need for periodic process audits respecting the sales activities of its sales force, with a view to ensuring that the rest of the 14 Point Program is having the desired effect with respect to compliance.

14. Summitt agrees to provide the Board with quarterly reports confirming its adherence to any Board order issued in this proceeding, which confirmation is to be made by way of certificate executed by a senior officer of the company.

81 The timing of the implementation of the 14 Point Program is noteworthy. None of it was adopted prior to the issuance of the Notice in June 2010. It cannot therefore serve in any degree as a defence to the allegations made in this proceeding. Quite to the contrary, the adoption of this comprehensive due diligence program after the Notice was issued really highlights the deficiencies of the system existing at the relevant time. This is even more telling when one considers that Summitt was involved in the development of better and more comprehensive practices through its involvement in the Ontario Energy Association working group from about 2008. The system in place governing the actions of the retail salespersons described in this proceeding was, or should have been, known to Summitt to be deficient in its content and its operationality.

82 It is also to be noted that the Board's acceptance of the 14 Points as a viable due diligence program is rooted in the current regulatory regime and its requirements. Changes to the regulatory requirements, as are expected to be implemented in the near future will require a re-examination and possible re-calibration of the due diligence program.

Credibility and Reliability

83 Before beginning a review of each of the 19 complainants at issue in this case, it is helpful to make some general observations and findings that are relevant for all of the cases advanced by Compliance Staff.

84 Much of the hearing before the Board focused on the credibility of witnesses. While the Board will, as necessary, address specific issues of credibility in its consideration of each of the 19 complaints, the Board's focus on this aspect of the proceeding is generally on the reliability of the respective testimony of the witnesses, not their credibility. In assessing the witnesses' reliability the Board has taken into account the following findings.

85 The Board considers it to be significant in its consideration of the reliability of the evidence of the respective witnesses that none of the retail salespersons had specific recollection of any of the instances giving rise to the alleged contraventions. In each case, the complainants were able to provide a significant amount of detail in their narrative of the interaction with the retail salesperson. By contrast, the retail salespersons had no such recollection, and cast their evidence on the basis of what they would "normally" or "typically" have done in a door-to-door sales effort. To some extent,

this is understandable, given that the retail salespersons made a significant number of contacts within the relevant period. However, it is also somewhat surprising that the retail salespersons were unable to remember even a single case. In some cases the retail salespersons were alerted by Summitt of the complaints which form part of this proceeding and were subject to retraining as a result of the complaint. One would have expected that the retail salespersons would have been able to provide a more detailed, precise and non-generic response to at least some of those allegations.

86 It is also apparent that the evidence of the diverse complainants with respect to the individual retail salespersons seems to establish similar noncompliant behavior on the part of the respective retail salespersons. For example, more than one complainant testified that a specific retail salesperson had not identified himself unequivocally as the retail salesperson of Summitt, an energy retailer. In other cases, diverse complainants described similar nonconforming behavior by a retail salesperson. This corroboration by unrelated witnesses tends to support the testimony of the complainants where it differs from that of the retail salesperson. It should be noted that witnesses were subject to a sequestration rule which kept them out of the hearing room while the testimony of other complainants was being given.

87 The Board also notes that in a couple of cases, two complainants were present at the door-to-door encounter and gave substantially the same evidence respecting it. This testimony was given in a forthright and direct manner, and was not seriously impugned during cross-examination.

88 There is no evidence of any kind that any of the complainants had been offered any inducements to provide their evidence or to sustain their complaints. A number of them had travelled considerable distances to attend and give their evidence. In some cases, Summitt had unilaterally canceled the contractual arrangements without penalty or liquidated damages, meaning the complainants had no incentive of any kind to maintain their complaint. Many of the complainant witnesses testified that their motivation for testifying was simply to try to protect other consumers from the treatment they asserted they had experienced with Summitt.

89 For these reasons, the Board finds the complainants' testimony to be consistently preferable to that of the retail salespersons who were only able to provide the most generic and unconvincing rebuttals.

The Conduct of the Investigation

90 During the course of the proceeding and in its submissions, Summitt expressed concerns respecting the fairness of the Board's investigation itself. The tone of this complaint was rooted in a sense that Summitt was unfairly targeted for an in-depth investigation by Compliance Staff, and that in the course of the investigation Compliance Staff "framed" the complainants evidence by asking specific questions about whether a salesperson wore a uniform, badges, left a business card, etc.

91 The Board was not convinced that Compliance Staff acted in any way inappropriately in conducting this investigation. Summitt suggests that it was singled out for investigation because of

the number of complaints made respecting its sales effort without regard to the overall proportionality of complaints to the number of contracts entered into. While that may be so, each complaint has its own history, and unless obviously frivolous, deserves to be explored, understood, and where necessary, acted upon.

92 Further, there is simply no evidence to the effect that Compliance Staff did anything that was inappropriate in trying to investigate the complaints which form the basis of this proceeding. In seeking detail from complainants, it was necessary to ask specific questions rooted in the regulatory requirements. It would have been strange for Compliance Staff to have proceeded in any other way. It was clear that none of the witnesses felt as though they had been cajoled or even encouraged by Compliance Staff into making their complaints or amplifying them in any way. Counsel for Summitt sought this kind of evidence through cross-examination, but it did not materialize.

93 Summitt also appeared to be concerned about the possibility that the respective complainants had been influenced in their testimony or even the motivation to bring a complaint by certain Internet sites which have become dedicated to consumer discontent with Summitt and energy retailers in general. While counsel for Summitt probed aggressively on this point during the cross-examination, the Board is not convinced that there is any meaningful or inappropriate influence from this source.

Relevant Statutory Provisions

94 It is worthwhile to outline the specific statutory provisions which Summitt has allegedly breached through the actions of its retail salespersons.

95 First, section 88.4 of the Act makes it an offence for a retailer of electricity or a gas marketer to engage in an unfair practice. The section goes on to say that an unfair practice is a practice that is prescribed by regulation. Section 88.4 also provides that the actions of a salesperson acting on behalf of the retailer or marketer are attributable to the retailer and marketer. The most directly relevant regulation is Ontario regulation 200/02 under the Act (Consumer Protection). This regulation provides a list of practices which are to be considered unfair practices for the purposes of the Act, including section 88.4.

96 Of very direct relevance is section 2 of Ontario Regulation 200/02 which provides that it is an unfair practice to make any false, misleading or deceptive statements to the public or to consumers. It then goes on to provide examples of subject matters related to the retailing and marketing function which could give rise to an unfair practice through the use of false misleading or deceptive statements. These include statements respecting the rate for the distribution of electricity or gas or the total price of electricity or gas, the difference between any price charged for the provision of electricity or gas by any retailer of electricity or gas marketer including a distributor, the amount of money to be saved by a consumer expressed in any manner if the consumer were to choose one retailer of electricity or gas marketer over another, including the local distribution companies, and the failure to disclose information about the products, services or business of a retailer of electricity

or gas marketer if the failure has the effect of deceiving or misleading a consumer or if the retailer of electricity or gas marketer knows, or ought to know, that the failure has the capacity or tendency to deceive or mislead a consumer.

97 In addition to the provisions of section 88.4 and the requirements of Ontario Regulation 200/02, section 88.9 of the Act makes it an offence for a retailer of electricity or gas marketer to fail to deliver a written copy of the contract to the consumer within the time prescribed by regulation. Section 88.9 also deals with the reaffirmation process.

98 Contraventions of these statutory provisions are subject to the order and penalty provisions contained in Sections 112.1, 112.2, 112.3, 112.4, and 112.5. Penalty provisions include suspension or revocation of licenses and administrative, that is monetary, penalties, which are particularized in Ontario Regulation 331/03.

99 It is also a contravention if the electricity retailer or gas marketer fails to adhere to the requirements of the Codes of Conduct for those respective businesses. The Codes are documents produced by the Ontario Energy Board, and compliance with the respective Codes is a license condition for electricity retailers and gas marketers. Failure to conform to the requirements of the respective Codes is a violation of license conditions. The respective Codes contain provisions which include the obligations of the retail salespersons respecting the utterance of false or misleading statements to consumers, the identification of the sales person to the consumer and the positive stipulation that the retailer or gas marketer, as the case may be, is not the consumer's distributor. The respective Codes also explicitly require the retailer of electricity or marketer of gas, as the case might be, to ensure that their respective salespersons adhere to the requirements set out in the Codes.

100 Breaches of the respective Codes can lead to license suspension or revocation.

Specific Alleged Contraventions

101 Considerable argument was advanced respecting the "scope" of this proceeding, directed to the meaning or significance that should be attached to complaints delineated in the Notice, but for which there was no supporting evidence. The Board considers that these allegations which have not been proven, and for which no evidence was provided, should play no role whatsoever in the Board's determination of liability, or with respect to the imposition of sentence. In arriving at its findings in this case, the Board has paid no regard to these allegations. The allegations to which this applies are from complainants R.C., P.R., J.S., J.F., A.B., B.D., C.H., H.G., and J.L.

102 What follows is a consideration and determination of the specific allegations for which evidence was provided.

Retail Salesperson M.G.

103 Five of the 19 complaints for which evidence was submitted relate to the behavior of M.G. and his sales technique.

104 In four cases, the complainants reported that M.G. had not identified himself as a representative of Summitt, but rather had either identified himself as an agent of the gas distributor, another retailer, or was unclear and unspecific as to whose agent he really was.

105 In all five cases, the price to be paid by the customer under the plan for natural gas and/or electricity was either misrepresented or not stated at all. In fact, in three cases, the complainants testified that the electricity portion of the Registration Form was checked off, even though there had been no discussion respecting electricity supply with M.G.

106 Furthermore, in three cases, the complainants testified that they were not provided with a copy of the "brochure".

107 It was J.W.'s testimony that M.G. identified himself as being associated with the Ontario Energy Board and that he did not explicitly identify himself as a retail salesperson of an energy retailer, specifically Summitt Energy Management Inc. The thrust of M.G.'s sales pitch with respect to electricity supply was that smart meters were going to create a situation in which the price J.W. was going to be paying for electricity was going to be somehow unfair. With respect to gas, M.G. indicated that he would be sending a chart to J.W. showing the increase in gas prices over the last period so that the customer could verify for himself that the price comparison suggested by M.G. was accurate. That chart was never received by J.W., nor did M.G. testify that he had followed through on this offer of further information.

108 J.W. testified that he had read the registration form before signing it. However, this evidence must be considered in the context of the rest of J.W.'s testimony. J.W. testified that M.G. represented the Registration Form as a confirmation that he had in fact met with J.W. that he had explained the situation to him and that it was necessary documentation for him, that is M.G., to get paid. It is clear from his testimony that J.W. regarded this contact with M.G. as in the nature of a survey respecting the adequacy of service of his utility companies.

109 With respect to the reaffirmation call, J.W. indicated that M.G. told him that someone would be calling in the next little while, that this was a mere formality, intended to confirm that M.G. was at the house and that his confirmation was necessary in order for M.G. to get paid. When he received the reaffirmation call J.W. answered all the questions in the affirmative. J.W. testified that he did so because he thought that he was simply confirming what he had been told at the door by M.G. This misapprehension was shared by other complainants.

