EB-2017-0007

ONTARIO ENERGY BOARD

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

AND IN THE MA TTER 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).

SUPPLEMENTAL AUTHORITIES OF
OF PLANET ENERGY
(Heard November 14, 16-17, 27-28, 2017)

January 10, 2018

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2017 ONSC 7065
Ontario Superior Court of Justice

Bennett v. Hydro One Inc.

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BILL BENNETT (Plaintiff) and HYDRO ONE INC., HYDRO ONE BRAMPTON NETWORKS INC., HYDRO ONE REMOTE COMMUNITIES INC., NORFOLK POWER DISTRIBUTION INC., and HYDRO ONE NETWORKS INC. (Defendants)

Perell J.

Heard: November 20, 2017; November 22, 2017
Judgment: November 28, 2017
Docket: CV-15-535019CP

Counsel: Kirk M. Baert, Garth Myers, Ian C. Matthews, for Plaintiff
Laura K. Fric, Lawrence Ritchie, Robert Carson, for Defendants

Subject: Civil Practice and Procedure; Public; Restitution; Torts

MOTION by representative plaintiff to certify action as class proceeding.

***Perell J.*:**

A. Introduction

1 It is known that because of a malfunctioning and a negligently implemented and administered customer information system ("CIS"), which was rolled out in 2013, Hydro One Networks undercharged some and overcharged some of its 1.3 million customers. Undercharging and overcharging could also have occurred for causes unrelated to the CIS, including smart meters that malfunctioned in measuring consumption or in communicating the measurements of consumption.

2 Pursuant to the *Class Proceedings Act, 1992*, [1] Bill Bennett, one of Hydro One Networks' customers, on behalf of all of the customers, sues Hydro One Networks Inc., Hydro One Inc., Hydro One Brampton Networks Inc., Hydro One Remote Communities Inc., and Norfolk Power Distribution Inc. (collectively, "Hydro One Networks").

3 Mr. Bennett advances claims for breach of contract, negligence, and unjust enrichment on behalf of the Hydro One Network's customers who were overcharged. He seeks aggregate damages of $100 million, which he submits will obviate the need for any Class Member to prove that they are owed money by Hydro One Networks. He also seeks punitive damages of $25 million.

4 In bringing his action, Mr. Bennett acknowledges that Hydro One Networks may attempt to set off or counterclaim against the Class Members who have no claim but who underpaid for the electricity they received. If Hydro One Networks were to advance counterclaims, Mr. Bennett would be a candidate to be not only a representative plaintiff but also a representative defendant.

5 As a proposed representative plaintiff, Mr. Bennett moves for certification of his action as a class action. In my opinion, however, his action fails to satisfy the common issues and preferable procedure criteria for certification. Accordingly, for the reasons that follow, I dismiss the certification motion.

B. Factual and Procedural Background

1. Hydro One Networks

6 Hydro One Inc. is a holding company that has no customers and no operations. It is a wholly-owned subsidiary of Hydro One Limited, whose shares trade on the Toronto Stock Exchange. The Province of Ontario owns 70.1% of the shares with the balance publicly owned.

7 Hydro One Inc. owns: (1) Hydro One Networks Inc., which is an electricity distributor; (2) Hydro One Brampton Networks Inc., another electricity distributor, against whom the action has been discontinued; (3) Hydro One Remote Communities Inc., which distributes electricity to 21 northern communities and which has a discrete customer service and billing department from Hydro One Networks; and (4) Norfolk Power Distribution Inc., which up until September 2015, distributed electricity to about 18,000 customers, after which it ceased carrying on business and its operations were integrated into Hydro One Networks.

8 Mr. Bennett pleads that the Defendants operate as a single economic unit. This is a contested fact, but the Defendants submit that Mr. Bennett causes of action are against only Hydro One Networks because Hydro One Inc. is not an operating company and because Hydro One Remote Communities Inc. and Norfolk Power Distribution Inc.'s customers were not impacted by the problems described below.

9 The unnecessary joinder of these Defendants may be true, but this is a factual matter that goes to the defence of Mr. Bennett's action and not to the certification of the action. I am, therefore, for the purposes of the certification motion treating the Defendants as a single entity under the name Hydro One Networks.

10 Hydro One Networks is Ontario's largest electricity transmission and distribution company and supplies residences, businesses, industries, and municipal utilities. It has approximately 1.3 million customers, approximately 25% of Ontario marketplace. It is registered as a distribution company under the *Electricity Act, 1998*, [2] and is regulated by the Ontario Energy Board ("OEB") pursuant to the *Ontario Energy Board Act, 1998*. [3]

11 Hydro One Networks' standard contract with its customers is known as its Conditions of Service. The contractual terms are informed by the Distribution System Code and the Retail Settlement Code promulgated by the OEB, which sets the minimum standards that must be met by every electricity distributor in carrying out its operations. The OEB requires Hydro One Networks to comply with a Distribution System Code and the Retail Settlement Code.

12 Under s. 7.11 of the Distribution System Code, a distributor must issue an accurate bill to each of its customers and this requirement must be met at least 98 percent of the time on a yearly basis. A bill is accurate if it contains correct customer information, correct meter readings, and correct rates that result in an accurately calculated bill. This provision of the Distribution System Code was introduced in 2015, and Mr. Bennett relies on this provision to submit that it is an express term of the contract between Hydro One Networks and its customers that Hydro One Networks charges accurately for the electricity consumed. In any event, he submits that it is an implied term that Hydro One Networks will accurately charge its customers for the electricity they use.

13 Pursuant to ss. 7.1.3, 7.2.4 and 7.3.3 of the Retail Settlement Code, a distributor is obliged to respond to customer inquiries regarding meter accuracy, distribution rates, and bill calculation errors. A distributor must adhere to certain protocols with respect to responding to overbilling or under-billing.

14 The Conditions of Service contract states that Measurement Canada has jurisdiction, under the *Electricity and Gas Inspection Act*, [4] in a dispute between Hydro One Networks and its customer where a meter is in question.

15 Section 1.9 of the Conditions of Service adopts s. 2.2.2. of the Distribution System Code that states that a distributor shall not, under any circumstances, be liable for punitive damages: *i.e.*, section 2.2.2 states:

> 2.2.2 Despite section 2.2.1; neither the distributor nor the customer shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, whether any of the said liability, loss or damages arise in contract, tort or otherwise.

16 Hydro One Networks' distribution business earns revenues by charging rates that are approved by the OEB. There are numerous rate classes depending upon types of user (*e.g.* residential, seasonal, general service) territory of distribution, time of use (off-peak, mid-peak, on-peak), and quantity of consumption. Some customers are billed monthly, some quarterly, some annually. There are a variety of billing plans including: "budget billing," where the charges are fixed monthly over the year and then adjusted at billing year end; "retailer billing," where the customer contracts with a retailer, e.g. Direct Energy, but Hydro One Networks sends the bill; and "summary billing," where commercial customers receive one consolidated bill for all their locations. Most residential customers are billed on time-of-use rates, but about 150,000 customers are billed on tiered rates, where there is a threshold rate and then another rate for additional consumption.

17 With some exceptions, Hydro One Networks' customers are required to have wireless smart metering systems. For billing purposes, these smart meters measure, record, and then broadcast the consumption of electricity to Hydro One Networks. When a customer's smart meter fails to communicate, Hydro One Networks typically issues an estimated bill.

18 Hydro One Networks has a customer relations centre to respond to customers' complaints about improper billing.

2. The Ontario Energy Board

19 Because the OEB is part of the factual background to Mr. Bennett's proposed class action and because the OEB's duties and powers are relevant to the analysis of the preferable procedure criterion, discussed below, it is necessary to describe the role of the OEB as a public sector regulator, and, in particular, it is necessary to focus on its jurisdiction to resolve complaints about the services provided by distributors such as Hydro One Networks and the OEB's jurisdiction to enforce compliance with its directives as a regulator.

