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)

SUPPLEMENTARY BOOK OF AUTHORITIES OF OEB ENFORCEMENT STAFF

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Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services

51 O.R. (2d) 302

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT
REID J.
20TH JUNE 1985.

Social welfare -- Social assistance -- Entitlement -- Living as single person -- Existence of familial economic or social relationship irrelevant unless cohabitation first established -- Social Assistance Review Board failing to state grounds for credibility finding -- Board acting on hearsay evidence -- Order rescinding benefits set aside -- Family Benefits Act, R.S.O. 1980, c. 151.

The appellant, a divorced mother of two children, received an allowance as a deserted mother under the Family Benefits Act, R.S.O. 1980, c. 151. Her allowance was cancelled by the Director of the Family Benefits Branch on the grounds that she was not living as a single person. The evidence at the hearing before the Social Assistance Review Board was that the appellant had a male friend with whom she spent a certain amount of time and with whom she had a social relationship. The board concluded that there was evidence of a "familial, social and economic relationship'' between the appellant and her friend, that the appellant had not provided credible evidence to rescind the decision and that therefore the benefit should be cancelled. The appellant appealed to the Divisional Court.

Held, the appeal should be allowed. The first issue for the

board to determine was whether or not the claimant was living with another person. The issue of whether there was a familial, social or economic relationship did not arise unless the claimant had not established that she was living singly. It is possible for a woman to have a relationship with a man like the one claimed by the appellant in the present case, and still be entitled to an allowance. The board stated that it had not received credible evidence to rescind the director's decision. Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided. The Social Assistance Review Board owed the claimant a reasonable statement of why her claim failed, particularly when it failed because the claimant or her witnesses were not believed. Furthermore, the information upon which the decision was based, contained in the director's written submissions, was hearsay. The appellant was given no opportunity to cross-examine the persons who were the source of the director's information and she had presented direct evidence which contradicted it. In the circumstances, the appellant's direct evidence was entitled to acceptance subject to a finding against her credibility. If such a finding had been made, it was wholly unexplained and there was nothing in the record that would justify it. When dealing with the necessities of life for a mother and her two children, the board should not accept unchallengeable hearsay evidence over direct testimony without a proper finding and explanation why the direct testimony was found not to be credible. Mere suspicion is not a proper basis for rejecting a claim such as that made by the appellant.

Cases referred to

Re Ellis & Ministry of Community & Social Services (1980), 28 O.R. (2d) 385, 110 D.L.R. (3d) 414; Dowlut v. Com'r of Social Services (1985), 30 A.C.W.S. (2d) 299; Re Warwick and Minister of Community & Social Services (1978), 21 O.R. (2d) 528, 91 D.L.R. (3d) 131, 5 R.F.L. (2d) 325; Re De Lima and Minister of Community & Social Services, [1973] 2 O.R. 821, 35 D.L.R. (3d) 481, 11 R.F.L. 365 sub nom. Re De Lima; Willis v. Ministry of Community & Social Services (1983), 40 O.R. (2d) 287

Statutes referred to

Canada Evidence Act, R.S.C. 1970, c. E-10
Family Benefits Act, R.S.O. 1980, c. 151, ss. 14(1), (5), 15(1), (4)
General Welfare Assistance Act, R.S.O. 1980, c. 188

Rules and regulations referred to
R.R.O. 1980, Reg. 318, ss. 1(1)(c), 5(b) (rep. & sub. O. Reg. 424/82; am. O. Reg. 709/84)

APPEAL from a decision of the Social Assistance Review Board pursuant to the Family Benefits Act, s. 15.

Carolyn D. Ateah, for appellant.

Leslie D. McIntosh, for respondent.

REID J.:-- Susan Pitts is a 28-year-old divorced mother of two children, aged nine and ten. She began receiving an allowance as a deserted mother under the Family Benefits Act, R.S.O. 1980, c. 151, for her and her children's support in March, 1977. In February, 1984, the respondent director cancelled the allowance on the ground that she was not living as a single person. She appealed to the Social Assistance Review Board. The board affirmed the director's decision.

Ms. Pitts now appeals the board's decision. The basis for this court's jurisdiction is found in s. 15(1) of the Act:

> 15(1) Any party to the proceedings before the board of review under section 14 may appeal from the decision of the board to the Divisional Court on a question that is not a question of fact alone in accordance with the rules of court.

This court's powers on such an appeal are set out in s. 15(4). They are:

> 15(4) On an appeal under this section, the court may affirm

the decision of the board of review or may rescind it and refer the matter back to the board or to the Director to be disposed of in accordance with such directions as the court considers proper under this Act and the regulations, and the board or the Director shall give effect to any direction given by the court under this section.

The hearing by the Social Assistance Review Board is in the nature of a review of the director's decision. Section 14(1) of the Act provides:

> 14(1) Where an applicant or recipient files a request for a hearing in accordance with section 13, the board of review shall fix a time for and hold a hearing to review the decision of the Director and the provisions of section 12 of the Ministry of Community and Social Services Act apply with necessary modifications to a hearing and review under this Act by the board of review.

At the hearing, the director need not appear but may make submissions in writing. Section 14(5) provides:

> 14(5) The Director may make his submissions at a hearing of the board of review in writing, but the applicant or recipient who is a party to the hearing shall be afforded an opportunity to examine before the hearing any such submission or any written or documentary evidence that the Director proposes will be produced or any report the contents of which the Director proposes will be given in evidence at the hearing.

Facts

The board convened a hearing to review the director's decision. It heard the following witnesses: Ms. Pitts, her "boyfriend" (her term) George Mitchell, and a C. Ladd, a friend of Ms. Pitts. The director's submissions were made in writing. They were to the effect that an anonymous complaint had been received that Ms. Pitts was living with George Mitchell. An "eligibility review" officer had visited her to inquire into that allegation. At that time, Ms. Pitts made a

written solemn declaration under the Canada Evidence Act, R.S.C. 1970, c. E-10, that:

> My boyfriend, George Mitchell, is living at 94 Roslin Ave. and not residing with me at this time or at any other time. He coms [sic] over frequently and may stay once a week overnight.

That notwithstanding, the officer continued to investigate and concluded that George Mitchell lived in Ms. Pitts apartment; that George Mitchell had given Ms. Pitts' address as his to the Ministry of Transportation, the Toronto Credit Bureau, a "leading department store" and a bank; and that George Mitchell did not live with his parents.

On this information, the director cancelled the allowance. Ms. Pitts responded with a request for a hearing. On the request form she wrote:

> You have stated that I am not living as a single person. Without a monthly Mother's Allowance cheque, I have no way to support me and my two children or to pay March's rent.
>
> I have already signed a paper saying that I am living by myself (with 2 children) and do not know why you have cut me off my allowance cheque.
>
> In the meantime I have to report to Welfare for help and I don't know what I am to do if they refuse me.

No record of evidence was kept at the hearing. What transpired must be gleaned from the "Record of Hearing" prepared by the board member, Gaetano Manuele, who presided, and his subsequent "Notice of Decision". In the "Record of Hearing" he summarized the viva voce evidence in the following terms:

> The Appellant stated that she and her children are persons in need and she is not living in a common-law relationship with George Mitchell. George is her boyfriend and she met him five years ago. She pays all her expenses and she does not receive

any support at all. George, her boyfriend, comes to see her every day for a couple hours because his work is not too far from her premises. George stays in overnight from two to three times a week. They go out together for shopping and at times he buys groceries for her. They went to Niagara and stayed in overnight and usually in the summer they go to George's father's cottage every Sunday morning and stay until Monday morning. George bought presents for Christmas and for birthday occasions. George is living with his parents at 94 Roslin Avenue. With regard to George's mail at her address and all accusations from the eligibility review officer, some are true some are not. The reasons why George is using and used her address was because George did and does not like his parents to know his business. In conclusion, she stated that it is clear that she lived for the period in question and at the present time as a single person with her two dependent children.

GEORGE MITCHELL -- WITNESS

Mr. Mitchell stated that he is living with his parents but he does not pay any accommodation. He is working full-time and has known Susan (the Appellant) for about six years. He is visiting her every day and stays in overnight about three times a week. His relation with her is just a friendship. He justified using Susan's address because he does not like his parents to know about his business. He admitted to go out for shopping, to the cottage on weekends, and to spend money at times for groceries and presents for special occasions.

C. LADD

Ms. Ladd, who lives at #402 and is the Appellant's friend, stated that Susan complained many times with her about George using Susan's address for many purposes, and she knows George does not live with Susan.

That summary is followed by the heading "Views of Board Members". Under it Mr. Manuele wrote:

Based on all evidence received from the Appellant, viva voce,

> and witness and considering all verifications from Family Benefits report, I feel that in this case I find that there is familial, social and economical relationship between the Appellant and George Mitchell. Therefore, I feel that I have not received credible evidence to rescind the Director's Family Benefits decision.

Under that entry is the heading, "Summary of Deciding Factors". Mr. Manuele wrote:

> I find as a fact that the Appellant lived and is living with George as husband and wife within the meaning of the Family Benefits Act and Regulation.
>
> Accordingly, I affirm.

Thereafter, a "Notice of Decision" was sent to Ms. Pitts over the hand of Mr. Manuele. It summarized the director's submissions and said:

> It is, therefore, the Ministry's view that the Appellant was living with Mr. George Mitchell as husband and wife within the meaning of the Family Benefits Act and Regulations.

It then summarized the evidence of Ms. Pitts and her witnesses in somewhat greater detail than what appeared in the "Record of Hearing". It said:

> At the hearing, the Appellant stated that she is 28 years old, divorced, has a Grade 10 education, and has not worked for the past three and a half years.
>
> She and her children are in need as she is not living in a common-law relationship with Mr. George Mitchell. Mr. Mitchell is her boyfriend and she met him five years ago. She pays all her expenses and she does not receive any support at all.
>
> Mr. Mitchell, her boyfriend, comes to see her every day for a couple of hours because his work is not too far from her premises. Mr. Mitchell stays overnight from two to three

times a week. They go out together for shopping and at times, he buys groceries for her. They went to Niagara Falls together and stayed overnight, and usually in the summer they go to Mr. Mitchell's father's cottage every Sunday morning and stay until Monday morning. Mr. Mitchell bought presents for Christmas and birthday occasions, and he is living with his parents at 94 Roslin Avenue.

With regard to Mr. Mitchell's mail and the Appellant's address and all accusations from the eligibility review officer, some are true and other accusations are not true. The reasons why Mr. Mitchell is using and used her address was because he did and does not like his parents to know his business.

In conclusion, the Appellant stated that it is clear that she lived for the period in question and at the present time as a single person with her two dependent children.

At the Hearing, Mr. George Mitchell stated that he is living with his parents, but he does not pay any accommodation. He is working full-time and has known the Appellant for about six years. He is visiting her every day and stays overnight about three times per week. His relationship with her is just a friendship. He justified using her address because he does not like his parents to know about his business. He admitted to going out for shopping and to the cottage on weekends and to spend money for groceries and presents for special occasions.

At the Hearing, Ms. C. Ladd stated that she lives in Apartment #402 and is a friend of the Appellant. She stated that the Appellant at many times complained with her about Mr. Mitchell using her address for many purposes. She stated that she knows that Mr. Mitchell does not live with the Appellant.

Mr. Manuele then concluded:

In considering this evidence I note that based on all evidence received from the Appellant and the viva voce

> evidence of the witnesses and considering all verifications from the Respondent's report, I feel that in this case there is a familial, social, and economic relationship between the appellant and Mr. George Mitchell. Therefore, I feel that I have not received credible evidence to rescind the decision of the Respondent.

(My emphasis.)

It will be noted that his reason for finding that a "familial, social and economic relationship" existed between Ms. Pitts and Mr. Mitchell was that he had "not received credible evidence to rescind the decision of the respondent" director.

He then concluded:

> Following careful consideration of the written submissions made to the Board and of all evidence presented to the Board for or at the Hearing, I find as a fact that there is a familial, social, and economic relationship between the Appellant and Mr. Mitchell as he goes out with the Appellant to his father's cottage, he buys groceries and presents, and uses the Appellant's address. Therefore, I find as a fact that the Appellant is not living in the circumstances of a single person within the meaning of the Family Benefits Act and Regulation made persuant [sic] thereto.
>
> Accordingly, I hereby affirm the decision of the Respondent.

(My emphasis.)

I have emphasized the passages in the foregoing that appear to be the rationale for the decision, a decision that is somewhat surprising given the outline of evidence. With respect, I think the decision is in error. It may be that the error stems from the method.

Not living as a single person

Clause 5(b) of R.R.O. 1980, Reg. 318, made under the Family Benefits Act, R.S.O. 1980, c. 151, states that "no person is eligible for an allowance ... who is not living as a single person". At the hearing, the onus was on Ms. Pitts to prove that she was living as a single person: Re Ellis and Ministry of Community & Social Services (1980), 28 O.R. (2d) 385, 110 D.L.R. (3d) 414 (Div. Ct.).

Clause 1(1)(c) of the regulations defines "single person" to mean "an adult person ... who is not living with another person as husband or wife". There are two elements to this definition:

(1) living with another person,

(2) as husband or wife.

Both elements must be present before it can be said that the recipient is not a single person.

The board must first consider whether or not the recipient is living with another person. If she is not, the inquiry ends there. It is not necessary for the board to inquire into the recipient's relationship with another person.

In its notice of decision, the board failed to make any finding as to whether Ms. Pitts was living with Mr. Mitchell. It considered only whether their relationship was that of husband and wife.

This case is similar in many respect to Dowlut v. Com'r of Social Services (March 29, 1985; Divisional Court, unreported [summarized 30 A.C.W.S. (2d) 299]) heard by my brother Henry. Much of what he said is applicable. He was dealing with a case to which the General Welfare Assistance Act, R.S.O. 1980, c. 188, applied, but the issue before the board of review was the same as it is in the case before me. Mr. Justice Henry observed that under that legislation, if spouses were "living together, the wife is by definition a dependant and so is ineligible for assistance". He said further, at p. 3 of his reasons:

In such circumstances the only decision to be made in determining whether an applicant or a recipient is eligible for assistance or for continued assistance is one of fact, that is, whether the spouses are living together.

In the case of Mrs. Dowlut, the appellant, the Social Assistance Review Board, from whose decision this appeal is brought, therefore had to decide a simple issue of fact -- whether her husband at or within a reasonable time before the suspension of welfare assistance on February 24, 1983, was living with her. The onus was on Mrs. Dowlut to satisfy the board that her husband was not living with her. That decision must be made on the evidence as a whole including the weight given to individual portions of it in the board's opinion.

In the final paragraph of its decision (infra) the board, by its language, indicates that it thought it should deal with the tests applicable to an informal spousal arrangement (as in Re Proc [Re Proc and Minister of Community & Social Services (1974), 6 O.R. (2d) 624, 53 D.L.R. (3d) 512, 19 R.F.L. 82] and Re Warwick [Re Warwick and Minister of Community & Social Services (1978), 21 O.R. (2d) 528, 91 D.L.R. (3d) 131, 5 R.F.L. (2d) 325]); that confusion does not vitiate what in my opinion was a finding of fact that Mrs. Dowlut's husband was living with her. The board need not have gone that far; it need only be satisfied on all the evidence that the appellant had not discharged the onus of showing that her husband was living elsewhere.

I agree with that. The first inquiry to be made by the board in that case, as in this, was whether the claimant was living with another (in that case, a spouse). If the claimant could establish that she was not, the inquiry was at an end. The Proc and Warwick, infra, tests came into play only if the claimant had not established that she was living singly. To apply those tests before the initial question was answered was "confusion".

In argument, counsel for the director submitted that the testimony that Ms. Pitts and Mr. Mitchell did not live together should be rejected because there was no evidence from his parents that he lived with them. That was not a point mentioned

by the board. Moreover, Ms. Pitts was not required to prove where Mr. Mitchell lived She had to prove only that he did not live with her.

In Dowlut, the board had rejected evidence that the husband was not living with the mother because the deponents were unable to state where he was living. Henry J. said at p. 10:

> It was of course not necessary for Mrs. Dowlut's case that she or her witnesses identify his whereabouts; it was necessary only to demonstrate that he was not living with her. The board therefore misapprehended the test that they were obliged to apply which is reversible error.

If a recipient is in fact living with another person, the next question which must be determined is, are they living as husband and wife? It is recognized that a woman may live with a man in a relationship other than husband and wife: landlord and tenant is one; housekeeper status is not unheard of, nor is simple friendship. The courts have provided guidelines to that second inquiry in a number of decisions commencing with Re Warwick and Minister of Community & Social Services (1978), 21 O.R. (2d) 528, 91 D.L.R. (3d) 131, 5 R.F.L. (2d) 325 (C.A.), particularly at p. 537. Having in mind that the primary purpose of the Family Benefits Act is to provide support for those in need (Re De Lima and Minister of Community & Social Services, [1973] 2 O.R. 821 at p. 822, 35 D.L.R. (3d) 481, 11 R.F.L. 365 sub nom. Re De Lima), one inquiry that must be made is where support is a feature of a live-in relationship. This was made clear in Willis v. Ministry of Community & Social Services (1983), 40 O.R. (2d) 287. As my brother Saunders said at p. 293:

> As the legislation is concerned with need, the understanding that support will be provided by the cohabitant is an essential but not the only element in the relationship.

As the Willis case itself illustrates, it is possible for a woman to have a relationship with a man not wholly unlike the one claimed by Ms. Pitts and still be entitled to an allowance. In Willis, the woman claimed that she was not, in fact, living

with the father of her child, and that he did not support her, that she had had sexual intercourse with him once after their child was born, that he often came to visit the child and brought the occasional gift of cans of milk or diapers. The director's submission included assertions that the father had, on a number of occasions, given her address and telephone number as his, had listed their son as beneficiary on an insurance policy, and had referred to her in the records of two employers as his common law wife. The court held that there was no evidence before the board to support a finding that she was living with another person as his wife.

Without finding that Mr. Mitchell was living with Ms. Pitts, Mr. Manuele held:

> I find as a fact that there is a familial, social, and economic relationship between [Ms. Pitts] and Mr. Mitchell.

The words "familial, social, and economic relationship" have been extracted like a formula from Re Warwick and Minister of Community & Social Services, supra. The finding was based on admissions that Mr. Mitchell occasionally bought groceries and presents for Ms. Pitts and her children, took them to his parents' cottage on week-ends and used her address as his mailing address. These factors may be consistent with a husband-and-wife relationship but they are also consistent with a close friendship. The direct evidence was that Ms. Pitts and Mr. Mitchell are close friends.

Credibility

The cases serve to illustrate how difficult can be the inquiries that the legislation requires. It must be particularly difficult to make findings of credibility, for the director's submission is (or I take it, customarily is) in writing, he is not present for cross-examination, the evidence before the board may be unsworn and counsel for either side do not normally appear to be present. In Willis, the director stopped the woman's allowance notwithstanding her assertions which, if accepted, would necessarily have required it to be continued. This court noted that, in confirming the director's

decision, the board had rejected the evidence of the claimant and her witnesses as self-serving and not entitled to credence. The board was then left with the director's submission. Mr. Justice Saunders, for the court, observed (at p. 293) that:

> The onus before the Board was on the appellant. She had the unenviable task of establishing a negative. She said that Springer was not living with her and the Board did not believe her. In cases such as this, that cannot be the end of the matter. We are dealing with the necessities of life for a mother and her small child. Notwithstanding the onus, the Board must act on more than mere suspicion to take away an allowance.
>
> . . . . .
>
> I am not unmindful of the difficulty in obtaining evidence in cases such as this and that allowances may be provided or continued where there is no eligibility. Nevertheless, if there are to be errors, it is better that they be in favour of those in need. In my opinion, there was no evidence before the Director or the Board on which they could base their respective decisions.

(My emphasis.)

The task of determining credibility may be a difficult one but it must be faced. If the board sees fit to reject a claim on the ground of credibility, it owes a duty to the claimant to state clearly its grounds for disbelief. The board cannot simply say, as the member did here, "I feel that I have not received credible evidence to rescind the decision of the Respondent." Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided.

In a now famous address, Sir Robert McGarry, Vice-Chancellor of England, has reminded judges that the most important person in a lawsuit is not the judge, sitting in elevated dignity on the dais, nor the lawyers, however eminent they might be; it is

the losing party: see "Temptations of the Bench" [1978] XVI Alta. L. Rev., p. 406. In order that faith may be maintained in the legal system, it is necessary that losing parties be satisfied that they have been fairly dealt with, that their position has been understood by the judge, and that it has been properly weighed and considered. It is, therefore, important that the reasons for a decision be stated, and stated in language that the party who has been dealt the blow can comprehend.

I think that this applies with equal weight to the decisions of tribunals. Thus, in my opinion, members of the Social Assistance Review Board owe to claimants, in simple justice, a reasonable statement of why their claim failed, particularly when it failed because the claimant or witnesses were not believed. Mr. Manuele's rejection of Ms. Pitts' and her witnesses' evidence as not entitled to credence was neither preceded nor followed by one single word indicating why he did not find it credible. Judges customarily give to juries suggestions on how to go about the task of determining the credibility of witnesses. In accordance with a standard form of instruction, a judge of the Supreme Court of Ontario might say to a jury:

> In weighing the testimony of witnesses you are not obliged to decide an issue simply in conformity with the majority of the witnesses. You can, if you see fit, believe one witness against many. The test is not the relative number of witnesses, but in the relative force of their testimony. With respect to the testimony of any witness, you can believe all that that witness has said, part of it, or you may reject it entirely.

Discrepancies in a witness' testimony, or between his testimony and that of others, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience and innocent misrecollection is not uncommon. It is a fact also that two persons witnessing an incident or transaction often will see or hear it differently. Discrepancies on trivial detail may be unimportant, but a falsehood is always serious.

In determining the credit to be given to the evidence of a witness, you should use your good commonsense and your knowledge of human nature. You might, in assessing credibility, consider the following:

The appearance and demeanour of the witness, and the manner in which he testified. Did the witness appear and conduct himself as an honest and trustworthy person? It may be that he is nervous or confused in circumstances in which he finds himself in the witness box. Is he a man who has a poor or faulty memory, and may that have some effect on his demeanour on the witness stand, or on the other hand, does he impress you as a witness who is shifty, evasive and unreliable?

The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception? You know that some people are very observant while others are not very observant.

Has the witness any interest in the outcome of the litigation? We all know that humanity is prone to help itself, and the fact that a witness is interested in the results of the litigation, either as a plaintiff or defendant, may, and often does, quite unconsciously tend to colour or tinge or shade his evidence in order to lend support to his cause.

Does the witness exhibit any partisanship, any undue leanings towards the side which called him as a witness? Is he a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his mind and consequently affected the value of his testimony?

It is always well to bear in mind the probability or improbability of a witness' story and to weigh it accordingly. That is a sound commonsense test. Did his evidence make sense? Was it reasonable? Was it probable? Does the witness show a tendency to exaggerate in his testimony?

Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom you considered more worthy?

Does the fact that the witness has previously given a statement that is inconsistent with part of his testimony at trial affect the reliability of his evidence?

After weighing these matters and any other matters that you believe are relevant, you will decide the credibility or truthfulness of the witness and the weight to be given to the evidence of that witness.

It might not be untoward to suggest that board members keep those suggestions in mind.

In this case, the information given in the director's written submission was hearsay. It is admissible by virtue of the legislation but its weight must be considered against contradictory evidence. Ms. Pitts, Mr. Mitchell and Ms. Ladd all testified that Mr. Mitchell did not live with Ms. Pitts but that he lived with his parents. It was admitted that Mr. Mitchell was dating Ms. Pitts, that he visited her daily on his way home from work and that he frequently stayed overnight. All of that would easily explain the director's submission that Mr. Mitchell was seen regularly at Ms. Pitts' apartment.

Ms. Pitts had no opportunity to cross-examine the persons who were the source of the director's information. They did not attend the hearing. She could challenge the director's hearsay evidence only by calling direct evidence to contradict or explain it. In such circumstances, her direct evidence was entitled to acceptance if it contradicted or explained the director's submissions, subject to a finding against her credibility.

Here there is such a finding, but it is wholly unexplained and there is nothing in the record that would appear to justify it. There is no discussion of credibility at all. The board has accepted the director's hearsay information as credible and

simply waved away the direct evidence of three witnesses as not credible. When dealing with the necessities of life for a mother and her two children, the board should not accept unchallengeable hearsay evidence over direct testimony without a proper finding and explanation why the direct testimony was found not to be credible.

The Dowlut case also involved an offhand finding that the applicant and her witnesses lacked credibility. As has been said, the onus was on the applicant to satisfy the board that her husband was not living with her. The director's written submission said, on the basis of hearsay, that the spouses had purchased furniture together, that she drove his car, and that he had given her address to his employer and to the Ministry of Transport. There was affidavit evidence from friends and neighbours that he did not live with her and from a friend of the husband explaining the purchase of the furniture. The claimant testified at the hearing and was not cross-examined on her statement that her husband did not live with her. Henry J. said, at p. 6:

> The board either rejected or gave little weight to the evidence led by the appellant. While it is the board's function to consider and weigh the evidence, they must do so fairly and impartially and according to principle as judges.

And at p. 7:

> They appear to have rejected her evidence entirely. To do so required, in the case of this essential witness, a clear finding on credibility which they did not make.

And at p. 8:

> Second, the affidavits of the friends and neighbours were virtually swept aside as being not objective. This, in my opinion, is not justifiable. That evidence is prima facie true because the deponents were put to their oath. The board did not see those witnesses and I find it difficult to understand how they could reject them as a class. The appellant has to prove a negative and it can be expected that

she will have difficulty in finding witnesses who will be willing to come forward in person.

I accept that Henry J. was speaking of affidavit evidence, whereas here, the evidence on the claimant's behalf does not appear to have been sworn. Nevertheless, while unsworn evidence cannot claim credit on the same ground as sworn evidence, it is, none the less, entitled to at least the credit impliedly given by the legislation to the director's submission. It must not be dismissed arbitrarily as lacking in credence, or non-objective.

Mr. Manuele might have noted a discrepancy between the evidence Ms. Pitts and Mr. Mitchell gave at the hearing that he stayed overnight with her two or three nights a week and her earlier solemn declaration that he lived with his parents and "may have stayed once a week overnight". That would have been a proper basis for doubting the credibility of her evidence. Yet, if Mr. Manuele thought it was, he did not say so, and it would be wrong to assume that it was a factor in his finding against credibility. A healthy scepticism may well be appropriate in those called upon to deal with claims for welfare and the like assistance, for no doubt there are many who would abuse our society's generous impulses and seek what they are not entitled to. Some such claims, and the claimants behind them, may be devious, even fraudulent. Some of the friends and neighbours who support such claims may be all too willing to pervert the truth. It is the function of the director, and the board, to winnow out such claims. It is, no doubt, no easy task. Yet, it must not be assumed that all claims are spurious. Each must be dealt with on its own merits. "Mere suspicion", as this court has observed, is not a proper basis for rejecting them, or the credibility of those who assert them.

I am moved to make these observations because of the disturbing frequency with which claims appear to be rejected on nothing more than "mere suspicion" and an undue scepticism. That, unhappily, is what appears to have occurred here.

A single mother shackled with the responsibility of raising

two children on meagre government assistance no doubt lives under very trying circumstances. It would be a strong woman indeed who could manage this without daily emotional support from a close friend. To deprive her of her only source of income because her close friend happens to be a man is very harsh. When dealing with the necessities of life for a mother and her children, the mother should be given the benefit of the doubt, especially when there is direct evidence that she is not living with her male friend. As Saunders J. said for the Divisional Court in Willis, supra, "If there are to be errors, it is better if they be in favour of those in need". I think this is the way the board should approach its task.

Conclusion

The Family Benefits Act does not permit an appeal from a decision of the board on a question of fact alone. The board herein erred in law in several ways. First, its failure to make a finding on whether the applicant was living with another person was error. Second, without having found that the applicant was living with another person, the board sought to apply the Warwick test which is applicable only when that finding is made, and third, it made a finding against the credibility of the applicant and her witnesses without stating the basis for it but, perhaps more importantly, without any justification for it visible on the record.

I do not think it is necessary to refer the case back to the board for a new hearing. Accepting the improperly rejected direct evidence, which was not contradicted by other direct evidence, I am of the opinion that Ms. Pitts established on a balance of probabilities that Mr. Mitchell was not living with her.

I, therefore, refer the matter back to the director to dispose of this case on the basis that Ms. Pitts was living as a single person and to restore her allowance from the point at which it was wrongly discontinued.

The appeal is allowed and the decision of the board is rescinded. Costs of the appeal to Ms. Pitts.