110 Summitt placed a great deal of importance on the reaffirmation call as a genuine confirmation that the customer had unequivocally entered into a contractual arrangement with Summitt. As discussed earlier in this decision, for the reaffirmation call to be genuinely effective it needed to be more sensitive to misunderstanding and misapprehension on the part of the customer

than it was. Summitt's due diligence program, in order to be effective and operational, needed to have these attributes in order to provide a defence to the allegation of non-compliance.

111 For J.W. the next event of consequence was the receipt in July of a utility bill which seemed to be extremely high. When J.W. called the gas company he was told that he was now a customer of an energy retailer and that the cost of supply of natural gas had accordingly increased. At this point J.W. formulated a complaint. In the end, his contract with Summitt was canceled without liquidated damages or any other form of penalty.

112 The fact that the complaint was not made until some months after the contract was actually signed comes as no surprise in these circumstances. J.W. did not believe that he had entered into a long-term fixed-price contract for the supply of natural gas or electricity on February 24, 2009. This circumstance was only brought home to him when he received his sharply increased utility bill in July of 2009. This lag, which is common to all of the cases because of the time it took to effect a transfer of the account to Summitt, is important. It means that Summitt should have had in place a much more rigorous process for assuring itself that its retail salespersons were conducting the sales calls in a manner that was consistent with the legal requirements. There should have been a scripted sales presentation, aggressive contemporaneous monitoring of the sales call and a more nuanced interaction with the customer to ensure that the prospective customer understood the nature of the relationship Summitt was going to rely upon. This is in fact the kind of approach adopted in the 14 Point Program implemented by Summitt in June 2010.

113 With respect to the complaints of D.B. and J.T., M.G. identified himself as a Summitt representative offering a price cap for natural gas. Specifically, it was D.B.'s testimony that M.G. offered them a contract for their natural gas supply at 35 cents per cubic meter and told them that the price would go down if gas prices went down but would never go above 35 cents per cubic meter . M.G. misrepresented the price to be paid under the contract. While it is true that under a fixed price contract, the price should not go above the contracted price for the term of the contract, M.G.'s statement that the "price would go down if gas prices went down" was false and misleading. The only means whereby that could occur was if the customer invoked a one-time adjustment described in the contract as the "Blend and Extend" option. Like every other term and condition appearing in the "brochure", the salesperson made no effort to disclose to the customer how this mechanism might work.

114 D.B. further testified that M.G. told them that the price of gas at that time was around 41 cents per cubic meter. This information is also inaccurate and misleading as the utility's price at that time was around 23.5 cents per cubic meter.

115 D.B. testified that the electricity portion of the registration form was checked off even though M.G. did not discuss electricity with them. During the reaffirmation call, D.B. advised the reaffirmation agent that M.G. had not spoken to them about electricity and as a result the electricity contract was cancelled by the reaffirmation agent. A copy of the brochure was not provided to D.B.

and J.T.

116 After filing a complaint with the Better Business Bureau and the Ontario Energy Board, D.B. and J.T.'s natural gas contract with Summitt was cancelled without penalty.

117 To the complainants A.H. and C.S., M.G. was unclear as to the entity for whom he was working. In their testimony, A.G. and C.S. were clear that M.G. told them that the purpose of his visit was to offer them better prices on gas and electricity. C.S. remembered that M.G. told them that Milton Hydro's (their local electricity distribution company) rates were guaranteed to increase within a very short period of time. A.H. signed the Registration Form based on M.G.'s presentation that they would save money on their bill. When she received the reaffirmation call, like J.W., A.H. answered all the questions in the affirmative not understanding that she was confirming a five year contract for the supply of natural gas and electricity with Summitt.

118 After receiving their bill with Summitt, A.H. and C.S. tried to cancel the contract for the supply of natural gas and electricity with Summitt. However, Summitt was only willing to cancel the contract upon payment of the liquidated damages assessed by Summitt. C.S. testified that he was not aware that cancellation charges would apply at the time of his encounter with M.G. and that they couldn't pay the liquidated damages assessed by Summitt. A.H. and C.S. are still under contract with Summitt for the supply of their natural gas and electricity.

119 To the complainant D.M., M.G. identified himself as being from "the energy company" and appeared to be wearing a Reliance Energy badge. D.M. testified that M.G. told her that the previous home owners had paid for a five year fixed rate plan and that D.M. could use the last three years and that the price under the plan was 32 cents per cubic meter. D.M. testified that M.G. told her that the price would go down if gas prices went down. D.M.'s testimony is consistent with the testimony of D.B. with respect to M.G.'s representation of the price to be paid under the plan. D.M. further testified that M.G. told her that the price of gas at that time was 39 cents per cubic meter. This information is also inaccurate and misleading as the utility's price at that time was around 20.5 cents per cubic meter.

120 Like D.B., D.M. testified that the electricity portion of the registration form was checked off even though M.G. did not discuss electricity with her and that she was not provided with a copy of the brochure.

121 M.G. told D.M. that she was "eligible" for the Provincial Benefit and someone would contact her about that. In fact, when she received the reaffirmation call, D.M. did inquire about the Provincial Benefit but didn't get a clear response from Summitt's agent.

122 When D.M. noticed Summitt as her energy provider on her bills, she called Union Gas and was told that Summitt was her supplier. She then contacted Summitt to cancel the contract and was told by Summitt that liquidated damages would apply. D.M.'s husband contacted the Ontario Energy Board and they sent an e-mail to Ellen Roseman, a Toronto Star journalist seeking help.

D.M. received an email from Summitt stating Summitt was willing to cancel her contract as a customer service gesture.

123 To the complainant A.S., M.G. identified himself as a supervisor from Union Gas and indicated that he was there to discuss energy saving programs with her. A.S. testified that she signed the Registration Form thinking she was registering for a Union Gas energy saving program. A.S. testified that M.G. advised her to call Union Gas in a few months to get her security deposit back.

124 Like D.B. and D.M., A.S. testified that the electricity portion of the registration form was checked off even though M.G. did not discuss electricity with her and that she was not provided with a copy of the brochure.

125 A.S. testified that when she received the reaffirmation call, she did not know it was Summitt and she misunderstood what was being discussed.

126 A.S. testified that when she called Union Gas a few months after the encounter with M.G. to get her security deposit back, she was told that M.G. was not from Union Gas. A.S. then called Summitt to cancel her contract but was told that cancellation fees would apply. A.S. complained to the Ontario Energy Board. After receiving an income verification letter from A.S., Summitt cancelled the contract for natural gas and electricity supply without penalty.

127 In the Board's view the testimony of complainants with respect to M.G. establishes that there have been numerous contraventions of the requirements of the Act, Ontario Regulation 200/02, and the Codes.

128 First, it is apparent that M.G. failed to explicitly identify himself as a representative of an energy retailer on four occasions. In three cases, he had actually identified himself or caused himself to be identified as an employee or agent of someone other than Summitt.

129 As noted elsewhere in this decision M.G. was unable to provide any specific rebuttal relating to these complaints, and could not specifically deny any of the allegations made by these complainants. M.G.'s general statement that he always identified himself as a Summitt representative cannot be preferred in the face of the complainants' quite specific recollections, especially when they appear to be corroborative of each other. It must also be noted that Summitt's training materials do not appear to have dealt with the obligation of the salesperson to positively stipulate that he did not represent the local distribution company. It is perhaps then not surprising that M.G. failed to meet this standard.

130 The Board finds therefore that there are four contraventions of section 2.1 of the Codes which requires the retail salesperson to immediately provide the name of the retailer and marketer he represents to the respective customers.

131 Second, the Board finds that M.G. provided false, misleading and deceptive statements to

each of the complainants and thereby engaged in an unfair practice contrary to section 88.4 of the Act. These misleading and deceptive statements touched on several aspects of the sale. The price comparison offered by M.G. was inaccurate. M.G. testified that he showed prospective customers their current gas prices as shown on their gas bills, and compared them to Summitt's gas prices and historic gas prices. He testified that he explained to customers that the utility price of gas went almost to 42 cents per cubic meter in 2008. This information was inaccurate and misleading. The effective price of the commodity had not risen to 42 cents per cubic meter in 2008. It had ranged between 24 .5 cents and 38.1 cents. At the time of the sales call, the price of natural gas was less than 30 cents.

132 M.G. indicated that he would be providing comparative data to J.W. with respect to the historic price of natural gas at the household. The Board finds that there was no intention on M.G's part to follow through with that promise, and that it therefore was false and misleading statement. To D.M., M.G. indicated that she was "eligible" for the Provincial Benefit and that someone would be contacting her with respect to that. The clear implication to D.M. was that she would be receiving a benefit of some kind associated with the Provincial Benefit. In fact, the Provincial Benefit, as was known, or should have been known by M.G., would result in significantly higher electricity charges for D.M. Further, the Board finds that there was no intention on the part of M.G. that he would take any steps to ensure that someone called D.M. to clarify this issue.

133 In addition, the Board finds that M.G.'s characterization of the reaffirmation call was intended to mislead these complainants into a misunderstanding respecting the meaning of and implications of the reaffirmation call.

134 The Board finds that in representing that the "comprehensive energy price protection plan" would result in energy savings, M.G. made false and misleading statements to these prospective customers. The plan, at least to the extent that it covered gas supply, could reasonably be described as a device which could minimize volatility in the customers' energy supply cost. But to describe it as a cost saving tool, without a more complete and nuanced description, is misleading.

135 The Board considers that enrolling customers in the electricity protection plan when there had been no discussion of that arrangement nor assent of any kind by the customer is an unfair practice contrary to section 88.4 of the Act.

136 In summary, the Board considers that the evidence with respect to M.G. establishes on a balance of probabilities the following contraventions of the Act and the Codes. Specifically the Board finds that:

1. M.G. provided false, misleading and deceptive statements to all five complaints: D.B. and J.T., A.H. and C.S., D.M., A.S. and J.W. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. M.G. did not provide a copy of the terms and conditions of the contract nor were they delivered to D.B. and J.T., D.M. or A.S. contrary to section 88.9 (1) of the Act.

3. M.G. breached section 2.1 of the Codes in all five cases:

   a. during the encounter with D.B. and J.T., by failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer;

   b. during the encounters with A.H. and C.S., D.M., A.S. and J.W., by failing to immediately and truthfully give the name of the retailer and marketer (Summitt) to the consumer, failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract.

Retail Salesperson G.W.

137 Three of the complaints concerned the sales presentation of G.W.

138 In two of these cases the complainants testified that G.W. either explicitly misrepresented who he worked for or did not say who he was representing.

139 With respect to the complainant C.L., it is clear that this customer was extremely reluctant to enter into any arrangement that did not result in immediate cost savings. In response to this G.W. represented that he was selling electricity at a discounted rate and that C.L. would save money on his hydro bill if he was to sign up with Summitt. A substantial portion of the sales effort by G.W. was directed to the effect that smart meters would have on C.L.'s electricity bill. He represented that C.L. would save money in the New Year, once the smart meters were installed. In the end C.L. paid $448 as liquidated damages to cancel this arrangement.