20 Under the *Ontario Energy Board Act, 1998*, in carrying out its responsibilities, the OEB shall be guided by the objective to protect the interests of consumers with respect to prices and the adequacy reliability and quality of electricity service. [5]

21 A person may not own or operate a distribution system without a license granted by the OEB. [6] The OEB may prescribe the conditions to a license. [7] The OEB may require

conditions in a license that govern the conduct of a distributor and its affiliates, specify the methods to determine rates, and specify performance standards. [8] The OEB may incorporate codes as conditions of a license, including the Distribution System Code and the Retail Settlement Code. [9] A distributor may not charge for electricity except in accordance with an order of the OEB. [10]

22 The OEB may receive complaints concerning conduct that may be in contravention of the Act and it may make inquiries, gather information, and attempt to mediate or resolve complaints. [11] The OEB may appoint inspectors who, among other things, may require a licensee to provide documents, records or information. [12] An inspector is empowered to enter any place that the inspector reasonably believes is likely to contain documents or records without a warrant to conduct inspections. [13] The chair of the OEB may appoint investigators. [14] Upon application by an investigator, a justice of the peace may issues a search warrant to be exercised by the investigator. [15]

23 The OEB may make compliance orders. [16] If the OEB is satisfied that a person has contravened or is likely to contravene an enforceable provision under the Act, the OEB may make an order requiring the person to comply and to take such action as the OEB may specify to remedy a contravention that has occurred. [17] If the OEB is satisfied that a person with a licence has contravened the Act, the OEB may impose an administrative penalty [18] or may make an order suspending or revoking the licence. [19] A person may give the OEB a written assurance of voluntary compliance, which has the same force and effect as an order of the OEB. [20]

24 The OEB has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. [21] The OEB has the jurisdiction to hold hearings and make orders.

25 The OEB has a call center to receive complaints about the distributors that it regulates, and it directs these complaints to the distributor for resolution. As noted above, the OEB has a compliance and enforcement process if the complaint is not resolved between the consumer and the distributor.

26 Typically for customer and distributor disputes, if the OEB's investigation of the complaint is favourable to the customer, the complaint is resolved by a voluntary compliance order. The customer, however, has no right to initiate any further proceedings if not satisfied with the outcome of the OEB's investigation. If the distributor does not agree to a voluntary

compliance order, the OEB may direct a hearing where it has the power to make a compliance order.

3. The Botched Cornerstone Project

27 In 2006, Hydro One Networks began a four-phase business $180 million project, known as Cornerstone, which would replace Hydro One Networks' business processes and software applications. The fourth and final phase, which commenced in 2011, was to replace the customer information system ("CIS") for billing and customer service. The CIS is a software program that interacts with external systems to obtain customers' electricity usage data and the other information necessary to prepare bills.

28 In May 2013, Hydro One Networks launched a new a CIS. The launch was a service provider and public relations disaster. Some customers did not receive a bill for extended periods of time. Other customers received incorrect bills. Most of the overcharges were small but some were gargantuan errors. Some customers, in a problem that Hydro One Networks attributes not to the CIS but to communications failures in the smart meter network in rural and remote parts of Ontario, received estimated bills that were followed by "catch up" bills that sometimes were very high and very burdensome.

29 Thus, some of Hydro One Networks' customers experienced no bills, others persistent estimated bills, others catch-up bills, and others incorrect bills.

30 There were also customers who were undercharged because of the botched CIS. Hydro's evidence is that the undercharges exceeded the overcharges. Mr. Bennett's position was that it remains to be determined the extent of overcharges and undercharges. Hydro One Networks, however, submits that the very high majority of Hydro One Networks customers were *not* affected by the new CIS. It submits that those affected amounted to about 7% of its clientele. And it submits that there are no ongoing problems with the CIS, all of which have been fixed. These points are disputed by Mr. Bennett.

31 In any event, the problems of the introduction of the new CIS caused a public storm of protest and anger. The Ontario Ombudsman, who under s. 14 (1) of the *Ombudsman Act*[22] is empowered to investigate the decisions of a public sector body, received an unprecedented number of complaints. On February 4, 2014, the Ontario Ombudsman, announced that he would commence an investigation about the complaints pursuant to s. 14(2) of the *Ombudsman Act*, which empowers the Ombudsman to make an investigation.

32 The Ombudsman received over 10,500 complaints of which 3,735 were forwarded to Hydro One Networks. The Ombudsman's investigation lasted for 15 months. The Ombudsman's team interviewed 190 people and reviewed more than 100,000 emails and more

than 23,000 pages of documents regarding the CIS system, its rollout and its functioning. The Ombudsman intervened to resolve approximately 3,700 complaints.

33 While the Ombudsman's investigation was ongoing, in March 2014, Hydro One Networks sent its customers a letter apologizing for its billing and customer service issues.

34 While the Ombudsman's investigation was ongoing, Hydro One Network's Board of Directors engaged PriceWaterhouseCoopers LLP ("PwC") to perform an independent review.

35 In December 2014, PwC issued a report. The report found that from the outset, the new CIS was causing a higher than expected number of estimated bills, billing exceptions, and no-bills, and as these billing exceptions were remediated, one consequence was that there were large catch-up bills that generated excessive bank account withdrawals, further inquiries and complaints, cancelled rebills, and refund cheques. The authors of the PwC report stated that affected customers were not given an adequate response to their inquiries.

36 Hydro One Networks accepted PwC's findings about the numerous errors made in implementing the CIS and management took steps to remedy the problems.

37 The problems of the CIS launch also came to the attention of the OEB. The OEB monitored the billing issues and Hydro One's response. Throughout the period of the Ombudsman's investigation, Hydro One Networks met regularly with the OEB staff.

38 Hydro One Networks established several teams to respond to the billing complaints and to report back to the Ombudsman. If the Ombudsman's office was satisfied with the resolution, the Ombudsman's file for the complaint was closed. Hydro One Networks' stated that all the files eventually were closed.

39 It is Hydro One Networks' evidence that it responded and resolved all of the complaints about billing inaccuracies and that no customer has been overcharged. It submitted that it addressed all the complaints received from the Ombudsman and all other sources. That all of the problems had been resolved was disputed, however, by Mr. Bennett. He submitted that his complaint was not resolved and the full extent of the harm caused by the botched CIS remains to be determined.

40 In May 2015, the Ombudsman's released a scolding and scalding report. He concluded, among other things, that thousands of customers were affected by a variety of defects that appeared after the CIS was introduced in May 2013. The Ombudsman reported that the CIS defects caused erroneous automatic withdrawals and inaccurate estimated bills. Because of the inept introduction of the CIS, more than 90,000 customers bills were delayed for months. The Ombudsman concluded that because of the defects in the system, Hydro One Networks

issued a flurry of multiple invoices and huge "catch-up" bills, leaving customers frustrated and confused. He noted that many customers had large sums withdrawn automatically from their bank accounts without notice or explanation. The Ombudsman reported that Hydro One Networks identified 32,766 inaccurately billed accounts. The average overcharge was $26.32 ($504,410 in total). He also concluded that Hydro One Networks' call centre and its in-house customer relations centre were not properly trained to respond to the flood of calls and complaints and the service provided was rude, insensitive, and substandard. The Ombudsman reported that when faced with negative publicity, Hydro One's response was irresponsible and instead of acknowledging the tens of thousands of billing issues, it deflected criticism with spin, concealment, and misleading and upbeat messages.

41 In his report, the Ombudsman made 65 recommendations all of which were subsequently accepted and implemented by Hydro One Networks. Indeed, some had been implemented before the Ombudsman's Report. Hydro One Networks stated that it spent more than $88 million to improve and address issues about the CIS, including improvements to the call centre and technical fixes of the CIS. It paid more than $12 million in goodwill credits to customers.

42 In the fall of 2015, the Ontario government established a Hydro One Networks Ombudsman that operates independently of Hydro One Networks' management and who reports to the Board of Directors. Hydro One Networks Ombudsman oversees a complaints resolution process.

43 For the purposes of the certification motion, Mr. Bennett retained Rajesh Gurusamy as an expert witness. Mr. Gurusamy is an expert in designing, configuring, customizing, planning and implementing systems like Hydro One Networks' CIS. He opined that Hydro One Networks' project was seriously flawed and resulted in the volumes of delayed or erroneous bills being produced, causing financial problems, understandable stress and lingering dissatisfaction amongst customers. He opined that Hydro One Networks breached various generally-accepted standards of care during every phase of its CIS Replacement project, including the post-implementation periods. He said that there was inadequate project scope management, reckless compromises to the planned testing strategy; and premature implementation of a "Go-Live" decision taken with no proof of readiness. He opined that the billing problems likely persist to this day.

4. Mr. Bennett's Personal Cause of Action

44 Mr. Bennett has a cottage near the town of Gravenhurst. He is a customer of Hydro One Networks with a smart meter, and he was enrolled in the Budget Billing Payment Plan.

45 In October 2011, the communications component on the smart meter at Mr. Bennett's cottage malfunctioned and it stopped transmitting the data it was collecting. It is to be observed that this problem has nothing directly to do with the CIS malfunctioning.

46 During the period when the meter was malfunctioning, Mr. Bennett received estimated bills based on his historical usage. However, when the meter was examined, it was determined that Mr. Bennett had consumed more electricity than he had been billed. He received a "catch-up" bill, which due to a backlog at Hydro One Networks was not received until March 2014.

47 On April 6, 2015, Mr. Bennett received 39 more revised bills for the period between October 2011 and February 2015. The bills indicated that he owed Hydro One Networks $2,587.69.