Appeal allowed.

Canadian Judicial Council - National Judicial Institute

Model Jury Instructions

Glossary

NOA = Name of Accused

NOA2 = Name of Accused 2

NOC = Name of Complainant

NOC2 = Name of Complainant 2

NOD = Name of Declarant

NOW = Name of Witness

NOW2 = Name of Witness 2

NOAW = Name of Accused-Witness (Accused who testifies)

NO3P = Name of Third Party

NOAV = Name of Actual Victim

NOIV = Name of Intended Victim

4.11 Assessing Testimony

Note[1]

(Last revised March 2011)

[1] Next, I want to speak to you about assessing a witness's testimony. It will be up to you to decide how much or little of the testimony of any witness you will believe or rely on. You may believe some, none, or all of the evidence given by a witness. You must ask yourself whether the witness is truthful and whether the witness is reliable.

(Here are a few questions to consider during your discussions.)

[2] Did the witness have a good opportunity to observe the event that he or she described? How long was the witness watching or listening? Did anything interfere with the witness's ability to observe? Was there anything else happening at the same time that might have distracted the witness?

[3] Did the witness have a good memory? Keep in mind the length of time that has passed since the date of the alleged offence. Was there something specific that helped the witness remember the details of the event that he or she described? Was there something unusual or memorable about the event so that you would expect the witness to remember the details, or was the event relatively unimportant at the time, so the witness might easily have forgotten or been mistaken about some of the details? Was any inability or difficulty that the witness had in remembering events genuine, or was the witness's memory selective in order to avoid answering questions?

[4] Was the witness able to communicate clearly and accurately?

[5] What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on the witness's manner. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different intellects, abilities, values, and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision.

[6] Was the witness forthright and responsive to questions, or was the witness evasive, hesitant, or argumentative?

[7] Did the witness give his or her testimony fairly, or was it tainted by self-interest or bias? Does the evidence disclose any reason why the witness might tend to favour the Crown or *(NOA)*?

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[1] Some judges prefer not to mention the factors that appear in question form in [2] – [11] in their Preliminary Instructions. For those who prefer this approach, para. [1] may be read, omitting the last sentence.

[8] Was the witness's testimony consistent with the testimony of other witnesses? As you know, people hear and see things differently. This means we should not be surprised to find discrepancies in their testimony. Minor discrepancies are often unimportant, but you may attach greater importance to more significant discrepancies.

[9] Are there any inconsistencies in the witness's own testimony? If so, do these inconsistencies make the testimony more or less believable and reliable? Are the inconsistencies about something important, or minor details? Could they be honest mistakes? Could they be deliberate lies? Are there any explanations for them? Do the explanations make sense?

[10] You must not decide an issue simply by counting which side has more witnesses. You may decide that the testimony of fewer witnesses is more reliable than the evidence of a larger number. It is the force of the evidence that counts, not the number of witnesses.

[11] Consider these questions in the context of the whole of the evidence. Use your common sense to decide how much weight or importance you wish to give to the testimony of the witnesses.

action.[76]

§4.104 In *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police),*[77] the issue was the scope of the exemption from disclosure of "personal information" under s. 19(1) of the *Access to Information Act*. For purposes of this section, "personal information" was defined as "information about an identifiable individual ... relating to the education or the medical, criminal or employment history of the individual ... " Commenting on this definition, Gonthier J. wrote:

> ... [T]he wording of [the definition] suggests that it has a broad scope. Indeed, the provision does not state that personal information includes "employment history" itself. Rather, it stipulates that it includes "information *relating to* . . . employment history" (emphasis added). *Black's Law Dictionary* (6th ed. 1990) defines the word "relate" at p. 1288 as "to bring into association with or connection with". The wording of the French version of s. 3(*b*) is equally general: "*Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, . . . relatifs à . . . ses antécédents professionnels . . .*" (emphasis added). The *Dictionnaire de droit québécois et canadien* (2nd ed. 2001) defines "*relatif*" at p. 477 as "*[q]ui concerne, qui se rapporte à*".[78]
>
> [Emphasis in original]

Gonthier J. here points out that in most contexts information "relating to" or "respecting" a subject is a good deal broader in scope than the information comprising that subject.[79]

Deems

§4.105 ***Deems.*** The verb "to deem" is used in legislation for a variety of purposes:

- to create a legal fiction by declaring that something exists or has occurred regardless of the truth of the matter;
- to create a legal presumption by declaring certain facts are to be taken as established;
- to declare the law; and
- to confer discretion.[80]

In older legislation, the expression "shall be deemed" is often encountered. In modern legislation, drafters generally use the present indicative: "is deemed". Nothing turns on this difference; the two expressions have the same legal effect. More recently, drafters have begun to use "is considered" or simply "is" in place of "is deemed", because the latter is considered legalistic and archaic.[81]

Use of "deem" (or "consider" or "is") to create legal fictions

§4.106 ***Use of "deem" (or "consider" or "is") to create legal fictions.*** The most important use of "deems" is to create a legal fiction: a given fact 'x' is declared to be 'y' or is to be dealt with as if it were 'y' for some or all purposes. A person is deemed to be single even though they may be married; a notice is deemed to have arrived on a certain day regardless of when it actually arrived; a provision is deemed to have come into force on a certain day even though the legislation was not in fact in force on that day. Although a sovereign legislature cannot change reality, it can declare that

for legal purposes reality is to be considered different from what it was or is.

§4.107 The role of such legal fictions in law was examined by the Supreme Court of Canada in *R. v. Verrette*.[82] The court was asked to determine whether a dancer at a cabaret had violated s. 170 of the *Criminal Code*, which was in the following terms:

> 170(1) Every one who, without lawful excuse, is nude in a public place ... is guilty of an offence punishable on summary conviction.
>
> (2) For the purpose of this section a person is nude who is so clad as to offend against public decency or order.

Beetz J. wrote:

> The key word of s. 170(2) is the verb "is" in the proposition "a person is nude". In my opinion "is" here means "shall be deemed to be", the very expression used in the predecessor of s. 170 which was added to the *Criminal Code* as s. 205A by the Statutes of Canada, 1931, c. 28, s. 2:
>
> > 205A. (1) Every one is guilty of an offence and liable upon summary conviction to three years' imprisonment who, while nude, is found in any public place ...
> >
> > ...
> >
> > For the purposes of this subsection any one shall be deemed to be nude who is so scantily clad as to offend against public decency or order.
>
> ...
>
> The last paragraph of s. 205A(1), a deeming provision, accordingly assimilated scantiness of dress to complete nudity provided that scantiness of dress was such as to offend against public decency or order. A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is.[83]

Beetz J. then made a number of points about legislative drafting and the revision process:

> Old s. 205A was given its present form as s. 159 in the 1953-54 revision of the Code, c. 51. The ... whole section was shortened and simplified although there is nothing to indicate that its general intent was otherwise modified.
>
> In that process of simplification, the words "anyone shall be deemed to be nude" were replaced by the words "a person is nude". In my view, this change did not alter the deeming nature of the provision; it merely expressed it in a simpler and more figurative way, a matter of style, not of substance. To say in a statute that a person is nude when he is clothed is to create a legal fiction whether the verb "is" or the expression "shall be deemed to be" are used: even Parliament cannot turn fiction into reality whatever words it uses.84

In *Canada (Attorney General) v. Scarola*,[85] the Federal Court of Appeal considered the effect of the following provision from the *Tax Court of Canada Act*:

> **16.2** (1) A party who instituted a proceeding in the Court may, at any time, discontinue that proceeding by written notice.
>
> (2) Where a proceeding is discontinued under subsection (1), it is deemed to be dismissed as of the day on which the Court receives the written notice.

Létourneau J.A explained the effect of s. 16.2(2) as follows:

> ... Subsection 16.2(2) operates to turn the filing of a discontinuance into a constructive dismissal akin to an actual dismissal. In other words, the discontinuance of an appeal, as a result of that subsection, takes on all of the properties of a dismissal. It produces the same effect as a judgment of dismissal by the Court, albeit that effect is obtained by sheer operation of the legal fiction. In either case, the powers of the Court are spent: the decision maker is *functus officio*. A dismissal, deemed or actual, is a final determination ... [86]

§4.108 When "deems" is used to create a legal fiction, the fiction cannot be contradicted or "rebutted".[87] The facts as declared by the legislature govern, even in the face of irrefutable evidence to the contrary. The difficulty that arises in interpreting legal fictions is determining not the force of the fiction, but its scope. Is a person who is deemed single to be regarded as single for all legal purposes or for the purpose of a particular Act only or even more narrowly for the purpose of a specific legal rule?

§4.109 This problem arose in *Fulton v. Fulton*,[88] where the court had to interpret s. 26(1) of Ontario's *Family Law Act, 1986*:

> 26(1) If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death.

In this case, the deceased spouse held the matrimonial home in joint tenancy with his son from a previous marriage. The issue was the effect of the legal fiction created by the section. Did it sever the joint tenancy and cause the son to lose the right of survivorship? Or did it merely entail that half the value of the home was to be included in the deceased's assets for purposes of calculating the net family property to be equalized under the *Family Law Act*?

§4.110 As argued before the Court, the outcome was said to turn on whether the expression "shall be deemed" should be taken literally or notionally. If "deemed" is taken literally, then the tenancy really was severed and the right of survivorship is lost. But if deemed is taken notionally, then the tenancy in fact remains joint but is only treated as if it had been severed for purposes of equalization under the *Family Law Act*. With respect, this analysis is confused. The confusion seems to have arisen from the following passage in *Re Vaillancourt*, which addressed the same issue:

> ... the use of the word "deemed" in [section 26(1) of the *Family Law Act*] may well be interpreted to mean "to treat as if": see *Black's Law Dictionary*, 5th ed. (1979). I say this because as the object and purpose of the statute is to treat between spouses this meaning would enable that to be done without impairing existing rights of others.[89]

This passage confuses the meaning of the word "deemed" with the scope of the legal fiction it creates. When "deemed" is used to create a legal fiction it always means "to treat as if". That is its ordinary meaning (or more accurately, its legal meaning).

§4.111 There are two differences between declaring a tenancy to be severed and deeming it to be severed. First, the former actually severs the tenancy whereas the latter does not. The latter says that

regardless of the actual status of the tenancy, it is to be dealt with as if it were severed. The second difference has to do with the scope of legal impact. If the tenancy is actually severed, then it is severed for all purposes. If the tenancy is merely deemed to be severed, the scope of the resulting legal fiction must be determined. Ideally, the legislature will provide this information in the legislation itself. But if the legislation is silent, it is left to the courts to resolve the matter using ordinary interpretation techniques.

§4.112 In the *Fulton* case, the court relied on the presumption against tautology in concluding that the legislature must have intended the legal fiction to apply for all legal purposes, not just for the purpose of equalization under the *Family Law Act*. Austin J.A. wrote:

> It was argued successfully before the judge of first instance that the severance ... was notional only [applied only for purposes of equalization], that all it did was to put the figure of $60,000 [half the value of the home] in the column of the husband's net family property ... It is our understanding of the *Family Law Act*, however, that that would have happened in any event ...
>
> ... One of the fundamental rules of construction ... is that every effort should be made to give meaning to each word or phrase of a statute. Accordingly, we see no alternative but to conclude that s. 26(1) was intended to apply literally [generally] ... to sever the tenancy for all purposes immediately before death.[90]

While this analysis is sound, the terminology relied on -- notional and literal -- is unhelpful.

§4.113 More recently, in *Sero v. Canada*,[91] the Federal Court of Appeal addressed a similar problem, namely the effect of s. 461(4) of the *Bank Act*, which provided that the "indebtedness of a bank by reason of a deposit in a deposit account in the bank shall be deemed for all purposes to be situated at the place where the branch of account is situated." After reviewing the *Vermette* case, Sharlow J.A. reached two conclusions: first, that a deeming provision creates a fiction, and second, "that the statutory fiction resulting from a deeming rule generally applies only for the purposes of the statute that creates it."[92] Sharlow J.A.'s conclusion asserts a rule of thumb rather than a rule. It was therefore necessary for the Court to consider whether words "for all purposes" in s. 461(4) extended the statutory fiction to statutes other than the *Bank Act*. The Court concluded that it did not. The Court pointed out that the French version of the provision made no reference to "all purposes". It provided that "la dette de la banque résultant du dépôt effectué à un compte de dépôt est réputée avoir été contractée au lieu où est situé la succursale de tenue du compte." Invoking the shared meaning rule, the court opted to rely on the narrower French version of the provision.

Use of "deem" (or "consider") to create presumptions

§4.114 ***Use of "deem" (or "consider") to create presumptions.*** The purpose of a presumption is to establish something as a fact without the benefit of evidence. Presumptions are rebutted by tendering evidence that tends to show that the presumption is false. If a presumption is not rebuttable in this way, it is indistinguishable from a legal fiction.[93] It is sometimes difficult to determine whether "deem" as used in a particular provision was intended to be rebuttable or conclusive. As Schultz J.A. wrote in *St. Leon Village Consolidated School District v. Ronceray*,

> in deciding whether ... the use of the words "deem" or "deemed" establishes a conclusive or a rebuttable presumption depends largely upon the context in which they are used, always bearing in mind the purpose to be served by the statute and the necessity of ensuring that such purpose is served.[94]

Acceptable consequences are also an important consideration. In *Hopper v. Municipal District of Foothills No. 31*,[95] for example, the Court was concerned with s. 51 of Alberta's *Expropriation Procedure Act*, which declared that a notice of expropriation could be served by registered mail and "shall be deemed to be served on the day it is so mailed." MacDonald J. interpreted "deemed" to mean "deemed until the contrary is proven", largely on the basis of the consequences that would follow if the provision were treated as conclusive:

> If the word "deemed" in s. 51 is to be taken as "deemed conclusively" a municipality could deliberately wait until the owner was on holidays or out of the province when it would be unlikely that he would receive the notice and be able to make representations. Such an interpretation would permit the intention of the Legislature as expressed in s. 24 [the intention that notice be given] to be flouted.
>
> On the other hand if the word "deemed" is to be taken as "deemed until the contrary is proven", service of the notice by registered mail is considered effective unless it is proven that the service contemplated by s. 24 was not in fact made. This interpretation, I feel, permits the continued observance of the rule of natural justice ... that the owner be given an opportunity to make representations ...
>
> As a man cannot be condemned for an offence without an opportunity of knowing the charge and being given an opportunity to make his defence, it seems equally just that he should not be deprived of his property nor have it destroyed without notice and the opportunity of making representations. This must have been the intention of the Legislature and I so find.[96]

This is a good example of the reasoning on which administrative law is based: the legislature must be presumed to act fairly and reasonably.

Use of "deem" (or "consider") to create a rule

§4.115 ***Use of "deem" (or "consider") to create a rule.*** There are many cases in which courts have interpreted provisions like the following:

(1) A municipal council is deemed to have consented to the issuance of a demolition permit if, within 15 days after the permit is issued, the council does not give notice of its intention to review the permit.[97]

(2) If the judge hearing the appeal does not dispose of an appeal from arbitration within three months of day on which the appeal is filed, the appeal shall be deemed to be dismissed.

(3) Pleadings are deemed to be closed when the time for delivering a reply has expired.

The purpose of such provisions is not to deal with an evidentiary issue -- to establish as a fact whether consent was given in provision (1) or whether the appeal has been dismissed in provision (2). The purpose rather is to create a rule. In each provision, a legal consequence is attached to a set of facts. If the facts are shown to exist (using the usual means of making proof), the consequence follows as a matter of law. As Schultz J.A. succinctly puts in, dealing with provision (2) in the *St.*

Leon Village case,

> the legal effect of the failure of the court to decide the appeal within three months is equivalent to a dismissal of it by operation of the law.[98]

Footnote(s)

1 [2011] S.C.J. No. 25, 2011 SCC 25, at para. 71 (S.C.C.).

2 *Interpretation Act*, R.S.B.C. 1996, c. 238.

3 For an explanation of implied exclusion, see Chapter 8, at §8.90-8.91.

4 See, for example, *Cronauer v. Grande Prairie (Subdivision and Development Appeal Board)*, [2011] A.J. No. 595, 2011 ABCA 164, at paras. 11-15 (Alta. C.A.). See also the test for conferring a power by necessary implication, which is discussed in Chapter 12.

5 See, for example, *R. v. Cancade*, [2011] B.C.J. No. 375, 2011 BCCA 105 (B.C.C.A.).

6 See, for example, *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30, 2011 SCC 30 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

7 This reasoning ignores the legislative drafting convention of not using "shall" when imposing an obligation on judges, Ministers or the Governor General in Council. Historically, it was considered inappropriate to do so. As the convention erodes, the use of "shall" to impose obligations on these office holders has become common.

8 [1990] S.C.J. No. 66, [1990] 2 S.C.R. 254 (S.C.C.).

9 *Ibid*., at para. 27.

10 (1880), 5 App. Cas. 214 at 222-23 (H.L.).

11 *Ibid.*, at 225.

12 *Ibid*., at 235-36.

13 See *Rustop Ltd. Estate v. White, Bower and Bower, Hessian & Associates Co.*, [1979] N.S.J. No. 670, 36 N.S.R. (2d) 207, at para. 9 (N.S.C.A.): "Now the word "may" used in a statute confers a power upon somebody to do something. The exercise of that power may be discretionary or obligatory, and this must be determined from an interpretation of the statute as a whole. Normally when the power to be conferred may be exercised upon the establishment of legal rights in favour of some person there is a duty to exercise the power when the rights have been established". See also *Bates v. Bates*, [2000] O.J. No. 2269, 49

O.R. (3d) 1, at para. 24 (Ont. C.A.); *Saskatchewan Government Insurance v. Nipawin (Town)*, [1998] S.J. No. 883, 169 D.L.R. (4th) 713, at para. 17 (Sask. C.A.); *Burke v. Canada (Immigration and Employment Commission)*, [1990] F.C.J. No. 711, 113 N.R. 73 (F.C.A.).

14 [1996] N.S.J. No. 146, 150 N.S.R. (2d) 43 (N.S.C.A.).

15 *Brown v. Metropolitan Authority*, [1996] N.S.J. No. 146, 150 N.S.R. (2d) 43, at paras. 56-60 (N.S.C.A.).

16 [2003] S.C.J. No. 45, [2003] 2 S.C.R. 357 (S.C.C.).

17 *Ibid*., at para. 16. See also *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] S.C.J. No. 64, 2004 SCC 68, [2004] 3 S.C.R. 461 (S.C.C.), where the Court approves the following analysis by the Ontario Court of Appeal (in *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.*, [1995] O.J. No. 3151, 26 O.R. (3d) 1 (Ont. C.A.)) of s. 100(2) of the *Bankruptcy and Insolvency Act*, which conferred jurisdiction on a court to give judgment if specified conditions were met (at para. 82): "When a contextual approach is adopted it is apparent that although the conditions of the section have been satisfied the court is not obliged to grant judgment. The court has a residual discretion to exercise."

18 *Ibid.*, at paras. 20-21.

19 SOR/2000-187.

20 [2012] F.C.J. No. 525, 2012 FCA 130 (F.C.A.).

21 *Ibid*., at para. 22.

22 [2011] B.C.J. No. 1090, 2011 BCCA 279 (B.C.C.A.).

23 *Ibid.*, at para. 36.

24 For an explanation and illustrations of the implied exclusion rule, see Chapter 8, at §8.90-8.91.

25 In *re Baker, Nicols v. Baker* (1890), 44 Ch. D. 262, at 270 (C.A.).

26 [2011] A.J. No. 678, 2011 ABCA 191 (Alta. C.A.).

27 (1880), 5 App. Cas. 214 (H.L.), discussed above at §4.63.

28 *Alberta (Minister of Justice and Attorney General) v. Sykes*, [2011] A.J. No. 678, 2011 ABCA 191, at paras. 25 and 31 (Alta. C.A.). In its reasons for judgment the Court considered other evidence of legislative intent. Having regard to all the evidence, its disposition of the appeal could well reflect legislative intent.

29 In holding that the judge was not obliged to issue a direction, the Court did not rely exclusively on "may"; it also considered a number of contextual features that supported its

conclusion.

30 [2006] S.C.J. No. 10, [2006] 1 S.C.R. 392 (S.C.C.).

31 *Ibid*., at para. 21.

32 *Ibid*., at para. 27.

33 [2011] S.C.J. No. 30, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.). See also *R. v. Ahmad*, [2011] S.C.J. No. 6, 2011 SCC 6, [2011] 1 S.C.R. 110, at para. 39 (S.C.C.), where the Court wrote: " ... The word 'may' in s. 38.07 [of the *Canada Evidence Act*, authorizing the giving of notice] will similarly be understood to require that notice of the Federal Court judge's final order be given to the trial judge. Although the determination *whether* to give notice to a criminal trial judge is not discretionary, the *content* of that notice remains at the discretion of the designated judge. This will vary with the different circumstances of each case." [Emphasis in original.]

34 *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30, 2011 SCC 30, [2011] 2 S.C.R. 504, para. 54 (S.C.C.).

35 See also *Surdivall v. Ontario (Disability Support Program)*, [2014] O.J. No. 1505, 2014 ONCA 240, at paras. 29*ff*. (Ont. C.A.).

36 If a provision is imperative, there is no discretion to not comply with it; however, there may be discretion respecting the consequences of non-compliance. See *R. v. D.C.A.*, [2000] A.J. No. 335, at para. 18 (Alta. C.A.), where the Court held that failure to comply with a duty to notify the parents of a young person of the conditions of his or her parole would nullify the probation order only if, on a balance of probabilities, the young person was materially prejudiced in a way that led to breach of the order.

37 [1917] A.C. 170, at 174-75 (P.C.). This reasoning was applied to s. 23 of the *Manitoba Act, 1870* in the *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 737-38 (S.C.C.). For other applications of the *Normandin* case, see *McCain Foods Ltd. v. Canada (National Transportation Agency)*, [1993] 1 F.C. 583 (Fed. C.A.); *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)*, [1992] F.C.J. No. 950, 45 C.P.R. (3d) 390 (Fed. C.A.); *Teskey v. Law Society of British Columbia* , [1990] B.C.J. No. 1557, 71 D.L.R. (4th) 531 (B.C.S.C.).

38 [1994] S.C.J. No. 35, [1994] 2 S.C.R. 41, at para. 148 (S.C.C.), *per* Iacobucci J. See also *Cleary v. Canada (Correctional Service)*, [1990] F.C.J. No. 305, 44 Admin. L.R. 142 at 145 (Fed. C.A.). Here in applying the mandatory-directory distinction Iacobucci J. wrote: "Whether the legislation is penal or not is irrelevant. What is relevant is that the decision involved is of importance to [the person affected] and has serious consequences ... At bottom what we are seeking is legislative intention ... [W]hether failure to comply with a command entails nullity, and if so to what extent, surely depends on the legislative scheme as a whole." This approach is well illustrated in *Hawrish v. Law Society of Saskatchewan*, [1998] S.J. No.

435, 161 D.L.R. (4th) 760 (Sask. C.A.).

39 [1995] S.C.J. No. 99, [1995] 4 S.C.R. 344, at para. 42 (S.C.C.). See also *Metal World Inc. v. Pennecon*, [2013] N.J. No. 397, 2013 NLCA 67, at para. 57 (Nfld. C.A.), reconsideration allowed [2014] N.J. No. 47, 2014 NLCA 10 (Nfld. C.A.); *Manitoba Government and General Employees Union v. the Honourable Edward Hughes*, [2012] M.J. No. 76, 2012 MBCA 16, at paras. 35-44 (Man. C.A.); *Steinmann v. Kotello*, [2012] M.J. No. 109, 2012 MBCA 30, at paras. 15-24 (Man. C.A.), leave to appeal refused [2012] S.C.C.A. No. 244 (S.C.C.); *J & R Property Management et al. v. Kenwell*, [2011] M.J. No. 30, 2011 MBCA 5, at paras. 45*ff*. (Man. C.A.).

40 *Ibid.*, at para. 43.

41 *Doucet v. British Columbia (Adult Forensic Psychiatric Services, Director)*, [2000] B.C.J. No. 586, 185 D.L.R. (4th) 313 (B.C.C.A.). See also *R. v. J.H.*, [2002] O.J. No. 268, at para. 21*ff*. (Ont. C.A.).

42 *Doucet v. British Columbia (Adult Forensic Psychiatric Services, Director)*, [2000] B.C.J. No. 586, 185 D.L.R. (4th) 313, at para. 13 (B.C.C.A.). In *Saskatchewan Government Insurance v. Gorguis*, [2013] S.J. No. 148, 2013 SKCA 32 (Sask. C.A.), the Court does a complete contextual analysis before concluding that "shall not" was mandatory and therefore a judgment rendered in contravention was a nullity. See also *Manitoba Government and General Employees' Union v. The Honourable Edward Hughes*, [2012] M.J. No. 76, 2012 MBCA 16, at paras. 30*ff*. (Man. C.A.); *Winnipeg (City) Assessor v. Licharson* , [2005] M.J. No. 315, at para. 54*ff*. (Man. C.A.).

43 [1994] S.C.J. No. 35, [1994] 2 S.C.R. 41 (S.C.C.).

44 *Cornie v. Security National Insurance Co. (c.o.b. TD Meloche Monnex)*, [2012] O.J. No. 5602, 2012 ONCA 837, at para. 42 (Ont. C.A.). See also *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] S.C.J. No. 61, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 74 (S.C.C.).

45 See, for example, *Newfoundland (Workplace Health, Safety and Compensation Commission) v. Ryan Estate*, [2011] N.J. No. 207, 2011 NLCA 42, at paras. 51-53 (Nfld. C.A.).

46 But see *Canada (Minister of National Revenue -- M.N.R.) v. Adelman*, [1993] F.C.J. No. 776, 66 F.T.R. 140 (T.D.); *Ottawa-Carleton (Regional Municipality) v. Canada (Employment and Immigration Commission)*, [1986] F.C.J. No. 556, 69 N.R. 156 (F.C.A.), where Hugessen J. wrote, at 158-59: "Where apparently imperative words in a statute ... have been interpreted as being only directory, it has always ... been in situations where the failure to act timely might produce unfortunate consequences, not so much for the actor but for some innocent third party."

47 [1986] F.C.J. No. 69, 26 D.L.R. (4th) 96 (F.C.A.), *per* Marceau J.

48 See, for example, *Strata Plan LMS 1751 v. Scott Management Ltd.*, [2010] B.C.J. No. 685, 2010 BCCA 192, at paras. 78-82 (B.C.C.A.), leave to appeal refused [2010] S.C.C.A. No. 215 (S.C.C.).

49 [1988] T.C.J. No. 306, 88 D.T.C. 1294 (T.C.C.).

50 [1993] F.C.J. No. 776 (F.C.T.D.).

51 *Trynor v. Canada (Minister of National Revenue -- M.N.R.)*, [1988] T.C.J. No. 306, 88 D.T.C. 1294 at 1297 (T.C.C.).

52 *Canada (Minister of National Revenue) v. Adelman*, [1993] F.C.J. No. 776, 66 F.T.R. 140 at 146 (F.C.T.D.).

53 *Reference re: Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at para. 27 (S.C.C.). For a case illustrating this confusion see *Kehewin Cree Nation v. Mulvey*, [2013] A.J. No. 918, 2013 ABCA 294, at para. 19 (Alta. C.A.). For cases that avoid this confusion, see *Metal World Inc. v. Pennecon*, [2013] N.J. No. 397, 2013 NLCA 67, at paras. 48*ff*. (Nfld. C.A.), reconsideration allowed [2014] N.J. No. 47 (Nfld. C.A.); *Steinmann v. Kotello*, [2012] M.J. No. 109, 2012 MBCA 30, at paras. 15*ff*. (Man. C.A.), leave to appeal [2012] S.C.C.A. No. 244 (S.C.C.).

54 *Canada (Minister of National Revenue) v. Adelman*, [1993] F.C.J. No. 776, 66 F.T.R. 140 at 146 (F.C.T.D.).

55 [1993] S.C.J. No. 6, [1993] 1 S.C.R. 416 (S.C.C.).

56 *Ibid*., at para. 30.

57 [2009] M.J. No. 332, 2009 MBCA 95, at paras. 46-47 (Man. C.A.).

58 Some obligations of this nature might be non-justiciable. See *Friends of the Earth v. Canada (Governor in Council)*, [2008] F.C.J. No. 1464, 2008 FC 1183, [2009] 3 F.C.R. 201 (F.C.), affd [2009] F.C.J. No. 1307, 2009 FCA 297 (Fed. C.A.), leave to appeal to the Supreme Court of Canada refused, [2009] S.C.C.A. No. 497 (S.C.C.).