140 In this case, it appears that G.W. did identify himself as a retail salesperson associated with Summitt. It also appears that it was clear to the customer that there was no relationship between Summitt and the local distribution company. However, the promise of discounted rates related to the advent of smart meters in the New Year was a false or misleading statement. This is so because the actual date of the implementation of the smart meter program, which involves not merely the installation of the smart meter itself, but also the enrollment of the local distribution company in the Time of Use regime operated by the Smart Metering Entity was certainly unknown to G.W. It

served his purpose in making the sale to assert that the Time of Use regime would be in place "in the New Year", and also that that regime would necessarily result in electricity prices higher than those currently experienced by the customer, and higher than those provided for in the Summitt offering. There was no factual basis for this assertion. The advent of the Time of Use regime can have widely varying effects on customers depending on their respective energy usage patterns.

141 In addition, in so far as the salesperson had embarked on a pointed price comparison, it was incumbent upon him to also factor in the effect of the Provincial Benefit, which would have been to increase the amount payable under the Summitt offering, to the extent of the Provincial Benefit.

142 Not only did the customer's recollection of the sales call not touch on any such discussion, these nuances would very likely have caused him to reject the Summitt package because it did not meet his immediate stated goal: an unequivocal reduction in electricity prices in the new year. The saleperson's recollection of his generic sales technique, which is his only rebuttal, certainly did not contain any mention of the kind of discussion outlined above. In the Board's view this is precisely the kind of exchange that Section 88.4 of the Act and Regulation 200/02 were intended to prohibit.

143 The complainant Z.P. believed that G.W. was the representative of the gas company. Z.P. indicated that he only had an interest in one very specific product under offer. That product was described as a "Green Energy Contract" at a cost of $12.99 per month. It was Z.P.'s testimony which the Board finds to be credible and reliable that at no time did he discuss enrollment in any other product respecting the supply of electricity or natural gas. His sole interest was in participating in the Green Energy Contract. The customer also indicated that he was subject to a one-year lease and would have no interest in any contract that had a term longer than that. He clearly did not appreciate that he was entering into a five-year fixed term contract for the supply of electricity and natural gas, and would not have done so had he known. The customer also testified that he did not receive copies of any of the forms he had signed, and did not recall receiving the "brochure" at all.

144 At the time of the reaffirmation call, the customer expected to be confirming his interest in establishing the Green Energy Contract, but nothing else. Summitt apparently repeatedly tried to procure from the customer his utility account information which he refused to provide. When the customer's lease term concluded and the customer's name was removed from the utility account by the landlord he received a letter from Summitt demanding payment of $611 apparently as liquidated damages for the closing of his natural gas account. The status of this demand is unknown to the Board.

145 In the Board's view, this interaction resulted in a violations of Section 88.9 of the Act through the failure of the salesperson to provide a copy of the brochure, a violation of Section 88.4, by the enrollment of the customer in the price protection program against his stated wishes, and a violation of the Code of Conduct for Gas Marketers as a result of G.W.'s failure to unequivocally identify himself to the customer as a salesperson for Summitt, without any affiliation with Enbridge Gas, the local distribution company.

146 With respect to the complainant A.G., G.W. represented himself as an employee of Hydro One. This is significant because the customer had a number of relatives who work for Hydro One, and she had a generally positive attitude respecting that company. G.W. indicated that if she signed up for the electricity supply program through Hydro One, her electricity prices would never rise for five years. This would not appear to be accurate given that the Terms and Conditions contained in the "brochure" make provision for a Pool Balancing Adjustment which could result in the upward adjustment of the Summitt contractual price by up to one cent per kWh for the total volume over the term of the Agreement. At no time did G.W. indicate that he was a representative of Summitt.

147 When the reaffirmation call occurred, the customer testified that she believed that she was being contacted by Hydro One and was confirming an arrangement with that company. It was only after a subsequent family visit where she had described the contact from Hydro One (as she thought it was) that she began to have doubts about the arrangement. Her family members indicated that she had probably entered into a long-term fixed-price contract with an energy retailer. When she checked the documentation she realized that this was the case and took steps to try to cancel her contract. The response from Summitt was a claim for over a thousand dollars in liquidated damages, which the customer could not afford to pay. As of the date of writing this customer is still a customer of Summitt.

148 G.W.'s rebuttal of these claims is very unconvincing. He had no specific recollection of any of these customers. His evidence was limited to a general denial based on what he "always" or "typically" did. The fact that two of the three complainants asserted unequivocally that he had not identified himself as an agent of Summitt makes it hard to attach any credibility to his general denial. He suggested that customers had a misconception, but his testimony suggested that he knew that the customers may not have understood the true nature of the arrangements they were entering into because of "inattention". Under the circumstances it is the Board's view that the agent has a positive responsibility to ensure that the customers clearly understand the nature of the contractual arrangements they are entering into. The Board also considers that it is the responsibility of Summitt to ensure not only that the salespersons understand that responsibility but that they have the appropriate scripts and tools necessary to discharge it. This standard reflects the Board's view that Summitt had a responsibility to ensure that the communication to the customers was clear and unequivocal given the inherent ambiguity created by the overall organization of the sale.

149 The Board considers that the testimony respecting the sales activity of G.W. in this case results in numerous contraventions of the Act and the applicable Codes. Specifically, the Board finds that the following contraventions have been proven on a balance of probabilities.

1. G.W. provided false, misleading and deceptive statements to all three complainants: A.G., C.L. and Z.P. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. G.W. did not provide a copy of the terms and conditions of the contract nor were they delivered to Z.P. contrary to section 88.9 (1) of the Act.

3. G.W. breached section 2.1 of the Electricity Retailers Code of Conduct in two cases:

    a. during the encounter with A.G., by failing to give the name of the retailer (Summitt) to the consumer and failing to advise A.G. that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of electricity, and making representations or statements that were false or likely to mislead a consumer; and

    b. during the encounter with C.L., by failing to state the price to be paid under the contract for the supply of electricity, and making representations or statements that were false or likely to mislead a consumer.

4. G.W. breached section 2.1 of the Code of Conduct for Gas Marketers by failing to give the name of the marketer (Summitt) to the consumer and failing to advise Z.P. that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas, and making representations or statements that were false or likely to mislead a consumer.

Retail Salesperson G.S.

150 Three of the 19 complaints concern the conduct and sales technique of G.S. In each case, it was the testimony of the complainants that G.S. failed to identify himself as a representative of Summitt, an energy retailer, and actually either wore clothing associated with local distribution companies or otherwise represented himself as being their agent.

151 With respect to the complainant W.G., it appears as though G.S. specifically identified himself as an agent of the local distribution company, Oakville Hydro. The Complainant testified that G.S. did not appear to be wearing any identifiable clothing or logos. Part of his sales effort included the suggestion that W.G. was particularly lucky to be living in Oakville because "they" were offering, at no extra cost, a price protection program. According to her testimony he also represented to W.G. that were she to sign up for the price protection program the electricity price would not increase, and also that she would not be tied in to any contractual obligation. This would

appear to be consistent with the evidence of G.S. himself where he indicated that he did represent to customers that they were not jumping into anything. W.G. also indicated that G.S. represented to her that in signing the registration form she was doing nothing more than confirming her name and address and indicating that she was in fact responsible for the electricity bill. W.G. understood that signing the registration form would enable her to get more information about the price protection plan. It was not her understanding that they had entered into a contract of any kind with anyone at this stage.

152 W.G.'s husband participated in the reaffirmation call, but W.G. confirmed in her testimony that it was not in their understanding that this was a confirmation of a five-year fixed-price contract for the supply of electricity and natural gas.

153 When she received an electricity bill that was much higher than expected she contacted Oakville Hydro to complain. After this, she became aware that she had entered into a five-year fixed price contract for electricity and natural gas. W.G. paid almost $1000 to cancel the comprehensive price protection plan.

154 G.S.'s rebuttal of the complaint associated with W.G. is unconvincing. In fact, some of his testimony corroborated elements of her complaint. He testified that he referred to the Registration Form as an "application", not as the contractual document it actually was. He also asserted that he did indicate to customers that they were not jumping into anything in executing the "application", that is the registration form which is a contractual document. Again, he suggested that he had no specific knowledge of any of the complaints, and could only rely on what he normally did. To the extent that G.S.'s evidence is not corroborative of the complainant's evidence, it is not reliable in the face of the clear and distinct recollection of the complainant.

155 The complainants K.S. and R.S. testified that G.S. represented himself as a sales agent associated with Kitchener Wilmot Hydro. His sales pitch was linked to the installation of smart meters. It was their testimony that G.S. advised them that in order to have the smart meter "take effect" it was necessary for them to sign the Registration Form which he had described as an application.

156 In the course of their testimony, K.S. and R.S. asserted that the signature on the registration form had been forged and was not genuine. The Board has received such complaints in the past, and has developed a methodology to assess the authenticity of signatures. The so-called "forgery package" is made available to complainants who assert that the signature has been forged. Recourse to this process was offered to K S and R.S., but they have not availed themselves of it. As a result, the board is unable to conduct an assessment of the authenticity of the signature as part of this proceeding.

157 K.S. and R.S. also asserted that the reaffirmation call, which was introduced in the proceeding both as a sound recording and a transcript, had been materially altered. In the Board's view, in order to sustain such an allegation it was necessary for these complainants or Compliance

Counsel to provide evidence in support. This was not done, and the assessment of the completeness and authenticity of the reaffirmation call is beyond the scope of this proceeding.

158 The Board is concerned, however, with these unsubstantiated assertions, and considers that they have implications for the credibility and reliability of these witnesses. Accordingly, the Board will make no finding with respect to the allegations of K.S. and R.S. with respect to their interaction with G.S.

159 The third complainant associated with G.S. was P.K. While P.K. offered her evidence in a straightforward and confident manner, evidence was introduced challenging her capacity to definitively recall the relevant events. Accordingly, the Board will make no finding with respect to P.K.'s allegations with respect to her interaction with G.S.

160 The Board considers that the evidence with respect to G.S. establishes on a balance of probabilities a number of contraventions of the Act and the Codes. Specifically the Board finds:

1. G.S. provided false, misleading and deceptive statements to W.G. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. G.S. did not provide a copy of the terms and conditions of the contract nor were they delivered to W.G., contrary to section 88.9 (1) of the Act.

3. G.S. also breached section 2.1 of the Codes by failing to give the name of the retailer (Summitt) to the consumer and failing to advise W.G. that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer.

Retail Salesperson A.B.

161 Four of the 19 complaints relate to the conduct and sales technique of A.B.

162 In all four of the cases the complainants testified that A.B. had not clearly represented himself as a representative of Summitt, an energy retailer. In fact, in three cases the complainants testified that he had misrepresented himself as being a representative of the local utility, variously Enersource and Veridian . According to the testimony of two of the complainants A.B. represented that he was there at their doorstep having installed a smart meter. The Registration Form, which he also referred to as an "application" was needed, he said, to acknowledge the installation of the smart meter. Of course, this was a complete fabrication. In fact, the fabrications respecting smart meters made during these sales calls were manifold. It appears to be consistent throughout most of the

testimony of these complainants that A.B. made no attempt to actually or accurately describe the implications of signing the Registration Form. It appears as though he consistently misrepresented the form as being in the nature of an acknowledgment respecting the smart meter.