48 Mr. Bennett complained about the billing, and he sought assistance with respect to his customer service issues from the Ontario Ombudsman, the OEB, the Minister of Energy, and his local MPP. Mr. Bennett was not satisfied with their responses, and his evidence was that "the complete and utter fiasco that I have experienced since the implementation of Hydro One's new billing and customer information system, and the mismanagement of my account, remains unresolved."

49 In October 2015, Hydro One Networks replaced the defective meter at Mr. Bennett's cottage.

50 In 2015, Hydro One gave Mr. Bennett credits of $1,345.40 and $567.12.

5. Mr. Bennett's Class Action

51 On August 24, 2015, Mr. Bennett commenced a proposed class action. He sued the Defendants for negligence, breach of contract, and unjust enrichment due to the Defendants' alleged failure to properly plan for and implement a customer information system.

52 Mr. Bennett brought his action on behalf of himself and a class of all persons and entities, who purchased electricity from Hydro One between May 2013 and the date of the certification order.

6. The Aggregate Damages Issue

53 Mr. Bennett contends that with the use of statistical evidence there is a methodology by which the Class Members' claims can be determined in the aggregate. Mr. Bennett retained Errol Soriano, to provide an opinion that aggregate damages could be certified as a common issue. Mr. Soriano is a Chartered Professional Accountant and a Chartered

Business Valuator. His practice is dedicated exclusively to matters involving quantification of financial loss and the valuation of business interests.

54 Mr. Soriano opined that he can calculate the loss suffered by the class on an aggregate basis with a reasonable degree of precision, based on the difference between the amounts invoiced by Hydro One to the class (the "Invoiced Amounts") and the dollar value of the amounts that the Defendants should have charged the class members in accordance with the stipulated rates and actual consumption (the "Proper Amounts"). He said that this calculation was possible because the Invoiced Amounts can be determined by Hydro One's business records and the customer categorization, consumption volumes, and applicable rates necessary to calculate the Proper Amounts are available from Hydro One's database records.

55 Mr. Soriano also proposed a methodology, to be carried out in cooperation with a statistician, to calculate aggregate damages based on a statistically valid sample of the class members. Mr. Soriano's opinion was that aggregate damages can be calculated by analyzing a statistically valid sample of the putative Class members and then extrapolating the results of the analysis to the population that is the putative class.

56 In response to Mr. Soriano evidence, Hydro One Networks retained Vinita M. Juneja of the City of New York, a Managing Director of NERA Economic Consulting, an international firm that provides economic and financial analysis for complex legal and business matters. Dr. Juneja has a B.A. (University of Western Ontario) M.A. (Harvard University) and a Ph.D. (Harvard University) in economics. She provided an expert's report.

57 Dr. Juneja opined that based on her review of the actual data, a sampling approach was inappropriate and problematic because a sample would need to reflect the many variations in the population and the various individualized issues that determine each invoice and using a sampling approach would likely result in more error and provide a biased and imprecise answer.

C. Discussion and Analysis

1. General Principles: Certification

58 The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding

that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

59 For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers. [23] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding. [24] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) providing access to justice for litigants; (2) encouraging behaviour modification; and (3) promoting the efficient use of judicial resources. [25]

60 The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim. [26] However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action. [27] The "some basis in fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case. [28] In particular, there must be a basis in the evidence to establish the existence of common issues. [29] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members. [30] The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification. [31] Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend. [32]

61 On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities but rather on that of the much less stringent test of "some basis in fact". [33] The evidence on a motion for certification must meet the usual standards for admissibility. [34] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest. [35] In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge. [36]

2. Cause of Action Criterion

(a) General Principles: Cause of Action Criterion

62 The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. T & N plc*, [37] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*. To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed. [38]

63 In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed. [39]

(b) Analysis: Cause of Action Criterion

64 Save for the pleading of an express contract term, Hydro One Networks does not dispute that Mr. Bennett has pleaded reasonable causes of action for negligence, breach of contract, and undue influence, and it rather objects to the joinder of Hydro One Limited, Hydro One Remote Communities Inc., and Norfolk Power Distribution Inc., because it submits that there is no reasonable cause of action against these entities.

65 I disagree with this facts-based argument, which is more suitable for a motion for summary judgment than for a certification motion. For the reasons set out above, the claims against Hydro One Limited, Hydro One Remote Communities Inc. and Norfolk Power Distribution Inc. satisfy the cause of action criterion notwithstanding Hydro One Networks' improper joinder argument.

66 With respect to the cause of the action for breach of a term of an express contract, keeping in mind that the proposed class period begins in 2013, there is some traction to Hydro One Networks' argument that between 2013 and 2015, there was no express term of the Conditions of Service about accurate billing.

67 However, since Hydro One's argument is more about the particulars of pleading claims and defences, and since Hydro One Networks concedes that it should correctly charge for electricity, and since deleting the allegation of an express term would change nothing about the viability of a breach of contract cause of action, practically speaking, in the context of a certification motion, Hydro One Networks' argument is a waste of breath argument that

does not get in the way of my conclusion that Mr. Bennett's action satisfies the cause of action criterion.

3. Identifiable Class Criterion

(a) Introduction

68 Mr. Bennett proposes the following class definition:

> All persons and entities, other than the Excluded Persons, who purchased electricity from Hydro One between May 2013 and the date of the certification order in this action.
>
> "Excluded Persons" are the defendants, their current and former officers and directors, members of their immediate families, and their legal representatives, heirs, successors or assigns.

(b) General Principles: Identifiable Class Criterion

69 The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice. [40]

70 In *Western Canadian Shopping Centres Inc. v. Dutton*, [41] the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

71 In identifying the persons who have a potential claim against the defendant, the definition cannot be merits-based. [42] In *Frohlinger v. Nortel Networks Corp.* [43] at para. 21, Justice Winkler, as he then was, explained why merits-based definitions are prohibited; he stated:

> 21. The underlying reason for each of these prohibitions is readily apparent. Merits-based class definitions require a determination of each class member's claim as a pre-condition of ascertaining class membership. Carrying that concept to its logical conclusion, it would mean that at the conclusion of a class proceeding, only those individuals who were successful in their claims would be members of the class and, therefore, bound by the result. Theoretically, unsuccessful claimants would not be "class members" and would be free to commence further litigation because s. 27(3) of the CPA, which states in part:
>
> > A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding ...,
>
> would not bind them or bar them from commencing further actions.

72 In defining the persons who have a potential claim against the defendant, the definition, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive. [44] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable. [45] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise. [46] The class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended. [47]

73 A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a claim against the defendants. [48]

(c) Analysis: Identifiable Class Criterion

74 In my opinion, Mr. Bennett's proposed class definition satisfies the identifiable class criterion. Without being merits-based, the proposed definition identifies the persons who have a potential claim against Hydro One Networks. The proposed definition defines the parameters of the lawsuit to identify those persons bound by the result of the action, and it describes those who are entitled to notice.

75 Hydro One Networks, however, argues that the definition is over-inclusive or overbroad. Upon analysis, however, Hydro One Networks argument is directed more at the common issues criterion than it is at the identifiable class criterion.

76 In other words, accepting Mr. Bennett's class definition, Hydro One Network's argument is that the definition, which is technically proper, does not rationally connect to the asserted common issues and, therefore, the definition is over-inclusive or overbroad. In still other words, Hydro One Networks' argument essentially is that the proposed definition does not confine the litigation to persons who can and should be bound by the proposed common issues.

77 In my opinion, Hydro One Networks' arguments about overbreadth are best dealt with as part of the analysis of the common issues criterion. As Justice Winkler noted in *Frohlinger v. Nortel Networks Corp.*,[49] it is the element of commonality, which must be assessed on a case-by-case basis, that determines the viability of a class definition. In my opinion, since the overbreadth factor of a class definition is analytically connected to the commonality aspect of the common issues criterion, it should be analysed in the context of that criterion to which I am about to turn.

78 Thus, I conclude that in the immediate case, the identifiable class criterion has been satisfied subject to Mr. Bennett satisfying the common issues criterion.

4. Common Issues Criterion

79 Mr. Bennett proposes the following common issues:

> **Negligence**
>
> 1. Do the Defendants owe the class a duty of care to take reasonable steps to ensure that they:
>
> > (a) employ a billing system that accurately and reliably bills customers for the amount of electricity actually consumed;
> >
> > (b) employ a system or process to ensure that bills issued to customers accurately state the consumption of electricity upon which the bill is based; and/or
> >
> > (c) employ a system of process to ensure that they provide timely, effective, accurate and informed customer service that is responsive to questions posed by Class Members about meter accuracy, distribution rates and billing errors;
>
> 2. Did the Defendants breach the standard of care? If so, how?
>
> 3. If the answer to (2) is yes, did the breach of the Defendants' standard of care cause damages to the class?