59 See, for example, *Re Morrison-Pelletier v. Pelletier*, [1993] O.J. No. 4185, 108 D.L.R. (4th) 358, at para. 30 (Ont. Div. Ct.): "In my view the use of the word 'should' is imperative."

60 [1990] S.C.J. No. 66, [1990] 2 S.C.R. 254 (S.C.C.).

61 *Ibid*., at 274. See also *R. v. Larche*, [2006] S.C.J. No. 56, [2006] 2 S.C.R. 762, at paras. 32-34 (S.C.C.).

62 [2011] S.C.J. No. 6, 2011 SCC 6, [2011] 1 S.C.R. 110 (S.C.C.).

63 *R. v. Ahmad*, [2011] S.C.J. No. 6, 2011 SCC 6, [2011] 1 S.C.R. 110, at para. 39 (S.C.C.).

64 See, for example, P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed.

(London: Sweet & Maxwell, 1969), at pp. 232-33.

65 [1971] N.B.J. No. 35, 21 D.L.R. (3d) 239 (N.B.C.A.).

66 For a similarly misleading analysis of "and", see *Menzies v. Manitoba Public Insurance Corp.*, [2005] M.J. No. 313, at paras. 24, 34 (Man. C.A.).

67 [1909] S.C.J. No. 25, 41 S.C.R. 607, at 617 (S.C.C.), *per* Anglin J.

68 *Ibid*.

69 Reed Dickerson, *Materials on Legal Drafting* (St. Paul, Minnesota: West Publishing Co., 1981), at pp. 250-51. Dickerson's analysis has been adopted by a number of courts. See, for example, *R. v. Yadegari*, [2011] O.J. No. 1668, 2011 ONCA 287, at para. 62 (Ont. C.A.); *W.Y. v. Bella*, [2004] N.J. No. 338, at para. 31*ff*. (Nfld. C.A.); *Guest v. Royal & Sun Alliance Insurance Co. of Canad*a, [2004] N.J. No. 69, at para. 19*ff*. (Nfld. C.A.). See also *Sinclair v. Sinclair*, [2013] S.J. No. 692, 2013 SKCA 123, at paras. 22*ff*. (Sask. C.A.), where the Court relied on legislative evolution to resolve the ambiguity.

70 The Yukon's *Interpretation Act*, R.S.Y. 2002, c. 125, s. 21(1), provides that "or" includes and. This is better than saying "or" means and, but does not quite capture the point being made in the text. For an application of this provision, see *Aucoin v. Shepherd*, [2013] Y.J. No. 1, 2013 YKCA 1, at paras. 33-34 (Y.T.C.A.).

71 *Seck v. Canada (Attorney General)*, [2012] F.C.J. No. 1519, 2012 FCA 314, at para. 47 (Fed. C.A.); *Canada (Minister of Citizenship and Immigration) v. Hyde*, [2006] F.C.J. No. 1747, 2006 FCA 379, at para. 22 (Fed. C.A.).

72 Reed Dickerson, *Materials on Legal Drafting* (St. Paul, Minnesota: West Publishing Co., 1981), at pp. 251-52.

73 *R. v. Stover*, [1947] 2 D.L.R. 874, [1947] 1 W.W.R. 397 (Sask. Dist. Ct.).

74 [1982] O.J. No. 164, at para. 13 (Ont. C.A.) [oral judgment].

75 [2003] S.C.J. No. 8, [2003] 1 S.C.R. 94 (S.C.C.).

76 [2003] S.C.J. No. 8, at para. 26, [2003] 1 S.C.R. 94 (S.C.C.).

77 [2003] S.C.J. No. 7, [2003] 1 S.C.R. 66 (S.C.C.).

78 *Ibid*., at para. 25.

79 For an interpretation of the term "respecting" in the context of an enabling authority, see *BPCL Holdings Inc. v. Alberta*, [2006] A.J. No. 1287, 2006 ABQB 757 (Alta. Q.B.), affd [2008] A.J. No. 451, 2008 ABCA 153 (Alta. C.A.).

80 In modern drafting practice, this last use of "deems" is obsolete.

81 Arguably, "deems" should be retained when legislatures create a legal fiction. "Deems" signals that the legislature intends to disregard what is true in order to achieve a legal purpose.

82 [1978] S.C.J. No. 40, [1978] 2 S.C.R. 838 (S.C.C.).

83 *Ibid*., at 844-45.

84 *Ibid*., at 845-46. See also *R. v. R.V.F.*, [2011] N.S.J. No. 411, at paras. 26*ff*. 2011 NSCA 71 (N.S.C.A.); *Coates v. Capital District Health Authority*, [2011] N.S.J. No. 2, 2011 NSCA 4, at paras. 37-41, 47 (N.S.C.A.); *Mills Estate v. Canada*, [2011] F.C.J. No. 1002, 2011 FCA 219, at paras. 21-22 (F.C.A.), leave to appeal refused [2011] S.C.C.A. No. 410 (S.C.C.); *La Survivance v. Canada*, [2006] F.C.J. No. 506, 2006 FCA 129, at paras. 53-55, 78-79 (F.C.A.); *Canada (Attorney General) v. Scarola*, [2003] F.C.J. No. 482, 2003 FCA 157, [2003] 4 F.C. 645, at paras. 19-21 (F.C.A.).

85 [2003] F.C.J. No. 482, 2003 FCA 157, [2003] 4 F.C. 645 (F.C.A.).

86 *Canada (Attorney General) v. Scarola*, [2003] F.C.J. No. 482, 2003 FCA 157, [2003] 4 F.C. 645, at para. 21 (F.C.A.).

87 For discussion of provisions in which "deem" creates a rebuttable presumption, see below at §4.114.

88 [1994] O.J. No. 478, 113 D.L.R. (4th) 266 (Ont. C.A.).

89 [1986] O.J. No. 921, 31 D.L.R. (4th) 420, at para. 34 (Ont. H.C.J.), *per* Holland J.

90 *Fulton v. Fulton*, [1994] O.J. No. 478, at paras. 12-13, 17 O.R. (3d) 641 (Ont. C.A.).

91 [2004] F.C.J. No. 71 (F.C.A.).

92 *Ibid*., at para. 41. In my view, the passage relied on in the *Vermette* case does not support Sharlow J.A.'s second conclusion. However, the conclusion is defensible on other grounds. When a legal fiction is part of a statutory scheme, it makes sense to presume that the legal fiction is co-extensive with the scheme. This presumption would be easily rebutted by indicators that the legislature intended a narrower or broader application.

93 In other words, there are only two categories here (1) legal fictions or irrebuttable presumption and (2) rebuttable presumptions. This classification is reflected in art. 2847 of the *Civil Code of Québec*: "A presumption concerning presumed facts ... may be rebutted by proof to the contrary; a presumption concerning deemed facts is absolute and irrebuttable."

94 [1960] M.J. No. 29, 31 W.W.R. 385, at 391 (Man. C.A.). See *St. Peter's Evangelical Lutheran Church (Ottawa) v. Ottawa (City)*, [1982] S.C.J. No. 90, [1982] 2 S.C.R. 616, in which McIntyre J. observed, at 629, that to determine whether "deemed" imports a conclusive deeming into a statutory scheme, "The word must be construed in the entire context of the

statute concerned." See also *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, [2011] S.C.J. No. 23, 2011 SCC 23, [2011] 2 S.C.R. 175, at paras. 112-119 (S.C.C.); *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.*, [1989] B.C.J. No. 965, 37 B.C.L.R. (2d) 88, at para. 4*ff*. (B.C.C.A.), leave to appeal refused [1989] S.C.C.A. No. 274 (S.C.C.).

95 [1974] A.J. No. 221, [1975] 2 W.W.R. 337 (Alta. S.C.).

96 *Ibid*., at paras. 27-29.

97 This is the provision considered by the court in *St. Peter's Church, ibid*. The Court found the provision to be conclusive.

98 *St. Leon Village, ibid.* See also *Hickey v. Stalker*, [1923] O.J. No. 147, [1924] 1 D.L.R. 440 (Ont. S.C. - A.D.).

CONSOLIDATED SCHOOL DISTRICT OF ST. LEON VILLAGE No. 1425 v. RONCERAY et al.

Manitoba Court of Appeal, Adamson C.J.M., Schultz and Miller JJ.A. February 15, 1960.

A. Dureault, for respondent, appellant.

T. D. Grafton, for appellants, respondents.

The judgment of the Court was delivered by

SCHULTZ J.A.:—This is an appeal from the judgment of George Co.Ct.J. in regard to an arbitration under the *Public Schools Act,* R.S.M. 1954, c. 215, hereinafter referred to as "the Act". In my opinion it is determined by the effect given to s. 323(7) of the said Act and in particular to the interpretation of the words therein, "shall be deemed to be dismissed".

The relevant facts can be briefly summarized. Arbitrators were appointed by the councils of the rural Municipalities of Lorne and Pembina to deal with three petitions presented to them under s. 306 of the Act.

The first of these petitions, hereinafter referred to as the Consolidation petition, was from the Board of Trustees of Cleophas S.D. and asked for the consolidation of their rural school with St. Leon Village School District.

The second petition, hereinafter referred to as the Rheault-Ronceray petition, was from seven land owners in Cleophas S.D. and

asked for the transfer of certain lands therein owned by them to Richard S.D.

The third petition, hereinafter referred to as the Ambler petition, was from certain land owners in Cleophas S.D. and asked for the transfer of certain lands owned by them therein to Altamont S.D.

It appears that the second and third petitions arose out of the first and that for this reason the councils of the municipalities concerned appointed the same arbitrators to deal with all three petitions.

The three arbitrators so appointed met on December 29, 1958, the school inspector for the inspectoral division in which the schools were situated acting as their secretary. The arbitrators made one single award purporting to deal with all three petitions. Pursuant to the requirements of the Act this was submitted to the Minister of Education for approval. He returned it, recommending that a separate award be made in regard to each petition. No meeting of the arbitrators was held to consider this recommendation but the school inspector interviewed the arbitrators individually and each of them signed the three separate awards. The effect of the three awards was identical with that of the original single award and the result was (a) to establish the Consolidated School District of St. Leon Village No. 1425, which is the (respondent) appellant herein; (b) to refuse the Rheault-Ronceray petition; and (c) to grant the Ambler petition.

Four of the original seven petitioners of the Rheault-Ronceray petition appealed to the County Court. Their action, hereinafter referred to as the Ronceray appeal, was heard by George Co.Ct.J., on May 26, 1959. In his reasons for judgment—not handed down until September 19, 1959,— he points out that there were many grave irregularities in the proceedings before the arbitrators and concludes: "The appeal will therefore be allowed, and all proceedings with respect to all three petitions before the Board of Arbitrators shall be quashed on the ground of irregularities of procedure, as outlined above."

It is evident from this finding, and implicit in his reasons for judgment, that the learned trial Judge was of the opinion he had jurisdiction to deal with all three petitions on the ground that all dealt with an issue arising out of the proposed consolidation of Cleophas S.D. with St. Leon Village S.D. The finding of the learned trial Judge that there had been serious irregularities in the arbitration proceedings is amply justified by the evidence and is relevant as far as the Ronceray appeal is concerned. There were, however, no appeals against the awards of the arbitrators in regard to the Consolidation and Ambler petitions. There was nothing in the notice of appeal in the Ronceray action that in any way

indicated the award of the arbitrators in regard to the Consolidation petition or the Ambler petition was in any way disputed or challenged. The Ambler petitioners were not even served with any notice of the Ronceray appeal.

Section 305 of the Act deals with the validity of awards made by arbitrators and the relevant parts thereof provide:

"305. Notwithstanding . . . the insufficiency or uncertainty of, or any error, omission, or defect in, any arbitration proceedings or the submission thereto, or the award thereunder . . . had, or made, under this Act . . . the proceedings, the submission, and the award shall,

"(*a*) on the making of the award; or

"(*b*) if an appeal therefrom may be taken, on the expiration without appeal of all times for appeal or on the final dismissal of any appeal taken;

be sufficient, certain, and binding, and the proceedings, the submission, and the award, and each of them, shall not be questioned in any action, suit, or proceeding, in any court on account of the insufficiency or uncertainty thereof, or on account of any defect, error, or omission therein."

No appeal having been taken from the awards of the arbitrators in regard to the Consolidation and Ambler petitions, these awards were not before the learned trial Judge and he could not assume jurisdiction to deal with them. By the explicit terms of s. 305, he could not question these awards, irrespective of the fact that there were defects in the proceedings under which the awards were made. These awards have the same status in law as they had before the said findings were made by the learned trial Judge.

The considerations I have mentioned do not apply to the Ronceray appeal which was before the learned trial Judge in proper form. In regard to this appeal the appellant argued that when the learned trial Judge delivered his reasons for judgment on September 19, 1959 he was *functus officio* on the ground that this date was 4 months and 10 days after service of notice of the appeal and that s. 323(7) of the Act required him to dispose of the appeal within 3 months from the date of service of the notice, subject only to s. 323(8) which, in the circumstances of this case, did not apply. The subsections of s. 323 referred to read:

"(7) Subject to subsection (8), unless the judge disposes of the appeal within three months after service of the notice of appeal has been completed the appeal shall be deemed to be dismissed.

"(8) Where the judge is satisfied that the appellant has been unavoidably delayed in obtaining necessary evidence, he may, in his discretion, extend the time for disposal of the appeal."

Counsel for the respondents admitted that the appeal had not been

disposed of within 3 months of the date of service of notice thereof but contended that "the learned County Court Judge de facto extended the time for disposal of the appeal in order to receive the submission in evidence which he had requested from Inspector Robson, the Secretary of the Board", thereby bringing the matter within the purview of s-s. (8), *ante*. There is nothing, however, in the record to show that the appellant was "unavoidably delayed in obtaining necessary evidence" nor that he made any application or request to the trial Judge for an extension of time to obtain and supply evidence. On the contrary, the record indicates that after the trial *de novo* before the learned trial Judge no further evidence was produced; all that the learned trial Judge requested was a summary of dates to be provided by the school inspector in regard to evidence he already had before him and there is nothing in his reasons for judgment to indicate that he extended the time for disposal of the appeal under s. 323(8).

Counsel for the respondents also contended that the words "shall be deemed to be dismissed" in s-s. (7) should be interpreted liberally rather than literally, as otherwise, in his words, the result would be to work "a distinct and unfair hardship upon a County Court Judge called upon to dispose of so complicated a matter", and that such liberal interpretation was not only just but required under s. 14 [now 1957 (Man.), c. 33, s. 13] of the *Interpretation Act*, R.S.M. 1954, c. 128, which provide: "Every Act . . . and every provision thereof shall be deemed remedial, and shall receive such fair, large, and liberal construction and interpretation as best insures the attainment of the object of the Act." In regard to this contention, I think it is fair to observe that the only matter before the learned trial Judge with which he had any obligation to deal and decide was the Ronceray appeal, which was not complicated or difficult. The complications, if any, arose as a result of the error of the learned trial Judge in assuming jurisdiction to deal with the awards of the arbitrators in regard to the Consolidation and Ambler petitions which were not before him.

What this Court has to consider in regard to the interpretation of the words "shall be deemed to be dismissed" is not the type of interpretation, *i.e.*, whether literal or liberal, but the meaning of these words as used in the Act. The words "deem", "deemed", and "shall be deemed" when used in statutes usually imply an element of finality, but that meaning is not inflexible or invariable. In some cases these words, or words of identical import, are construed to establish a conclusive presumption. Thus in *Shepheard* v. *Broome*, [1904] A.C. 342 the House of Lords held that the conduct of the director of a limited company, who knew that a prospectus issued by the company did not disclose a contract which

was in fact material but which he was advised and honestly believed was not material, must be "deemed to be fraudulent", although there was in fact no fraud, but that because the statute provided what he had done "shall be deemed" to be fraudulent it must therefore be so found.

In *Re Rogers & McFarland* (1909), 19 O.L.R. 622, the Ontario Divisional Court had to consider the effect of s. 151(3) of the *Mining Act of Ontario*, 1908, which provided that unless an appeal be set down and a certificate of such setting-down lodged within a specified time "the appeal shall be deemed to be abandoned". The Court held that "deemed" as here used meant nothing less than "adjudged" or "conclusively considered" for the purpose of the legislation.

The same meaning is attached to the word in *Re Duperreault*, [1941] 1 D.L.R. 38, 7 I.L.R. 347, and in a decision of the Ontario Court of Appeal in *Madden* v. *Madden*, [1947] O.R. 866.

But there are cases which indicate that a strict, literal interpretation is not justified; that the presumption established by the use of such words is rebuttable. Thus in *Ex p. Walton, Re Levy* (1881), 17 Ch. D. 746, the words to be interpreted were "deemed to be determined" as used in a statute dealing with bankruptcy. Jessel M.R. said (p. 753): "The results of a literal construction of the section would be so monstrous that such a construction must be considered absurd."

James L.J. said (p. 756): "When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to." This case is referred to with approval in *Hill* v. *East & West India Dock Co.* (1884), 9 App. Cas. 448, in which the House of Lords refused to apply the strictly literal interpretation of the words "be deemed to have been surrendered", although it must be noted there is a persuasive dissenting opinion by Lord Bramwell.

In *Hickey* v. *Stalker*, [1924] 1 D.L.R. 440, 53 O.L.R. 414, the Ontario Supreme Court dealt with the interpretation of the word "deemed", Middleton J. pointing out that the meaning of the word was not inflexible. Referring to the earlier decision of the same Court in *Re Rogers & McFarland, supra*, he said (p. 444 D.L.R., p. 418 O.L.R.): "It may but does not always mean 'adjudged and determined'. Certainly, when the doing or abstaining from doing a particular thing is to be 'deemed' to have a particular consequence, this is a very natural meaning . . . So, when an appeal which is not set down in time is to be 'deemed to be abandoned,' it does not require much imagination to find an intention on the

part of the Legislature to say that such an appeal shall be regarded as abandoned, and make it the duty of the Court to 'adjudge and determine' that it was abandoned." He referred with approval to the opinion of Townshend C.J. in *R.* v. *Fraser* (1911), 45 N.S.R. 218 at p. 220, who in considering the meaning of the word "deemed" in a statute concluded it meant "treated as '*prima facie* evidence,' 'held until the contrary is proved' ". Middleton J. said (p. 445 D.L.R., p. 419 O.L.R.): "I think this modified meaning should be given to the word as found in our statute, for it will not only save the legislation from being unjust but also from being absurd."

In *Mutchenbacker* v. *Dominion Bank* (1911), 21 Man. R. 320, this Court had to determine the words "shall be deemed to be" when ineptly used in one clause of an involved contract and Perdue J.A. pointed out that in interpreting the words regard had to be had to the contract as a whole. The headnote reads in part: "The words 'shall be *deemed to be*' were not equivalent to 'shall be' when taken along with the rest of the document."

I think a consideration of these cases indicates that in deciding whether or not the use of the words "deem" or "deemed" establishes a conclusive or a rebuttable presumption depends largely upon the context in which they are used, always bearing in mind the purpose to be served by the statute and the necessity of ensuring that such purpose is served.

In the present case the purpose of the Legislature in enacting s. 323(7) can be ascertained from reading Part XVI. of the Act and in particular ss. 302 to 329. These sections provide, *inter alia*, a practical, inexpensive and expeditious method of dealing with the formation alteration and consolidation of school districts and for arbitrations in relation thereto and appeals from such arbitrations. It was agreed by counsel that delays in arbitration proceedings or in appeals from such proceedings may alter the assessments of the school districts concerned, may affect the Government and municipal grants to such districts, and are of importance to the municipalities in which the school districts are located. The necessity for an expeditious procedure and for early decisions in such matters is obvious and is recognized and given effect to by the Legislature, as indicated by the provisions to that end in

(a) Section 305, which provides for validation of arbitration proceedings and for finality in awards despite errors and omissions in the proceedings, subject only to a right of appeal promptly and properly exercised;

(b) by provision of s. 307(1) requiring that "arbitrators . . . shall proceed with and complete the arbitration and award as speedily as possible";

(c) by the provisions of s. 328(2) which provides that where an appeal is taken against any finding or award by an inspector it must be taken within a relatively short period and must be heard by the County Court Judge within 2 weeks after the notice of appeal has been served;

(d) by the provisions of s. 323(7), which are under consideration in the present appeal.

When regard is had to these provisions I think the intention of the Legislature in s. 323(7) is unmistakable. It provides that the County Court Judge hearing an appeal from arbitration proceedings must act with promptitude; that if he fails to dispose of the appeal within three months after service of the notice of appeal has been completed the appeal shall be deemed to be dismissed". It must be taken to mean that, subject only to the proviso in s. 323(8), the legal effect of the failure of the Court to decide the appeal within 3 months is equivalent to a dismissal of it by operation of the law. It is immaterial if, as in the present case, the trial Judge assumes to render judgment after the period of 3 months has expired for, being without jurisdiction, his judgment is of no effect.

The appeal will be allowed. Under the circumstances there will be no allowance for costs in this Court. The costs in the County Court will be as stated by the learned trial Judge.

Appeal allowed.

Indexed as:

Gordon Capital Corp. v. Ontario (Securities Commission) (Ont. Div. Ct.)

Between
Gordon Capital Corporation, Appellant, and
Ontario Securities Commission, Respondent

[1991] O.J. No. 934

50 O.A.C. 258

1 Admin. L.R. (2d) 199

27 A.C.W.S. (3d) 731

14 OSCB 2713

Action No. 552/90

Ontario Court of Justice - General Division
Divisional Court - Toronto, Ontario

Craig, Holland and Carruthers JJ.

June 13, 1991

(17 pp.)

J.E. Sexton, Q.C., J.M. Freedman and A.J. Stitt, for the Appellant. D. O'Connor, Q.C. and J. Douglas, for the Respondent.

The judgment of the Court was delivered by

CRAIG J.:--

NATURE OF PROCEEDINGS

This appeal by Gordon Capital Corporation ("Gordon") is from the decision of the Ontario Securities Commission (the "OSC") dated May 24, 1990. After a hearing, the OSC ordered that a condition be placed on Gordon's registration as an investment dealer under the Securities Act, R.S.O. 1980, chapter 466, as amended (the "Act"), such that Gordon would be prohibited from engaging, directly or indirectly, in Principal Trading (as later defined) for a period of 10 business days. The suspension, which was to commence June 18, 1990, was stayed by Order of the OSC dated June 4, 1990, pending disposition of this appeal.

The hearing before the OSC was held pursuant to Subsection 26(1) of the Act. Subsection 26(1) provides as follows:

> "The Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration or reprimand the registrant where in its opinion such action is in the public interest. (Emphasis added)

The hearing was convened to consider whether it was in the public interest to impose any of the sanctions referred to in S. 26(1) on the registration of Gordon, a member of the Toronto Stock Exchange (TSE), and David Bond, a registered trader and senior floor trader employed by Gordon. Bond's functions on behalf of Gordon were the execution of agency Trades for his firm and "pro-trading" trading for Gordon's own account. As a registered trader, his pro-trading serves to stabilize the market and enhance liquidity in his stocks of responsibility, including ITL Industries Limited (ITL). At the time of the events leading to the hearing, Donald Bainbridge (Bainbridge) was President of Gordon and in charge of supervising the activities of its traders (including Bond) on the floor of the TSE.

As more particularly mentioned later herein, the OSC found as follows:

> Through Bond's trading purchase of common and preference shares of ITL in 1987 and 1988, Gordon Capital made a take-over bid for that company. In so doing, Gordon Capital breached all of Ontario's take-over bid rules as well as the insider reporting rules. It is common ground that these breaches occurred and that they were inadvertent. The question, as put by Mr. Douglas for Commission staff, was whether this inadvertence was excusable or inexcusable.

The proceedings against Gordon and Bond were exclusively of a disciplinary or regulatory nature. Although other provisions of the Act may have permitted charges to be laid against Gordon and Bond in respect of the conduct in issue, no such quasi-criminal proceedings were taken against either of them.

The Jurisdiction of this Court on the Appeal is set out in Section 9 of the Act as follows:

> 9(1) Any person or company directly affected by a decision of the Commission, other than a decision under section 73, may appeal to the Divisional Court.
>
> (5) Where an appeal is taken under this section, the court may by its order direct the Commission to make such decision or to do such other act as the Commission is authorized and empowered to do under this Act or the regulations and as the court considers proper, having regard to the material and submissions before it and to this Act and the regulations, and the Commission shall make such decision or do such act accordingly.

The issues in this case are:

(i) The jurisdiction of the OSC at a hearing pursuant to Subsection 26(1) of the Act, and in particular whether the evidence of "due diligence" advanced by Gordon is an answer in law or on the facts to proceedings under subsection 26(1) of the Act.

(ii) In the event that some penalty on Gordon was warranted, is a suspension of its trading privileges disproportionate to the conduct in question.

The O.S.C. found that as a consequence of its acquisitions of the common and preference shares of ITL industries Limited ("ITL" during the calendar year 1988, Gordon committed the following breaches of the Act:

(a) on or about April 5, 1988, Gordon acquired 10% or more of the common shares of ITL on a fully converted basis and failed to issue and file a press release and file a report contrary to the "early warning" requirements of subsection 100(1);

(b) throughout the remainder of 1988, Gordon continued to acquire further common shares or shares convertible into common shares of ITL and failed to issue and file a press release and file a report contrary to the "early warning" requirements of subsection 100(2) with each 2% increment in its holdings of commons shares on a fully converted basis;

(c) throughout the remainder of 1988, Gordon failed to observe the statutory waiting periods prescribed by subsection 100(3) respecting its further acquisitions of common shares or shares convertible into common shares of ITL;

(d) on or after April 22, 1988, Gordon made take-over bids as defined by subsection 88(1) for both the common shares of ITL as a class and the preference shares of ITL as a class without complying with the requirements relating to take-over bids as prescribed in Part XIX;

(e) in or about May or June, 1988, Gordon became an "insider" of ITL as defined by paragraph 17(iii) of subsection 1(1) and failed to file an insider report as prescribed by 102(1);

(f) after becoming an insider of ITL, Gordon failed to file the continuous disclosure reports required by subsection 102(2) with subsequent changes in its ownership of ITL shares.

These breaches of the Act were admitted by Gordon at the hearing but Counsel relies on evidence adduced at the hearing that, in addition to being inadvertent, it was not reasonably foreseeable that a floor trader (Bond), on his own, could trigger the take-over bid provisions of the Act. Counsel for Gordon relies particularly on the line of cases commencing with R. v. Sault Ste. Marie (1978) 2 S.C.R. 1299 at pp. 1325-1326. His submission is that conduct of Gordon herein is a "public welfare" offence and prima facie a strict liability offence to which due diligence - the taking of reasonable care - is a complete defence.

Gordon's knowledge of the facts

On the evidence of Bainbridge, the OSC found that Gordon first became aware of Bond's abnormally large accumulation of stock in ITL on its behalf at the end of 1987. At that time, Gordon knew that Bond had acquired the position in ITL as an investment and not merely as part of his market-making responsibilities to the TSE.

On February 4, 1988, ITL issued a press release through the Canada News-Wire service which announced that its board of directors would be submitting to ITL's shareholders a proposal to reorganize the share capital of the corporation at the annual and special meeting to be held in April, 1988. The press release clearly stated that the proposed capital reorganization included changes to the preference shares that would make them fully voting and improve their conversion rate to common shares from .83 common shares for each preference share held to 3 common shares for each preference share held.

In or about February, 1988, Gordon received notice of the annual and special meeting of shareholders of ITL to be held on April 6, 1988. The notice was accompanied by a proxy solicitation and management information circulation. The material described in detail the proposed capital reorganization of ITL.

It is clear from the reasons for the decision and the evidence of Bainbridge that, despite Gordon's combined knowledge of its own large shareholdings in ITL and the proposed capital reorganization of ITL, no one at Gordon considered the regulatory impact that the reorganization might have upon Gordon's share position in ITL. In the spring of 1988, Bainbridge noticed that Bond's heavy accumulation of ITL shares on behalf of Gordon was continuing and responded by asking Bond to "slow down a bit".

During the summer of 1988, Bond continued to accumulate an Increasingly large position in ITL

stock, far exceeding his market-making responsibilities to the TSE as a registered trader. When the position again came to the attention of Bainbridge, his response was to move the entire ITL position from Bond's trading account to a separate account, restore Bond's discretionary acquisitions to its former level of $2 million and instruct Bond not to increase his position in ITL. The sole purpose of these initiatives was to restore Bond to normal and profitable trading activity on behalf of Gordon.