163 As to the complainant P.S., she testified that A.B. had told her that he was there to get her to sign documentation to set up a smart meter at her premises. Her recollection was particularly detailed in so far as she recalled that he advised her that the previous owners of the property, who had recently moved out, did not want smart meters and he had therefore waited for the new occupant, that is P.S., to sign the necessary documentation. She indicated that A.B. referred to a newspaper article respecting the upward pressure on electricity prices after smart meters were implemented. She testified that there was no specific discussion whatsoever with respect to a fixed price five-year contract for the supply of gas or electricity. Her account is further corroborated by her evidence to the effect that she had the documents left with her by A.B. and after reading them she realized that they were of very different effect than he had represented. She immediately contacted Summitt to cancel the arrangement. She then filed a complaint with the Ontario energy Board. In the Board's view this series and chronology of events lend support to her version of events.

164 It was the evidence of complainant V.T. that A.B. represented himself to be an agent of Enersource, the local distribution company. According to her testimony, he referred to a newspaper article which suggested that there is considerable discontent surrounding the implementation of smart meters. According to her testimony, A.B. represented that if she "locked in", she would be saving money. It was her belief that when she signed the registration form that she was signing to receive more information about the price protection program that she believed the local utility was offering. She did not appreciate that she had signed a contractual document for a five-year fixed price contract for the supply of electricity. She indicated that A.B. had not provided her with a copy of the brochure.

165 The reliability of V.T.'s version of events is supported by her next steps. Shortly after the reaffirmation call, which she did not appreciate to be a confirmation of the fixed-price contract, she contacted her local utility Enersource to reconfirm everything that happened on the phone during the course of that call. She learned that the call was not from her local utility. It was at that point that she called Summitt to cancel the contract. Up until this time it was her belief that the only long-term contract that was in issue was for the supply of electricity. But sometime after this it became apparent that she had also been enrolled in a gas supply arrangement. She complained to Summitt and to the Ontario Energy Board. Initially the Board considered that insofar as she had answered "yes" to all of the questions during the reaffirmation call that she was bound to the contract. Finally, she paid the liquidated damages assessed by Summitt to cancel the gas contract.

166 With respect to the misrepresentation by A.B. of his identity, the complainant T.V.'s evidence with respect to her exchange with A.B. was quite similar to that described by V.T. According to her evidence A.B. had represented himself to be an agent of Veridian, the local

distribution company, who had just replaced her meter. It was her evidence that A.B. was actually wearing a Veridian jacket. According to her testimony she was asked to sign a form to acknowledge the agent's presence at her home. There was no discussion whatsoever with respect to natural gas. It was her evidence that she did not receive any documents from A.B. or from Summitt with the exception of the signed registration form, which she believed to be a mere acknowledgment of his visit. It appears that a reaffirmation call was made to the residence and a man answered in the affirmative to all of the questions. About two weeks after this, she found the registration form, discussed it with her husband and then called the number on the form thinking that it was Veridian's number with the intention to switch back to system supply. This action is supportive of her testimony that she believed at all times that she was dealing with Veridian, her local distribution company. In fact, the number was Summitt's number and she was advised that if she wanted to cancel the contract she would be required to pay a sum in liquidated damages. She has not paid liquidated damages and at the present time she does not know the status of her "account" with Summitt.

167 As to the complainant Z.A., her evidence is strikingly similar to the evidence of the other two complainants who had dealings with A.B. Her testimony is to the effect that A.B. identified himself as an agent for Veridian, the local distribution company and that he was there with respect to smart meters. Once again, according to the evidence of this complainant there was no explicit discussion of the electricity or gas supply contracts. She testified that A.B. presented her with the registration form and indicated that it needed to be signed in order for the smart meter to be installed. He did not indicate that it was a contract for the supply of natural gas and electricity. A.B. did indicate that she would receive a telephone call that was in the nature of a credit check designed to enable the utility to set up an account. Z.A. indicated that she called Veridian two days after the visit from A.B. and learned that A.B. did not represent her local distribution company. Z.A. then called Summitt to cancel the contract. Her contract was canceled by Summitt without penalty.

168 A.B.'s rebuttal of these complaints is utterly unconvincing. Not only are there substantial areas of consistency in the evidence of the complainants, he had no specific recollection of any of these sales. The consistent modus operandi reflected in the testimony of these witnesses lends their testimony reliability and credibility. The Board considers it noteworthy that even customers whose contracts have been canceled without penalty or liquidated damages wanted to pursue their complaints in the public interest. This is the case for example with Z.A., who persisted with her complaint notwithstanding that Summitt had canceled her contract. This certainly lends reliability to her evidence and her complaint, which was made without any prospect of gain.

169 Accordingly the Board finds that the following contraventions of the Act and the Codes have been proven on the balance of probabilities with respect to the sales activity of A.B.:

1. A.B. provided false, misleading and deceptive statements to all four complainants: Z.A., P.S., V.T. and T.V. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. A.B. did not provide a copy of the terms and conditions of the contract nor were they delivered to V.T. or T.V. contrary to section 88.9 (1) of the Act.

3. A.B. breached section 2.1 of the Codes in all four cases by failing to immediately and truthfully give the name of the retailer and marketer (Summitt) to the consumer, failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer.

Retail Salesperson A.T.

170 Four of the 19 complaints are attributable to the conduct and sales technique of A.T. In three of the cases the complainants testified that A.T. represented that it was necessary to sign the Registration Form in order to ensure continued gas service at their homes. This of course was completely inaccurate.

171 Two complainants testified that A.T. made specific representations respecting the price of natural gas. Their testimony was consistent in describing his sales pitch as including either a general statement respecting the upward pressure on natural gas prices or very specific representations that the price of gas would rise, for example, to 42 cents per cubic meter in the near term. At the time the representation respecting the 42 cents per cubic meter price was made the actual rate charged by Enbridge gas for the supply of natural gas was between 17 and 23 cents per cubic meter.

172 In three of the cases, the prospective customers canceled any relationship with Summitt very shortly after A.T.'s visit. This means two things: first that the misrepresentations made by this retail salesperson were so obvious that customers knew almost immediately that there was something fundamentally wrong with this sales call. Second, it means that these complainants had nothing whatsoever to gain by pursuing their complaints. They did so in the public interest, which lends credibility and reliability to their testimony.

173 In the fourth case, Summitt made a demand for about $1000 in liquidated damages in order to cancel the contract ostensibly entered into by J.M. J.M. testified that she could not afford to pay that amount, and she continues to be bound to the Summitt Price Protection Plan.

174 As to complainant J.M., her testimony was to the effect that A.T. identified himself as being "from the gas company" and believed that he was wearing a shirt bearing the logo of either Direct Energy or Enbridge, Enbridge being the local distribution company. She testified that A.T.

specifically asked her if she wanted to continue receiving gas services at the home. When presented with the registration form, she believed it to be a continuation of her account with the local distribution company, and not a fixed-price contract for the supply of gas and electricity. She indicated that there had been no discussion whatsoever about electricity with A.T.

175 J.M. acknowledged receiving a reaffirmation call, believing it to be a confirmation that she wanted to continue gas supply at her home. Shortly after the reaffirmation call, she started to receive several calls a day requesting that she provide the caller with her electricity account number. At this point, she contacted Enbridge to complain. This supports her in her evidence that she believed that she merely arranged a continuation of gas supply from her local distribution company. Enbridge advised her to contact Summitt or the Ontario Energy Board, which she did. She was advised by Summitt that in order to cancel the contract she would be required to pay liquidated damages. At the time of this decision she continues to be bound to the price protection plan.

176 Complainant J.M(1) testified that A.T. did identify himself as an agent of Summitt. According to his testimony he was told by A.T. that because the previous owners had a contract for gas supply with Summitt that he was obliged to do so as well, and could not choose to not enter into the arrangement. It was his impression that his gas supply would be terminated if he did not enter into the arrangement. This element is consistent with that described by J.M. where a similar suggestion about termination of gas service was reported. This complainant did receive a copy of both the registration form and the brochure. Shortly after the visit, this complainant reviewed the documentation more carefully and realized that he had executed what appeared to be a fixed-price contract for the supply of gas and electricity. Shortly thereafter, after doing some online research, he contacted Summitt to cancel the arrangement. His contract was canceled without penalty, but J.M. (1) has persisted with his complaint.

177 The testimony of the complainant L.M. is strikingly similar to that of J.M.(1). L.M. testified that A.T. did identify himself as an agent from Summitt and was wearing the Summitt logo. He was also advised in a manner similar to that reported by J.M. and J.M. (1) that he had no choice but to continue an arrangement with Summitt that had begun with the previous occupant of the home. L.M. testified that he specifically asked the salesperson if he had a choice to deal directly with his local distribution company for the supply of gas, and was advised by A.T. that he did not have a choice. He signed the registration form in order to get A.T. to leave his house, but immediately felt that there was something fundamentally wrong with the representations made by A.T. Accordingly, L.M. called Summitt to cancel the contract. Like J.M. (1) L.M. has persisted in his complaint, even though there is no prospect of any advantage to him in doing so.

178 The complainant A.Z. testified that A.T. identified himself as a Summitt agent at his doorstep. According to this witness, A.T.'s sales pitch was directed primarily to price comparison. A.T. told the witness that the price of natural gas would be rising to over 42 cents per cubic meter but that Summitt was offering price protection at 38 cents per cubic meter. The witness indicated that there was no discussion whatsoever with respect to electricity supply. A short time later, A.Z.

actually compared the price offering from Summitt with the current Enbridge rate which was between 17 and 23 cents per cubic meter. At that point A.Z. contacted Summitt to cancel the arrangement which was accomplished without penalty. Like L.M. and J.M. (1) A.Z. has persisted in his complaint. The signal event in this exchange from a regulatory point of view is the price comparison.

179 A.T.'s rebuttal of these complaints is not convincing. His representation of the price trend for natural gas was particularly telling. It was clear that A.T. did not have an accurate appreciation of the current natural gas pricing in the market. It appears that his knowledge of natural gas pricing was gleaned almost exclusively from the graphic presentation on the brochure, which was not designed to provide accurate information respecting natural gas prices prevailing at the time of sale.

180 The consistency of the testimony of these complainants respecting A.T.'s representation that they had really no choice but to enter into the price protection program lends credibility and reliability to the complaints.