4. If the answer to (3) is yes,

(a) can damages be assessed on an aggregate basis?

(b) if so, what is the quantum of aggregate damages owed to the Class Members?

Breach of Contract

5. Was it a term of Class Members' contracts with the Defendants that the Defendants will:

(a) employ a billing system that accurately and reliably bills customers for the amount of electricity actually consumed;

(b) employ a system or process to ensure that bills issued to customers accurately state the consumption of electricity upon which the bill is based;

(c) employ a system of process to ensure that they provide timely, effective, accurate and informed customer service that is responsive to questions posed by Class Members about meter accuracy, distribution rates and billing errors; and/or

(d) observe a duty of good faith and fair dealing with customers.

6. Were the terms of the contract between the Defendants the class breached?

7. If the answer to (6) is yes,

(a) can damages be assessed on an aggregate basis?

(b) if so, what is the quantum of aggregate damages owed to the Class Members?

Unjust Enrichment

8. Were the Defendants enriched?

9. If the answer to (8) is yes, were the Class Members correspondingly deprived?

10. If the answer to (9) is yes, was there a juristic reason for the Defendants' enrichment?

11. If the answer to (10) is no, can damages be assessed on an aggregate basis?

12. If the answer to (11) is yes, what is the quantum of aggregate damages owed to the Class Members?

Punitive Damages

13. Should the Defendants pay punitive damages? If so, in what amount, and to whom?

(a) General Principles: Common Issues

80 The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim. [50] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice. [51] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class. [52] In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [53] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

81 Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining such issues on a class-wide basis. [54]

82 An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member. [55] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries. [56] However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another. [57]

83 The common issue criterion presents a low bar. [58] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. [59] Even a significant level of individuality does not preclude a finding of commonality. [60] A common issue need not dispose of the

litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation. [61]

(b) Common Issues No.'s 1 and 2 (Negligence)

84 The essence of common issues No.'s 1 and 2 is the proposition that Hydro One Networks breached the standard of care to provide bills that accurately charge for electricity. The underlying allegation is one of systemic negligence with the notion that for a variety of systemic reasons, including possibly erroneous programming and inadequate preparation and training, the specifics of which are generalized by the pleading of systemic negligence, there were a multitude of errors of different types that led to underbilling or overbilling. Mr. Bennett cannot yet specify whether the putative class members suffered or benefited from the systemic negligence associated with the CIS?

85 This reliance on systemic negligence as opposed to a discrete common error that potentially could harm all the class members is a critical because it differentiates the case at bar from the precedent cases, most particularly, *Markson v. MBNA Canada Bank* [62] and *Fulawka v. Bank of Nova Scotia*, [63] upon which Mr. Bennett principally relies. The misplaced reliance on systemic negligence is the fatal flaw in the theory of commonality for the case at bar. Unlike some cases of systemic negligence, where the negligence produces a common harm, the case at bar produces no common harm but rather the alleged systemic negligence produces a multiplicity of errors some harmful, some neutral, and some even beneficial and a windfall to putative Class Members.

86 In the case at bar, any dispute about the accuracy of the bills eventually requires an individual inquiry, and this individuality distinguishes this case from the illegal interest, overtime miscalculation, or price-fixing class action cases that rely on systemic misconduct or a conspiracy, because in those cases, the systemic misconduct produced a potentially common (singular) adverse consequence for the class members. In the immediate case, there is a multiplicity of errors and even taking the billing errors collectively, there is the prospect that some would have occurred regardless of the CIS. In some cases, simple human error might explain a billing error in a putative Class Member's individual case. The systemic common issues are not a substantial ingredient and may not even be an ingredient of the putative Class Members' claims of a billing error.

87 In *Markson v. MBNA Canada Bank*, *supra*, Mr. Markson alleged that the combined effect of a flat fee and the interest rate charged by MBNA Canada Bank on credit card cash advances amounted to criminal rate of interest contrary to s. 347 of *Criminal Code*. [64] In *Markson*, the flat fee was charged in every transaction and all the class members were at risk of being charged a criminal rate of interest. In contrast, in the case at bar, there is no identified common cause for the billing errors that is necessarily connected to the

CIS. In the case at bar, the proof of systemic negligence would not reveal whether the positive or negative billing errors were caused by improper classification of the consumer, improper classification of rates to the customer, improper application of the rates, improper calculation of consumption, human errors, software design errors, data input errors, or operational errors. In the case at bar, while it is true that all class members are at risk of being improperly charged, it requires an individual examination to determine whether the overcharge is explained by some defect connected to the CIS or is explained by some other defect not connected to the CIS; for example, a smart meter with a mechanical defect or a communications failure.

88 In *Markson v. MBNA Canada Bank*, Justice Rosenberg for the Court of Appeal stated that the motions judge was undoubtedly correct that if a multitude of transactions had to be examined individually, the case would not be suitable for certification, but for the appeal, Mr. Markson had recast his case and for the first time submitted that s. 23 (statistical evidence) and s. 24 (aggregate assessment) offered a solution to the common issues problem, and Justice Rosenberg agreed that this was the solution to the common issues problem.[65] As I shall explain below, in the case at bar, sections 23 and 24 do not assist Mr. Bennett.

89 Mr. Bennett submits that this identification of the source of error can be determined and can only be determined after documentary discovery and oral discoveries. He argues that the analysis of the experts, who will be able to compare the issued bills with the bills that ought to have been issued, will identify and aggregate the effect of the errors. Mr. Bennett denies that his proposed class action is in effect an audit, investigation, or fishing expedition to find as opposed to proving a cause of action, but in truth, that inquisitorial design is the essential nature of Mr. Bennett's systemic negligence claim. Such a design is not appropriate for a class action.

90 Having regard to the common issue of systemic negligence that Mr. Bennett proposes, his proposed class definition is over-inclusive or overbroad. The prohibition against over-inclusion centers on the notion that there must be a rational connection between inclusion of the class member and the resolution of the common issues, which is the major operative goal of the class action procedure. If there is no connection, then the inclusion of the class member is arbitrary and the class action is overbroad, with the result that both the identifiable class and also the common issues criteria are not satisfied. If there is a connection between class membership and the common issue but the connection is not rational, then the putative class members should not be bound by the outcome of the class action, and, once again, the result is that both the identifiable class criterion and also the common issues criterion are not satisfied.

91 Mr. Bennett's proposed class action has a class definition that upon analysis is overbroad. In the immediate case, the common issues of systemic negligence do not advance

the class members' claims, which remains based on their individual circumstances on a case-by-case basis inside or even outside the operation of the CIS. In the case at bar, there is no rational relationship between the class and the cause of action for systemic negligence and thus it can be said that the class definition is overbroad.

92 Another way of understanding why the case at bar is different than *Markson v. MBNA Canada Bank* is to imagine that the *Markson* case was advanced as a systemic negligence case. Such a case would capture the illegal interest charges, but because of the over-generalization of attributing the harm to system negligence, the case would also capture other errors or illegal charges with the result that the common issues would want for commonality, aggregate damages would not be a possibility, and the case would be unmanageable and not a preferable procedure.

93 *Fulawka v. Bank of Nova Scotia*,[66] was a case that included an allegation of a systemic breach. In that case, Mr. Fulawka sued the Bank of Nova Scotia for not paying overtime pay. It is to be noted that Mr. Fulawka's case against the Bank was not an overtime misclassification case like *McCracken v. Canadian National Railway*,[67] where the issue was whether employees entitled to overtime pay had been wrongly classified as management and not entitled to overtime pay, and there was thus no issue in the *Fulawka* case about entitlement to overtime pay; rather, the common issues in the *Fulawka* case centered on whether the Bank had systemically and unlawfully restricted the employees to the overtime pay for which they were entitled.

94 In the *Fulawka* case, the Court of Appeal held that while there was no common issue about aggregate damages, there was a useful series of common issues about the systemic practices of the bank that allegedly denied the employees their overtime pay. Chief Justice Winkler, who wrote the judgment for the Court of Appeal, concluded that the common issues about systemic practices would advance both the class members' claims for individual payments and also the collective's claims for declaratory and injunctive relief. Mr. Bennett relies on the *Fulawka* case to argue for the productivity and utility of his proposed common issues on liability and declaratory relief.

95 Although Mr. Bennett also relies on systemic wrongdoing to advance claims for monetary and non-monetary relief, the design of his proposed class action does not present a common issue about wrongdoing or about declaratory relief, but rather his proposed class action presents as an investigation about whether there are common causes for the billing irregularities. Mr. Bennett's proposed class action even includes the possibility that it will be discovered after documentary and oral discoveries and the work of the computer scientists that some of Hydro One Network's consumers have been misclassified, which as *McCracken v. Canadian National Railway* demonstrates is not an issue that can be said to be common across a class of putative class members.