Gordon's compliance failures

It was clear from the evidence of Peter Hyland, a Vice-Chairman of Gordon, that as a group, Gordon's registered traders on the floor of the TSE are provided by Gordon with $10 million in aggregate for the purpose of discretionary principal trading. Taking into account their ability to purchase certain equity securities on margin, this translates into $40 million in purchasing power on a daily basis.

The OSC found that Gordon had no procedures in place to ensure regulatory compliance on the part of its registered traders. The registered traders operated by the general "rules of thumb" that they should not commit more than 25% of their capital to any one security and they should not be responsible for more than 25% of the daily trading volume in any one stock. However, these were not hard and fast rules and there were no ceilings or restrictions upon the volume or the dollar value of security positions taken by Gordon's registered traders. The OSC found that Bonds trading was monitored by Gordon only to ensure that it was profitable and within margin. Important amendments relating to "take-over" bids were made to the Act in 1987 (R.S.O. 1987 c. 7) which came into force on June 30, 1987. The effect of amendments relating to a "take-over" was that any offer for voting or equity securities - whether made in private negotiations, through the facilities of the Stock Exchange or by a circular - is a take-over bid if the number of securities sought, aggregated with the securities already held by the offeror, crosses the 20 per cent line.

The OSC found that Bond did not know of the 1987 amendments to the Act and that his knowledge of the regulatory requirement on take-over bids was limited; also that Bainbridge, a skilled and experienced floor trader, was not aware of the 1987 amendments. They did not appreciate that the ITL preference shares Bond was buying attracted the take-over provisions of the Act.

The OSC dealt in part with the evidence of Peter Hyland as follows:

> Peter Hyland is a Vice-Chairman of Gordon Capital, has some 27 years' experience in the securities industry and heads Gordon Capital's corporate finance operations. Take-over bids are very much within his area of responsibility. Outside legal counsel are invariably brought in on any acquisition proposal being considered by Gordon Capital clients. He stated that the corporate finance department operates behind a Chinese wall and floor traders have no knowledge whatsoever of corporate finance's operations. He described the several levels of activity in which the firm deploys its capital. The first of these is

> on the trading floor, in the hands of the firm's pro traders. The next level is "upstairs" on the institutional trading desk. There the firm takes positions for its own account, including the facilitation of client orders by employing the firm's own capital to take the opposite side of such orders. Commitments made at this level, Hyland told us, might typically range from $10 million to $20 million. At the next higher level of commitment of capital is the taking of positions for the firm's own account in arbitrage, in soliciting takeovers or other opportunities of a longer term nature.

No one at Gordon with responsibility for supervision of Bond's trading activities knew anything about the take-over bid provisions of the Act. By way of contrast, the "upstairs" traders at Gordon, who like the registered traders engage in principal trading and who as a group have the same amount of discretionary capital to trade with, were educated by Gordon with respect to the take-over bid requirements of the Act.

In delivering its decision the OSC stated at p. 42.

> In our consideration of the respondents' conduct in this matter, and the appropriate sanctions respecting that conduct, we have declined Mr. Sexton's invitation to study and draw upon the authorities and the decisions of the courts on the varying degrees of negligence addressed in the law of torts. We consider ourselves on better ground if we base our decision, as we do, on our sense of the standards that the investing community is entitled to expect of Exchange members, in the context of and consistent with previous decisions of the Commission and the courts.
>
> We do not accept the respondents' excuses based on the foreseeability of the breaches that occurred.

And later at p. 43.

> In this rapidly changing regulatory environment, registrants have a continuing obligation to keep themselves aware of new developments and to determine their application to each registrant's particular business and operations. Further, they are under a continuing obligation to take appropriate steps - appropriate each to its own particular business and operations - to ensure due compliance. Gordon Capital, in the matters considered in this hearing, has failed to meet that obligation.

Gordon's track record

In rendering its decision, the OSC took into account, among other things, Gordon's past regulatory violations. These included:

(a) proceedings before the OSC in 1985 against Gordon and Unicorp Canada Corporation ("Unicorp"), arising out of Unicorp's take-over bid for Union Enterprises Limited ("Union"), that were settled under an agreement which included a reprimand of Gordon and a $1.1 million contribution by Gordon to a fund established for compensation of minority shareholders of Union; and

(b) proceedings before the TSE in 1989 arising from alleged trading violations that resulted in a fine of $20,000 and costs against Gordon's head institutional trader and a fine of $15,000 and costs against Gordon.

Both of these regulatory violations involved compliance violations, the Jurisdiction of the OSC pursuant to s. 26(1) and the defence of "due diligence".

The jurisdiction of the OSC and the "due diligence" defence

In CTC Dealer Holdings Ltd. et al. and Ontario Securities Commission et al. (1987) 37 DLR (4th) 94 (Ontario Divisional Court) Reid J. on behalf of the Court, reviewed the authorities relating to the jurisdiction of the OSC and the powers conferred upon the Court by s. 9 of the Act. He stated in part at p. 104:

> For reasons that have been expressed many times by many courts, the exercise of appeal powers such as these neither calls for nor justifies a trial de novo.

And later on the same page:

> Such powers have, however, always been used with caution. Out of respect for the expertise of the Commission, for the weight of the responsibility it bears, and for the stature it has achieved in the industry it is called upon to regulate, the courts have repeatedly expressed the view that its actions should not lightly be interfered with.

Judicial deference towards the OSC has always been particularly evident in circumstances such as the case at bar where the OSC is exercising its discretionary powers under subsection 26(1) of the Act. The courts of this Province have long recognized that it is the intention of the Legislature that the Commission shall have extremely wide powers of discretion in forming its opinion under this subsection of the Act as to whether, upon a given set of facts, a registrant such as Gordon should suffer suspension, cancellation or restriction of its registration or the imposition of terms and

conditions thereupon. Re Southern Brokerage & Holdings Co. Inc. et al., [June, 1967] O.S.C.B. 4 (C.A.), pp. 4-5 and Re the Securities Commission and Mitchell, [1957] O.W.N. 595 (C.A.), at p. 599.

As indicated earlier, Gordon is not charged with an offence. We have not been referred to any case holding, either expressly or by analogy, that the due diligence defence applies to a subsection 26(1) hearing.

The general legislative purpose of the Act and the OSC's role thereunder is to preserve the integrity of the capital markets of Ontario and protect the investing public. In this context, the proceedings against Gordon and Bond under subsection 26(1) of the Act are properly characterized as regulatory, protective or corrective. The primary purpose of the proceedings is to maintain standards of behaviour and regulate the conduct of those who are licensed to carry on business in the securities industry. The proceedings are not criminal or quasi-criminal in their design or punitive in their object. This distinction has been made in a number of cases involving proceedings of a regulatory or public protective nature such as that under Subsection 26(1) of the Act. Re Barry et al., and Alberta Securities Commission (1986), 25 D.L.R. (4th) 730 (Alta. C.A.) at pp. 735-736; affirmed sub. nom Brosseau v. The Alberta Securities Commission, [1989] 1 S.C.R. 301 at pp. 314 and 320-321; R. v. Wigglesworth, [1987] 2 S.C.R. 541 at p. 560; and Harmatiuk v. Pasqua Hospital (1987), 25 Admin. L.R. 157 (Sask. C.A.) at pp. 174-175.

For example in Re Barry et al. and Alberta Securities Commission, the appellants were charged with an offence under the Alberta Securities Act (making false statements in a prospectus). Subsequently, the Alberta Securities Commission issued a Notice of hearing to determine whether the appellants should be subjected to a cease-trading order and certain other disciplinary sanctions. These allegations under the Securities Act were the same as those forming the subject of the charges under the same Act. The hearing before the Commission was postponed pending the disposition of the charges. The charges were dismissed by the Provincial Court. Thereafter the Commission held that it had jurisdiction to proceed. The appellants then appealed to the Court of Appeal alleging, inter alia, that they were being tried twice for the same offence in violation of Section 11(h) of the Canadian Charter of Rights and Freedoms. In delivering the unanimous Judgment of the Court dismissing the Appeal, Stevenson J.A., as he then was, stated at p. 736.

> I do not read s. 11 as touching upon all proceedings arising out of prohibited conduct, but only to those in which the sanctions can be characterized as criminal or quasi-criminal, as distinct from protective. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, proceedings to determine qualifications for a licence are not to be characterized as criminal or quasi-criminal.
>
> While the result of these proceedings may be seen by the appellants as

> punitive, the object of both the hearing and the remedies available is a protective one. I have no hesitation in distinguishing these proceedings from criminal or quasi-criminal proceedings where public protection is but one object. In my view s. 11 has no application to this hearing.

As indicated above this decision was affirmed by the Supreme Court of Canada. However, it should be stated that, before the case was to be heard, the appellant to the Supreme Court of Canada informed the Court that he was abandoning any argument based on the Charter of Rights and Freedoms.

In R. v. Wigglesworth (supra.), the Supreme Court of Canada held that the conviction of an R.C.M.P. Constable for a "major service offence" under the Royal Canadian Mounted Police Act did not preclude subsequent proceedings under the Criminal Code for the same misconduct; it was held that the appellant Constable did not have the benefit of s. 11(h) of the Charter because he was not being tried for the same offence.

Re Barry was expressly approved by the Supreme Court of Canada in Wigglesworth. In delivering judgment for the majority Wilson J. stated at p. 560:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, Re Law Society of Manitoba and Savino, supra, at p. 292, Re Ontario Securities Commission (1986), 54 O.R. (2d) 544 (H.C.), at p. 549, and Re Barry and Alberta Securities Commission, supra, at p. 736, per Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offenses under the Criminal Code and for quasi-criminal offenses under provincial legislation are automatically subject to s. 11. They are the very kind of offenses to which s. 11 was intended to apply.

Of course if Gordon had been charged with breaches of the Act under s. 118, the defence of due

diligence would have been available to it. Such charges result in criminal or quasi-criminal proceedings with penal consequences; a conviction under s. 118 can lead to a fine or imprisonment or to both.

The Decisions in the last mentioned cases support the proposition that the classification of criminal and quasi-criminal offenses into categories of "absolute liability", "strict liability" and full "mens rea" as defined in R. v. Sault Ste. Marie is irrelevant to proceedings under subsection 26(1). The fact that Gordon may have acted without malevolent motive and Inadvertently is not determinative of the right of the OSC to exercise its regulatory and discretionary powers to impose a sanction upon Gordon.

For the above reasons, Gordon has failed to demonstrate that the OSC has committed any error in law in rejecting the defence of due diligence.

Was the penalty disproportionate to the conduct in question?

39. There is no definition of the phrase "the public interest" in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion. Re The Securities Commission and Mitchell, supra p. 14, at p. 599.

The scope of the OSC's discretion in defining "the public interest" standard under subsection 26(1) is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public. Re W.D. Latimer Co. Ltd. and A.G. Ontario (1973), 2 O.R. (2d) 391 (Div. Ct.) at p. 393 affirmed (1974), 6 O.R. (2d) 129 (C.A.) and Re The Securities Commission and Mitchell, supra p. 14, at p. 599.

Based upon the activities the OSC should be accorded a particularly broad latitude in formulating its opinion as to the public interest in matters relating to the activities of registrants such as Gordon under subsection 26(1) of the Act. As reflected in its decision, the OSC insists that registrants such as Gordon remain abreast of all of the laws and policies governing the securities industry in Ontario and that they abide by them in the operation of all aspects of their businesses. In my opinion, this insistence is imperative in the public interest. The OSC did not suspend Gordon's registration. The order merely imposed a condition on the registration of Gordon that for 10 business days it be restricted from engaging in principal trading.

In imposing this sanction the OSC commented as follows:

> In this case, Gordon Capital is a successful and influential firm; Bainbridge and other senior management personnel at Gordon Capital have many years

> experience in their fields and are perceived as leaders and setters of standards in the firm's areas of specialization. This status has its rewards and also carries with it a corresponding responsibility for the highest level of regulatory compliance.

I see no basis for interference with the order under appeal.

The Territorial Scope of the OSC Order

After the OSC rendered its reasons for decision on May 24, 1990, Gordon requested and was granted a further hearing before the OSC (the second hearing). Among other things Gordon sought a stay of the OSC order pending the decision of the Divisional Court. Also, prior to the second hearing Gordon had written to the OSC staff raising a number of questions for clarification relative to the OSC order of May 24. None of the questions related in any way to the territorial scope of the OSC order.

The issue of the territorial scope of the OSC order was raised for the first time by the TSE in a letter to the OSC staff dated May 30, 1990. The matter was put in issue by Counsel for the TSE at the second hearing. However Counsel for the TSE did not take a position on the issue. In responding to a direct question from the OSC panel regarding Gordon's position on the issue, Thomas Allen ("Allen"), a lawyer and senior officer of Gordon, indicated that Gordon did not wish to make any submissions on the issue. Allen further assured the OSC panel that Gordon had no intention of engaging in activities which the panel "would regard as circumventing its order".

Still later at the 2nd hearing, Counsel for Gordon assured the OSC that Gordon had no intention of moving its Toronto business elsewhere to circumvent the order, and confirming that its New York subsidiary would carry on only its normal business activities during the currency of the order, and undertaking to the OSC to advise its staff of any change in Gordon's stated position.

After the OSC had made its order at the conclusion of the second hearing, counsel for Gordon wrote to the OSC and, without purporting to resile from the assurances and undertaking given by Allen at the second hearing, requested that the issue of the territorial scope of the order be reopened. The OSC declined this request.

There was little or no evidence before the OSC concerning the nature and extent of Gordon's business activities outside of the Province of Ontario. The OSC order at the second hearing dealt with this matter as follows:

> AND IT IS FURTHER ORDERED (but not in limitation of the power of the Commission under section 140 of the Act) that the Acting Director of Enforcement be and is hereby appointed to respond to any further questions which Gordon Capital may pose prior to and during the ten business days commencing June 18, 1990, with respect to the scope and effect of the Order so

as to assist Gordon Capital in complying with the terms thereof.

In the circumstances herein the issue of territorial scope is one of some complexity. I do not propose to say more than that. In my opinion, there is not a sufficient evidentiary basis upon which this Court could deal with this matter as a fresh issue on appeal.

The appeal is dismissed with costs to the Respondents fixed at $3,500.00 plus assessable disbursements.

As indicated earlier the OSC granted Gordon a stay of its order pending the disposition of this appeal. An order will go that this matter be returned to the OSC to fix a date for the commencement of the "10 business days" suspension imposed herein by its order of May 24, 1990.

CRAIG J.
HOLLAND J.:-- I agree.
CARRUTHERS J.:-- I agree.

Case Name:

Shooters 222 Restaurant Ltd. v. Ontario (Alcohol and Gaming Commission)

Between
Shooters 222 Restaurant Ltd., and
Registration of Alcohol and Gaming Commission of Ontario

[2004] O.J. No. 5595

Court File No. 03-DV-000923

Ontario Superior Court of Justice
Divisional Court - Ottawa, Ontario

J.D. Cunningham A.C.J.S.C.J.

Judgment: November 22, 2004.
Released: November 29, 2004.

(8 paras.)

Administrative law -- Judicial review and statutory appeal -- Liquor control -- Licensing.

Appeal by Shooters 222 Restaurant from the imposition of a seven day suspension of its liquor licence for operating in excess of its licensed capacity. The Restaurant submitted that the suspension was tantamount to a fine wholly out of proportion to the offence.

HELD: Appeal allowed. The length of suspension under the circumstances constituted a reversible error and was varied to two days.

Counsel:

Lawrence Greenspon and Trevor Brown, Counsel for Appellant

1 **J.J. CUNNINGHAM A.C.J.S.C.J.** (endorsement):-- The Appellant's argument concerning officially induced error was abandoned at the outset. As to the submissions that the defence of due diligence ought to be available at the liability stage of proceedings before the Board, we are of the view that the issue was fully determined in Gordon Capital v. OSC (1991), 1 Admin. L.R. (2d) 199, which considered R. v. Wigglesworth, [1987] 2 S.C.R. 541, and the clear distinction between Criminal/quasi criminal offences and proceedings to regulate the conduct of those licensed to carry on business.

2 In the present case, no licensee is thus charged with an offence. Having voluntarily entered into a regulatory scheme, the main purpose of which is to maintain standards of conduct and regulate conduct, the defence of due diligence, at the liability stage, is not available. This has been expressed in numerous Divisional Court decisions dealing with proceedings under the C.C.A.

3 As to the matter of penalty, we recognize that the Board has broad discretion. Here the Appellant argues that the 7 day suspension is tantamount to a very large fine wholly out of proportion to the failure to ensure overcrowding did not occur. We have been given a number of recent cases regarding sanctions in overcrowding situations of which seem to reflect a 7 day suspension lien where no previous warning was given.

4 Loathe as we are to interfere with the Board's discretion we are satisfied the 7 day suspension, on the particular facts of this case was a reversible error. Although the Board found the system had broken down we prefer the view that the count here resulted from an employee's error in judgment and not a complete failure of the system in place.

5 Whether the Board gave consideration to previous warnings as opposed to the one earlier verbal warning we shall not know. The decision on sanctions however erroneously speaks of previous warnings.

6 In this case, as well, more attention ought to have been paid to the licencee's effort to control overcrowding. Clearly much was done to ensure that overcrowding did not occur.

7 Accordingly we vary the 7 day suspension on these facts to a 2 day suspension.

8 As success is divided, no costs.

J.J. CUNNINGHAM A.C.J.S.C.J.

Tarion Warranty Corporation v. Kozy

[Indexed as: Tarion Warranty Corp. v. Kozy]

109 O.R. (3d) 180

2011 ONCA 795

Court of Appeal for Ontario,
Rosenberg, MacPherson and Epstein JJ.A.
December 16, 2011

Sale of land -- New home warranty program -- "Builder" -- Contractor performing most of construction work on new home but owner responsible for installing well and septic system -- Contractor being "builder" within meaning of Ontario New Home Warranties Plan Act despite performance of some work by owner -- Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

The respondent was retained to construct a new home on the owners' property. He performed most of the construction work, but the owners added fireplaces and were responsible for installing the well and septic system. The respondent did not register as a builder under the Ontario New Home Warranties Plan Act. He was charged with violating ss. 6 and 12 of the Act. He was acquitted at trial, and the acquittal was affirmed on appeal to the Court of Justice. The appeal court judge held that the owners' involvement in arranging and paying for the well and septic system took the construction by the respondent out of the definition of "builder" in the Act. The appellant appealed.

Held, the appeal should be allowed. [page181]

The Act is remedial legislation and should be given a fair and liberal interpretation. That approach requires an interpretation of "builder" that would cover persons who build a home but leave some work to be performed by the owner. The Act contemplates that owners will often perform some work; for example, s. 13(2)(a) provides that ONHWP warranties do not cover "work supplied by the owner". It is important not to deny such owners New Home Warranty Program coverage. The respondent was a "builder" within the meaning of the Act despite the performance of some work by the owners.

Cases referred to

Tarion Warranty Corp. v. Boros (2011), 105 O.R. (3d) 401, [2011] O.J. No. 2149, 2011 ONCA 374, 282 O.A.C. 74, 6 R.P.R. (5th) 73, 1 C.L.R. (4th) 307, apld

JRC Developments Ltd. v. Tarion Warranty Corp., [2010] O.J. No. 5089, 2010 ONSC 6205 (Div. Ct.); Ontario New Home Warranty Plan v. McPhail, [1997] O.J. No. 4570 (C.J.); R. v. Boissonneault (July 14, 2004), unreported, North Bay (C.J.); R. v. Segal, [2006] O.J. No. 1034, 2006 ONCJ 80, 52 C.L.R. (3d) 85, 69 W.C.B. (2d) 6, consd

Other cases referred to

Lam (Re), [1997] O.C.R.A.T.D. No. 92 (Comm. Reg. App. Trib.); Ontario (2947-ONHWPA-Claim) (Re), [2006] O.L.A.T.D. No. 54 (Lic. App. Trib.); Ontario (5319-ONHWPA-Claim) (Re), [2009] O.L.A.T.D. No. 363 (Lic. App. Trib.); Staples (Re), [2006] O.L.A.T.D. No. 175 (Lic. App. Trib.)

Statutes referred to

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 [as am.], ss. 1 [as am.], 6, 12, 13(2)(a), 22 [as am.], (1)(b)

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 131

APPEAL from the judgment of Downie J. of the Ontario Court of Justice dated December 31, 2010 dismissing the appeal from the acquittal of the respondent by Justice of the Peace Solursh of the Ontario Court of Justice dated September 9, 2008.

David Outerbridge, for appellant.

Martin J. Prost, for respondent.

The judgment of the court was delivered by

MACPHERSON J.A.: --

A. Introduction

[1] The appellant, Tarion Warranty Corporation ("Tarion"), appeals from the decision of Justice Donald Downie of the Ontario Court of Justice dated December 13, 2010. In that decision, Downie J. dismissed an appeal from Justice of the Peace Gerry Solursh's acquittal of the respondent, David Kozy, on two charges under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 (the "ONHWP Act"). Both judges based their decisions on a conclusion that Mr. Kozy was not a "builder" within the meaning of the term in the ONHWP Act. [page182]

B. Facts

(1) The parties and events

[2] Tarion is the corporation designated by regulation to administer the ONHWP Act. The ONHWP Act is consumer protection legislation aimed at protecting purchasers of new homes in Ontario.

[3] In 2006, Joseph and Irena Kobylinski purchased a rural property at 91 Farlain Lake Road East in the Township of Tiny in Simcoe County. In August 2006, they entered into a contract with Mr. Kozy for the construction of a house on the property. The contract provided:

> The Contractor agrees to supply all the materials, and perform all the work . . . as described in the contract documents and as set out below. The Work shall be done on the premises . . . which are owned by the Owner [.]

[4] Mr. Kozy performed the majority of the construction work for a price of $153,594, including GST. The Kobylinskis paid for several items outside the scope of the contract: $6,600 for driveway work and the septic system, $6,254 for the well and water system connected to the house, and $4,458 for two fireplaces.

[5] Mr. Kozy did not register as a builder under the ONHWP Act. The statute provides that:

> 1. In this Act,
>
> "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner[.]

[6] Because he did not register, Mr. Kozy was charged with two offences under s. 22(1)(b) of the ONHWP Act for violating ss. 6 and 12 of the Act, which provide:

> 6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act.
>
> . . . . .
>
> 12. A builder shall not commence to construct a home until the builder has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation.

(2) The trial

[7] Justice of the Peace Solursh acquitted Mr. Kozy of both charges. For the purpose of this appeal, the parties prepared an [page183] Agreed Statement of Facts which includes this summary of the justice of the peace's decision:

> Justice of the Peace Solursh held that Mr. Kozy did not fall within the definition of "builder" or "vendor". He based his decision primarily on: (a) the fact that the construction contract was silent on the question of who would construct the major structural components of the Residence, and (b) what he described as an absence of evidence as to who performed this work.

(3) The appeal

[8] Justice Downie dismissed Tarion's appeal from the justice of the peace's acquittal of Mr. Kozy. In the Agreed Statement of Facts, the parties record this description of Downie J.'s decision:

> The issues of statutory interpretation were the same on appeal as they were at trial. Also at issue on appeal was whether the decision of the Justice of the Peace at trial was unreasonable in light of the evidence.
>
> The appeal judge held that the Justice of the Peace at trial had misapprehended the evidence regarding the role played by Mr. Kozy in building the Residence. Downie J. stated at paragraph 20 of his Reasons for Judgment:
>
> > It is clear that the learned Justice of the Peace was in error when he stated on page six of his judgment "There was no evidence before the court as to who performed these services, and at what cost", while he was referring to major structural components of the building such as footings, foundation, framing, plumbing and rough-in electrical. There was evidence before the court by Mr. Kozy and Mr. Kobylinski that it was in fact Mr. Kozy who performed most of these services . . . . It is clear from the evidence . . . that Mr. Kozy's workers did in fact do the majority of the work. It is only the work that was evidenced in Exhibit #21 where Mr. Kobylinski acted as contractor and hired outside persons, other than Mr. Kozy, to do the work. It is clear that Mr. Kozy was not doing the well drilling, the connection of the well to the house, the septic system and the connection of the septic system to the house, as well as certain fireplace work that was contracted out.
>
> The appeal judge went on to consider whether Mr. Kozy qualified as a "builder" and "vendor" for purposes of the ONHWP Act, in light of the roles played by Mr. Kozy and by the Kobylinskis.
>
> The appeal judge held that:

(a) the addition of fireplaces by the Kobylinskis would not take the construction by David Kozy out of the definition of "builder"; and
(b) the Kobylinskis' involvement in arranging and paying for the well and septic system did take the construction by David Kozy out of the definition of "builder".

(4) Leave to appeal

[9] By order dated March 24, 2011, Winkler C.J.O. granted Tarion's application for leave to appeal pursuant to s. 131 of the [page184] Provincial Offences Act, R.S.O. 1990, c. P.33. In his endorsement supporting the order, the chief justice said, at para. 5:

> The interpretation of the definition of "builder" is a question of law. As to whether it is essential in the public interest, the issue of the definition of "builder" is central to the entire statute. This is consumer protection legislation which affects any potential new home buyer in Ontario.

C. Issue

[10] The sole issue on the appeal is whether the appeal judge erred in his interpretation of the term "builder" as used in the ONHWP Act.

D. Analysis

[11] The appeal judge noted that the definition of "builder" in the ONHWP Act is a person who undertakes the performance of "all the work and supply of all the materials" necessary to construct a completed home. He concluded that the addition of fireplaces by the owners did not remove Mr. Kozy as the "builder". However, he reached the opposite result with respect to the owners' separate arrangements for the installation of septic and well systems. The core of his reasoning is contained in this passage:

> The question in this case is, did Mr. Kozy and his workers do

all of the work necessary to build a completed home. In the view of the court they did not. They did not do the septic system and they did not do the well. There is no way a home could be described as a completed home that did not have an operational toilet and sewer system, whether connected to a municipal system or to a septic system and there is no way a home could be considered a completed home if it did not have a water system. The Kobylinski's as owners arranged and paid for the installation of these systems. Therefore, to this court it seems that Mr. Kozy is not "a builder" as defined in the Act, even as that term has been expanded by some of the case law.

[12] With respect, I am not persuaded by this analysis. In my view, the purpose of the ONHWP Act, the leading cases interpreting the term "builder" and the facts of this case suggest that Mr. Kozy is a "builder" within the meaning of the ONHWP Act.

(1) The purpose of the ONHWP Act

[13] Justice MacFarland of this court recently had occasion to consider the purpose of the Act and, specifically, the implication of that purpose for the interpretation of the term "builder" in Tarion Warranty Corp. v. Boros (2011), 105 O.R. (3d) 401, [2011] O.J. No. 2149, 2011 ONCA 374, at paras. 20-22: [page185]

I begin with the observation of this court in Ontario New Home Warranty Program v. Lukenda (1991), 2 O.R. (3d) 675 (Ont. C.A.), at p. 676;

> The major purpose of the Plan Act is to protect purchasers of new homes by requiring that vendors and builders be screened for financial responsibility, integrity and technical competence. To assure public protection, it provides warranties, a guarantee bond and compensation in the event of loss by a purchaser resulting from dealings with a registrant. In order to effect this purpose of the Plan Act, a broad and liberal interpretation of its provisions is appropriate.

This court further observed in Mandos v. Ontario New Home Warranty Program (1995), 86 O.A.C. 382, at p. 383: "The Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O-13 is remedial legislation and should be given a fair and liberal interpretation."

The central issue in this case is whether the respondent meets the definition of "builder" as it is defined in the ONHWP Act. It would appear that this question has not arisen in this court before. However, as outlined above, the prior jurisprudence of this court with respect to the ONHWP Act requires that a broad and liberal approach be taken to interpreting the meaning of the term "builder" in order to reflect the remedial purpose of the Act.

[14] This approach requires an interpretation of "builder" that would cover persons who build a home but leave some work to be performed by the owner. Courts have recognized that the Act contemplates that owners will often perform some work relating to a construction project: see, for example, Ontario New Home Warranty Plan v. McPhail, [1997] O.J. No. 4570 (C.J.), at para. 21, MacDonnell Prov. J. (discussing s. 13(2)(a) of the ONHWP Act, which provides that ONHWP warranties do not cover "work supplied by the owner"). Given the purpose of the Act, it is important not to deny such owners New Home Warranty Program coverage. To hold that a contractor who leaves some work to a homeowner is not a "builder" would therefore be inconsistent with the statutory scheme.

(2) The leading cases

[15] In several cases involving interpretation of the ONHWP Act, courts have articulated tests delineating when a person falls within the term "builder".

[16] In JRC Developments Ltd. v. Tarion Warranty Corp., [2010] O.J. No. 5089, 2010 ONSC 6205 (Div. Ct.), at para. 4, Molloy J. said that whether a contractor is a "builder" involves consideration of "who was responsible for completing the essential elements of the home and who had control over the construction of the home".