181 It was clear from the testimony of the witnesses, and A.T. himself, that new homeowners were specifically targeted in these sales efforts. One can only conclude that the retail salespersons and their employers saw a specific advantage in targeting this category of prospective customers. While there is no evidence to the effect that Summitt knew about this focus on new homebuyers, it would certainly have been aware of it if had monitored the retail salespersons effectively. Such customers would have no reliable information respecting the utility costs associated with the properties, the nature of any arrangements made by their predecessors at the property, or the binding nature of those arrangements on themselves. In such circumstances, the Board finds that it was incumbent upon Summitt to ensure that the sales technique used by its representatives took this into account in a manner that was sensitive to this deficiency. In fact, it appears that the sales effort was focused on these customers specifically because they would be more likely to be confused about the true state of affairs of their utility supply. This has implications for the adequacy of Summitt's due diligence defence. In order to be effective, its due diligence system should have addressed this issue forthrightly, and provided its sales agents with appropriate scripts and information necessary to ensure that customers understood the nature of the arrangements they were entering into.

182 The Board finds that with respect to A.T.'s sales the following contraventions of the Act and Codes have been proven on the balance of probabilities.

1. A.T. provided false, misleading and deceptive statements to all four complainants: J.M., J.M.(1), L.M. and A.Z. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. A.T. did not provide a copy of the terms and conditions of the contract nor were they delivered to J.M. contrary to section 88.9 (1) of the Act.

3. A.T. breached section 2.1 of the Codes in all four cases as follows:

a. during the encounter with J.M., by failing to immediately and truthfully give the name of the retailer and marketer (Summitt) to the consumer, failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer;

b. during the encounters with J.M.(1), L.M. and A.Z., by failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer.

Issuance of an Order, Corrective Orders and Penalties

183 The Board has made a number of findings above that Summitt through its retail salespersons has contravened the Act and the Codes.

184 The Board's authority to issue an order respecting compliance derives from sections 112.3 and 112.4 of the Act. The Board's authority to impose monetary penalties, which are referred to as administrative penalties in the Act, derives from section 112.5 of the Act. In addition, the imposition of any administrative penalty is governed by Ontario Regulation 331/03.

185 In determining the appropriate remedy in this case, the Board has been guided by the "protective and preventive" aim of regulatory provisions identified by the Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.*:

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of

minimum standards of conduct and care.[16]

Suspension and Audit

186 In its submissions, Compliance Counsel urges the Board to make an order suspending Summitt's door-to-door sales activities immediately pending completion of an audit of its operations and processes relating to these activities and the implementation of any other recommendations the Board may make.

187 Summitt, while denying liability with respect to all of the allegations, argues in the alternative that the Board ought not to impose a suspension of its door-to-door activities. In its view, such an order would have the effect of imposing sanctions on persons not responsible for the contraventions, and is otherwise inappropriate given the circumstances illuminated during the course of this proceeding.

188 It is the Board's view that it certainly has the authority pursuant to section 112.3 and 112.4 of the Act to make an order suspending the door-to-door sales activity of Summitt. Section 112.3 provides the Board with broad authority to prevent further contraventions and section 112.4 permits the Board to grant "an order suspending or revoking" a person's licence.

189 However, the Board does not believe that suspension of Summitt's door-to-door sales activities is the appropriate approach in this case. As indicated by the introduction of its 14 Point Program on June 30, 2010, Summitt appears to recognize that some of its past practices were deficient and that improvement is needed. In light of this development, the Board will require Summitt to procure a review and audit of the sales practices of its retail salespersons in accordance with the following terms:

* The review and audit shall involve a review of 20 transactions entered into between September 1 and September 30, 2010 chosen at random.

* The entity undertaking the review and audit shall be an independent third-party recognized as an expert in conducting such activities.

* The review and audit will assess compliance by Summitt and its agents in the conduct of these transactions, in light of the 14 Point Program described elsewhere in this Decision.

* The product of that review and audit will be a report which will be filed with the Board and Compliance Staff.

* The review and audit will contain a conclusion respecting the extent to which Summitt and its sales agents have substantially complied with the 14 Point Program.

190 If the conclusion of the review and audit is that Summitt and its agents have substantially complied with the 14 Point Program, the Board will take no further action with respect to this aspect of its decision. On the other hand, if the conclusion of the third-party review and audit is that Summitt was not in substantial compliance with the 14 Point Program, the Board will then reconvene to receive submissions from Summitt and Compliance Staff respecting next steps. In such circumstances, suspension or revocation of Summitt's door-to-door sales activity will be at issue, in addition to any other remedial direction the Board may impose.

Compensatory and Restitutionary Remedy

191 Compliance Staff also urged the Board to make orders requiring Summitt to provide "restitution" to customers who have been harmed by contraventions found to have been proven in this case.

192 Summitt argues that the Board has no such power and that any order providing for restitution of any form for affected customers is beyond the Board's authority. Summitt's position on the subject is rooted in its view that unless the Board had been given he specific power to grant a compensatory or restitutionary remedy it is beyond its jurisdiction to do so. Summitt points to sections in the Act that direct retailers or marketers to provide restitution to customers as indicating that if the legislature had intended to provide a broader power to the Board, it would have done so. It also suggests that a proposed amendment to the Act giving authority to the Superior Court, not the Board, to make compensatory and restitutionary orders upon conviction of an offence as indicating that it was not the legislature's intention to bestow that power on the Board under the current legislation.

193 The Board finds that subsection 112.3 of the Act is sufficiently broad and clear in its effect to permit the Board to make orders to remedy a contravention by providing compensation and restitution to parties affected by the contravention. That section reads as follows:

> 112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to ... (a) remedy a contravention that has occurred:

194 In the Board's view, this provision was intended to provide the Board with significant flexibility in crafting an appropriate order to remedy a contravention. This approach is consistent with the Supreme Court of Canada's decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)* where the Court found that a similar broadly worded provision of the Canada Labour Code provided "the flexibility and the authority to create the innovative remedies which are needed to

counteract breaches of the Code and to fulfil its purposes and objectives."[17]

195 In the Board's view, it would be very odd and inconsistent with the "purposes and objectives" of the Act if the Board were to find, as it has, that specific contraventions of the statute have been committed by Summitt but be unable to remedy those breaches by ordering compensation and restitution, particularly where the breach resulted in material and quantifiable costs to innocent consumers.

196 The evidence in this case shows that customer after customer was misled into signing contracts that provided an economic benefit to Summitt at the expense of the customer.

197 To permit Summitt to retain that money is inappropriate by any measure. Clearly, if the Board was precluded from making such orders, or if section 112.3 of the Act was less clear than it seems to be, the Board would have no option but to ignore this aspect of the circumstances arising in this case. But it is our view that section 112.3 of the Act does contemplate the making of compensatory and restitutionary orders.

198 Accordingly, the Board directs that:

> In cases where the Board made a finding of non-compliance, the Board directs Summitt to cancel without any penalty or cost whatsoever the electricity or natural gas supply contracts entered into by each of the complainants where it has not already done so, and to compensate the customers who have been subject to those contracts an amount equivalent to the difference between the sums paid by them pursuant to the contracts and the prevailing RPP prices, in the case of electricity supply contracts, and system gas prices, in the case of gas supply contracts over the period, together with interest on that amount equal to the prime rate charged by Summitt's bank within 90 days of the date of this Decision and Order . This aspect of our order affects D.B. and J.T., A.H. and C.S., D.M., A.S., J.W., A.G., C.L, Z.P., W.G., Z.A., P.S., V.T., T.V., J.M., J.M.(1), LM., and A.Z.
>
> In cases where the Board made a finding of non-compliance and the customer was required to pay liquidated damages to cancel their electricity and/or natural gas supply contracts, Summitt shall repay each of the complainants the amount of those liquidated damages together with interest on that amount equal to the prime rate charged by Summitt's bank within 90 days of the date of this Decision and Order. This aspect of our Decision affects CL., W.G., and V.T.
>
> There were a couple of complainants that testified their status with Summitt was unclear. The Board directs Summitt to provide a letter to those complainants indicating unequivocally that Summitt has no outstanding claim with respect to

> these customers. To the extent that Summitt may have referred some matters affecting complainants who testified in this proceeding to collection agencies, Summitt is directed to terminate all such proceedings and to take all steps necessary to ensure that the credit rating of the affected customers does not reflect any outstanding claim from Summitt. This aspect of our decision affects ZP. and T.V.

199 Compliance Staff should ensure that all of the complainants entitled to restitution receive a copy of this decision.

Administrative Penalty

200 As noted above, the imposition of administrative penalties arises through the operation of section 112.5 of the Act as informed by Ontario Regulation 331/03.

201 Pursuant to Regulation 331/03 the Board is required to make a determination as to the extent of the deviation from the requirements of the respective enforceable provisions. The regulation provides a schedule which categorizes contraventions as major moderate or minor, and provides a range of penalty for each category.

202 In making this determination the Board is also required to take into account the extent to which the adverse effects of the contravention have been mitigated by the person who committed the contravention, whether the person who committed the contravention has previously contravened any enforceable provision, and whether the person who committed the contravention derived any economic benefit from the contravention. The Board is also empowered to take into account any other criteria that it considers relevant in this determination of the extent of deviation.

203 The Board has never before had to engage in this characterization of contraventions, and accordingly there is no guidance for the panel from previous decisions. Nor does the Board consider it particularly useful for the purposes of this case to review the amounts of fine imposed in other jurisdictions for like contraventions. It is the Board's view that the imposition of administrative penalties pursuant to section 112.5 of the Act is a matter that needs to be determined within the context of this marketplace and its rather unique circumstances.

204 Compliance Counsel argues that the contraventions in this case were consistently in the major category. In its view, the use of unfair practices designed to ensnare consumers into contractual arrangements they would not otherwise have entered into is a serious, hence major, contravention.

205 Summitt argues that these contraventions fall within the minor or moderate category of severity. It based this view on several factors. First, it suggests that the complaint-to-registration ratio for the retail salespersons is very low. This means in its submission that the contraventions should be dealt with as isolated events of sales agent conduct for which Summitt Energy exercised

an appropriate degree of due diligence. Summitt also suggests that the effect of the contravention in a number of the instances is minor. It bases this submission on the observation that a number of the customers terminated the agreement during the statutory cooling off period or prior to the reaffirmation call. In other cases, Summitt unilaterally released the customers from their presumed contractual obligations.

206 These contraventions were clearly committed with a view to economic gain both on the part of the retail salespersons and Summitt itself. The consequences of entering into a long-term fixed-price contract can be very serious. This element of household expense can be virtually doubled as a result of the energy price protection plans, especially those respecting the supply of electricity.

207 On the other hand, the Board notes that there were a number of occasions where Summitt appeared to recognize that something very seriously had gone wrong with the particular sale and cancelled the contract unilaterally, without penalty.

208 It is the Board's intention that Summitt will be denied any economic benefit from these transactions as a result of the Board's restitutionary order under section 112.3. of the Act.

209 The Board does not consider Summitt's due diligence program in place during the relevant period to be in any degree in mitigation of penalty. The due diligence program was inadequate for the purposes of avoiding liability and is also inadequate in providing mitigation of sentence. The due diligence program did not adequately take into account the dynamic and complex nature of the market, and the potential for confusion by customers, a confusion materially contributed to by the organization of the sale devised by Summitt.