96 Upon analysis, the common issue of whether Hydro One Networks was systemically negligent is not a substantial ingredient of each member's claim and for some class members, the common issue of systemic negligence would be an ingredient of Hydro One Systems' potential counterclaim. All members of the class would not benefit from the successful prosecution of the action and indeed some would be potentially harmed if Hydro One were to assert a counterclaim.

97 I conclude that common issues No.'s 1 and 2 do not satisfy the common issues criterion.

(c) Common Issues No.'s 5 and 6 (Breach of Contract)

98 For similar reasons as those set out above, there is no common issue about breach of contract.

(d) Common Issues No.'s 8, 9, and 10 (Unjust Enrichment)

99 For similar reasons as those set out above, there is no common issue about unjust enrichment.

(e) Common Issues No. 3 (Causation of Damages)

100 For similar reasons as those set out above, there is no common issue about causation of damages. There is no basis in fact for concluding that causation can be established on a class-wide basis. The court needs to consider each class member's complaint to determine whether a particular billing issue was caused by the CIS or by idiosyncratic circumstances. The proposed common issues regarding causation of loss depend on individual findings of fact for each customer, and the answers cannot be extrapolated, in the same manner, to each class member

101 I disagree with Mr. Bennett's argument that he has met the very low standard of showing a plausible methodology to prove that the systemic negligence caused damages to the class of consumers of Hydro One Networks. Mr. Bennett's expert witness, Mr. Soriano, has rather produced a plausible methodology to prove that the systemic negligence produced errors, some of which were of the opposite of showing causation of damages but rather might be a windfall to an individual putative class member.

(f) Common Issues No.'s 4, 7, 11, and 12 (Aggregate Damages)

102 For similar reasons and for technical reasons, there is no common issues about aggregate damages (Common Issues No.'s 4, 7, 11, and 12).

103 Section 24(1) of the *Class Proceedings Act, 1992* stipulates when the court may assess aggregate damages. Section 24(1) states:

> **Aggregate assessment of monetary relief**
>
> 24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

104 For an aggregate assessment of damages to be available no questions of fact or law other than those relating to the assessment of monetary relief must remain to be determined in order to establish the amount of the defendant's monetary liability. An antecedent finding of liability is required before resorting to the aggregate damages provision of the *Class Proceedings Act, 1992*, and if liability cannot be established through the common issues, then an aggregate damages common issue cannot be certified. [68]

105 In the case at bar, there inevitably will be individual issues trials to determine both liability and damages. There is no general experience of damages arising from the alleged systemic negligence or systemic breach of contract. In other words, the preconditions of paragraphs 24(1)(b) and (c) are not satisfied in the case at bar and, therefore, the aggregate damages issues are not certifiable as common issues.

106 The case at bar is different from *Markson v. MBNA Canada Bank*, *supra*, where every customer of MBNA Canada Bank was exposed to the risk of suffering an illegal interest charge and where Mr. Markson might be able to prove that MBNA Canada violated s. 347 of the *Criminal Code* for some of those customers, after which resort could be had to sections 23 and 24 of the *Class Proceedings Act, 1992* to calculate the global damages figure.

107 In the case at bar, every class member is not exposed to the risks of systemic negligence associated with the CIS. While, it might be possible, as proposed by Mr. Soriano, to calculate the aggregate of the deviation in Proper Amounts from the Invoiced Amounts, that deviation simply assumes or attributes the deviation as having been caused by systemic negligence associated with the CIS.

108 In *Markson v. MBNA Canada Bank*, *supra*, in interpreting the operation of sections 23 and 24 of the *Class Proceedings Act, 1992*, Justice Rosenberg was concerned that the defendant MBNA Canada Bank should not be allowed to structure its affairs so as to avoid a possible class proceeding or to make it practically impossible to determine the extent of its misconduct. In the immediate case, the non-available of sections 23 and 24 does not arise from the same concern because it cannot be said that all putative class members are exposed to a common risk of a particular wrongdoing, and while a pleading of systemic negligence will in some cases avoid the necessity of individual issues trials, the case at bar is not such a case.

109 Thus, the damages cannot be aggregated, and Common Issues No.'s 4, 7, 11, and 12 (Aggregate Damages) are not certifiable as common issues.

(g) Common Issue No. 13 (Punitive Damages)

110 In cases where individual issues trials are inevitable, it has become *de rigueur* to certify the common issue of whether the defendant's conduct would justify an award of punitive damages but not to certify the issue of determining the amount of those damages. It is also normative that punitive damages standing alone cannot justify the certification of an action as a class proceeding. [69]

111 In the case at bar, I shall not certify Common Issue No. 13 (Punitive Damages). The matter of punitive damages is peripheral and it stands alone as the only question that, technically speaking, is certifiable. Punitive damages alone cannot justify the certification of an action as a class proceeding.

5. Preferable Procedure Criterion

(a) General Principles: Preferable Procedure

112 Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute. [70]

113 In *Fischer v. IG Investment Management Ltd.*, [71] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell for the court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the

claimants will receive a just and effective remedy for their claims if established. Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims. [72] Arguments that no litigation is preferable to a class proceeding cannot be given effect. [73] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues. [74]

114 Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different Class Members.
>
> 3. Different remedies are sought for different Class Members.
>
> 4. The number of Class Members or the identity of each Class Member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all Class Members.

115 To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice. [75]

116 In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s) and their importance in relation to the claim as a whole; (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent

to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s). [76]

117 The court must identify alternatives to the proposed class proceeding. [77] The proposed representative plaintiff bears the onus of showing that there is some basis in fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative. [78] It is not enough for the plaintiff to establish that there is no other procedure which is preferable to a class proceeding; he or she must also satisfy the court that a class proceeding would be fair, efficient and manageable. [79]

118 In *Fischer v. IG Investment Management Ltd.*, Justice Cromwell pointed out that when the court is considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case?; (2) What is the potential of the class proceeding to address those barriers?; (3) What are the alternatives to class proceedings?; (4) To what extent do the alternatives address the relevant barriers?; and (5) How do the two proceedings compare? [80]

119 And in light of the Supreme Court of Canada's directives in *Hryniak v. Mauldin* [81] and *Bruno Appliance and Furniture Inc. v. Hryniak*, [82] one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the focus on judicial economy and with the part of the preferable procedure analysis that considers manageability and whether the claimants will receive a just and effective remedy for their claims.

120 In cases, particularly cases where the individual class members' respective harm is nominal, or cases where an aggregate assessment of damages in whole or in part is possible, a class action may more readily satisfy the preferable procedure criterion because the common issues trial may be the only viable means for remedying the wrong and for calling the wrongdoer to account because individual litigation may be prohibitively expensive. [83]

121 In undertaking a preferable procedure analysis in a case in which individual issue trials are inevitable, it should be appreciated that the *Class Proceedings Act, 1992* envisions the prospect of individual claims being litigated and sections 12 and 25 of the *Act* empowers

the court with tools to manage and achieve access to justice and judicial economy in those circumstances, and, thus, the inevitability of individual issues trials is not an obstacle to certification. In the context of misrepresentation claims, numerous actions have been certified notwithstanding individual issues of reliance and damages. [84]

122 That said, in a given particular case, the inevitability of individual issues trials may obviate any advantages from the common issues trial and make the case unmanageable and thus the particular case will fail the preferable procedure criterion. [85] Or, in a given case, the inevitability of individual issues may mean that while the action may be manageable, those individual issue trials are the preferable procedure and a class action is not the preferable procedure to achieve access to justice, behaviour modification, and judicial economy. A class action may not be fair, efficient and manageable having regard to the common issues in the context of the action as a whole and the individual issues that would remain after the common issues are resolved. [86] A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action. [87]

(b) Analysis: Preferable Procedure

123 In my opinion, Mr. Bennett's proposed class action does not satisfy the preferable procedure criterion. The absence of productive common issues entails that the proposed class action is not fair, efficient, and manageable nor useful. It is axiomatic that if there are no common issues, then there is no basis-in-fact for a class action satisfying the preferable procedure criterion. [88]

124 The case at bar flounders on the preferable procedure criterion much for the same reasons that *Vaugeois v. Budget Rent-A-Car of B.C. Ltd.* [89] , a British Columbia proposed class action, was not certified. In this case, the plaintiff's allegation was that contrary to British Columbia's *Business Practices and Consumer Protection Act*, the defendant engaged in a systemic practice of improperly charging or over-charging consumers for repairs to rented cars. The plaintiff sued for civil conspiracy, breach of statute, constructive trust, waiver of tort, and unjust enrichment. The court noted that even if the defendant succeeded in defeating the systemic negligence claim, the common issues trial would not be determinative because the class members still would have individual claims of being overcharged. And if the plaintiff was successful at the common issues trial, there would nevertheless by a host of issues that remained to be determined at individual issues trials. The British Columbia agreed with the motions judge that in these circumstances a class action was not the preferable procedure and would not advance the class members' cases.