[17] In R. v. Segal, [2006] O.J. No. 1034, 2006 ONCJ 80, at para. 54, Reinhardt J. said: [page186]

> In order to rationalize section 13(2)(a), which contemplates that an owner may provide some work or materials to the construction of the new home, with the definition of a "builder", which refers to the provision of "all" work and materials, the definition of a "builder" has been interpreted as meaning the provision of a significant portion of construction. A home is not taken outside of the purview of the Act only because the owner was responsible for some work or materials.

(Emphasis added)

[18] Applying these tests, a long line of decisions in the courts and before the Ontario Licence Appeal Tribunal and the Ontario Commercial Registration Appeal Tribunal have held that the fact that an owner is responsible for the installation of water and septic systems does not mean that a contractor is not a "builder" under the ONHWP Act: see, for example, Ontario (5319-ONHWPA-Claim) (Re), [2009] O.L.A.T.D. No. 363 (Lic. App. Trib.), affd JRC Developments Ltd. v. Tarion Warranty Corp., supra; R. v. Boissonneault (July 14, 2004), unreported, North Bay (C.J.); Lam (Re), [1997] O.C.R.A.T.D. No. 92 (Comm. Reg. App. Trib.); Ontario (2947-ONHWPA-Claim), (Re), [2006] O.L.A.T.D. No. 54 (Lic. App. Trib.); and Staples (Re), [2006] O.L.A.T.D. No. 175 (Lic. App. Trib.).

[19] The appeal judge was aware of this case law. He said that "[t]he existing cases have purported to try and get around the definition of 'builder'" and "changed the definition" from the one in the statute.

[20] With respect, I do not agree. The interpretation of the definition of "builder" in cases like McPhail, JRC Developments Inc., Segal and Boissonneault is, in my view, consistent with the consumer protection purpose of the ONHWP Act, the wording of the definition of the word "builder" and a contextual reading of the definition with other provisions of the Act, such as s. 13(2)(a).

(2) Application to this case

[21] Finally, once the proper definition of "builder" is set down, its application in this case is easy. Mr. Kozy did almost all of the construction work on the new Kobylinski home. The contract listed 12 separate categories of exterior work and about 20 separate categories of interior work to be performed by Mr. Kozy. Mr. Kozy was responsible for constructing virtually the entire home. The only work outside Mr. Kozy's responsibility related to the water and septic systems and two fireplaces. The work done by Mr. Kozy cost $153,594. The water and septic system work [page187] cost $12,854. By either yardstick, Mr. Kozy was the "builder". The owners' subsidiary participation in the construction project did not negate warranty coverage for them, nor did it remove the duty on Mr. Kozy to comply with the ONHWP Act.

E. Disposition

[22] I would allow the appeal and order a new trial on both charges. I would not award costs.

Appeal allowed.

Sedgwick wrote in 1874, when the dominant approach to interpretation was "literal" construction. During this period, legislation in common law jurisdictions was drafted in a concrete and detailed style which left little room for judicial choice. Yet even in this era, the idea that legislation should be interpreted so as to promote its purpose remained an important part of statutory interpretation. If the words to be interpreted lent themselves to two or more plausible interpretations, the courts would choose the interpretation that best advanced the purpose. As Viscount Simon said in *Nokes v. Doncaster Amalgamated Collieries Ltd.*:

> [I]f the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.[4]

Legislative purpose was also taken into account under the golden rule. It would be absurd for a legislature to adopt a provision that conflicted with the purpose of legislation or was likely to render it futile. To avoid this absurdity, the courts could reject the ordinary meaning of the provision in favour of a more reasonable alternative.[5]

Modern purposive analysis

§9.6 ***Modern purposive analysis.*** Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. This is clear from Driedger's modern principle, which makes purpose an essential part of the entire context. It is also clear from the caselaw. In 1975, in *Carter v. Bradbeer*, Lord Diplock wrote:

> If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the past thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.[6]

A similar trend is evident in the case law of the Supreme Court of Canada and other appellate courts in Canada. In *Covert v. Nova Scotia (Minister of Finance)*, for example, Dickson J. wrote:

> The correct approach, applicable to statutory interpretation generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose.[7]

In *R. v. Z. (D.A.)*, Lamer C.J. wrote:

> In interpreting ... an Act, the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and the purpose of the legislation ... [T]he Court of Appeal properly proceeded on this basis when it stated that the best approach to the interpretation of words in a statute is to place upon them the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction.[8]

In *R. v. Adams*, Sopinka J. wrote:

> In approaching the interpretation of any statutory provision, it is prudent to keep in mind the simple but fundamental instruction offered by the court in *Reigate Rural District Council v. Sutton District* ... and affirmed by this court in *Hirsch v. Protestant Board*

questions and the justification for taking absurdity into account. It sets out a principle that purports to summarize current judicial practice.

§10.2 The chapter next describes certain well-established categories of absurdity -- defeating legislative purpose, irrational distinctions, contradictions and anomalies, inconvenience, interference with the administration of justice, and unfair or unreasonable results.

§10.3 The chapter ends by examining the ways avoiding absurdity is used to help resolve interpretation issues.

Relevance of consequences in interpretation

§10.4 ***Relevance of consequences in interpretation.*** When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of individuals and communities for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purpose. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended. If adopting an interpretation would lead to absurdity, the courts may reject that interpretation in favour of a plausible alternative that avoids the absurdity. As O'Halloran J.A. explained in *Waugh v. Pedneault*:

> The Legislature cannot be presumed to act unreasonably or unjustly, for that would be acting against the public interest. The members of the Legislature are elected by the people to protect the public interest, and that means acting fairly and justly in all circumstances. Words used in enactments of the Legislature must be construed upon that premise. That is the real 'intent' of the Legislature. [1]

This understanding has been affirmed on numerous occasions by the Supreme Court of Canada. In *Morgentaler v. The Queen*, Dickson J. wrote:

> We must give the sections a reasonable construction and try to make sense and not nonsense of the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities.[2]

In *R. v. McIntosh*, McLachlin J. wrote:

> While I agree ... that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear intention to the contrary, the courts must impute a rational intent to Parliament.[3]

In *Ontario v. Canadian Pacific Ltd.*, Gonthier J. wrote:

> Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results.[4]

§10.28 ***Purpose is defeated.*** Statutory interpretation is founded on the assumption that legislatures are rational and competent agents. They enact legislation to achieve a particular mix of purposes, and each provision in the Act or regulation contributes to realizing those purposes in a specific way. An interpretation that would tend to frustrate legislative purpose or thwart the legislative scheme is likely to be labelled absurd.

§10.29 In *R. v. Proulx*,[3] for example, the Supreme Court of Canada had to determine whether a conditional sentence was a "sanction other than imprisonment" within the meaning of s. 718.2(e) of the *Criminal Code*. Even though conditional sentences were defined in the Code as a sentence of imprisonment, the court concluded they were not a "sanction [of] imprisonment" for purposes of s. 718.2(e). As Lamer C.J. explained, if imprisonment were here given its technical sense as set out in Part XXIII of the Code, it would "fly in the face of Parliament's intention in enacting s. 718.2(e) -- reducing the rate of incarceration ... ":

> [I]f this interpretation of s. 718.2(*e*) were adopted, it could lead to absurd results in relation to aboriginal offenders. The particular circumstances of aboriginal offenders would only be relevant in deciding whether to impose probationary sentences, and not in deciding whether a conditional sentence should be preferred to incarceration. This would greatly diminish the remedial purpose animating Parliament's enactment of this provision, which contemplates the greater use of conditional sentences and other alternatives to incarceration in cases of aboriginal offenders.[4]

To avoid this absurd result, the Court interpreted the phrase "sanction other than imprisonment" to mean "sanction other than incarceration", an interpretation supported as well by the French language version of the provision.

Irrational distinctions

§10.30 ***Irrational distinctions.*** A proposed interpretation is likely to be labelled absurd if it would result in persons or things receiving different treatment for inadequate reasons or for no reason at all. This is one of the most frequently recognized forms of absurdity.

§10.31 In *Hills v. Canada (A.G.)*,[5] for example, a majority of the Supreme Court of Canada rejected an interpretation of the *Unemployment Insurance Act* partly because it made entitlement to unemployment insurance benefits depend on an arbitrary circumstance. The provision to be interpreted disqualified claimants for unemployment insurance if they were out of work because of a strike which they themselves were "financing". The issue was whether a claimant could be said to be "financing" a strike at his workplace because some of his union dues automatically went to an international strike fund from which the striking workers at his plant were paid. The majority wrote:

> Here ... it might be out of sheer convenience that claimant's union strike funds were handled by the international union. They could just as well have been administered by the union local to which appellant belonged or deposited in a bank or other financial institution. There is no doubt that in such case, the claimant would have been entitled to unemployment insurance benefits as neither he nor his union could have been held to have financed the strike of the other local of the union. Could the legislature really have intended disentitlement to be dependant upon such a trivial fact? I think not.[6]

§10.32 In *R. v. Paré*,[7] the Supreme Court of Canada was concerned with the meaning of the words "while committing" in s. 214(5)(b) of the *Criminal Code*. It classified as first degree murder any "murder ... when the death is caused by [a] person ... while committing an offence under section ... 156 (indecent assault on male)". The defendant argued that the words "while committing" meant that the homicide must be exactly simultaneous with the sexual offence. However, this argument was rejected because of the unacceptable consequences that would follow if exact simultaneity were required. Wilson J. wrote:

> The first problem with the exactly simultaneous approach flows from the difficulty in defining the beginning and end of an indecent assault. In this case, for example, after ejaculation the respondent sat up and put his pants back on. But for the next two minutes he kept his hand on his victim's chest. Was this continued contact part of the assault? It does not seem to me that important issues of criminal law should be allowed to hinge upon this kind of distinction. An approach that depends on this kind of distinction should be avoided if possible.
>
> A second difficulty with the exactly simultaneous approach is that it leads to distinctions that are arbitrary and irrational. In the present case, had the respondent strangled his victim two minutes earlier than he did, his guilt of first degree murder would be beyond dispute. The exactly simultaneous approach would have us conclude that the two minutes he spent contemplating his next move had the effect of reducing his offence to one of second degree murder. This would be a strange result. The crime is no less serious in the latter case than in the former ... An interpretation of s. 214(5) that runs contrary to common sense is not to be adopted if a reasonable alternative is available.[8]

In both *Hills* and *Paré*, the absurdity consisted in making the fate of the parties turn on something that appeared to be foolish or trivial; there was no rational connection between the consequence and the key determining factor -- in *Hills*, the place where union funds were deposited, in *Paré*, the two-minute pause.

§10.33 In *Berardinelli v. Ontario Housing Corp.*,[9] the Supreme Court of Canada had to decide whether s. 11 of Ontario's *Public Authorities Protection Act*, which imposed a short limitation period on actions against public authorities, applied to the defendant corporation in respect of all its activities or only those having a public dimension. Estey J. wrote:

> The Court is here confronted with at least two possible, but quite different, interpretations of s. 11. The one would impose on all actions involving the [defendant municipality] ... , however minor or miniscule, the protection of the limitation period established by s. 11. The imposition of this limitation period for this special class would have the direct result of producing two categories of housing units in the community: the one operated by persons having a statutory mandate to which a six-month limitation period would extend; and the other operated by a person without statutory authority to which the general limitation period would apply. Of course both housing projects would appear identical in fact to the attending public whose rights are directly affected by the distinction. [10]

To avoid creating "different conditions of owner liability for two apparently similar housing facilities,"[11] the Court opted for the other interpretation. In this case, although there might have been grounds for treating public authorities differently from private entrepreneurs, the Court clearly judged them to be inadequate or inapplicable to these circumstances.[12]

Misallocation and disproportion

§10.34 ***Misallocation and disproportion.*** A variation on irrational distinction occurs when an

interpretation leads to an outcome in which persons deserving of better treatment receive worse treatment or vice versa. In *R. v. Wust*,[13] the Supreme Court of Canada had to determine whether the discretion to give credit for pre-sentencing custody conferred on a sentencing court by s. 719(3) of the *Criminal Code* applied to mandatory minimum sentences. Arbour J. wrote:

> If this Court were to conclude that the discretion provided by s. 719(3) ... was not applicable to the mandatory minimum sentence of s. 344(a), it is certain that unjust sentences would result. First, courts would be placed in the difficult situation of delivering unequal treatment to similarly situated offenders ... Secondly, because of the gravity of the offence and the concern for public safety, many persons charged under s. 344(a), even first time offenders, would often be remanded in custody while awaiting trial. Consequently, discrepancies in sentencing between least and worst offenders would increase, since the worst offender, whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention. An interpretation ... that would reward the worst offender and penalize the least offender is surely to be avoided.[14]

Interpretations that result in a lack of fit between conduct and consequences may be rejected as absurd. In *R. v. Hinchey*,[15] for example, the issue was application of s. 121(1)(c) of the *Criminal Code*, which made it an offence for government employees to accept "a commission, reward, advantage or benefit of any kind". Cory J. wrote:

> The section could not have been designed to make a government clerk or secretary guilty of a crime as a result of accepting an invitation to dinner or a ticket to a hockey game from one known to do business with government.[16]

Along similar lines L'Heureux-Dubé J. wrote:

> My colleague is rightly concerned about this section imposing a criminal sanction for a benefit received which is so minimal it clearly does not warrant such a harsh reprisal. I agree that such an interpretation would clearly be absurd, and as such is not one which should be followed.[17]

The desire to avoid disproportionate results is also apparent in judicial applications of the *de minimus* principle.

Contradictions and anomalies

§10.35 ***Contradictions and anomalies.*** From the earliest recognition of the golden rule, contradiction and internal inconsistency have been treated as forms of absurdity. Legislative schemes are supposed to be coherent and to operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately be labelled absurd.

§10.36 In *Canada (Attorney General) v. Public Service Alliance of Canada*,[18] for example, the issue was whether the Public Service Staff Relations Board was correct in treating persons who provided services to the federal government under long-term government contracts as "employees" within the meaning of the *Public Service Staff Relations Act*. A majority of the Supreme Court of Canada said no because treating these persons as employees would disrupt the labour relations scheme established through the joint operation of several federal Acts. Sopinka J. wrote:

> In the scheme of labour relations which I have outlined above there is just no place for a species of *de facto* public servant who is neither fish nor fowl. The
> introduction of this special breed of public servant would cause a number of problems which leads to the conclusion that creation of this third category is not in keeping with the purpose of the legislation when viewed from the perspective of a pragmatic and functional approach.[19]

Sopinka J. went on to describe the confusion that would result if the suggested interpretation were accepted. The workers would be subject to contradictory terms and conditions of employment and contradictory bargaining regimes. Such basic matters as who would pay their salary and what deductions would be made at source would be unclear.[20] To suppose that such confusion was intended would be absurd.

§10.37 Interpretations are also labelled absurd if they create an inconsistency or anomaly when considered in the light of some other provision in the statute. In *Swan v. Canada (Minister of Transport)*,[21] for example, the court had to interpret s. 3.7(4) of the *Aeronautics Act* which empowered the Minister of Transport to "establish, maintain and carry out, at aerodromes, ... such security measures as may be prescribed by regulations of the Governor in Council or such security measures as the Minister considers necessary ... ". The Minister argued that under this provision he had an administrative power to establish security measures equal in scope to those which might be prescribed by the Governor in Council by regulation. Reed J. acknowledged that this interpretation was plausible on a hasty reading of the section. But she went on to say:

> Such a result does not, however, accord well with the other provisions of the Act. For example, s. 3.3(1) allows the Minister to subdelegate to members of the R.C.M.P. *or to any other person any* of his powers under the Act. It is hard to conclude that such a broad subdelegation of authority would have been prescribed if the Minister's powers under s. 3.7(4) were equal in scope to the regulation-making powers of the Governor in Council.[22]
>
> [Emphasis in original]

The interpretation favoured by the Minister was rejected because its implications, in light of other provisions in the Act, were unacceptable.

Hardship and inconvenience

§10.38 ***Hardship and inconvenience.*** Another recurring ground on which outcomes are judged to be absurd is pointless inconvenience or disproportionate hardship. While the legislature often imposes burdens and obligations on persons as part of the means by which its objects are achieved, when these seem greatly disproportionate to any advantages to be gained, and still more when these appear to serve no purpose at all, they may be judged absurd.

§10.39 In *Québec (Services de santé) v. Québec (Communauté urbaine)*,[23] for example, the Supreme Court of Canada had to interpret the provisions of Quebec's *Code of Civil Procedure* governing the filing of incidental appeals. Article 499 of the Code provided that a party wishing to appeal must file an appearance at the office of the Appeal Court. Article 500 provided that a party could also "make an incidental appeal, without formality other than a declaration, served on the

adverse party and filed at the same time as his written appearance." The appellant in the case, wishing to make an incidental appeal, served the required declaration on the adverse party and then filed it in the office of the trial court. The issue was whether this satisfied the filing requirement set out in art. 500. The Court ruled that the filing requirement imposed by art. 500 contemplated filing at the office of the Court of Appeal. L'Heureux-Dubé J. wrote:

> [I]t would be incongruous, to say the least, if the appearance and incidental appeal, which, under art. 500 *C.C.P.*, are to be filed *at the same time*, were required to be filed in two different places which, depending on the judicial district, may be a considerable distance apart. In my view, an interpretation that leads to such a result is untenable.[24]
>
> [Emphasis in original]

Even though the *Code of Civil Procedure* is to be interpreted in a non-formalistic way, so as to facilitate the efficient disposition of suits on their merits, this absurdity was too much to ignore.

Interference with the efficient administration of justice

§10.40 ***Interference with the efficient administration of justice.*** Another important category of absurdity is based on the efficient and orderly administration of justice. The courts have always regarded law enforcement as a matter particularly suited to judicial supervision. In exercising their supervisory role various principles based on the rule of law have been developed to protect individual subjects from arbitrary law enforcement. Apart from this concern for the individual, however, and potentially opposed to it, is a concern for values like efficiency and effectiveness and a desire to promote the smooth operation of law enforcement machinery. Interpretations that interfere with the operation of this machinery or render the enforcement of the law ineffective may be labelled absurd.[25]

§10.41 In *R. v. Budget Car Rentals (Toronto) Ltd.*,[26] for example, the Ontario Court of Appeal had to interpret s. 460(8)(b) of Ontario's *Municipal Act* which provided that the owner of a vehicle "is liable to any penalty" provided for in any parking by-law made under the section. The respondent argued that although this language might render the owner of a vehicle liable to pay a fine, it did not create an offence of which the owner could be found guilty. The Court rejected this argument on the following grounds:

> [I]f the respondent's interpretation is accepted ... then the only way in which the penalty could be enforced against the owner, other than by amending the statute, would be for the appellant to endeavour to recover the penalty in Small Claims Court. This would be a highly impractical remedy. The tremendous volume of parking tags issued, coupled with the need for street-by-street surveillance to obtain the driver's name, would make the by-law unenforceable for all practical purposes.[27]

To avoid this result, the Court accepted the interpretation proposed by the Crown even though this was contrary to the principle that ambiguities in penal legislation should be resolved in favour of the accused.

§10.42 Interpretations that would interfere with the proper exercise of judicial discretion,[28] would render the task of interpretation too onerous or arbitrary,[29] or would permit easy avoidance or abuse of the legislation[30] may be dismissed as absurd. So may interpretations that would encourage litigation or unduly tax the resources of the court.[31]

Consequences that are self-evidently unreasonable, unjust or unfair

§10.43 ***Consequences that are self-evidently unreasonable, unjust or unfair.*** There is a residual category of absurdity consisting of consequences that violate norms of reasonableness, justice and equity. As stated by Gonthier J. in *Ontario v. Canadian Pacific Ltd.*, " ... it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments."[32] The presumption was applied by the Supreme Court of Canada in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*,[33] where one of the issues was whether the deemed reliance provision in paragraph 75(2)(a) of British Columbia's *Real Estate Act* created an irrebuttable presumption. That provision read as follows:

> If a prospectus has been accepted for filing by the superintendent under this Part,
>
> > (a) every purchaser of any part of the [land or interests] to which the prospectus relates is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not ...

On its face, this provision appears to create an irrebuttable presumption, that is, a legal fiction.[34] As the trial judge pointed out, there is no qualifying language in the provision, no reference to circumstances in which the reliance would not be deemed. The fact that reliance is deemed even if the prospectus has not been received further suggests an intention to create a fiction rather than a rebuttable presumption. However, the Supreme Court of Canada concluded that "a non-rebuttable presumption would be contrary to the legislative balancing that underlies the disclosure requirements ... and would result in absurd and unjust results."[35] As Rothstein J. explained:

> [A] non-rebuttable presumption would allow an investor to claim reliance on a misrepresentation, even if the investor was fully informed and had complete knowledge of all the facts. In doing so, the issuer would be held liable for a misrepresentation of which the investor was fully aware. This would be an absurd and unjust result, which would place issuers into the position of having to guarantee the losses of fully informed investors.[36]

The unreasonableness and injustice of such a result was apparently self-evident to the Court. However, it does not seem entirely absurd that, even in the absence of reliance, a legislature would intend to penalize an issuer that knowingly misrepresented material facts in a prospectus by imposing liability even in the absence of reliance.

Consequences that are undesirable

§10.44 ***Consequences that are undesirable.*** Consequences needn't be absurd to be taken into

account in an interpretation. In *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*,[37] the issue was whether an American bidder for a Canadian government procurement contract could bring a complaint before the Canadian International Trade Tribunal. The Tribunal was established by the *Canadian International Trade Tribunal Act*[38] to resolve disputes arising under a number of specified trade agreements. Section 30.11 provided that complaints about non-compliance with the procurement process set out in the Agreement on Internal Trade could be filed by a "potential supplier". Section 30.1 defined "potential supplier" as a "bidder or potential bidder" on a government procurement contract, which on its face included Northrop. However, the Agreement on Internal Trade is a domestic agreement between federal, provincial and two territorial governments. The Court found it implausible that Parliament would have intended to extend the benefit of recourse to the tribunal to non-parties to the Agreement. In concluding that the reference to a potential supplier in s. 30.11 was limited to a Canadian supplier as defined in the Agreement, the Court relied on the following considerations:

> Northrop Overseas' argument that non-Canadian suppliers have standing to bring complaints based on the AIT [Agreement on Internal Trade] to the CITT [Canadian International Trade Tribunal] leads to problematic results. If the argument of Northrop Overseas were correct, it would gain rights under the AIT despite its government (here, the U.S.) not being a party to the AIT. This poses difficulties. First, the goods that were the subject of this procurement were excluded from the NAFTA and the WTO-AGP. Allowing non-Canadian suppliers to gain rights under the AIT where those rights were specifically excluded from agreements signed with their country's government would undercut the exclusion. ...
>
> Second, Northrop Overseas' interpretation undermines the Canadian government's approach to negotiating trade agreements. Access to an accelerated alternative dispute resolution body for procurement disputes, such as the CITT, is a concession that Canada can offer other countries in negotiating trade agreements with the intent of obtaining reciprocal concessions in the other country. If access to the CITT were freely available to suppliers of all countries, access to it would have no value as a concession and Canada would have greater difficulty securing the equivalent access for its own suppliers in foreign countries.[39]

The Court here, especially in addressing the second problematic result, takes judicial notice of political realities and assumes that Her Majesty would not assent to legislation that would hamper the effective exercise of the prerogative power to enter international agreements. Such a consequence alone would not justify a significant departure from ordinary meaning, but it is a factor to be considered along with others.

Footnote(s)

1 In *Rizzo & Rizzo Shoes (Re)*, [1998] S.C.J. No. 2, 1998 SCC 837, [1998] 1 S.C.R. 27 (S.C.C.), the Supreme Court of Canada, at para. 27, relied on P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Que.: Yvon Blais, 1991), at pp. 378-80, for the following catalogue: "an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment ... ". This passage is frequently cited in the current case law.

2 See *Air Canada v. Ontario*, [1997] S.C.J. No. 66, 148 D.L.R. (4th) 193 (S.C.C.); *C.P. Airlines v. Canadian Air Line Pilots Assn.*, [1993] S.C.J. No. 114, [1993] 3 S.C.R. 724, at

743-45 (S.C.C.); *Union des employées et employés de service, section locale 800 c. Association démocratique des ressources à l'enfance du Québec (CSD) -- Mauricie -- Centre-du-Québec*, [2011] J.Q. no 19243, 2011 QCCA 2383, at paras. 46-47 (Que. C.A.), leave to appeal refused [2012] S.C.C.A. No. 72 (S.C.C.).

3 [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61 (S.C.C.).

4 *Ibid*., at para. 92. See also *Cuthbertson v. Rasouli*, [2013] S.C.J. No. 53, 2013 SCC 53, [2013] 3 S.C.R. 341, at paras. 43, 51 (S.C.C.); *R. v. Middleton*, [2009] S.C.J. No. 21, 2009 SCC 21, [2009] 1 S.C.R. 674, at paras. 45-46 (S.C.C.); *R. v. Monney*, [1999] S.C.J. No. 18, [1999] 1 S.C.R. 652, at para. 28 (S.C.C.); *R. v. Alsager*, [2013] S.J. No. 736, 2013 SKCA 129, at paras. 48*ff.* (Sask. C.A.); *Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2013] N.S.J. No. 606, 2013 NSCA 131, at para. 76 (N.S.C.A.); *Canada (Procureur général) c. Marier*, [2013] F.C.J. No. 159, 2013 FCA 39, at paras. 4-5 (F.C.A.); *Workers' Compensation Board of Saskatchewan v. Mellor*, [2012] S.J. No. 57, 2012 SKCA 10, at paras. 39-40 (Sask. C.A.), leave to appeal refused [2012] S.C.C.A. No. 196 (S.C.C.); *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, [2012] O.J. No. 815, 2012 ONCA 125 at para. 28*ff.* (Ont. C.A.), affd [2014] S.C.J. No. 36 (S.C.C.); *Keizer v. Slauenwhite*, [2012] N.S.J. No. 89, 2012 NSCA 20, at paras. 8 and 9 (N.S.C.A.), quoting the trial judge at para. 71.

5 [1988] S.C.J. No. 22, [1988] 1 S.C.R. 513 (S.C.C.).

6 *Ibid.*, at 557-58, *per* L'Heureux-Dubé J.

7 [1987] S.C.J. No. 75, [1987] 2 S.C.R. 618 (S.C.C.).

8 *Ibid.*, at 631. See also *Re Rizzo and Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at 39 and 41 (S.C.C.); *Fillion v. Degen*, [2005] M.J. No. 155, at para. 13 (Man. C.A.).

9 [1978] S.C.J. No. 86, [1979] 1 S.C.R. 275 (S.C.C.).

10 *Ibid.*, at 280.

11 *Ibid.*, at 283-84. For other examples of absurdity defined by irrational distinctions, see *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] S.C.J. No. 35, 2012 SCC 35, at para. 29 (S.C.C.); *Canada v. Antosko*, [1994] S.C.J. No. 46, [1994] 2 S.C.R. 312, at para. 42 (S.C.C.); *Canada (Attorney General) v. Mossop*, [1993] S.C.J. No. 20, [1993] 1 S.C.R. 554, at 673, *per* Lamer J. (S.C.C.); *Slattery (Trustee of) v. Slattery*, [1993] S.C.J. No. 100, [1993] 3 S.C.R. 430, at 451-54 (S.C.C.); *Rawluk v. Rawluk*, [1990] S.C.J. No. 4, [1990] 1 S.C.R. 70, at 94-95 (S.C.C.); *McQueen v. Echelon General Insurance Company*, [2011] O.J. No. 4563, 2011 ONCA 649 (Ont. C.A.).

12 Compare *R. v. Biniaris*, [2000] S.C.J. No. 16, [2000] 1 S.C.R. 381 (S.C.C.), where the Crown claimed that it was absurd to interpret the appeal provisions of the *Criminal Code* as granting an appeal from unreasonable convictions, but no corresponding appeal from

unreasonable acquittals. The Court responded, at 402-03, by pointing out different policy considerations apply to appeals of convictions and appeals of acquittals, and therefore it was not irrational to treat them differently.

13 [2000] S.C.J. No. 19, [2000] 1 S.C.R. 455 (S.C.C.).