210 However, with a few exceptions the Board is of the view that the contraventions proven in this case fall into the high end of the moderate category both with respect to the effect of the contravention, and the nature of the contravention.

211 The exceptions relate to the representations made by retail salespersons to the effect that continued service from the local distribution utility was contingent upon signing the contract. In the Board's view, these unfair practices achieve a higher level of turpitude, and fall within the major category with respect to the nature of the contravention, and the moderate category with respect to the effect of the contravention. It is not determinative of this analysis that some customers avoided binding contractual relations. It was certainly the intention of the retail salespersons that the sale would be effective, notwithstanding that it had been procured through a seriously improper representation. Further, the Regulation stipulates that it is the "potential" for adverse effects on consumers, not actual effects that should govern the characterization of the contraventions.

212 This assessment leads to our finding that for 15 of the violations of Section 88.4 of the Act found to have occurred the administrative penalty should be set at $9,000 per contravention. For the two contraventions which the Board considers to be Major the penalty is set at $13,500.

213 In addition, the Board has found there to be eight contraventions of Section 88.9 of the Act. The Board considers each of these to fall into the moderate category for both potential to adversely affect consumers and the extent of deviation from the requirement. Accordingly, the administrative penalty for these violations is set at $9,000 for each contravention.

214 The Board considers the violations of the respective Codes to be subsumed in the contraventions of the Act delineated above.

Costs

215 The Board will require Summitt to pay the costs associated with the prosecution of the Notice to a ceiling of $65,000.

Implementation

216 This panel will remain seized of this case for the purposes of the audit process, and to provide the parties with guidance with respect to the implementation of any aspect of this Decision.

217 IT IS THEREFORE ORDERED THAT:

1. Summitt shall take all necessary step to ensure compliance with sections 88.4 (2) (c), 88.4 (3) (c) and 88.9 (1) of the Act and section 2.1 of the Codes.

2. Summitt shall pay an administrative penalty in the amount of $234,000.

3. Summitt shall procure a review and audit of the sales practices of its retail salespersons in accordance with all of the terms and conditions contained in the Decision portion of this Decision and Order.

4. Summitt shall file the result of the review and audit ordered in item No. 3 above with Board by January 15, 2011.

5. Summitt shall remedy the individual contraventions found by the Board in accordance with all of the terms and conditions contained in the Decision portion of this Decision and Order.

6. Summitt shall pay the Board's costs of and incidental to, this proceeding including the costs incurred by Compliance Counsel to a ceiling of

$65,000 immediately upon receipt of the Board's invoice.

7. In the event of a dispute over the terms of this Order, including the interpretation of any of the provisions of this Order, Summitt or Compliance Counsel may apply to the Board to adjudicate the dispute.

DATED at Toronto, November 18, 2010

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

qp/e/qlspi

1 John D. McCamus, *The Law of Contracts,(Toronto: Irwin Law, 2005) at pp* 182-183

2 McCamus, at 182-183

3 *Harris v. Great Western Railway Co.* (1876), 1 Q.B.D. 515

4 McCamus at 184

5 *Parker v. South Eastern Railway Co.*, (1877), 2 C.P.D. 416 (C.A.)

6 McCamus at 184

7 *R. v. Sault Ste. Marie,[*1978] S.C.R. 1299 (*"Sault Ste. Marie"*)

8 *Sault Ste. Marie at pp.1312*

9 *Sault Ste. Marie at pp.1326*

10 [1924] 1 D.L.R. 440 at 442 (Ont. S.C. (A.D.)).

11 [1982] 2 S.C.R. 616 at 629.

12 2003 MBCA 80.

13 *Hill v. East & West India Dock Co.*, (1884), 9 App. Cas. 448 at 456 (H.L.).

14 *Sault Ste. Marie at pp.1331*.

15 Implementation of Consumer Protection (Retailer/Marketer) Provisions of the Energy Consumer Protection Act, 2010 (EB-2010-0245.

16 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 219.

17 *Royal Oak Mines Inc. v. Canada (Labour Relations Board),* [1996] 1 S.C.R. 369 at paras. 64-65.

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

[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.

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.

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[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.

[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."

SULLIVAN
ON THE
CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

LexisNexis®

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.).

HANSARD EXCERPT

Legislative Assembly session 39-2

April 13, 2010

The House met at 0900.

The Speaker (Hon. Steve Peters): Good morning. Please remain standing for the Lord's Prayer, followed by a moment of silence for inner thought and personal reflection.

Prayers.

…

ORDERS OF THE DAY

ENERGY CONSUMER PROTECTION ACT, 2010 / LOI DE 2010 SUR LA PROTECTION DES CONSOMMATEURS D'ÉNERGIE

Mr. Duguid moved third reading of the following bill:

Bill 235, An Act to enact the Energy Consumer Protection Act, 2010 and to amend other Acts / Projet de loi 235, Loi édictant la Loi de 2010 sur la protection des consommateurs d'énergie et modifiant d'autres lois.

The Speaker (Hon. Steve Peters): Debate?

Applause.

Hon. Brad Duguid: Thank you to the member for Brant for his support. I'll be sharing my time with the member for Brant. Maybe that's why he's clapping right now. He's trying to get me to go a little quicker.

I rise to speak today on what is a very important bill to consumers across this province, the Energy Consumer Protection Act, 2010. But before I move forward with my comments, I want to acknowledge the contribution made to this legislation by the Honourable Gerry Phillips, who was the minister when the legislation was originally introduced, I believe, in December.

We all know Mr. Phillips as a very honourable member in this House, a well-liked, very non-partisan member, measured in his thinking and really talented in finding the balance required in coming forward with good public policy. I think that Mr. Phillips is respected by all members of the House and by the media-by just about everybody in this business-for his long and very distinguished service in this place and as a minister in both the Peterson government in the 1980s and the McGuinty government over the last couple of terms. I want to thank him for his work on this bill. I want to thank him for all of the work that he has contributed. It's my honour to carry forward the bill that he originally introduced as the Minister of Energy and Infrastructure today.

As I said, this bill was originally introduced this past December. It captured the attention of many when it was introduced. Many members of this Legislature have been very engaged by this piece of legislation and many of our constituents have expressed their views on this legislation as well. I'm very proud of the work, to date, that we've brought to this effort. In fact, I think it illustrates the very vital role that this government can play and that all governments play in improving the lives of people in this province. I'm confident that we've arrived at a piece of legislation that strikes the right balance between creating an environment where business can operate openly and one in which consumers are protected and treated fairly. Really, that pretty much sums up what this bill is all about.

I'd like to acknowledge as well David Ramsay, the member from Timiskaming-Cochrane, whose private member's bill highlighted the issue of consumer fairness in the energy retailing sector. He's another distinguished member in this Legislature and another member who is liked by all members of this House. I thank him for his vision early on in bringing forward that private member's bill: another example of how working on and introducing private member's bills-although sometimes it may seem like a long, drawn-out process and sometimes those bills don't in themselves see fruition or the light of day-can sometimes ultimately have a big impact on public policy. Mr. Ramsay deserves much credit from consumers who will benefit from this new legislation, and gratitude from this government for his contribution.

I'd also like to thank Ted McMeekin, the member from Ancaster-Dundas-Flamborough-Westdale, who is here in the Legislature with us today. Last year, as Minister of Consumer Services, he was instrumental in shaping the consumer protections at the heart of this proposed act. Again, we have another member who is not highly partisan in nature, a member who knows how to strike a balance and work with all people on all sides of the Legislature, a distinguished member from the Hamilton area. It's always a pleasure to work with him. He deserves credit for much of what is before us today as well.

Finally, I want to thank the Standing Committee on General Government, all members from all parties, which recently examined this bill and provided insightful and valuable input to strengthen the bill's effectiveness. Your questions and input-by "your" I mean the members of this committee-have helped to clarify the policy intent of this proposed legislation, and many of the proposed amendments that flowed from the work that the committee did have served to improve the legislation. On behalf of Ontario energy consumers, I really want to thank the committee members for their diligent work.

I want to acknowledge the work as well-and we often don't do this in this Legislature-of the critics on this particular piece of legislation. Parliamentary Assistant Levac has indicated that both Peter Tabuns, the critic and member from Toronto-Danforth, and John Yakabuski, the

Conservative member from Renfrew-Nipissing-Pembroke who served as critic, both worked very well on this bill. While I don't expect that all members of the House agreed on every aspect of this bill and there was good debate at committee on amendments, potential amendments and different aspects and provisions of the bill, I think that the critics and all members from all sides really recognize that this is a good piece of legislation in the interests of Ontarians and, in a very non-partisan way, have moved forward.

I don't know whether the opposition members will be supporting this bill in the end. Maybe we'll get an inclination today; maybe we won't know until third reading actually takes place. I see the critic Mr. Tabuns nodding his head yes, and I think that's good news. I think it speaks well of the collegial work that the committee was able to accomplish. We really do appreciate the support from Mr. Tabuns on this and the good contribution that he and his colleagues have made to this particular piece of legislation.

1610

I want to speak a little bit about the objective of this legislation, which is really quite simple: to empower consumers, to protect their interests and to ensure that Ontario's energy market is fair and transparent.

Our proposed legislation does this in three main ways. First, it includes measures to crack down on the unacceptable practices of some-and I say some, not all-electricity retailers and gas marketers. Each week, the Ontario Energy Board averages between 100 and 150 consumer complaints about the practices of gas marketers and electricity retailers. That's worth repeating: That's 100 to 150 complaints that the Ontario Energy Board averages every single week. That's a lot of complaints. It means that there is an issue here, an issue that had to be dealt with and an issue that the committee and our government had to tackle.

We've all heard the stories. We've heard them from constituents, about how difficult it can be to understand the energy market. I recognize that as the Minister of Energy and Infrastructure who has been in the job for two months. It's a whole new world out there. It's a whole new set of languages. There are acronyms all over the place. This is a complex energy sector that we work in, and it is difficult for consumers, I think, to understand the energy market.

The pressure that has been exerted by some electricity retailers and gas marketers is a problem. It has been a problem in the past as well. They call and turn up at the door, offering multi-year, fixed-rate contracts for energy. It's that pressure that consumers sometimes find themselves under that may well have led, at times, to consumers making decisions that may not have been in their best interests, or they may have been making decisions when all the information wasn't before them. Some of us have probably experienced some of those experiences ourselves.

This proposed legislation would help consumers deal with that pressure by enabling new requirements, regulations and training standards that would root out unprofessional behaviour. It would also make the energy market easier to understand by ensuring that consumers have every opportunity to fully understand what they're buying.

I think that's the key. It's a free market out there and people have the opportunity to do business. They have the opportunity to market their products and their services. I don't think anybody in

this Legislature would have a qualm with that, but it's important that consumers have the ability to understand what it is that they're buying when they are making these kind of purchases.

This would include requirements for the use of plain language to explain the key terms of energy contracts to help consumers more easily understand what they're buying, at what cost and over what period of time-really, what they're committing to do-as well as new regulatory power that would help extend and clarify the conditions under which contracts can be cancelled.