125 *Tiemstra v. Insurance Corp. of British Columbia*;[90] *Mouhteros v. DeVry Canada Inc.*;[91] *Williams v. Mutual Life Assurance Co. of Canada*; *Zicherman v. Equitable Life Insurance Co. of Canada*;[92] *Dennis v. Ontario Lottery and Gaming Corp.*[93] ; *Penney v. Bell Canada*;[94] *Loveless v. Ontario Lottery & Gaming Corp.*;[95] and *Green v. The Hospital for Sick Children*[96] are other examples of cases where a class action is the inferior and not the preferable route to behaviour modification, judicial economy, and substantive and procedural justice.

126 Returning to the case at bar, assuming that there were some viable common issues to be decided, for those class members that were victims and not beneficiaries of Hydro One Networks' conduct, the resolution of the common issues of liability in their favour would be of little assistance to them as they proceeded to individual issues trials. The imposition of an expensive class action before the individual issues trials simply delays the individual issues trial.

127 It is true, as submitted by Mr. Bennett, that part of the rationale for introducing class action legislation was to provide access to justice and behaviour modification for the circumstances where a wrongdoer otherwise could capture enormous profits from a multitude of petty misdeeds. Thus, with a class size of 1.3 million customers and a claim of $100 million, it seems that the theory of Mr. Bennett's action is that the average loss per customer is about $77 per putative Class Member. In contrast, Hydro's belief is that the number of customers that were overcharged was around 90,000 and the average overcharge was $26.32 per customer ($504,410 in total). Regardless of whom is correct about the extent of the overpricing, it is obvious that it would be prohibitively expensive for an individual to sue for a loss between $25 to $100. However, it does not follow that a class action will always be the preferable response to these circumstances or that a class action is always the necessary or feasible response to these circumstances. Sometimes, a class action, even if certified, leaves too much to be done at the individual issues trials and impedes rather than removes the barriers to access to justice.

128 The point is that a class action will not be preferable if claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action. In this last regard, it is useful to point out that at individual issues trials, class members lose their invulnerability to an adverse costs award and they must pay legal fees to their own lawyers or they must pay Class Counsel assuming that Class Counsel stays on the record after the common issues trial.

129 I appreciate that s. 25 of the *Class Proceedings Act, 1992* empowers the court to design expedient and efficient procedural mechanisms and that in an appropriate case that resource could be used to reduce the individual issues phase to a very simple fill-in-the-form-based procedure, but those efficiencies must be matched with a meaningful common issues

phase and if simplified the procedure must still be procedurally fair to the defendant. The appropriate circumstances seem to have been present in cases like *Markson v. MBNA Canada Bank*[97] and *Lundy v. VIA Rail Canada Inc.*,[98] but they are not present in the case at bar.

130 There is a second reason that Mr. Bennett's proposed class action does not satisfy the preferable procedure criterion. In the circumstances that was the fiasco of the Cornerstone Project, the alternative of the administrative procedures of the OEB is preferable.[99] The OEB's complaint process has the potential to provide more effective substantive and procedural justice for the putative class members' and the OEB process better fulfills the access to justice and behaviour modification objectives that underlie the *Class Proceedings Act, 1992*.

131 Mr. Bennett submits that the OEB does not have the substantive law juridical resources of the Superior Court, and thus the OEB cannot provide effective redress for the substance of the plaintiff's claims and it cannot provide access to justice in a manner that accords suitable procedural rights. Mr. Bennett argues that the OEB cannot be the preferable procedure because it cannot offer the same remedial relief available from the court. He submits that the OEB does not have jurisdiction over the claims for negligence, breach of contract, and unjust enrichment, cannot answer the proposed common issues, has extremely limited participatory rights for class members, and the initiative to institute proceedings is a matter for the OEB and not the customer.

132 I disagree that resort to the OEB is not the superior choice. Since the OEB has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact,[100] it may be that the OEB has equivalent jurisdiction to that available to the court, but regardless, the OEB has adequate jurisdiction to redress problems of electricity consumers being overpriced.[101] The OEB has the jurisdiction to determine whether Hydro One Networks has overcharged a customer, and, indeed, that jurisdiction apparently had an influence in the settlements already reached between customers and Hydro One Networks in the aftermath of the Cornerstone Project and the CIS problems. In terms of behaviour management, the OEB has enormous powers to influence the behaviour of Hydro One Networks, and, once again, the OEB's authority apparently was brought to bear in the immediate case.

133 From the perspective of individual consumers, it should be recalled that the legislature directed that under the *Ontario Energy Board Act, 1998*, in carrying out its responsibilities, the OEB shall be guided by the objective to protect the interests of consumers with respect to prices and the adequacy reliability and quality of electricity service.[102] Accepting that individual consumers cannot initiate OEB proceedings, it does not follow that the OEB will not respond in appropriate cases in accordance with its statutory mandate.

134 While an aspect of the legislative purposes of the *Class Proceedings Act, 1992* is to provide access to justice for small claims that would be economically unviable to litigate, the Act does not oust all alternatives measures, particularly ones prescribed by other public law statutes. In *Hollick v. Metropolitan Toronto (Municipality)*, [103] Chief Justice McLachlin stated that the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

135 I conclude that Mr. Bennett's action does not satisfy the preferable procedure criterion.

6. Representative Plaintiff Criterion

(a) General Principles: Representative Plaintiff Criterion

136 The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

137 The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant. [104]

138 Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact. [105]

139 Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim. [106]

140 While a litigation plan is a work in progress, it must correspond to the complexity of the particular case and provide enough detail to allow the court to assess whether a class action is: (a) the preferable procedure; and (b) manageable including the resolution of the common issues and any individual issues that remain after the common issues trial. [107] The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed. [108]

(b) Analysis: Representative Plaintiff

141 Hydro One Networks argues that his claim is not a genuine representation of the claims of the members of the class and he does not share the proposed common issues with other class members, as the proposed common issues are not a substantial ingredient of, and would not advance, his claims.

142 I disagree. Assuming that all the other certification criteria were satisfied, then Mr. Bennett satisfies the requirements to be representative plaintiff.

D. Conclusion

143 For the above reasons, Mr. Bennett's motion for certification is dismissed.

144 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within 20 days from the release of these Reasons for Decision followed by Mr. Bennett's submissions within a further 20 days.

Motion dismissed.

Footnotes

1 S.O. 1992, c. C.6.

2 S.O. 1998, c. 15, Sch. A.

3 S.O. 1998, c. 15, Sch. B.

4 R.S.C. 1985, c E-4

5 S.O. 1998, c. 15, Sched. B, s.1(1) para. 1.

6 S.O. 1998, c. 15, Sched. B, s. 57 (a).

7 S.O. 1998, c. 15, Sched. B, s. 70(1).

8 S.O. 1998, c. 15, Sched. B, s. 70(2).

9 S.O. 1998, c. 15, Sched. B, s. 70.1.

10 S.O. 1998, c. 15, Sched. B, s. 78.

11 S.O. 1998, c. 15, Sched. B, s. 105.

12 S.O. 1998, c. 15, Sched. B, s. 107.

13 S.O. 1998, c. 15, Sched. B, s. 108.

14 S.O. 1998, c. 15, Sched. B, s. 112.1.

15 S.O. 1998, c. 15, Sched. B, s. 112.0.2.

16 S.O. 1998, c. 15, Sched. B, Part VII.1.

17 S.O. 1998, c. 15, Sched. B, 112.3.

18 S.O. 1998, c. 15, Sched. B, s. 112.5.

19 S.O. 1998, c. 15, Sched. B, s. 112.4.

20 S.O. 1998, c. 15, Sched. B, s. 112.7.

21 S.O. 1998, c. 15, Sched. B, s.19(1).

22 R.S.O. 1990, c O.6.

23 *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).

24 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 16.

25 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at paras. 26 to 29; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 15 and 16.

26 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 28 and 29.

27 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 16-26.

28 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.); *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.).

29 *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (Ont. S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 21; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.) at para. 140.

30 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 110.

31 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 22.

32 *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.), aff'd 2012 ONSC 3692 (Ont. Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.); *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 545 (S.C.C.);

Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Ont. Div. Ct.).

33 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 16-26; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 50, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).