14 *Ibid*., at para. 42. See *R. v. Arthurs*, [2000] S.C.J. No. 20, [2000] 1 S.C.R. 481, at 486 (S.C.C.), and *R. v. Arrance*, [2000] S.C.J. No. 21, [2000] 1 S.C.R. 488, at 492 (S.C.C.), dealing with the same issue. In these cases, the Court emphasized "the absurdity and the unfairness that results from an interpretation of the *Criminal Code* that precludes granting credit for time served prior to sentencing." See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] S.C.J. No. 68, [2003] 3 S.C.R. 228, at para. 76 (S.C.C.), where the appellant's attempt to rely on s. 18(2) of Quebec's *Charter of Human Rights and Freedoms* was rejected because the Court was "not satisfied that [by enacting s. 18(2)] the legislature intended to provide people convicted of a penal or criminal offence with more job security than accused persons." See *also Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] S.C.J. No. 72, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 27 (S.C.C.).

15 [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128 (S.C.C.).

16 *Ibid*., at 1190.

17 *Ibid*., at 1160-61. See also *Ontario v. Canadian Pacific Ltd.*, [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031 (S.C.C.), *per* Gonthier J. at 1082: "since the legislature is presumed not to have intended to attach penal consequences trivial or minimal violations of a provision, the absurdity principle allows for the narrowing of the scope of the provision."

18 [1991] S.C.J. No. 19, [1991] 1 S.C.R. 614 (S.C.C.).

19 *Ibid.*, at 633.

20 *Ibid.*, at 633-34.

21 [1990] F.C.J. No. 114, 67 D.L.R. (4th) 390, at 409 (F.C.T.D.).

22 *Ibid.*, at 410. See *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.), where La Forest J. concluded at 141 that the words "Her Majesty" in s. 90(1) of the *Indian Act* did not refer to Her Majesty in Right of a province because if this interpretation were adopted it would be impossible to make any sense of s. 90(2); *McKibbon (Rodger, David) v. R.*, [1984] S.C.J. No. 8, [1984] 1 S.C.R. 131 (S.C.C.), where Lamer J. wrote at 155: "giving to those words the meaning suggested by appellant ... would lead to an absurdity ... Parliament could not have intended to abolish under s. 505(4) the power it had conferred upon the prosecutor under s. 504(b)."; *R. v. J.H.-D. (Y.C.J.A.)*, [2013] B.C.J. No. 1327, 2013 BCCA 295 (B.C.C.A.), where Chiasson J.A. wrote, at para. 32, that "a court will take into account anomalies, paradoxes and inconsistency created by an interpretation and, to

a great degree, eschew them." See also *Keewatin v. Ontario (Natural Resources)*, [2013] O.J. No. 1138, 2013 ONCA 158, at para. 195 (Ont. C.A.), leave to appeal granted [2013] S.C.C.A. No. 215 (S.C.C.); *Dupuy c. Gauthier*, [2013] J.Q. no 4265, 2013 QCCA 774, at para. 50 (Que. C.A.); *Roggie v. Ontario*, [2012] O.J. No. 5476, 2012 ONCA 808, at paras. 52-53 (Ont. C.A.); *E.G. c. Reid*, [2009] J.Q. no 12582, 2009 QCCA 2086, at paras. 28-29 (Que. C.A.); *R. v. L.T.C.*, [2009] N.J. No. 269, 2009 NLCA 55, at para. 34 (Nfld. C.A.).

23 [1992] S.C.J. No. 14, [1992] 1 S.C.R. 426 (S.C.C.).

24 *Ibid.*, at 437. See also *Canada (Attorney General) v. TeleZone Inc.*, [2010] S.C.J. No. 62, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 23 (S.C.C.); *Poulin v. Serge Morency et Associés Inc.*, [1999] S.C.J. No. 56, [1999] 3 S.C.R. 351, at 366-68 (S.C.C.); *Blue Mountain Resorts Ltd. v. Bok*, [2013] O.J. No. 520, 2013 ONCA 75, at paras. 35-43 (Ont. C.A.).

25 Since 1982, of course, the competition between the protection of individual rights and efficient law enforcement must take Charter rights and remedies into account.

26 [1981] O.J. No. 2888, 20 C.R. (3d) 66 (Ont. C.A.), *per* Howland J. See also *Bisallon v. Concordia University*, [2006] S.C.J. No. 19, [2006] 1 S.C.R. 666, at paras. 94-96 (S.C.C.); *R. v. Deruelle*, [1992] S.C.J. No. 69, [1992] 2 S.C.R. 663, at 675 (S.C.C.); *R. v. Chase*, [1987] S.C.J. No. 57, [1987] 2 S.C.R. 293, at 302-03 (S.C.C.); and *R. v. B.(G.) (No. 1)*, [1990] S.C.J. No. 59, [1990] 2 S.C.R. 3, at 28 (S.C.C.), where interpretations were rejected because they would unduly hamper the enforcement process.

27 *Ibid.*, at 82. See also *R. v. Bernshaw*, [1994] S.C.J. No. 87, [1995] 1 S.C.R. 254, at 290 (S.C.C.), where the Court rejected an interpretation that would have invalidated the alcohol consumption test if police officers waited to administer the test and equally if they didn't -- "an intolerable situation [which] would emasculate the statutory scheme ... "

28 See, for example, *R. v. Fitzgibbon*, [1990] S.C.J. No. 45, [1990] 1 S.C.R. 1005, at 1017 (S.C.C.) (proposed interpretation rejected because it "would severely limit the role of the sentencing judge which is so valid to the administration of criminal law"); *R. v. Thompson*, [1990] S.C.J. No. 104, [1990] 2 S.C.R. 1111, at 1172 (S.C.C.) (proposed interpretation rejected because it "would presuppose that a judge would exercise his discretion to issue a renewal when satisfied that it was not in the best interests of justice to do so").

29 See, for example, Cory J. in *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) (rejecting an interpretation because it would render the concept in question too vague and open-ended); McLachlin J. in *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, at 1412-13 (S.C.C.) (rejecting proposed interpretation because it would require courts or juries to make determinations on questions of morality that they are not in a position to make); see also *Pfizer Co. v. Deputy M.N.R.*, [1975] S.C.J. No. 126, [1977] 1 S.C.R. 456, at 461-62 (S.C.C.) (rejecting proposed interpretation because it would create a slippery slope).

30 See, for example, *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41, [1992] 1

S.C.R. 986, at 1005 (S.C.C.) *per* Iacobucci J.: "Given that the employer has attempted, whether deliberately or not, to frustrate the intention of the legislature, it would indeed be perverse to allow the employer to avail itself of legislative provisions intended to protect employees, so as to deny the employees their common law right ... " See also *Canada (M.N.R.) v. Crown Forest Industries*, [1995] S.C.J. No. 56, [1995] 2 S.C.R. 802, at 826-27 (S.C.C.).

31 See, for example, *Rawluk v. Rawluk*, [1990] S.C.J. No. 4, [1990] 1 S.C.R. 70, at 107, 110-11 (S.C.C.), *per* McLachlin J. dissenting (proposed interpretation rejected because it would add uncertainty and promote litigation featuring detailed inquiries into matters difficult to prove and it might upset the operation of other legal doctrines). See also *C.B.C. v. Canada (Labour Relations Board)*, [1995] S.C.J. No. 4, [1995] 1 S.C.R. 157, at 182 (S.C.C.), where majority rejected an interpretation lest "virtually every unfair labour practice complaint under this section ... would be subject to review by the courts on a standard of correctness."

32 [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031, at para. 65 (S.C.C.).

33 [2011] S.C.J. No. 23, 2011 SCC 23, [2011] 2 S.C.R. 175 (S.C.C.).

34 For discussion of legal fictions and presumptions created by deeming provisions, see Chapter 4, at §4.106, 4.114.

35 *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, [2011] S.C.J. No. 23, 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 119 (S.C.C.).

36 *Ibid.*, at para. 118. See also *Quebec (Attorney General) v. Canada*, [2011] S.C.J. No. 11, 2011 SCC 11, at paras. 41-42 (S.C.C.); *Skoke-Graham v. R.*, [1985] S.C.J. No. 6, [1985] 1 S.C.R. 106, at 119 (S.C.C.); *Bank of Montreal v. 100875 P.E.I. Inc.*, [2014] P.E.I.J. No. 32, 2014 PECA 12, at paras. 77, 81 (P.E.I.C.A.); *Ambrosi v. British Columbia (Attorney General)*, [2014] B.C.J. No. 588, 2014 BCCA 123, at para. 56 (B.C.C.A.); *4053532 Canada inc. c. Longueuil (Ville de)*, [2013] J.Q. no 10423, 2013 QCCA 1428, at para. 62 (Que. C.A.), leave to appeal refused [2013] S.C.C.A. No. 429 (S.C.C.); *Blue Mountain Resorts Ltd. v. Bok*, [2013] O.J. No. 520, 2013 ONCA 75, at paras. 33-44 (Ont. C.A.); *Keizer v. Slauenwhite*, [2010] N.S.J. No. 650, at paras. 77, 79 (N.S.S.C.), affd [2012] N.S.J. No. 89, 2012 NSCA 20 (N.S.C.A.); *Hagen v. Insurance Corporation of British Columbia*, [2011] B.C.J. No. 415, 2011 BCCA 124, at paras. 20-23 (B.C.C.A.); *Gill v. Canada (Attorney General)*, [2010] F.C.J. No. 896, 2010 FCA 182, at paras. 39-40 (F.C.A.).

37 [2009] S.C.J. No. 50, 2009 SCC 50, [2009] 3 S.C.R. 309 (S.C.C.).

38 R.S.C. 1985, c. 47 (4th Supp.).

39 *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] S.C.J. No. 50, 2009 SCC 50, [2009] 3 S.C.R. 309, at paras. 41-42 (S.C.C.).

CARSWELL

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

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7:1700 The Doctrine of Legitimate Expectations

The "doctrine of legitimate expectations," has been recognized as a discrete category in which participatory rights are protected by the courts as a matter of fairness.[102] As well, the doctrine may be addressed by the courts as one factor in determining the content of the duty of fairness.[103] It has been defined as follows:

> Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty.[104]

7:1710 *The Nature of a Legitimate Expectation*

The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor.[105] Thus, a legitimate expectation may result from an official practice[106] or assurance[107] that certain procedures will be followed

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[102] The legitimate expectation doctrine was first recognized by the Supreme Court of Canada as an independent source of participatory rights in ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)***, [1990] 3 S.C.R. 1170 at para. 74. **See also** *Araia v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 832 at para. 27; *El-Helou v. Canada (Courts Administration Service)*, 2012 FC 1111 at para. 83 (unfair to promise opportunity to respond to findings and not to follow through); ***Canada (Attorney General) v. Mavi,*** 2011 SCC 30; ***Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*** (2001), 200 D.L.R. (4th) 193 (SCC) at para. 16; *Bow Valley Naturalists Society v. Alberta (Minister of Environmental Protection)*, [1996] 2 W.W.R. 749 (Alta. Q.B.) at para. 38 (no expectation of further participation created).

[103] See topic 7:3500, *post*.

[104] ***Canada (Attorney General) v. Mavi***, [2011] 2 S.C.R. 504, *per* Binnie J. at para. 68.

[105] ***Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)***, 2013 SCC 36 at para. 95.

[106] E.g. ***Campbell v. Workers' Compensation Board,*** 2012 SKCA 56 at para. 76 (board published policy to hold hearing if requested); *Schwarz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)* (2001), 32 Admin. L.R. (3d) 113 (FCTD) at para. 31; *Alberta (Energy Resources Conservation Board) v. Sarg Oils Ltd.* (1998), 14 Admin. L.R. (3d) 128 (Alta. Q.B.) at para. 188. **And see** *H. Coyne & Sons Ltd. v. Yukon*, 2014 YKSC 13 at para. 29; *North End Community Health Assn. v. Halifax (Regional Municipality)*, 2012 NSSC 330 at para. 53 (expectation is that council will follow the procedures it has put in

as part of the decision-making process, or that a positive decision can be anticipated.[108] As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed.[109] Of course, the practice or conduct said to give rise to the reasonable expectation must be clear,

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place) rev'd on basis that substantial compliance is sufficient ***Jono Developments Ltd. v. North End Community Health Assn. (appeal by Jono Developments Ltd.)***, 2014 NSCA 92; ***Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*** (2004), 241 D.L.R. (4th) 83 (SCC) at para. 10.

[107] E.g. *Khadr v. Canada (Prime Minister)* (2010), 321 D.L.R. (4th) 413 (FC) at paras. 65, 70; *Taticek v. Canada (Attorney General)*, 2009 FC 366 (investigator had promised to forward draft report and other information); *Small v. New Brunswick (Minister of Education)*, 2008 NBQB 201 at para. 25; *Worthington v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C. 409 (letter promising to request further information if necessary); *Greenisle Environmental Inc. v. Prince Edward Island* (2005), 33 Admin. L.R. (4th) 91 (PEISC) (legitimate expectation created that decision would be rendered in accordance with Regulations in place at time of application); *Martins v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 189 (letter gave rise to reasonable expectation); *Basudde v. Canada (Attorney General)*, 2002 FCT 782 at para. 46 (expectation of further consultation created); ***C.U.P.E. v. Ontario (Minister of Labour)*** (2000), 51 O.R. (3d) 417 (Ont. C.A.) (letter of commitment to continue practice), aff'd on other grounds 2003 SCC 29. **Compare** *Halcrow v. Canada (Attorney General)* (2003), 236 F.T.R. 65 (FCTD); *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)* (2001), 273 N.R. 52 (FCA) (consultation adequate; no legitimate expectation that all documents would be disclosed); *Rhodes v. U.F.C.W., Local 330W* (2000), 145 Man. R. (2d) 147 (Man. C.A.), aff'g [1999] M.J. No. 139 (Man. Q.B.) (legitimate expectation of oral hearing probably raised, but reconsideration of decision cured any breach); *Toronto Independent Dance Enterprise v. Canada Council* (1989), 38 Admin. L.R. 231 (FCTD) (past renewals of an annual grant created no legitimate expectation of a further renewal).

[108] See topic 7:1700, *post.*

[109] ***Canada (Attorney General) v. Mavi,*** 2011 SCC 30; *Taser International, Inc. v. British Columbia (Commissioner)* (2010), 321 D.L.R. (4th) 619 (BCSC) (procedures followed; fairness met); *Brar v. Calgary (City)* (2006), 403 A.R. 270 (Alta. Q.B.), rev'd on other grounds 2006 ABCA 396; *Brunico Communications Inc. v. Canada (Attorney General)* (2004), 14 Admin. L.R. (4th) 92 (FC), suppl. reasons 2004 FC 1306; *Gale v. Canada (Treasury Board)* (2004), 10 Admin. L.R. (4th) 304 (FCA) (procedure for receipt of evidence); *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 19 Admin. L.R. (2d) 69 (FCTD); *Oxford v. Corner Brook/Deer Lake/St. Barbe School District No. 3* (1997), 481 A.P.R. 299 (Nfld. S.C.) (school closure); **and see discussion** in *Klahoose First Nation v. British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 59 (BCSC); *Watson v. Saskatchewan (General Insurance Council)* (1997), 156 Sask. R. 267 (Sask. Q.B.). **But see *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)***, [1990] 3 S.C.R. 1170, where the Court expressed a reluctance to hold the municipality to a procedure promised by a municipal committee, when the statutory procedural code already provided ample opportunities for participation in the decision-making process.

unambiguous and unqualified.[110] One court has said that two criteria must be satisfied before the doctrine applies: a binding understanding to follow set procedures, and the fact that the understanding in question must not conflict with the tribunal's statutory duty.[111]

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[110] ***Mavi v. Canada (Attorney General),*** 2011 SCC 30 at para. 68; ***C.U.P.E. v. Ontario (Minister of Labour)***, 2003 SCC 29 at para.131 *per* Binnie, J.; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2002), 62 O.R. (3d) 305 (Ont. C.A.) at para. 83, aff'd without reference to point 2004 SCC 54. **And see e.g.** *Mudalige Don v. Canada (Minister of Citizenship and Immigration),* 2014 FCA 4 at paras. 55-8 (guidelines did not make unambiguous representation); *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers,* 2014 BCSC 903 at para. 48; *MacDonald v. Alberta Health Services,* 2013 ABQB 404 (no evidence of any representations); *Campbell v. Workers' Compensation Board,* 2009 SKQB 275 (no clear right to oral hearing) at para. 46; *R.K. Heli-Ski Panaorama Inc. v. Jumbo Glacier Resort Project* (2007), 54 Admin. L.R. (4th) 291 (BCCA) at para. 46*ff* (no representation that previous consultation process would be followed); *Friends of the Regina Public Library Inc. v. Regina (Public Library Board)* (2004), 13 Admin. L.R. (4th) 244 (Sask. Q.B.) (no clear and unambiguous representation), aff'd (2004), 254 Sask. R. 4 (Sask. C.A.); *Eiba v. Canada (Attorney General),* [2004] 3 F.C.R. 416 (FC) (no "usual practice" that commissioner inform applicant that request and payment had not been received); *F. Hoffmann-La Roche AG v. Canada (Commissioner of Patents),* [2004] 2 F.C.R. 405 (FC) ("general practice" of delivering notice when deadline missed insufficient to create legitimate expectation), aff'd (2005), 344 N.R. 202 (FCA); *Halcrow v. Canada (Attorney General)* (2003), 236 F.T.R. 65 (FCTD) (fiduciary obligation to consult not established); *Humber Heights of Etobicoke Ratepayers Inc. v. Toronto District School Board* (2003), 171 O.A.C. 21 (Ont. Div. Ct.) (no regular practice or promise of consultation); *Jang v. Canada (Minister of Citizenship and Immigration)* (2001), 278 N.R. 172 (FCA) (expectation neither reasonable nor legitimate); *S.G.E.U. v. McKenzie* (1991), 1 Admin. L.R. (2d) 284 (Sask. Q.B.), where it was held that the practice must be clearly established. **See also** *Elderkin v. Nova Scotia (Minister of Service Nova Scotia and Municipal Relations),* 2012 NSSC 61 at para. 73, aff'd 2013 NSCA 79; *Tahmourpour v. Canada (Royal Canadian Mounted Police),* 2012 FC 378 at para. 27 (no representation that a further oral hearing would be held), aff'd 2013 FCA 3; *Burton v. Canada (Minister of Public Safety and Emergency Preparedness),* 2012 FC 727 at para. 24 (representation was qualified); ***Baker v. Canada (Minister of Citizenship and Immigration)*** (1999), 174 D.L.R. (4th) 193 (SCC) (no legitimate expectation created by international convention); *Attaran v. University of British Columbia* (1998), 4 Admin. L.R. (3d) 44 (BCSC) (no legitimate expectation created); *Pollard v. Surrey (District)* (1992), 7 M.P.L.R. (2d) 213 (BCSC), aff'd (1993), 14 M.P.L.R. (2d) 121 (BCCA), leave to appeal to SCC ref'd (1993), 22 M.P.L.R. (2d) 155(n) (no expectation was held to have been created); *Sierra Club of Western Canada v. British Columbia (Attorney General)* (1991), 83 D.L.R. (4th) 708 (BCSC), aff'd (June 2, 1992), Doc. CA014516 (BCCA) (no expectation created concerning granting of tree-cutting permit); *Giesbrecht Dairies Ltd. v. British Columbia (Milk Board)* (1993), 91 B.C.L.R. (2d) 395 (BCCA) (no expectation of hearing prior to reduction in milk quota); *Atlantic Coast Scallop Fisherman's Assn. v. Canada (Minister of Fisheries)* (1996), 116 F.T.R. 81 (FCTD) (no evidence of undertaking by minister or by officials on his behalf); *Thin Ice v. Winnipeg (City)* (1995), 29 M.P.L.R. (2d) 201 (Man. Q.B.) (no expectation of consultation concerning amendment of bylaw); *Union of Nova Scotia Indians v. Canada (Attorney General)* (1996), 122 F.T.R. 81 (FCTD) (no expectation of consultation as to environmental concerns).

[111] *Addy v. Canada (Commissioner and Chair, Commission of Inquiry into Deployment of Canadian Forces in Somalia),* [1997] 3 F.C. 784 (FCTD). **See also** *Kennedy v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 920.

7:1720 *The Rationale for the Doctrine of Legitimate Expectations*

The principal rationale for holding an administrative agency to its procedural undertakings, rules or past practice is that individuals are entitled to expect that governmental bodies will honour the undertakings they have given, either expressly or by implication, particularly where there has been reliance on them.[112] Secondly, when procedures have been adopted or practices established, it would amount to arbitrary conduct for an agency to fail to comply with them in some material respect, since amendments to rules should generally be prospective in operation.[113]

7:1730 *Limitations on the Legitimate Expectations Doctrine*

There are, however, some limitations to the application of the doctrine of legitimate expectations. Apart from the obvious limitation that the conduct of officials cannot commit them to procedures that are unlawful or outside of their statutory authority,[114] the Supreme Court of Canada in the *Canada Assistance Plan* case[115] has stated that the doctrine does not apply to the exercise of "legislative" power.[116] As

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[112] E.g. *Watson v. Saskatchewan (General Insurance Council)* (1997), 156 Sask. R. 267 (Sask. Q.B.); *Oxford v. Corner Brook/Deer Lake/St. Barbe School District No. 3* (1997), 481 A.P.R. 299 (Nfld. S.C.); *Furey v. Conception Bay Centre Roman Catholic School Board* (1993), 17 Admin. L.R. (2d) 46 (Nfld. C.A.); **see also** *Shooters Sports Incorporated v. Nova Scotia (Liquor Licence Board)* (1996), 153 N.S.R. (2d) 247 (NSSC); *Canada (Attorney General) v. Moore* (1998), 160 F.T.R. 233 (FCTD) (no detriment). **Compare** *Sunshine Coast Parents for French v. Sunshine Coast School District No. 46* (1990), 44 Admin. L.R. 252 (BCSC), which would seem to inappropriately restrict the application of the doctrine. If rules exist, they must be adhered to whether or not the individual is aware of their existence and there would seem to be no obvious reason why practices or conduct that establish procedures ought to be treated differently.

[113] L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964). **See also** *Watson v. Saskatchewan (General Insurance Council)* (1997), 156 Sask. R. 267 (Sask. Q.B.).

[114] See e.g. *Addy v. Canada (Commissioner and Chair, Commission of Inquiry into Deployment of Canadian Forces in Somalia)*, [1997] 3 F.C. 784 (FCTD); *Lidder v. Canada (Minister of Employment & Immigration)* (1992), 136 N.R. 254 (FCA); **see also** *Escamilla v. Canada (Solicitor General)* (1993), 22 Imm. L.R. (2d) 94 (FCTD). **And see** *Immeubles Jacques Robitaille inc. v. Québec (City)*, 2014 SCC 34 (estoppel in a public law context cannot operate in the face of a clear legislative provision).

[115] ***Reference re Canada Assistance Plan (Canada)***, [1991] 2 S.C.R. 525; **see also** *Pharmaceutical Manufacturers Assn. of Canada v. British Columbia (Attorney General)* (1997), 2 Admin. L.R. (3d) 71 (BCCA) at para. 36 (no duty of fairness in relation to policy as to expenditure of funds; *British Columbia (Egg Marketing Board) v. British Columbia (Marketing Board)* (1991), 57 B.C.L.R. (2d) 369 (BCSC) (amendment of federal-provincial marketing agreement).

[116] This decision, however, dealt with the enactment of legislation directly by the

well, it has been held that the doctrine of reasonable expectations cannot create substantive rights.[117] Accordingly, an applicant cannot succeed on the merits on the basis of a breach of the doctrine.[118]

Parliament of Canada and not with the enactment of delegated legislation by ministers, independent agencies or municipalities which is not subject to the same constitutional principles. Nevertheless, there is authority in Canada for excluding the exercise of delegated legislative power from a duty of fairness even where there may be reasonable expectations: **see** *Czerwinski v. Mulaner*, 2007 ABQB 536 at para. 32; *Treaty Seven First Nations v. Canada (Attorney General)* (2003), 230 F.T.R. 53 (FCTD); *Treaty Eight First Nations v. Canada (Attorney General)* (2003), 236 F.T.R. 65 (FCTD); *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 18 M.P.L.R. (2d) 146 (Alta. Q.B.), aff'd (1994), 23 M.P.L.R. (2d) 78 (Alta. C.A.), leave to appeal to SCC ref'd (1995), 27 M.P.L.R. (2d) 98(n) (bylaws of general application not subject to the legitimate expectation doctrine when passed in breach of clear procedural undertakings on which individuals had relied). **See also** *Halcrow v. Canada (Attorney General)* (2003), 236 F.T.R. 65 (FCTD); *Aasland v. British Columbia (Ministry of Environment, Lands and Parks)* (1999), 19 Admin. L.R. (3d) 154 (BCSC); *Animal Alliance of Canada v. Canada (Attorney General)*, [1999] 4 F.C. 72 (FCTD); *Apotex Inc. v. Canada (Attorney General)*, [1997] 1 F.C. 518 (FCTD), aff'd [2000] F.C.J. No. 634 (FCA) (but see *dicta* of Evans J.). As to legislative power generally, **see** topics 1:2220, 7:2330, *ante*.

[117] ***Moreau-Bérubé v. New Brunswick (Judicial Council)***, 2002 SCC 11; **see also** *Varadi v. Canada (Attorney General)*, 2017 FC 155 at paras. 46-7; *Nshogoza v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1211 at para. 40; *Giffen v. Ontario (Minister of Transportation)*, 2013 ONSC 7461 (Ont. Div. Ct) at para. 48; ***Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)***, 2013 SCC 36 at para. 97; *Paradise Active Healthy Living Society v. Nova Scotia (Attorney General)*, 2013 NSCA 9 at para. 27; *Skypower CL 1 LP v. Ontario (Minister of Energy)*, 2012 ONSC 4979 at para. 64; *South Yukon Forest Corp. v. Canada*, 2012 FCA 165 at para. 79; *C.-W. (C.) v. Ontario Health Insurance Plan (General Manager)* (2009), 95 O.R. (3d) 48 (Ont. Div. Ct.) at para. 81; *Johnston Canyon Co. v. Canada (Attorney General)*, 2009 FCA 219 (renewal of lease was substantive issue; no breach by Minister in refusal to renew) at paras. 32*ff*; *Vietnamese Association of Toronto v. Toronto (City)* (2007), 85 O.R. (3d) 656 at para. 25 (Ont. Div. Ct.); ***dela Fuente v. Canada (Minister of Citizenship and Immigration)*** (2006), 350 N.R. 362 (FCA) at para. 19 (doctrine cannot be used to counter Parliament's clearly expressed intent); *Air Canada Pilots Assn. v. Air Line Pilots Assn.* (2005), 330 N.R. 331 (FCA) at para. 22 (parties had explicitly agreed decision not reviewable by board; no substantive legitimate expectations arose); *St. Anthony Seafoods Ltd. Partnership v. Nfld. & Lab. (Minister of Fisheries and Aquaculture)* (2003), 677 A.P.R. 310 (Nfld. & Lab. S.C.), rev'd on other grounds (2004), 245 D.L.R. (4th) 597 (Nfld. & Lab. C.A.); ***Ahani v. Canada (Attorney General)*** (2002), 208 D.L.R. (4th) 66 (Ont. C.A.) at para. 59, leave to appeal to SCC filed Mar. 4, 2002; *Cook v. Alberta (Minister of Environmental Protection)* (2001), 207 D.L.R. (4th) 668 (Alta. C.A.) at para. 32; ***Libbey Canada Inc. v. Ontario (Ministry of Labour)*** (1999), 42 O.R. (3d) 417 at p. 434 (Ont. C.A.); *Lidder v. Canada (Minister of Employment & Immigration)* (1992), 136 N.R. 254 (FCA); *Pollard v. Surrey (District)* (1992), 7 M.P.L.R. (2d) 213 (BCSC), aff'd (1993), 14 M.P.L.R. (2d) 121 (BCCA), leave to appeal to SCC ref'd (1993), 22 M.P.L.R. (2d) 155(n); *Ludco Enterprises Ltd. / Enterprises Ludco Ltée v. R.*, [1995] 2 F.C. 3 (FCA), leave to appeal to SCC ref'd (1995), 97 N.R. 318(n); *Huseyinov v. Canada (Minister of Employment & Immigration)* (1994), 174 N.R. 233 (FCA); *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (1991), 2 O.R. (3d) 716 (Ont. Div. Ct.), leave to appeal to CA ref'd (1991), 4 Admin. L.R. (2d) 226; *Ontario Nursing Home Assn. v. Ontario* (1990), 72 D.L.R. (4th) 166 (Ont. H.C.J.), where a "gentlemen's agreement" by a senior government official was held not to bind the government. **And see discussion** in ***Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*** (2001), 200 D.L.R. (4th) 193 (SCC) *per* Binnie J.