In short, this proposed legislation makes sure that the consumer has every opportunity to understand the offers they're being presented with and to make sure that retailers understand that they are obligated to present their offers clearly and fairly. I think it's reasonable. I think that's fair. I think it's something that consumers would expect, and I think that's one of the reasons why all members of this Legislature are providing some level of support to the approach.

Secondly, this proposed legislation sets out clear rules and strengthens protections for people who live in multi-unit residential buildings where suite metering is possible. This is metering and billing each individual unit individually for electricity. This is something that has been somewhat of a bone of contention for a very long time in the energy conservation world. It's something that we've been trying to strike the balance in for a very long time.

This suite metering has the potential to contribute to the overall drive to build a lasting conservation movement in this province, and that's something I think all of us in this Legislature would support. I think that's something that's very important, because this isn't just about passing laws; this is about allowing our generation of Ontarians to seize this opportunity to build a better future for our kids and our grandkids. This conservation movement, and it is a movement, is something that each and every one of us should be enthusiastic about. When I say each and every one of us, I don't just mean members of the government or members of this Legislature; I mean each and every Ontarian has to seize this opportunity to make life better for our kids and grandkids. If we do not seize this conservation opportunity, we will not be passing them a planet that has clean air and a clean environment for them to have the same quality of life that we've enjoyed in our lives.

This is something that's very, very important, because experience has shown that if you live in a multi-unit residential building, your electricity use will drop by 12% to 22% if you are paying for your own electricity. What that means for the people listening out there is that if you have your own individual apartment unit and you're being charged unit-by-unit on the usage that you're incurring yourself, it provides an extra incentive to you as an individual to try to conserve. It also provides an opportunity for you as an individual to try to save some money by taking advantage of some of the conservation opportunities that exist. There's no question, for instance, that if you turn up your air conditioner a little too much, you're going to see the effect of that on your electricity bill, so it absolutely makes sense for people who have the ability to control their own electricity use, whether they live in residences they own or residences they rent, and in so doing, to benefit directly from their own conservation efforts. However, in rental situations, it's important as well that tenants in existing buildings know there are clear rules and protections around the introduction of suite metering. It's only fair.

I believe that this proposed legislation, again, strikes the right balance between protecting the rights of tenants, ensuring transparency and contributing to the culture of energy conservation we

are building. In the case of existing tenants, a change in the tenancy agreement to shift responsibility for energy from a landlord to a tenant would, under the bill, require the tenant's explicit consent. This proposed legislation would ensure fair rent reductions when tenants take on energy bills, and it would also support the development of minimum energy efficiency guidelines for suite-metered rental apartment buildings, further ensuring that tenants are able to conserve. We need to ensure that we're providing Ontario tenants with access to the tools that can help them lower their electricity use.

If passed, this legislation would ensure that a smooth transition occurs as suite metering becomes the norm in multi-residential buildings cross Ontario. It would enable Ontarians who live in these buildings to make informed decisions about their electricity use and to participate more fully in the conservation movement we're building in this province.

The third and final area of this proposed legislation provides clear authority to the Ontario Energy Board and regulatory power for the government, if it desires, to implement standards with regard to how gas and electricity utilities, including sub-metering companies, set their rules for consumer security deposits and disconnections. Currently, there's quite a variety of different policies used by various energy companies across the province. If passed, this legislation would provide the opportunity to create standard practices. This proposed legislation would allow particular attention to be paid to vulnerable consumers such as those with health and income challenges.

After much debate, discussion and consultation, I believe we have arrived at a piece of legislation that is absolutely fair and balanced. It is fair to the business community, it is fair to the retailers and marketers, and it is fair to the consumer.

If passed, this legislation would create the conditions that will insist that the seller clearly present what they're selling, and it will create the conditions necessary to help the buyer understand what they're purchasing. It's that simple. It will create conditions that will protect Ontario tenants and give them the opportunity to participate in greater energy conservation, and it will create the conditions necessary to help protect Ontario's most vulnerable consumers.

This proposed act is a thoughtful, integrated, comprehensive approach to balancing the rights of consumers with the rights of business to do good business. It ensures fairness and commonality of treatment. It works to eliminate subjectivity and opportunities for exploitation.

Thanks to the input and fine work of many members of this Legislature, of policy experts and of all industry stakeholders, I believe we have arrived at a piece of legislation of which each and every one of us can be proud: a balanced bill that respects the rights of all, protects the most vulnerable, creates a welcoming atmosphere for a legitimate business to operate and supports our broad goals of supporting a generational shift toward greater energy conservation.

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I'm very proud to be standing in this Legislature today to speak in support of Bill 235. I believe this legislation is absolutely required. It protects consumers and strengthens Ontario's energy market. It builds on the McGuinty government's record of action with respect to consumer protection and transparent disclosure. I'm very proud to be part of a government that continues to

act in the best interests of Ontarians and consumers, and I'd urge all members to support the proposed Energy Consumer Protection Act.

I've had the privilege of working in the world of politics for over 25 years, and I've been elected for 16 or 17 years at different levels of government. I find that one of the privileges of this office is that on many occasions you learn as you go; you learn new things almost every day. I've got to admit that when this legislation first came forward in this Legislature, as introduced by my colleague Gerry Phillips, I kind of had to take a look at it and say: "What is the purpose of retailers in the market? Do they serve a useful place in the energy market? What are they really accomplishing for consumers? Should we be more draconian in moving forward on this legislation? Should we be allowing them to operate at all?"

Well, I think one of the things you do in this business is learn as you go, and that may have been the reaction of many of us on all sides of the House when we heard that 100 to 150 complaints every week are being lodged as a result of some of the practices of some of these retailing companies. But at the end of the day, not all of these companies are engaged in practices that are not in the interests of consumers. Not each and every one of them is engaged in those practices. In fact, many of them are employing thousands of Ontarians in jobs that would otherwise not be here in this province.

The other thing is that some consumers feel more comfortable having a fixed rate, just like in mortgages. Some consumers, when planning their mortgage, might want a fixed-rate mortgage for one reason or another. I think the key is to ensure that consumers know what they're getting into, know what their choices are, have an opportunity at the appropriate times to be able to remove themselves from those contracts, when appropriate, in particular when the business practices in getting them to sign on to these programs may not be completely above board.

I think we've struck that balance, and I think we have all learned, as we have gone through this legislation, about the importance of and the complexities in our energy sector. We'll continue to learn as we go.

I think the other good thing to note for consumers is that we may not be done yet. If this legislation passes in this Legislature-if the will of the Legislature is to see this legislation pass, and I hope it is-we'll have a good opportunity to make this work. I think energy retailers will have ample opportunity to make this work, continue to do good, above board business and continue to allow consumers to have the protections they need. But we'll be watching carefully, and if this legislation doesn't prove to be everything we believe it will be, maybe other action will be necessary. At this point in time I'm absolutely confident that we've struck the proper balance that's going to protect consumers and ensure that tenants have the protection they need-this is a long-awaited piece of legislation for tenants.

I want again to thank all the members of the committee from all sides of the House. I want to thank my parliamentary assistant, who has shepherded this very complex piece of legislation. He's done a very able job of shepherding it through the committee system and getting consensus around the principles in this bill.

Madam Speaker, I'm now going to pass the floor over to the member from Brant, who will continue this conversation.

The Acting Speaker (Mrs. Julia Munro): The Chair recognizes the member from Brant.

Mr. Dave Levac: I appreciate the opportunity, on third reading, to have an opportunity during this lead to have some of my thoughts shared with the House and, in particular, with the opposition critics for whom I have nothing but praise with regard to the path we took during this process.

But I will start by saying that some will hold the opinion that this bill does not accomplish what we are saying it does. There will be some who will hold the opinion-and I don't vehemently disagree; I just simply disagree-that the way it was presented to us was as a prediction as opposed to an angered fit, and I respect that. What the opposition member did talk about was his experience and his understanding of how this bill would have an impact on renters and people on fixed and low incomes. I don't subscribe to that because I think there are other factors that are going to be taking place outside of the bill that would, I honestly believe, not have the impact that he's predicting. I look forward to his rationale and his logic behind that, but I don't subscribe to it.

I also think that some will hold the opinion that the bill doesn't have enough teeth, and I don't subscribe to that, either. The minister made it clear that his intention is to use this as the first round of legislation that provides the companies an opportunity to change some of the behaviours that some of the companies were employing, and I guess the shot over the bow is if this doesn't do it, other things could. So that's out there and I think that it deserves to be understood.

At the heart of this proposed legislation, the Energy Consumer Protection Act, 2010, is the desire to help Ontario's energy consumers become better informed and, most importantly, to ensure that they are better protected, because there has been some lack of information that has not come. The second thing is there also have been some actions and activities that took place that the average consumer at the door should not tolerate, and governments have a role to play in making sure that that doesn't happen.

I'd also like to take this opportunity to echo the sentiments of the Minister of Energy and Infrastructure by again acknowledging the work of the standing committee and thanking all of the members for the questions and insights they've brought to the table, stakeholders from the consumer protection groups, tenant protection groups, individuals, retailers and others who contributed to the debate. I felt that all of the positions were clear. There were a few positions that I felt somewhat-a warning shot over the bow is that we have other things to do and we'll take other courses if we have to. But I would respectfully suggest to those individuals that this type of legislation is always part and parcel of how we work here, and we do have reams of individuals who are talented, skilled and trained at the legal level and also at the government policy level who work very hard, and I thank them for it.

This important bill has indeed benefited greatly from the committee process, which I do consider a privilege to have participated in. I've always made the commitment in this place to try to do the best I possibly can in finding consensus and finding the right piece of legislation to land on.

We heard some thought-provoking deputations from stakeholders who raised a number of interesting areas for discussion and debate. I believe that that was the important aspect of committee work and I felt very engaged by some of the organizations and individuals that did step forward. I must say that I was interested in the dialogue, the recommendations and the positions that some people took.

We listened carefully, and we did carefully analyze the concerns and the issues that were brought up. There were copious meetings that were held after the hearings to digest that information that I asked on a couple of occasions in front of committee to make sure that staff heard what those deputations were all about. We tried to see where we could improve what I felt was already a pretty good piece of legislation, and I dealt with the opposition in a respectful manner that tried to incorporate some of the concerns that they were raising. I repeat again that that was not always going to end up being the case, but we're going to find out, if this Legislature sees fit to pass the legislation and if it comes into act, whether or not the dire predictions of some are going to come true.

I would suggest to you respectfully that there is a piece of this that we're going to do in regulation, and I made mention of that a couple of times. There's going to be some shopping and some touring and some consultation of the regulation stream that's going to go along with this.

If, indeed, after a review-which I'll bring up in a moment-takes place and some of the concerns that have been raised that we have not, to their opinion, dealt with shall surface, it will provide us with an opportunity to provide changes in our regulations and also provide us with an opportunity to introduce amendments to the act in order to clean up what they believed was a problem, if it indeed does appear.

1630

I felt it was an open and honest debate about the issues. I am very highly complimentary of all the people that we dealt with. I felt no threat of discord other than a difference of opinion, which I think is a good way to deal in this place.