34 *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 (Ont. S.C.J.); *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.), aff'd 2012 ONSC 3692 (Ont. Div. Ct.); *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 545 (S.C.C.); *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 (Ont. S.C.J.) at para.13.

35 *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.) at para. 76.

36 *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 (B.C. S.C.), aff'd 2012 BCCA 260 (B.C. C.A.).

37 [1990] 2 S.C.R. 959 (S.C.C.).

38 *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) at p. 679, leave to appeal to S.C.C. ref'd, (2000), [1999] S.C.C.A. No. 476 (S.C.C.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 19, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).

39 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 25; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 41, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g, (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.

40 *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).

41 2001 SCC 46 (S.C.C.) at para. 38.

42 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 38; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 21; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.); *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 (Ont. S.C.J.) at paras. 159-167.

43 [2007] O.J. No. 148 (Ont. S.C.J.).

44 *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Ont. Div. Ct.), which had aff'd [2002] O.J. No. 2764 (Ont. S.C.J.).

45 *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.) at paras. 121-146.

46 *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 22.

47 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 21; *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (Ont. S.C.J.) at paras. 12-13, aff'd [2003] O.J. No. 3918 (Ont. Div. Ct.).

48 *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.) at para. 10 at para. 10; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.) at para. 22, leave to appeal ref'd [2007] O.J. No. 1991 (Ont. Div. Ct.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Ont. Div. Ct.); *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at para. 103-107 at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Ont. S.C.J.).

49 [2007] O.J. No. 148 (Ont. S.C.J.) at para. 24.

50 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 18.

51 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at paras. 39 and 40

52 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 545 (S.C.C.); *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.) at paras. 145-46 and 160, leave to appeal to S.C.C. refused, (2009), [2008] S.C.C.A. No. 512 (S.C.C.); *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.) at para. 183.

53 2013 SCC 57 (S.C.C.) at para. 106.

54 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at paras. 114-119; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.).

55 *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Ont. Div. Ct.) at paras. 3, 6.

56 *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (Ont. S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C. S.C.) at para. 51, varied on other grounds (2004), 42 B.L.R. (3d) 161 (B.C. C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (Ont. S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Ont. Div. Ct.), varied 2011 ONSC 5882 (Ont. Div. Ct.).

57 *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1 (S.C.C.) at paras. 44-46.

58 *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at para. 42; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Ont. Div. Ct.), aff'd [2010] O.J. No. 2683 (Ont. C.A.), leave to appeal to S.C.C. refused (2011), [2010] S.C.C.A. No. 348 (S.C.C.).

59 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).

60 *Hodge v. Neinstein*, 2017 ONCA 494 (Ont. C.A.) at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 54.

61 *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (B.C. C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21 (S.C.C.).

62 2007 ONCA 334 (Ont. C.A.), leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346 (S.C.C.).

63 2010 ONSC 1148 (Ont. S.C.J.), leave to appeal to S.C.C. ref'd (2013), [2012] S.C.C.A. No. 326 (S.C.C.).

64 R.S.C. 1985, c. C-46.

65 2007 ONCA 334 (Ont. C.A.) at paras. 37-38, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346 (S.C.C.).

66 2010 ONSC 1148 (Ont. S.C.J.), leave to appeal to S.C.C. ref'd (2013), [2012] S.C.C.A. No. 326 (S.C.C.).

67 2012 ONCA 445 (Ont. C.A.), rev'g 2010 ONSC 4520 (Ont. S.C.J.).

68 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 131; *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148 (Ont. S.C.J.), leave to appeal to S.C.C. ref'd (2013), [2012] S.C.C.A. No. 326 (S.C.C.); *Kalra v. Mercedes Benz*, 2017 ONSC 3795 (Ont. S.C.J.).

69 *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (Ont. S.C.J.) at para. 75, aff'd [2004] O.J. No. 5309 (Ont. Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (Ont. S.C.J.) at para. 104.

70 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.) at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.).

71 2013 SCC 69 (S.C.C.) at paras. 24-38.

72 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).

73 *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 45, aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).

74 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.).

75 *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.); *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.).

76 *Cloud v. Canada (Attorney General) Cloud v. Canada* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.).

77 *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at para. 35; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 28.

78 *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at paras. 48-49.

79 *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 (Ont. C.A.) at para. 62; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at para. 62-67.

80 *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at paras. 27-38; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.) at para. 125.

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84 *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at paras. 48-49, rev'g (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), leave to appeal to S.C.C. refused, (2001), [2000] S.C.C.A. No. 660 (S.C.C.); *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Ont. Div. Ct.) at para. 35; *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 (Ont. S.C.J.) at para. 20; *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.); *Murphy*

v. BDO Dunwoody LLP, [2006] O.J. No. 2729 (Ont. S.C.J.); *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Ont. S.C.J.); *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (Ont. S.C.J.) at para. 103; *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (Ont. S.C.J.) at paras. 340, 350-351, leave to appeal to Div. Ct. refused, 2012 ONSC 6101 (Ont. Div. Ct.); *OPA v. Ottawa Police Services Board*, 2014 ONSC 1584 (Ont. Div. Ct.) at para. 59; *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (Ont. C.A.).

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86 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.).

87 *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (Ont. C.A.) at para. 26.

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89 2017 BCCA 111 (B.C. C.A.), aff'g 2015 BCSC 802 (B.C. S.C.).

90 [1996] B.C.J. No. 952 (B.C. S.C.), aff'd [1997] B.C.J. No. 1628 (B.C. C.A.).

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93 2010 ONSC 1332 (Ont. S.C.J.), aff'd 2011 ONSC 7024 (Ont. Div. Ct.), aff'd 2013 ONCA 501 (Ont. C.A.), leave to appeal refused (2014), [2013] S.C.C.A. No. 373 (S.C.C.).

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100 S.O. 1998, c. 15, Sched. B, s.19(1).

101 *Summitt Energy Management Inc. v. Ontario (Energy Board)*, 2013 ONSC 318 (Ont. Div. Ct.).

102 S.O. 1998, c. 15, Sched. B, s.1(1) para. 1.

103 2001 SCC 68 (S.C.C.) at para. 39.

104 *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (Ont. S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (Ont. S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (Ont. C.A.).

105 *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (Ont. S.C.J.) at para. 2, leave to appeal granted, [2002] O.J. No. 2135 (Ont. S.C.J.), varied (2003), 64 O.R. (3d) 208 (Ont. Div. Ct.), varied [2003] O.J. No. 2218 (Ont. C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (Ont. S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) at para. 55.

106 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 41.

107 *Carom v. Bre-X Minerals Ltd.* (2000), 44 O.R. (3d) 173 (Ont. C.A.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (Ont. C.A.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 95; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at para. 76; *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.) at para. 100.

108 *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at paras. 62-67; *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.).

End of Document

TAB 2

2007 CarswellOnt 1683
Ontario Superior Court of Justice (Divisional Court)

Maystar General Contractors Inc. v. I.U.P.A.T., Local 1819

2007 CarswellOnt 1683, [2007] O.L.R.B. Rep. 459, [2007] O.J. No. 1067, 156 A.C.W.S. (3d) 117, 2007 C.L.L.C. 220-052, 223 O.A.C. 13, 280 D.L.R. (4th) 692, 62 Admin. L.R. (4th) 217

MAYSTAR GENERAL CONTRACTORS INC. (Applicant) and THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1819 and THE ONTARIO LABOUR RELATIONS BOARD (Respondents)

Cunningham A.C.J. Ont. S.C.J., Lane, Smith JJ.

Heard: December 6, 2006
Judgment: March 20, 2007 *
Docket: Toronto 481/06

Counsel: Martin Sclisizzi, Morton Mitchnick for Applicant
Ronald Lebi for Respondent, The International Union of Painters and Allied Trades, Local 1819
Leonard Marvy for Respondent, The Ontario Labour Relations Board

Subject: Labour; Public

APPLICATION by employer for judicial review of decisions by labour relations board that it could not consider late-filed information.

***Cunningham A.C.J. Ont. S.C.J.*:**

Overview

1 The applicant, Maystar General Contractors Inc. ("Maystar"), seeks judicial review of the June 19, 2006 Certification Decision and September 6, 2006 Reconsideration Decision of the respondent Ontario Labour Relations Board (the "Board"). The Board ordered the respondent International Union of Painters and Allied Trades, Local Union 1819 (the "Union") to be certified as the bargaining agent representing two "glaziers" allegedly employed by Maystar as of June 13, 2006 (the date of the certification application). The Board arrived at its decision without considering Maystar's response to the certification

application because the response was delivered after the statutory two-day time limit and the Board concluded it did not have jurisdiction to consider late-filed information.