However, if the conduct of officials gives rise to the legitimate expectation that discretion will be exercised in favour of an individual, this may attract the duty of fairness, or enhance the content of the procedural rights beyond those that the common law would otherwise have granted.[119] Similarly, a representation that particular factors would be considered in the exercise of discretion will enable a court to review the reasonableness of the decision by reference to those factors.[120]

7:1740 *Failure to Comply With Reasonable Expectations*

It will be a breach of the duty of fairness for the decision-maker to fail, *in a substantial way*[121] to meet the procedural standards that it

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[118] E.g. *NorChris Holdings Inc. v. Sturgeon (County)*, 2013 ABQB 184 at para. 111; *Mohagheghzadeh v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 533 at para. 9, ref'g to ***Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)***, 2001 SCC 41 at para. 35.

[119] ***Baker v. Canada (Minister of Citizenship and Immigration)*** (1999), 174 D.L.R. (4th) 193 at p. 214 (SCC). **Contrast** ***Minister for Immigration & Ethnic Affairs v. Teoh*** (1995), 128 A.L.R. 353 (H.C.A.) (deportee entitled to be informed that official intended to depart from treaty obligation to exercise powers in the best interests of children). For other cases where the doctrine of legitimate expectations has had a "substantive aspect," **see** *N. (R.) (Litigation Guardian of) v. Ontario (Minister of Community, Family and Children's Services)* (2004), 70 O.R. (4th) 420 (Ont. Div. Ct.) (applicants led to believe during meetings that proposals would be accepted); *Chan v. Canada (Minister of Citizenship and Immigration)* (1999), 173 F.T.R. 254 (FCTD); *Gingras v. Canada*, [1990] 2 F.C. 68 (FCTD), rev'd in part, [1994] 2 F.C. 734 (FCA); *Said v. Canada (Minister of Employment & Immigration)* (1992), 6 Admin. L.R. (2d) 23 (FCTD); *Bendahmane v. Canada (Minister of Employment & Immigration)* (1989), 61 D.L.R. (4th) 313 (FCA); *Demirtas v. Canada (Minister of Employment & Immigration)* (1991), 47 F.T.R. 139 (FCTD), rev'd (1992), 59 F.T.R. 319(n) (program under which refugee claims would be dealt with). **But see** *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1802 (discretion of removals officer to grant deferral very limited; not overridden by legitimate expectations doctrine); *Peralta v. Canada (Minister of Citizenship & Immigration)* (1996), 122 F.T.R. 153 (FCTD). **See also** *Gill v. Canada (Minister of Employment & Immigration)* (1991), 50 F.T.R. 37 (FCTD); *Cortez v. Canada (Minister of Employment & Immigration)* (1992), 54 F.T.R. 52 (FCTD); *Dee v. Canada (Minister of Employment & Immigration)* (1991), 83 D.L.R. (4th) 371 (FCA), leave to appeal to SCC ref'd (1992), 86 D.L.R. (4th) viii(n); *Owusu v. Canada (Minister of Employment & Immigration)* (1991), 50 F.T.R. 244 (FCTD); *Naredo v. Canada (Minister of Employment & Immigration)* (1990), 37 F.T.R. 161 (FCTD), aff'd (1995), 184 N.R. 352 (FCA), leave to appeal to SCC ref'd (1996), 198 N.R. 397(n). **And see** M. Allars, "One Small Step For Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case & the Internationalisation of Administrative Law" (1995) 17 *Syd. L. Rev.* 204.

[120] *Gonzalez v. Canada (Minister of Citizenship and Immigration)* (2000), 6 Imm. L.R. (3d) 33 (FCTD).

[121] E.g. ***Jono Developments Ltd. v. North End Community Health Assn. (appeal by Jono Developments Ltd.)***, 2014 NSCA 92 at paras. 94 and 108; *Fisher Park Residents Assn. v. Ottawa (City) Board of Education* (1986), 33 D.L.R. (4th) 411 (Ont. H.C.J.); *Gillingham v. Corner Brook/Deer Lake/St. Barbe School District No. 3)* (1998), 521 A.P.R. 1 (Nfld. S.C.).

had promised in its assurance,[122] intimated by its conduct,[123] prescribed in its rules[124] or policy,[125] or followed in its previous

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[122] E.g. *T.E.A.M. Inc. v. Manitoba Telecom Services Inc.* (2010), 248 Man. R. (2d) 31 (Man. Q.B.); *Taticek v. Canada (Attorney General),* 2009 FC 366; *Sadykbaeva v. Canada (Minister of Citizenship and Immigration)* (2008), 336 F.T.R. 51 (FC) (letter had indicated test would be written one) at para. 23; *Manitoba Heavy Construction Assn. v. Winnipeg (City)* (2000), 152 Man. R. (2d) 35 (Man. Q.B.); *Pachkov v. Canada (Minister of Citizenship and Immigration)* (2000), 191 F.T.R. 91 (FCTD); *Coughlan v. WMC International Ltd.*, [2000] O.J. No. 5109 (Ont. Div. Ct.); *Watson v. Saskatchewan (General Insurance Council)* (1997), 156 Sask. R. 267 (Sask. Q.B.); *Shankaran v. Canada (Minister of Citizenship and Immigration)* (1997), 130 F.T.R. 201 (FCTD); *Gaw v. Canada (Commissioner of Corrections)* (1986), 19 Admin. L.R. 137 (FCTD) (procedure to be followed at investigative stage of disciplinary process); **and see** *Pulp, Paper & Woodworkers of Canada, Local 8 v. Canada (Minister of Agriculture)* (1991), 50 F.T.R. 43 (FCTD), aff'd (1994), 174 N.R. 37 (FCA), where a breach of a promise by *A* to *B* that *A* would consult *C* before taking action adverse to *B* was held a violation of the duty of fairness owed by *A* to *B*. **See also** *Badejo v. Canada (Minister of Citizenship and Immigration)* (2000), 198 F.T.R. 66 (FCTD) (court accepted that visa officer had undertaken to contact doctor); *Central Kootenay (Regional District) v. Canada* (1990), 39 F.T.R. 60 (FCTD); *Mercier-Neron v. Canada (Minister of National Health & Welfare),* [1995] F.C.J. No. 1024 (FCTD). **And see discussion in** *Apotex Inc. v. Canada (Attorney General),* [2000] F.C.J. No. 634 (FCA) *per* Evans J.A. (Regulation-making context), foll'd *Halcrow v. Canada (Attorney General)* (2003), 236 F.T.R. 65 (FCTD).

[123] Thus, when an agency *voluntarily* affords an opportunity to participate in its decision-making process, or considers a claim that it was not obliged to consider, it may thereby attract the duty of fairness to its conduct: **see e.g.** *Bennett v. Wilfrid Laurier University* (1983), 15 Admin. L.R. 42 (Ont. Div. Ct.), aff'd (1984), 15 Admin. L.R. 49 (Ont. C.A.).**And see further e.g.** *Zaki v. Ontario College of Physicians and Surgeons*, 2017 ONSC 1613 (Ont. Div. Ct.) (having provided one report created expectation that subsequent reports would be provided); ***Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*** (2004), 241 D.L.R. (4th) 83 (SCC) at para. 10 (legitimate expectation of fair process of decision). And once having commenced or committed to provide procedural fairness, the administrative actor must follow through: **e.g.**: *Pascal v. Canada (Citizenship and Immigration)*, 2017 FC 595 (having requested further documentation, error to decide before documents received); *Otjes v. General Supplies* (1964), 47 D.L.R. (2d) 189 (Alta. S.C.); *Weston v. Ontario (Chiropody (Podiatry) Review Committee)* (1980), 29 O.R. (2d) 129 (Ont. C.A.); *O'Brien v. Canada (National Parole Board)* (1984), 12 Admin. L.R. 249 (FCTD) (voluntary in-person hearing held to consider application by inmate for temporary unescorted absence); **see also** *Atlantic Shrimp Co., div. of Clearwater Seafoods v. Newfoundland and Labrador (Lab. Rel. Board)* (2006), 258 Nfld. & P.E.I.R. 170 (Nfld. & Lab. S.C.); *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works & Government Services),* [1995] 2 F.C. 694 (FCA) where the doctrine was applied in the tendering context.

[124] E.g. *Khadr v. Canada (Attorney General)* (2006), 268 D.L.R. (4th) 303 (FC) (issuance of passport); *Gilchrist v. Canada (Treasury Board)* (2005), 281 F.T.R. 135 (FC); *Brunico Communications Inc. v. Canada (Attorney General)* (2004), 252 F.T.R 146 (FC), suppl. reasons 2004 FC 1306; *Ross v. Avon Maitland District School Board* (2000), 45 Admin. L.R. (3d) 178 (Ont. Sup. Ct. J.); *Edison v. The Queen* (2001), 208 F.T.R. 58 (FCTD) (legitimate expectation that any review of a decision would be made independently of first one); *Hammond v. Assn. of British Columbia Professional Foresters* (1991), 47 Admin. L.R. 20 (BCSC); *Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3d) 737 (Ont. Div. Ct.); *Stumbillich v. Ontario (Health Disciplines Board)* (1983), 7 Admin. L.R. 184 (Ont. Div. Ct.), aff'd (1984), 8 Admin. L.R. 321 (Ont. C.A.), leave to appeal to SCC ref'd (1985), 6 O.A.C. 399; *Dion v. Cyr* (1993), 18 Admin. L.R. (2d) 86 (NBQB).

practice.[126] That does not mean, however, that an agency should be held to some higher standard of procedural propriety whenever it extends some latitude not provided for in its rules of procedure. For instance, to permit a person to be represented by a lawyer at a meeting, when legal representation was not guaranteed by either the body's rules or the duty of fairness, will not attract all the incidents of a formal adjudicative hearing.[127]

7:2000 THE SCOPE OF THE DUTY OF FAIRNESS

7:2100 Introduction

In *Cardinal v. Kent Institution,*[128] Le Dain J. defined the scope of the duty of fairness as follows:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or

(Continued on page 7 - 29)

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[125] *Czerwinski v. Mulaner*, 2007 ABQB 536 at para. 38.

[126] *Smith v. Canada (Attorney General)* (2009), 307 D.L.R. (4th) 395 (FC) (government's reversal of position on clemency support for those subject to death penalty abroad violated legitimate expectations and procedural fairness); *Brunico Communications Inc. v. Canada (Attorney General)* (2004), 14 Admin. L.R. (4th) 92 (FC) (applicant had legitimate expectation that minister would make decisions based on own published guide, not subsequent revision of it), suppl. reasons 2004 FC 1306; *Aurchem Exploration Ltd. v. Canada* (1992), 7 Admin. L.R. (2d) 168 (FCTD); *MacDonald v. New Brunswick School District No. 18* (1993), 141 N.B.R. (2d) 81 (NBQB); ***Council of Civil Service Unions v. Minister for the Civil Service***, [1985] A.C. 374 (H.L.).

[127] *Roper v. Royal Victoria Hospital Medical Board*, [1975] 2 S.C.R. 62.

[128] ***Cardinal v. Kent Institution***, [1985] 2 S.C.R. 643. **See also *Dunsmuir v. New Brunswick (Board of Management)***, 2008 SCC 9 at para. 88.

Ontario

Energy Consumer Protection Act, 2010

S.O. 2010, CHAPTER 8

Historical version for the period December 3, 2015 to December 31, 2016.
Last amendment: 2015, c. 29, s. 1-6.

CONTENTS [–]

PART I
GENERAL

Definitions and powers of Minister

Definitions

1. (1) In this Act,

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

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

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

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

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

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

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

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

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

Powers of Minister

(2) The Minister may,

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

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

Delegation of powers

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

Same

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

Powers and duties of Board re energy consumers

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

Definition, energy consumer

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

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

PART II
ELECTRICITY RETAILING AND GAS MARKETING

Definitions

2. In this Part,

"consumer" means,

(a) in respect of the retailing of electricity, a person who uses, for the person's own consumption, electricity that the person did not generate and who annually uses less than the prescribed amount of electricity, and

(b) in respect of gas marketing, a person who annually uses less than the prescribed amount of gas; ("consommateur")

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

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

"gas marketer" means a person who,

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

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

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

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

"retail", with respect to electricity, means,

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

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

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

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

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

"salesperson" means,

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

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

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

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

Application

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

Contracts, other agreement or waivers to contrary

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

Limitation on effect of term requiring arbitration

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

Procedure to resolve disputes

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

Settlements or decisions

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

Non-application of *Arbitration Act, 1991*

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

Class proceedings

4. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a contract, other agreement or waiver despite any term or acknowledgment in the contract, agreement or waiver that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding. 2010, c. 8, s. 4 (1).

Procedure to resolve dispute

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

Settlements or decisions

(3) A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning a contract or agreement to which this Part does not apply. 2010, c. 8, s. 4 (3).

Non-application of *Arbitration Act, 1991*

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

Rights of consumers preserved

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

Conflict

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

Interpretation: ambiguities to benefit consumers

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

Interpretation, in writing

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

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

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

Same, provision of information or document in writing

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

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

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

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

Same, information or document in non-electronic form

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

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

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

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

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

Same, signing a document

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

Signature, touching or clicking on an icon

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

Intent

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

Use of electronic document or information not mandatory

(7) Nothing in this Part requires a consumer who uses, provides or accepts information or a document to use, provide or accept it in an electronic form without the consumer's consent. 2010, c. 8, s. 7 (7).

Use of electronic signature not mandatory

(8) Nothing in this Part requires a consumer who uses, provides or accepts a document to sign the document by way of an electronic signature without the consumer's consent. 2010, c. 8, s. 7 (8).

Implied consent

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

Payments

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

Disclosure of information

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

Delivery of document

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

Manner of determining prices re contracts retailing electricity

9. In the case of a contract with a consumer with respect to retailing of electricity, the retailer shall determine the price it charges for electricity in the manner and in accordance with the requirements that may be prescribed. 2010, c. 8, s. 9.

Note: On January 1, 2017, the day named by proclamation of the Lieutenant Governor, section 9 of the *Act* is repealed and the following substituted: (See: 2015, c. 29, s. 1)

Manner of determining prices re contracts

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

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

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

Same, gas

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

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

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

Conflict

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

Note: On January 1, 2017, the day named by proclamation of the Lieutenant Governor, the Act is amended by adding the following sections: (See: 2015, c. 29, s. 2)

Door-to-door sales

9.1 (1) No supplier shall,

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

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

Contract void

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

Exception, advertising and marketing

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

Advertising and marketing to consumers

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

Rules must be obeyed

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

Contract void

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

Remuneration

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

Unfair practices, prohibition

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

Same, suppliers

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

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

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

Contracts, in accordance with s. 12

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

Application

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

Classes or types of contracts

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

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

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

Prohibition re entering, etc., certain contracts

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

Contract not binding

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

Definition, account holder

(6) For the purposes of subsection (4),

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

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

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

Information required in contract

12. (1) A contract with a consumer shall,

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

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

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

(b) in the case of the retailing of electricity by a retailer and subject to such requirements as may be prescribed in accordance with clause (a),

Note: On January 1, 2017, the day named by proclamation of the Lieutenant Governor, clause 12 (1) (b) of the Act is amended by striking out "and subject to such requirements as may be prescribed in accordance with clause (a)" in the portion before subclause (i). (See: 2015, c. 29, s. 3 (1))

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

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

(c) in the case of gas marketing and subject to such requirements as may be prescribed in accordance with clause (a),

Note: On January 1, 2017, the day named by proclamation of the Lieutenant Governor, clause 12 (1) (c) of the Act is amended by striking out "and subject to such requirements as may be prescribed in accordance with clause (a)" in the portion before subclause (i). (See: 2015, c. 29, s. 3 (2))

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

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

Note: On January 1, 2017, the day named by proclamation of the Lieutenant Governor, section 12 of the Act is amended by adding the following subsection: (See: 2015, c. 29, s. 3 (3))

Conflict

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

Consumer acknowledgments and signatures

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

Information, etc., not permitted in contracts

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

Text-based copy of contract

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

Copy in prescribed form

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

Contract deemed void

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

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

Requirement of acknowledgment of receipt

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

Need for verification of contract

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

Persons not permitted to verify contract

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

Verification in accordance with regulations

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

Timing of verification

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

Consumer notice that contract not verified

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

Application of subss. (1) to (5)

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

Contract deemed void

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

Note: On January 1, 2017, the day named by proclamation of the Lieutenant Governor, subsection 16 (1) of the Act is amended by adding the following clause: (See: 2015, c. 29, s. 4)

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

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

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

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

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

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

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

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

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

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

(f) the prescribed circumstances apply. 2010, c. 8, s. 16 (1).

No cause of action

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

Refund within prescribed time

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

Consequences of contract being deemed to be void

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

Application of ss. 15 (1) to (5) and 16 (1) (c) and (e)

17. (1) Subsections 15 (1) to (5) and clauses 16 (1) (c) and (e) do not apply to the following contracts:

1. A contract negotiated and entered into as a result of a consumer contacting a supplier, unless the contact occurs within 30 days after the supplier contacts the consumer.
2. A contract entered into by a consumer's response to a direct mail solicitation from a supplier.
3. An internet agreement within the meaning of Part IV of the *Consumer Protection Act, 2002*. 2010, c. 8, s. 17 (1).

Same
(2) For the purpose of paragraph 1 of subsection (1), a supplier is deemed not to have contacted a consumer if the sole contact by the supplier is through the dissemination of an advertisement that is seen or heard by the consumer. 2010, c. 8, s. 17 (2).

Note: On January 1, 2017, the day named by proclamation of the Lieutenant Governor, section 17 of the Act is repealed. (See: 2015, c. 29, s. 5)

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

Application of subs. (1)
(2) Subsection (1) applies to,

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

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

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

Cancellation of contracts
Cancellation, cooling-off period
19. (1) A consumer may, without any reason, cancel a contract at any time from the date of entering into the contract until 10 days after,

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

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

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

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

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

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

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

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

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

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

No required form of cancellation
21. (1) Cancellation of a contract by a consumer pursuant to this Part may be expressed in any way, as long as it indicates the intention of the consumer to cancel the contract. 2010, c. 8, s. 21 (1).

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

Means of delivery

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

When given

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

When effective

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

Extended meaning of contract

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

Cancellation fees and other obligations

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

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

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

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

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

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

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

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

Refunds on cancellation

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

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

Same, s. 19 (2)

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

Same, s. 19 (4)

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

Return of pre-payment

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

Retailer to ensure reading of consumer's meter

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

Retailer responsible for additional costs

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

No cause of action for cancellation

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

Right of action in case of dispute

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

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

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

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

Action in Superior Court of Justice

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

Judgment

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

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

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

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

Same

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

Evidence

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

Waiver of notice

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

Review of Part II of Act

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

Report

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

PART III
SUITE METERING

Definitions

31. In this Part,

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

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

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

"multi-unit complex" means,

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

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

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

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

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

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

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

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

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

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

"unit" means,

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

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

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

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

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

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

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

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

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

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

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

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

Suite meter specifications

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

Definition, specifications

(2) In this section,

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

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

(b) properties or classes of properties, and

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

Requirements to take certain actions

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

Exclusive authority of Board

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

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

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

Installation of suite meters permitted

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

Installation of suite meters required

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

Same, condominiums

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

Use of suite meters for billing permitted

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

Use of meters for billing required

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

Use of meters prohibited

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

Energy efficiency, etc.

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

Priority over registered declaration

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

Requirement to provide information

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

No billing of consumer based on time of use

(7) A regulation made in respect of subsection (6) may provide that the suite meter provider shall not bill the consumer based on the consumption or use of electricity by the consumer in respect of the unit, if at the time of the billing there is outstanding non-compliance with subsection (6). 2010, c. 8, s. 34 (7).

PART IV
REGULATIONS

Regulations, general

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

Same

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

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

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

Same, Part II

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

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

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

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

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

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

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

Note: On January 1, 2017, the day named by proclamation of the Lieutenant Governor, clause 35 (3) (f) of the Act is amended by striking out “the price a retailer charges for electricity” and substituting “the price a supplier charges for electricity or gas”. (See: 2015, c. 29, s. 6 (1))

(g) governing unfair practices;

(h) governing consumer contracts;

Note: On January 1, 2017, the day named by proclamation of the Lieutenant Governor, subsection 35 (3) of the Act is amended by adding the following clause: (See: 2015, c. 29, s. 6 (2))

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Same, Part III

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

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

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

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

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

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

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

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

(iii) classes of properties or classes of consumers,

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

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

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

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

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

(iii) classes of properties or classes of consumers,

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

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

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

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

(ii) properties or classes of properties,

(iii) consumers or classes of consumers, and

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

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

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

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

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

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

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

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

(i) classes of properties and classes of consumers,

(ii) persons or classes of persons, and

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

Same, transition

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

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

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

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

Ontario

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

ONTARIO REGULATION 389/10

GENERAL

Historical version for the period June 24, 2016 to December 31, 2016.
Last amendment: O. Reg. 241/16.

This Regulation is made in English only.

CONTENTS [–]

43.	Smart meters and smart sub-meters

PART I
CONSUMER PROTECTION

Application and Interpretation

Application

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

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

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, subsection 1 (2) of the Regulation is amended by striking out "16" and substituting "17". (See: O. Reg. 241/16, s. 1)

Definitions

2. In this Part,

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

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

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

"account holder's agent" means,

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

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

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

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

(b) interest,

(c) penalties, and

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

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

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

"energy distributor" means a distributor or gas distributor;

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

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

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

Interpretation

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

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

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

(2) In this Part,

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

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

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

Amounts prescribed for purposes of definition of "consumer"

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

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

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

Unfair Practices

Unfair practice

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

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

   i. The provisions of a contract.

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

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

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

   iv.1 The requirements to qualify for financial assistance under the *Ontario Clean Energy Benefit Act, 2010*, including whether the consumer is entitled or may be entitled to the financial assistance,

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, subparagraph 1 iv.1 of section 5 of the Regulation is amended by striking out the portion before sub-subparagraph A and substituting the following: (See: O. Reg. 241/16, s. 2 (1))

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

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

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

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

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

B. any of the additional energy charges, or

C. any financial assistance to which the consumer is entitled under the *Ontario Clean Energy Benefit Act, 2010*.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, sub-subparagraph 1 v C of section 5 of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 2 (2))

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iii. to give to the consumer, at the consumer's request, a text-based copy of any document that is presented to but not signed by the consumer.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, subparagraph 6 iii of section 5 of the Regulation is amended by adding "unless clause 5.1 (2) (d) or (e) applies with respect to the document" at the end. (See: O. Reg. 241/16, s. 2 (3))

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

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

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

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

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

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

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

    i. the cost of the contract, or

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

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

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, paragraph 12 of section 5 of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 2 (4))

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

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

14. Failing to comply with any applicable code, order or rule issued or made by the Board, including but not limited to the Fair Marketing Practices set out in the Electricity Retailer Code of Conduct or the Code of Conduct for Gas Marketers issued by the Board. O. Reg. 389/10, s. 5; O. Reg. 497/10, s. 1.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, section 5 of the Regulation is amended by adding the following paragraph: (See: O. Reg. 241/16, s. 2 (5))

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

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

ii. any equipment, product or service that has been provided by the supplier to the consumer.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, the Regulation is amended by adding the following section: (See: O. Reg. 241/16, s. 3)

Door-to-Door Advertising and Marketing

Permissible door-to-door advertising and marketing

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

(2) A supplier or salesperson shall not,

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

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

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

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

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

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

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

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

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

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

(i) the consumer solicits the communication, or

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

Contracts

With whom a supplier may enter into a contract

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

(a) the account holder; or

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

Contract requirements

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

1. The name, business address and telephone number of the supplier and any fax number, website address, e-mail address and toll-free telephone number for the supplier.
2. The number of the supplier's licence issued under the *Ontario Energy Board Act, 1998*.
3. If the contract is entered into with the consumer in person, the name of the person who negotiated and signed the contract on behalf of the supplier.
4. In printed letters, the consumer's name, the address to which the electricity or gas is to be provided and, if it is different, the account holder's name and mailing address.
5. The date on which the contract is entered into, the length of time during which electricity or gas is to be provided pursuant to the contract, the date that the provision of electricity or gas is intended to start under the contract and a description of any circumstances that may prevent the provision of electricity or gas from starting on that date.
6. The contract price for the electricity or gas, or the method of calculating it, and, if any additional energy charges are payable by the consumer for the supply or delivery of the electricity or gas, a statement describing the categories of the additional energy charges and indicating to whom they are payable.
7. The terms of payment for the electricity or gas, including the terms relating to any deposit, late payment or other charges, interest or penalties that may be payable under the contract.
8. A statement that the consumer has the right under the Act to cancel the contract without cost or penalty up to 10 days after the consumer acknowledges receipt or is deemed to acknowledge receipt of a text-based copy of the contract.
9. A statement that if the consumer cancels the contract within that 10-day period, the consumer is entitled to a full refund of all amounts paid under the contract.
10. In the case of a contract for the provision of electricity, a statement that the consumer may cancel the contract without cost or penalty up to 30 days after receiving the first bill under the contract.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, paragraph 10 of subsection 7 (1) of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 4)

10. A statement,
    i. that the consumer may cancel the contract without cost or penalty up to 30 days after receiving the first bill under the contract, in the case of a contract for the provision of electricity entered into before the day Ontario Regulation 241/16 came into force, and
    ii. in the case of a contract entered into on or after that day, that the consumer may cancel the contract without cost or penalty up to 30 days after receiving the second bill under the contract.
11. A statement that nothing in the contract negates or varies the consumer's rights to cancel the contract under and in accordance with the Act and this Part.
12. A statement that if the consumer permanently moves out of the premises to which the electricity or gas is provided under the contract, the consumer may, without cost or penalty, cancel the contract.
13. A description of any other circumstances in which the consumer or the supplier is entitled to cancel the contract with or without notice or cost or penalty, the length of any notice period, the manner in which notice can be given and the amount of any cost or penalty.
14. Information about whether the contract may be assigned by either the supplier or the consumer and any provisions relating to the assignment.
15. If the contract is for the provision of electricity and provides for the assignment of any rebate to which the consumer is entitled to another person, a statement informing the consumer that he or she will not receive the rebate.
16. A description of how the consumer may contact the supplier to make a complaint, request information or renew, extend the term of or cancel the contract.

17. Except as otherwise provided in section 9, the signature and printed name of the consumer, or the account holder's agent signing the contract on behalf of the consumer, and of the person signing the contract on behalf of the supplier, at the bottom of the contract and before the acknowledgment described in paragraph 18.

18. Except as otherwise provided in section 9, following the signatures referred to in paragraph 17, an acknowledgment to be signed and dated by the consumer or account holder's agent that he or she has received a text-based copy of the contract. O. Reg. 389/10, s. 7 (1).

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

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

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

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

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

Disclosure statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Contracts entered into over the internet

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

(a) that its internet website is secure;

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

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

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

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

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

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

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

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

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

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

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

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

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

Receipt of contract and acknowledgement of receipt

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

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

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

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

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

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

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

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

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

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, the Regulation is amended by adding the following section before the heading "Verification of Contracts": (See: O. Reg. 241/16, s. 5)

Permissible remuneration

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

Verification of Contracts

Verification

11. A contract may be verified for the purposes of section 15 of the Act only as provided in sections 12 and 13 of this Regulation. O. Reg. 389/10, s. 11.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, section 11 of the Regulation is amended by striking out "sections 12 and 13" and substituting "sections 12 to 13.2". (See: O. Reg. 241/16, s. 6)

Who may verify a contract

12. A contract may be verified only by an individual who satisfies the following:

1. The individual must not receive any remuneration or other compensation or benefit that is determined, directly or indirectly by reference to the number of contracts verified or the percentage of contracts that are verified.
2. The individual must have successfully completed such training for persons who verify contracts as may be required by a code, order or rule issued or made by the Board. O. Reg. 389/10, s. 12.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, section 12 of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 7)

Verification, general

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

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

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

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

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

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

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

Verification process

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

(a) only by telephone; and

(b) only with the account holder for those premises or a person who is the account holder's agent at that time in respect of the premises. O. Reg. 389/10, s. 13 (1).

(2) The person verifying the contract shall comply with any code, order or rule issued or made by the Board relating to the verification procedure. O. Reg. 389/10, s. 13 (2).

(3) The person verifying the contract shall make a recording of the telephone call and advise the account holder or account holder's agent that the telephone call is being recorded. O. Reg. 389/10, s. 13 (3).

(4) Despite subsection 15 (4) of the Act, a contract may be verified no earlier than the 10th day and no later than the 45th day after the day on which a text-based copy of the contract is delivered or provided to the consumer. O. Reg. 389/10, s. 13 (4).