I particularly wanted to acknowledge the pragmatic and respectful way in which the committee approached the important work, along with both opposition critics who used the same approach. I thought they were both pragmatic, I thought they were logical and I thought they presented their cases in a reasonable way. Indeed, I can say to them that their concerns were considered and did result in some of the amendments that did come forward, along with some of the technical ones that both the ministerial staff and the lawyer that we had participated in.

I said then-even before that-and I say now that there are very few obligations that are more central in the role of government and legislators than protecting consumers and individuals who can't protect themselves, and more importantly the entire population of Ontario. When government steps forward to form these types of regulatory streams, it's very important for them to understand that the attempt is being made to ensure (1) that they are safe, first and foremost; (2) that their consumer habits are protected; and (3) that they don't fall prey to people who do not follow the regulatory stream.

This was echoed by all members of the committee and all parties. I thank them for that. There wasn't one person who did not stand on the principle of protecting the consumers and making sure that they're cared for. The public has a right to be protected against predatory, misleading or simply confusing retail practices. The public has the right to expect honest and straightforward business dealings, which, by the way, the most populous parts of our business do.

The public has the right to know when abuses occur and that they will be dealt with. We believe that the proposed legislation would do that in many ways. This includes measures that would ensure electricity retailers and gas marketers can operate their businesses in a fair and transparent way. This isn't about a hammer on business. It's to make sure that we do work with those partners.

By the way, they did offer some opportunities to dialogue with us and showed us examples of things that they've personally, proactively implemented to ensure that their customers understood what they were doing; that the reputations of those companies had been tarnished and they were working towards improving them.

It focuses on ensuring consumers have access to easy-to-understand information. As simple as that sounds, that seemed to have been one of the larger complaints that was coming forward from some of our consumers. They just didn't understand the complexity and the mind-numbing information that was being twisted and turned to get them to sign up. The information will help them make more informed decisions. Whether it's to stay with their local utility, or sign an energy contract with an electricity retailer or a gas marketer, that's fair game. I think that that's a fair way to approach this.

This bill also provides regulatory authority to address concerns regarding cancellation practices and fees. We heard stories of different ways in which some companies were really kind of pounding it to the consumer for cancelling, and also the fees that they had to pay for doing certain things that the company didn't want them to do-practices for which I'm sure that there probably isn't a member in this house who hasn't had that issue dealt with at their riding offices.

If passed, the legislation would include measures to ensure that tenants in units where suite metering is being introduced are fairly treated.

The bill, if passed, would provide clear authority to the Ontario Energy Board and regulatory authority for the government, if desired, to implement standards that would guide gas and electricity utilities, including sub-metering companies, in setting their rules for consumer security deposits and disconnections. During that time frame, what that's going to allow us to do is to put some certainty in what those people can assume in terms of what their consumer security deposits are going to be and the disconnections. Clearly, that starts to wrap up some of the concerns that were being expressed simply by saying that you can get them in another way: "If I can't get them this way, then I'll get them on the security deposits and the disconnects," and we're tying that knot up.

Today, I would also like to highlight some important amendments that were brought forward during the committee process that did provide us with an opportunity to make the legislation, I believe, even better, amendments which would ensure that the protection of Ontario's energy consumers was still further enhanced.

As the minister reminded us earlier, part of the bill deals with the practices of energy retailers and marketers. The first obligation is to ensure that consumers have every chance to fully understand what they're buying at the door. Unfortunately, sometimes, we've heard, again, promises of being made cheaper, long-term energy prices, and sometimes we've even heard that customers feel pressured to make a quick decision at a door or on the phone. That has already had impacts across North America, from various types of legislation that have cooling-off periods and all kinds of protections for consumers. We've heard stories about salespeople who don't clearly identify themselves or, what's even worse, whom they're representing.

The bill goes a long way to remedy these problems. The first part of the bill, if passed, would allow the government or the Ontario Energy Board to require door-to-door salespeople to clearly identify who they are, whom they work for, and even whom they do not work for. In some cases, we've heard stories of cutting out a picture of a trillium, putting it on a badge with their name, and saying they work for the government. That in itself is a little mischievous at best.

Through new regulations, the bill would establish training standards to root out unprofessional behaviour. We did hear deputation that some companies have already instituted that, and good for them; power to them; thanks to them. What they're doing is identifying a problem that we've identified here. We're taking some steps to entrench that, and they've already started to do some of the things themselves. So I think that they deserve a few pats on back for doing that.

This proposed legislation would also ensure that companies are held to account for their salespeople. Another trick we heard was that they did third party hiring, put them to the side, put their hands up when the complaint came in, and said, "They don't work for us; they're working independently." I know that all of us have said, "That's got to stop," so we're going to make them responsible for who comes to the door representing them. Regardless of whether they're working door-to-door, by phone or online, they're hired by that company, however they do it, and they're responsible.

If passed, Bill 235 would allow the government to require additional licensing conditions, including background checks for salespeople. That one in itself is very important, because of other possibilities that those types of people can come to your door, they can case the place, they can look for children, and they can do all kinds of things. I think companies don't want those kinds of people at their door representing them, so I know that they're embracing this kind of background-check opportunity on an ongoing basis.

If passed, the bill could allow requirements for retailers and marketers to use better language to explain the key sections of their contract, so that consumers can easily understand what they're buying over that length of time and how much it would cost: all of the kinds of questions that should be legitimately asked by the companies and responded to. It could allow the Ontario Energy Board to require retailers and marketers to use forms that will ensure that all of the costs are disclosed, so that the consumer can understand the difference between what they would pay each month if they stayed with their local utility or switched to a retailer, comparing apples and apples: information on a form that shows clearly that if they sign the contract, they know that they're comparing what they're presently paying for a utility or what they would pay for the retailer.

The first important proposed amendment I'd like to highlight today focuses on the portion of the bill that deals with third party verification. Although they didn't get the entire ask-and I know that the critic for the Progressive Conservative Party brought this to our attention-they got half of the thing, so I know that there are probably going to be some concerns about third party verification. We did try to deal with that.

I would suggest, very respectfully, that this half was as important as the other half, and that is: We are now going to have rules that would enable the retailers and marketers to directly provide the service of third party verification so that it ensures that the customer has the opportunity to consider and confirm the contract before it becomes enforceable. So third party verification will be in-house: That means that the companies who did present to us and said, "You're going to make us go and hire somebody else"-we could be hearing telephone calls from India. So we want the retailers to know that that verification is going to be done by them if they choose. We believe that third party verification, in and of itself, is an important aspect, but because they brought it to our attention, we listened to it and made that part of the amendment.

This amendment would have a dual effect of enhancing consumer protection and making the industry more accountable to the OEB, because the Ontario Energy Board would not have jurisdiction over an out-of-province, out-of-country third party verifier.

1640

Mr. Ted McMeekin: This fixes that.

Mr. Dave Levac: We fixed that by doing it this way. I'm sure that the dual effect of that amendment was brought on not only by the industry, but it was supported, I would point out, by both opposition parties, because they saw the value in the consumer protection end of it.

This is just one powerful example of how the work of the committee was done, to hone the proposed legislation to be more precise, easier to follow, and keenly focused on protecting the interests of the consumer while still allowing business to operate in a fair and transparent manner.

That was the other discussion that was pretty healthy, to ensure that we didn't shut an industry down. There are thousands of people who would be employed during this process, and if we can get that component right, and we have that service provided in a way that the consumers can accept and be protected, I think the industry is well served, as much as it needed a wakeup call or the changes that we're proposing in this piece of legislation. Because I would respectfully suggest to you that it's at the higher end of complaints that all of the members would hear in their constituency offices, particularly during a season in which renewals are necessary.

We want to keenly focus on protecting those interests, and having this business practice done in a transparent manner that the industry is actually accepting.

The second amendment I'd like to mention today wisely acknowledges the speedy pace of change in Ontario's energy market landscape. What we're talking about is an amendment that

would provide the government with the authority to require the Ontario Energy Board to review the portion of the bill that deals with electricity retailers and gas marketers after three years.

What we're saying, and I was saying this earlier, is that after three years, even though there are predictions that the bill will cause an awful lot of discourse, a full review by the OEB will take place, and whatever regulatory streams need to be adjusted, tweaked, changed or modified could take place during that time. This would provide the government with the authority for the Ontario Energy Board to do just that: to ensure that the appropriate regulatory and legislative framework is in place to protect the consumer. That sentence confirms what the bill is trying to do.

Additional proposed measures could be introduced after the review. This says that in the three-year time frame while this is being implemented, that review takes place and then other regulatory streams can be introduced to tighten up, to shore up, anything that has kind of poked its head through that is not good for consumer protection.

I'm looking over to my colleague across the way, the critic, who's going to speak next, and I would ask him if he's ready. Is he going to be ready? Okay, thank you.

This amendment sends the message that we will continue to be vigilant.

Interjection.

Mr. Dave Levac: He asked, as a favour. He's-

Interjection.

Mr. Dave Levac: Oh, I know that. He's ever ready, for sure.

To stay focused: The amendment sends the message that we will continue to be vigilant. It provides an important chance for review and re-examination and allows those in the service of the public an opportunity to continue to act in its best interest.

This is not going to be "pass a piece of legislation and let it collect dust" or "let it die and wither." We're going to be proactive and re-evaluate this.

My belief is that the proposed legislation will go quite a far way toward fulfilling the vital obligation, which is to protect Ontario's energy consumers. While ensuring sound business practices, we can ensure that consumers are protected. We can do both.

I was very pleased to be able to participate as the standing committee examined the bill. I appreciate the confidence that the minister has shown in my capacity to help us with legislation and the dialogue that took place. I deeply appreciate that opportunity.

I proudly and sincerely thank and acknowledge the work of the ministry staff, who worked tirelessly.

Interjections.

Mr. Dave Levac: While the heckling was going on, I want to repeat that so that I'm sure the members opposite would agree with me.

I proudly and sincerely thank and acknowledge the work of ministry staff who, day after day in this place, help all of us and work tirelessly to ensure that we write the best pieces of legislation that we possibly can.

I was impressed with the fine questions and the keen eye of the committee members who brought this very important piece of legislation to life.

I'm very thankful for the input from the stakeholders and for some of their proactive responses to major identified consumer problems. They do deserve some credit for standing up and identifying that they've got a problem and saying they're going to work toward improving it. It's their job now, I'd respectfully suggest, to ensure that it gets done right; to make sure that the consumers who, at the door, were feeling they were not being listened to-now we all are listening to them, and I'm sure we can work together to ensure that that happens again. I believe that, working together, we have developed a bill that will help benefit Ontario and the hard-working men and women who call it their home.

I've made a commitment in my public service to try to write the best possible legislation. I stand very proudly in the Legislature to say that I believe we have made a really good attempt at this particular piece of legislation, the Energy Consumer Protection Act, 2010.

Again, I want to compliment all of the members of the committee for the hard work they've done. I look forward to the comments they'll make on third reading. I look forward to the regulatory stream that's going to come on board and the consultation that the government has made a commitment to do to continue writing this piece of legislation for the protection of the Ontario consumer.

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