(5) If, at any time during the verification process, the person who is verifying the contract is advised by the account holder or the account holder's agent of an act or omission that appears to be an unfair practice of the supplier, or has reasonable grounds for believing that the supplier has committed an unfair practice, whether at the time of soliciting, negotiating or entering into the contract or after, the person,

(a) shall not proceed with the verification process; and

(b) shall advise the account holder, or the account holder's agent, and the supplier of the reason for not proceeding. O. Reg. 389/10, s. 13 (5).

(6) If a person who is verifying a contract is advised that the account holder did not receive a text-based copy of the contract or the disclosure statement, the person,

(a) shall not proceed with the verification process; and

(b) shall advise the account holder, or the account holder's agent, and the supplier of the reason for not proceeding. O. Reg. 389/10, s. 13 (6).

(7) An account holder or the account holder's agent may, by any means that indicates to the supplier the intention not to proceed with the contract, give notice to the supplier not to have the contract verified. O. Reg. 389/10, s. 13 (7).

(8) A notice given under subsection (7), other than by personal service or by a telephone call to the supplier, is deemed to have been given when sent by the account holder or the account holder's agent. O. Reg. 389/10, s. 13 (8).

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, section 13 of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 7)

Who may verify a contract, third party verification

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

1. The individual's employer is not a party to the contract being verified, nor an affiliate or partner of a party to the contract.
2. The individual must not receive any remuneration or other compensation or benefit,
    i. from the supplier or from an affiliate or partner of the supplier, or
    ii. that is determined, directly or indirectly, by reference to the number of contracts that are verified or the percentage of contracts that are verified.
3. The individual must have successfully completed such training for individuals who verify contracts by telephone as may be required by a code, order or rule issued or made by the Board. O. Reg. 241/16, s. 7.

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

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

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

(3) In this section,

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

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

Verification process, telephone

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

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

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

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

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

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

Verification process, internet

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

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

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

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

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

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

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

Void Contracts

When a contract is void

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

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

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

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

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

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

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

Contract Renewals, Extensions And Amendments

Conditions for renewals and extensions of contracts

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

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

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

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

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

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

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

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

(i) the change to the termination date,

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

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

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

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

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

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

2. If section 16 applies to the renewal or extension of the term of the contract, it must clearly describe the changes to the contract required by that section and identify the provisions of the Act and this Part that will apply as if the cancellation were under section 19 of the Act.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, paragraph 2 of subsection 15 (2) of the Regulation is revoked. (See: O. Reg. 241/16, s. 8 (1))

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

4. Whether or not the supplier is offering the consumer the option of an automatic renewal or extension permitted under section 17, the renewal or extension form must clearly indicate that the contract will be renewed or the term of the contract extended if,

i. the consumer,

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

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

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

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

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

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, paragraph 4 of subsection 15 (2) of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 8 (2))

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

i. the consumer,

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

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

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

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

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

5. If the supplier is offering the consumer the option of an automatic renewal or extension under section 17 of a contract for the provision of gas, the renewal or extension form must clearly state,

i. that the contract will be automatically renewed or the term of the contract will be automatically extended if the consumer does not,

A. take the action described in subparagraph 4 i or ii, or

B. advise the supplier in writing or by telephone that he or she does not wish to renew or extend the term of the contract, and

ii. the contract price that will apply if the contract is automatically renewed or extended.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, paragraph 5 of subsection 15 (2) of the Regulation is revoked. (See: O. Reg. 241/16, s. 8 (2))

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

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

(3) Except in the case of an automatic renewal or extension under section 17 of a contract for the provision of gas, a contract is renewed or its term extended only if the consumer takes the action described in subparagraph 4 i or ii of subsection (2). O. Reg. 389/10, s. 15 (3).

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, subsection 15 (3) of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 8 (3))

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

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

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

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

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

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

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

(5) For the purposes of this section,

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

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

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

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

Renewal, transitional

16. (1) If a contract was entered into before the day this section comes into force, it shall not be renewed or extended unless the supplier amends the contract to give to the consumer the right to cancel the contract at any time during the renewed or extended term of the contract,

(a) without cost or penalty, if the supplier engages in an unfair practice with respect to the consumer;

(b) without cost or penalty if the supplier does something described in clause 21 (a);

(c) without cost or penalty if the consumer does something described in clause 21 (c);

(d) without cost or penalty if the contract was automatically renewed under section 17;

(e) without any reason if the consumer gives the supplier 10 days notice. O. Reg. 389/10, s. 16 (1).

(2) Section 19 does not apply to an amendment described in subsection (1). O. Reg. 389/10, s. 16 (2).

(3) An amendment described in subsection (1) does not require the consent of the consumer. O. Reg. 389/10, s. 16 (3).

(4) If, after the renewal or extension of the term, a consumer cancels the contract pursuant to a provision of the contract that provides a right of cancellation described in subsection (1), the following rules apply:

1. Sections 21 and 22, subsections 23 (1) and (3) and sections 24, 25 and 26 of the Act and sections 21, 22, 23 and 24, subsections 25 (1) and (3) and section 26 of this Regulation apply.

2. In the application of the provisions of the Act and this Regulation referred to in paragraph 1,

i. references to subsections 19 (1) and (2) and 23 (2) of the Act are not applicable,

ii. references to subsection 19 (3) of the Act are read as references to a contractual right to cancel the contract described in clause (1) (a),

iii. references to subsection 19 (4) of the Act are read as references to a contractual right to cancel the contract described in clause (1) (b), (c) or (d), and

iv. references to subsection 19 (5) of the Act are read as references to a contractual right to cancel the contract described in clause (1) (e). O. Reg. 389/10, s. 16 (4).

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, section 16 of the Regulation is revoked. (See: O. Reg. 241/16, s. 9)

Automatic renewal or extension of gas contracts

17. (1) Despite section 15, a supplier may automatically renew or extend the term of a contract for the provision of gas for a period of up to one year if,

(a) the contract expressly authorizes the automatic renewal or extension of the term of the contract for that period in default of the consumer,

(i) otherwise renewing or extending the term of the contract under section 15, or

(ii) notifying the supplier that he or she does not wish to renew or extend the term of the contract;

(b) the contract has not previously been automatically renewed or extended;

(c) the contract price of the automatically renewed or extended contract does not exceed the contract price in the contract immediately before the renewal or extension; and

(d) the consumer does not take the action described in subclause (a) (i) or (ii) after receiving the material required to be sent to the consumer by the supplier in accordance with clause 15 (1) (b). O. Reg. 389/10, s. 17 (1).

(2) Either the supplier or the consumer may, at any time after the contract is automatically renewed or extended, cancel the contract, without any cost or penalty for cancelling, by giving to the other notice in writing or, if not prohibited under the contract, by telephone. O. Reg. 389/10, s. 17 (2).

(3) All telephone calls between the supplier and the consumer referred to in this section must be recorded by the supplier. O. Reg. 389/10, s. 17 (3).

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, section 17 of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 10)

No automatic renewal, extension of contracts

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

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

Retraction of renewal or extension

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

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

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

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

Contract amendments

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

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

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

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

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

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

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

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

New contract not prevented

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

Contract Cancellation

Cancellation

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

(a) the supplier is required under this Part to make a voice recording of a telephone discussion with the consumer and fails to provide a copy of that recording to the consumer within 10 days after the consumer requests a copy;

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, clause 21 (a) of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 11 (1))

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

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

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

(d) in the case of a contract for the provision of electricity, the consumer cancels the contract not more than 30 days after receiving the first bill under the contract;

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, clause 21 (d) of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 11 (2))

(d) the consumer cancels the contract,

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

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

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

(f) the cancellation is under section 17. O. Reg. 389/10, s. 21.

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, clause 21 (f) of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 11 (3))

(f) the contract was automatically renewed or extended.

Notice of cancellation

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

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

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

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

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

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

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

(a) record the telephone call; and

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

Cancellation fees

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

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

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, paragraph 1 of subsection 23 (1) of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 12)

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

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

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

2. A fee of not more than $100 for each year, or part year, remaining on the contract, if the contract is for the provision of gas. O. Reg. 389/10, s. 23 (1).

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, paragraph 2 of subsection 23 (1) of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 12)

2. In the case of a contract entered into on or after the day Ontario Regulation 241/16 came into force, a fee of not more than $50, whether the contract is for the provision of electricity, gas or both, and regardless of the term remaining on the contract.

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

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

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

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

(4) In subsection (2),

"high volume consumer" means a consumer,

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

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

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

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

Cancellation, when effective

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

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

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

(i) the end of the notice period, and

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

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

Refunds

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

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

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

Meter reading

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

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

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

General

Exemptions

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

1. Broader public-sector procurement agents in respect of contracts they enter into with suppliers or broader public-sector account holders for the provision of gas and electricity.
2. A gas distributor who is not required to hold a gas marketer's licence under subsection 48 (1) of the *Ontario Energy Board Act, 1998*. O. Reg. 389/10, s. 27 (1).

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, subsection 27 (1) of the Regulation is amended by adding the following paragraph: (See: O. Reg. 241/16, s. 13)

3. Ag Energy Co-Operative Ltd. in respect of contracts with its members that it enters into, amends, renews or extends.

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

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

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

Telephone calls

28. (1) If a supplier is required under this Part to make a recording of a telephone call to or by a consumer, the supplier shall provide a copy of the recording to the consumer not more than 10 days after the consumer requests the copy. O. Reg. 389/10, s. 28 (1).

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

(a) the day that is three years after the day of the telephone call; and

(b) the day that is one year after the effective date of cancellation, termination or expiry of the last contract or last renewed or extended contract between the consumer and the supplier. O. Reg. 389/10, s. 28 (2).

Note: On January 1, 2017, the day section 2 of the *Strengthening Consumer Protection and Electricity System Oversight Act, 2015* comes into force, section 28 of the Regulation is revoked and the following substituted: (See: O. Reg. 241/16, s. 14)

Copies of telephone recordings, internet records

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

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

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

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

Transitional, written copy of contract

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

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

Transitional, reaffirmation of contract, etc.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transitional, information required in contract

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

PART II
SUITE METERING

Definitions and Interpretation

Definitions

32. (1) In this Part,

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

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

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

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

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

(a) condominium units,

(b) demised premises,

(c) member units,

(d) non-member units,

(e) rental units, and

(f) residential units;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Multi-unit complex

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

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

Unit

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

(a) demised premises in a commercial building;

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

(c) a member unit; and

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

Unit smart metering, prescribed activities

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

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

Unit sub-metering, prescribed activities

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

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

Suite Meter Specifications

Suite meter specifications

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

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

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

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

Installation and Billing

When installation of suite meters permitted

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

TABLE

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

7.	Demised premises	The commercial landlord, owner or other person in charge of the building in which the demised premises are located has retained the suite meter provider to install suite meters in the building.
8.	Common elements of a commercial building	The commercial landlord, owner or other person in charge of the building in which the common elements are located has retained the suite meter provider to install suite meters in the building.

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

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

When installation of suite meters is required in new buildings

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

TABLE

Column 1 Item	Column 2 Class of Units	Column 3 Circumstances	Column 4 Conditions
1.	Rental unit in a residential complex	Before completion of construction of the residential complex in which the rental unit is located.	Installation must take place in the rental unit before the rental unit is occupied.
2.	Common elements of a residential complex	Before completion of construction of the residential complex.	Installation must take place before any rental unit in the residential complex is occupied.
3.	Condominium unit in a condominium building	Before completion of construction of the condominium building in which the condominium unit is located.	Installation must take place in the condominium unit before the condominium unit is occupied.
4.	Common elements of a condominium building.	Before completion of construction of the condominium building.	Installation must take place before any condominium unit in the condominium building is occupied.
5.	Member unit of a non-profit housing co-operative building	Before completion of construction of the non-profit housing co-operative building.	Installation must take place in the member unit before the member unit is occupied.
6.	Common elements of a non-profit housing co-operative building	Before completion of construction of the non-profit housing co-operative building.	Installation must take place before any member unit in the non-profit housing co-operative building is occupied.

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

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

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

Use of meters for billing purposes in new and existing buildings

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

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

TABLE

Column 1 Item	Column 2 Class of consumers	Column 3 Class of units	Column 4 Circumstances
1.	Occupant	Rental unit	The suite meter was installed in respect of the rental unit in accordance with section 33 of the Act and this Part, and the residential landlord, (a) has terminated its obligation to supply electricity to the rental unit under the tenancy agreement pursuant to subsection 137 (3) of the *Residential Tenancies Act, 2006*; or (b) does not have an obligation under the tenancy agreement for the rental unit to supply electricity to the rental unit.
2.	Residential landlord, owner or other person in charge of a residential complex	Common elements of the residential complex	The suite meter was installed in respect of the common elements in the residential complex in accordance with section 33 of the Act and this Part.
3.	Person who is both owner and occupant of a condominium unit	The condominium unit	The suite meter was installed in respect of the condominium unit in accordance with section 33 of the Act and this Part.
4.	Condominium corporation or other person in charge of the condominium building	Common elements of the condominium building	The suite meter was installed in respect of the common elements of the condominium building in accordance with section 33 of the Act and this Part.

5.	Occupant	Member unit	The suite meter was installed in respect of the member unit of the non-profit housing co-operative building in accordance with section 33 of the Act and this Part.
6.	Non-profit housing co-operative	Common elements of the non-profit housing co-operative building	The suite meter was installed in respect of the common elements of the non-profit housing co-operative building in accordance with section 33 of the Act and this Part.
7.	Occupant	Demised premises	The suite meter was installed in respect of the demised premises in accordance with section 33 of the Act and this Part, and the commercial landlord does not have an obligation under the commercial lease for the demised premises to supply electricity to the demised premises.
8.	Commercial landlord, owner or other person in charge of the commercial building	Common elements of the commercial building	The suite meter was installed in respect of the common elements of the commercial building in accordance with section 33 of the Act and this Part.

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

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

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

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

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

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

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

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

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

Information and Disclosure

Information to be provided

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) the announcement of the change; and

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

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

(6) In this section,

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

TRANSITION

Residential complexes and condominium buildings

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

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

Smart meters and smart sub-meters

43. (1) In this section,

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

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

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

(a) before November 3, 2005,

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

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

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

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

(a) before November 3, 2005,

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

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

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

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

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

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

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

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

PART III (OMITTED)

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

Ontario

Consumer Protection Act, 2002

S.O. 2002, CHAPTER 30
SCHEDULE A

Historical version for the period December 8, 2016 to December 31, 2016.
Last amendment: 2016, c. 34.

Legislative History: [+]

CONTENTS [−]

PART I
INTERPRETATION AND APPLICATION

Interpretation

1. In this Act,

"consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes; ("consommateur")

"consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment; ("convention de consommation")

Note: On a day to be named by proclamation of the Lieutenant Governor, section 1 of the Act is amended by striking out the definition of "consumer agreement" and substituting the following: (See: 2016, c. 34, s. 1 (1))

"consumer agreement" means an agreement between a supplier and a consumer in which,

(a) the supplier agrees to supply goods or services for payment, or

(b) the supplier agrees to provide rewards points to the consumer, on the supplier's own behalf or on behalf of another supplier, when the consumer purchases goods or services or otherwise acts in a manner specified in the agreement; ("convention de consommation")

"consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement; ("opération de consommation")

"credit card" means a card or device under which a borrower can obtain advances under a credit agreement, as defined in Part VII, for open credit; ("carte de crédit")

"Director" means the person designated as the Director under the *Ministry of Consumer and Business Services Act*; ("directeur")

"future performance agreement" means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement; ("convention à exécution différée")

"goods" means any type of property; ("marchandises")

"initiation fee" means a fee in addition to an annual membership fee; ("droit d'entrée")

"internet" means the decentralized global network connecting networks of computers and similar devices to each other for the electronic exchange of information using standardized communication protocols; ("Internet")

"internet gaming site" means an internet site that accepts or offers to accept wagers or bets over the internet,

(a) as part of the playing of or participation in any game of chance or mixed chance and skill that is to take place inside or outside of Canada, or

(b) on any contingency or on any event that may or is to take place inside or outside of Canada,

including, without restricting the generality of the foregoing, a casino game, card game, horse race, fight, match, sporting event or contest; ("site de jeux en ligne")

"loan broker" means,

(a) a supplier of loan brokering, or

(b) a person who holds themself out to be a person described in clause (a); ("courtier en prêts")

"loan brokering" means services or goods that are intended to assist a consumer in obtaining credit or a loan of money, including obtaining credit or a loan of money from the loan broker who is providing the services or goods to the consumer; ("courtage en prêts")

"Minister" means the Minister of Consumer and Business Services or such other member of the Executive Council to whom the administration of this Act may be assigned under the *Executive Council Act*; ("ministre")

"Ministry" means the Ministry of Consumer and Business Services; ("ministère")

"officer" includes the chair and any vice-chair of the board of directors, the president and any vice-president, the secretary and assistant secretary, the treasurer and assistant treasurer and the general manager and assistant general manager of the corporation or a partner or general manager and assistant general manager of a partnership, any other individual designated as an officer by by-law or resolution or any other individual who performs functions normally performed by an individual occupying such office; ("dirigeant")

"open credit" means credit or a loan of money under a credit agreement, as defined in Part VII, that,

(a) anticipates multiple advances to be made as requested by the borrower in accordance with the agreement, and

(b) does not define the total amount to be advanced to the borrower under the agreement, although it may impose a credit limit; ("crédit en blanc")

"payment" means consideration of any kind, including an initiation fee; ("paiement")

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

"regulations" means regulations made under this Act; ("règlements")

"representation" means a representation, claim, statement, offer, request or proposal that is or purports to be,

(a) made respecting or with a view to the supplying of goods or services to consumers, or

(b) made for the purpose of receiving payment for goods or services supplied or purporting to be supplied to consumers; ("assertion")

Note: On a day to be named by proclamation of the Lieutenant Governor, section 1 of the Act is amended by adding the following definition: (See: 2016, c. 34, s. 1 (2))

"rewards points" means, subject to the regulations, points provided to a consumer under a consumer agreement that can be exchanged for money, goods or services; ("points de récompense")

"services" means anything other than goods, including any service, right, entitlement or benefit; ("services")

"supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themself out to be a supplier or an agent of the supplier; ("fournisseur")

Note: On a day to be named by proclamation of the Lieutenant Governor, section 1 of the Act is amended by striking out the definition of "supplier" and substituting the following: (See: 2016, c. 34, s. 1 (3))

"supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, including the supply of rewards points, and includes an agent of the supplier and a person who holds themself out to be a supplier or an agent of the supplier; ("fournisseur")

"trade-in allowance" means the greater of,

(a) the price or value of the consumer's goods or services as set out in a trade-in arrangement, and

(b) the market value of the consumer's goods or services when taken in trade under a trade-in arrangement; ("valeur de reprise")

"trade-in arrangement" means an arrangement under which a consumer agrees to sell his or her own goods or services to the supplier and the supplier accepts the goods or services as all or part of the consideration for supplying goods or services; ("convention de reprise")

"Tribunal" means the Licence Appeal Tribunal established under the *Licence Appeal Tribunal Act, 1999* or such other tribunal as may be prescribed. ("Tribunal") 2002, c. 30, Sched. A, s. 1; 2004, c. 19, s. 7 (1-4); 2006, c. 34, s. 8 (1); 2008, c. 9, s. 79 (1); 2013, c. 13, Sched. 2, s. 1.

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

Application

2. (1) Subject to this section, this Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place. 2002, c. 30, Sched. A, s. 2 (1).

Exceptions

(2) This Act does not apply in respect of,

(a) consumer transactions regulated under the *Securities Act*;

(b) financial services related to investment products or income securities;

(c) financial products or services regulated under the *Insurance Act*, the *Credit Unions and Caisses Populaires Act, 1994*, the *Loan and Trust Corporations Act* or the *Mortgage Brokerages, Lenders and Administrators Act, 2006*;

(d) consumer transactions regulated under the *Commodity Futures Act*;

(e) prescribed professional services that are regulated under a statute of Ontario;

(f) consumer transactions for the purchase, sale or lease of real property, except transactions with respect to time share agreements as defined in section 20; and

(g) consumer transactions regulated under the *Residential Tenancies Act, 2006*. 2002, c. 30, Sched. A, s. 2 (2); 2006, c. 17, s. 249; 2006, c. 29, s. 60.

Same

(3) This Act does not apply to the supply of a public utility or to any charge for the transmission, distribution or storage of gas as defined in the *Ontario Energy Board Act, 1998* if such charge has been approved by the Ontario Energy Board. 2002, c. 30, Sched. A, s. 2 (3).

(4) Repealed: 2010, c. 8, s. 36 (1).

Definition

(5) In this section,

"public utility" means water, artificial or natural gas, electrical power or energy, steam or hot water. ("service public") 2002, c. 30, Sched. A, s. 2 (5); 2010, c. 8, s. 36 (2).

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

Anti-avoidance

3. In determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form. 2002, c. 30, Sched. A, s. 3; 2008, c. 9, s. 79 (2).

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

Consumer agreements

4. A consumer agreement that meets the criteria of more than one type of agreement to which this Act applies shall comply with the provisions of this Act and of the regulations that apply to each type of agreement for which it meets the criteria, except where the application of the provisions is excluded by the regulations. 2004, c. 19, s. 7 (5).

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

Disclosure of information

5. (1) If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible and prominent. 2002, c. 30, Sched. A, s. 5 (1).

Delivery of information

(2) If a supplier is required to deliver information to a consumer under this Act, the information must, in addition to satisfying the requirements in subsection (1), be delivered in a form in which it can be retained by the consumer. 2002, c. 30, Sched. A, s. 5 (2).

PART II
CONSUMER RIGHTS AND WARRANTIES

Rights reserved

6. Nothing in this Act shall be interpreted to limit any right or remedy that a consumer may have in law. 2002, c. 30, Sched. A, s. 6.

No waiver of substantive and procedural rights

7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary. 2002, c. 30, Sched. A, s. 7 (1).

Limitation on effect of term requiring arbitration

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act. 2002, c. 30, Sched. A, s. 7 (2).

Procedure to resolve dispute

(c) all guarantees given in respect of money payable under the agreement;

(d) all security given by the consumer or a guarantor in respect of money payable under the agreement; and

(e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes,

(i) extended, arranged or facilitated by the person with whom the consumer reached the agreement, or

(ii) otherwise related to the agreement. 2002, c. 30, Sched. A, s. 18 (14).

Waiver of notice

(15) If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so. 2002, c. 30, Sched. A, s. 18 (15); 2008, c. 9, s. 79 (5).

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

Transition

19. (1) This Part applies to consumer transactions that occur on or after the day this section is proclaimed in force. 2002, c. 30, Sched. A, s. 19 (1).

Same

(2) The *Business Practices Act*, as it existed immediately before its repeal by the *Consumer Protection Statute Law Amendment Act, 2002*, continues to apply to consumer transactions that occurred before its repeal. 2002, c. 30, Sched. A, s. 19 (2).

PART IV
RIGHTS AND OBLIGATIONS RESPECTING SPECIFIC CONSUMER AGREEMENTS

Definitions and Application

Interpretation

20. (1) In this Part,

"direct agreement" means a consumer agreement that is negotiated or concluded in person at a place other than,

(a) at the supplier's place of business, or

(b) at a market place, an auction, trade fair, agricultural fair or exhibition; ("convention directe")

"internet agreement" means a consumer agreement formed by text-based internet communications; ("convention électronique")

"membership fee" means the amount payable by a consumer for personal development services; ("droit d'adhésion")

"personal development services" means,

(a) services provided for,

(i) health, fitness, diet or matters of a similar nature,

(ii) modelling and talent, including photo shoots relating to modelling and talent, or matters of a similar nature,

(iii) martial arts, sports, dance or similar activities, and

(iv) other matters as may be prescribed, and

(b) facilities provided for or instruction on the services referred to in clause (a) and any goods that are incidentally provided in addition to the provision of the services; ("services de perfectionnement personnel")

"remote agreement" means a consumer agreement entered into when the consumer and supplier are not present together; ("convention à distance")

"time share agreement" means a consumer agreement by which a consumer,

(a) acquires the right to use property as part of a plan that provides for the use of the property to circulate periodically among persons participating in the plan, whether or not the property is located in Ontario, or

(4) No permission given under subsection (3) applies for longer than 90 days but a subsequent permission may be given on the expiration of a permission. 2002, c. 30, Sched. A, s. 36 (4).

Duties of trustee

(5) Where a supplier has a trustee under subsection (1),

(a) any notice to the trustee shall be deemed to be notice to the supplier; and

(b) any money payable by the supplier is payable by the trustee to the extent that the trustee holds sufficient trust funds for that purpose. 2002, c. 30, Sched. A, s. 36 (5).

Same

(6) Every trustee under subsection (1) shall, upon receiving any payment from a consumer, provide the consumer with written confirmation of receipt of the payment and of the fact that the payment will be dealt with in accordance with sections 30 to 35 and with this section. 2002, c. 30, Sched. A, s. 36 (6).

Same

(7) No trustee shall release to a supplier funds received from a consumer until the personal development services are available. 2002, c. 30, Sched. A, s. 36 (7).

Same

(8) The trustee shall release the funds held under this section to the consumer if the consumer cancels the personal development services agreement in accordance with this Act. 2002, c. 30, Sched. A, s. 36 (8).

INTERNET AGREEMENTS

Application

37. Sections 38 to 40 apply to an internet agreement if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds a prescribed amount. 2002, c. 30, Sched. A, s. 37.

Disclosure of information

38. (1) Before a consumer enters into an internet agreement, the supplier shall disclose the prescribed information to the consumer. 2002, c. 30, Sched. A, s. 38 (1).

Express opportunity to accept or decline agreement

(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. 2002, c. 30, Sched. A, s. 38 (2).

Manner of disclosure

(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. 2002, c. 30, Sched. A, s. 38 (3).

Copy of internet agreement

39. (1) A supplier shall deliver to a consumer who enters into an internet agreement a copy of the agreement in writing within the prescribed period after the consumer enters into the agreement. 2002, c. 30, Sched. A, s. 39 (1).

Content of internet agreement

(2) The copy of the internet agreement shall include such information as may be prescribed. 2002, c. 30, Sched. A, s. 39 (2).

Deemed supply of internet agreement

(3) For the purposes of subsection (1), a supplier is considered to have delivered a copy of the internet agreement to the consumer if the copy is delivered in the prescribed manner. 2002, c. 30, Sched. A, s. 39 (3).

Cancellation of internet agreement

40. (1) A consumer may cancel an internet agreement at any time from the date the agreement is entered into until seven days after the consumer receives a copy of the agreement if,

(a) the supplier did not disclose to the consumer the information required under subsection 38 (1); or

(b) the supplier did not provide to the consumer an express opportunity to accept or decline the agreement or to correct errors immediately before entering into it. 2002, c. 30, Sched. A, s. 40 (1).

Same

(2) A consumer may cancel an internet agreement within 30 days after the date the agreement is entered into, if the supplier does not comply with a requirement under section 39. 2004, c. 19, s. 7 (7).

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

DIRECT AGREEMENTS

Application

41. (1) Sections 42 and 43 apply to direct agreements if the consumer's total potential payment obligations under the agreement, excluding the cost of borrowing, exceeds a prescribed amount. 2002, c. 30, Sched. A, s. 41 (1).

Transition

(2) Sections 42 and 43 apply to direct agreements entered into on or after the day this section is proclaimed in force. 2002, c. 30, Sched. A, s. 41 (2).

Same

(3) The *Consumer Protection Act*, as it existed immediately before its repeal by the *Consumer Protection Statute Law Amendment Act, 2002*, continues to apply to direct sales contracts entered into before its repeal. 2002, c. 30, Sched. A, s. 41 (3).

Requirements for direct agreements

42. (1) Every direct agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements. 2002, c. 30, Sched. A, s. 42.

Minister's regulations

(2) In addition to the power of the Lieutenant Governor in Council to make regulations under section 123, the Minister may make regulations,

(a) governing contents of direct agreements and requirements for making, renewing, amending or extending direct agreements;

(b) requiring a supplier under a direct agreement to disclose to the consumer the information specified in the regulation, governing the content of the disclosure and requiring the supplier to take the other measures specified in the regulation to ensure that the consumer has received the disclosure. 2013, c. 13, Sched. 2, s. 3.

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

Cancellation: cooling-off period

43. (1) A consumer may, without any reason, cancel a direct agreement at any time from the date of entering into the agreement until,

(a) 20 days, or such other period as is prescribed, after the consumer has received the written copy of the agreement and the supplier has met all the requirements for entering into the agreement, in the case of a direct agreement that requires the supplier to supply to the consumer a water heater or other goods or services that are prescribed; or