2 For the reasons that follow, Maystar's application for judicial review is allowed.

Background

3 On June 13, 2006, pursuant to s. 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A (the "LRA"), the Union sought certification for "all glaziers and glazier apprentices" employed by Maystar. Certification applications in the construction industry are card-based certifications. Where more than 55 percent of the employees in a proposed bargaining unit sign union membership cards, the Board may automatically certify the union without a representation vote (LRA, s. 128.1 (13)).

4 The Union claimed that as of June 13, 2006, there were two employees in the proposed province-wide bargaining unit working at Maystar's Harmony Road job-site in Oshawa. On June 15, 2006, Maystar served the Union with its response. Through the inadvertence of the attending lawyer's assistant, Maystar did not fax the response to the Board.

5 On June 19, 2006, the Board issued its Certification Decision, certifying the Union. Since Maystar's response was not faxed to the Board, the Certification Decision was made without considering the information in the response. On June 26, 2006, Maystar filed a Request for Reconsideration with the Board, asking it to reconsider its Certification Decision and consider the information in Maystar's response.

6 In Maystar's response, it alleged that it did not employ any glaziers or glazier apprentices on June 13, 2006. According to Maystar, the only two glaziers at the Harmony Road job-site were contractors and were not "employees" of Maystar for the purposes of the LRA. Maystar admitted that it did have two labourers at the Harmony Road job-site that day. If those labourers were found to be "glaziers" or "glazier apprentices", Maystar submitted that it actually employed eight such employees over four job-sites on June 13, 2006. Therefore, it challenged the number of employees in the Union's proposed bargaining unit.

7 On September 6, 2006, the Board issued its Reconsideration Decision. The Board held it would not consider the information in Maystar's response because it was filed after the two-day time limit prescribed by s. 128.1 (3) of the LRA. In coming to this conclusion, the Board adopted the analysis in *U.A., Local 787 v. Air Kool Ltd.* (Ont. L.R.B.) at paras. 15-29 [*Air Kool Ltd.*]. In *Air Kool Ltd.*, the Board concluded that the two-day time limit in s. 128.1 (3) was mandatory and that the Board was required by s. 128.1 (4) to consider only the information in the certification application and timely information from the employer when determining the description of, and number of union members in, the proposed bargaining unit.

Legislative Provisions

8 The provisions of the LRA relevant to this application for judicial review are as follows:

Application for certification without a vote Election

128.1 (1) A trade union applying for certification as bargaining agent of the employees of an employer may elect to have its application dealt with under this section rather than under section 8.

Notice to Board and employer

(2) The trade union shall give written notice of the election,

(a) to the Board, on the date the trade union files the application; and

(b) to the employer, on the date the trade union delivers a copy of the application to the employer.

Employer to provide information

(3) Within two days (excluding Saturdays, Sundays and holidays) after receiving notice under subsection (2), the employer shall provide the Board with,

(a) the names of the employees in the bargaining unit proposed in the application, as of the date the application is filed; and

(b) if the employer gives the Board a written description of the bargaining unit that the employer proposes, in accordance with subsection 7 (14), the names of the employees in that proposed bargaining unit, as of the date the application is filed.

Matters to be determined

(4) On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (3),

(a) the bargaining unit; and

(b) the percentage of employees in the bargaining unit who are members of the trade union.

Exception: allegation of contravention, etc.

(5) Nothing in subsection (4) prevents the Board from considering evidence and submissions relating to any allegation that section 70, 72 or 76 has been contravened or that there has been fraud or misrepresentation, if the Board considers it appropriate to consider the evidence and submissions in making a decision under this section.

. . . . .

Board may certify or may direct representation vote

(13) If the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the date the application is filed, it may,

(a) certify the trade union as the bargaining agent of the employees in the bargaining unit; or

(b) direct that a representation vote be taken.

Legal Issues

9 The following issues are relevant to this application for judicial review:

1. What is the appropriate standard of review?

2. Did the Board err in concluding that the word "shall" in s. 128.1 (3) of the LRA is mandatory and that the Board is therefore precluded from considering employer information that is submitted after the two-day time limit?

Standard of Review

10 To determine the appropriate standard of review, the court must engage in the pragmatic and functional approach (*Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at paras. 29-38 [*Pushpanathan*] and *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226 (S.C.C.), at 238).

11 The pragmatic and functional approach requires consideration of four contextual factors: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and the nature of the question — law, fact or mixed law and fact.

12 Maystar submits that the appropriate standard of review of the Board's decision is correctness. Maystar concedes that the Board's decisions are protected by broad privative clauses (ss. 114 and 116 of the LRA), but argues that other factors suggest less deference is owed to this particular decision of the Board. Maystar submits that the nature of the question before the Board is a question that concerns the limits of the Board's jurisdiction — namely, is the Board precluded from considering information provided to it beyond a time limit prescribed by the LRA? Maystar asserts that this question does not fall squarely within the Board's expertise to regulate and resolve particular labour disputes, but rather concerns the boundaries of its jurisdiction, which is a general question of law. Maystar also points out that the Board's ruling on this question is of precedential value.

13 The Union submits that the appropriate standard of review is patent unreasonableness. It notes that the Board's decisions are protected by strong privative clauses and are not subject to appeal, and that the Board is recognized as an expert tribunal, particularly regarding certification applications. The Union says the LRA is intended to resolve and balance competing policy objectives or the interests of various constituencies. Finally, the Union submits that the nature of the question before the Board called for an informed interpretation by an expert tribunal of its home statute. Taken together, the Union submits that these factors suggest that the Board is entitled to the highest degree of deference.

14 The Board also submits that the appropriate standard of review is patent unreasonableness. In addition to being protected by two strong privative clauses, the Board points out that the courts have acknowledged the Board's expertise on questions of interpretation of labour relations legislation. The purposes of the LRA are set out in s. 2, and include facilitating collective bargaining, recognizing the importance of workplace parties adapting to change, promoting flexibility, productivity and employee involvement in the workplace, encouraging co-operative resolution of workplace issues, and promoting the expeditious resolution of workplace disputes. The purpose of s. 128.1 of the LRA is to provide an expeditious alternative regime for the certification of unions in the construction industry. The Board submits that it must balance these sometimes-competing purposes and objectives when interpreting the LRA, which suggests that it is entitled to deference. While the Board admits that interpretation of s. 128.1 is a question of law, it submits that this question goes to the heart of the Board's expertise, which also points toward deference. Taken together, the Board submits that all of these factors indicate that the Board should receive the highest degree of deference.

15 While the Supreme Court has said in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (S.C.C.) at para. 68, that a correctness standard of review will rarely be applied in the context of labour adjudications, I find that the appropriate standard of review for this particular decision of the Board is correctness. I acknowledge that curial deference is

suggested both by the presence of two privative clauses protecting the Board's decisions and by the fact that the Board must balance competing labour relations objectives when interpreting the LRA. Nevertheless, the pragmatic and functional approach is not meant to be rigid and formulaic in its application. As stated by Laskin J.A. in *O.P.S.E.U. v. Seneca College of Applied Arts & Technology* (2006), 80 O.R. (3d) 1 (Ont. C.A.) at para. 32: "The purpose of the pragmatic and functional analysis — of considering the four contextual factors — is to ascertain the legislature's intent. See *Q.*, *supra*, at para. 26. Did the legislature intend that a reviewing court give deference to the Board's decision, and if so, what level of deference?" While certain contextual factors may suggest curial deference is owed to a tribunal, other factors may, in the context, overwhelmingly indicate that the Legislature intended there be little or no deference given to the tribunal's decision.

16 As will be outlined below, the foundation of the Board's analysis rests on its conclusion that the word "shall" in s. 128.1 (3) is mandatory and not directory. This is a question of law of precedential value, which suggests less deference is owed (P*ushpanathan*, *supra* at para. 43). Since relative expertise is the "most important factor" in the pragmatic and functional analysis, the key question for determining the appropriate standard of review in this particular case is whether the Board has greater relative expertise than the courts in interpreting the legal effect of the word "shall" in s. 128.1 (3) (*Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) at para. 50; *Pushpanathan v. Canada (Minister of Employment & Immigration)*, *supra* at para. 32-33). In my opinion, the Board's labour relations expertise does not give it a comparative advantage over the courts on this narrow legal question. Therefore, the Board's interpretation is not entitled to deference and will be reviewed on a standard of correctness.

Analysis

17 In deciding to refuse to consider the employer's late-filed information, the Board relied extensively on the analysis in *Air Kool*, reproducing all of paras. 15-29 of that decision in its own reasons. This necessitates a detailed examination of the analysis contained in those paragraphs.

18 In *Air Kool Ltd.*, *supra* at paras. 15-29, the Board outlined its interpretive approach to s. 128.1 (3). Subsection 128.1 (3) states that the employer "shall" provide certain information to the Board within two days. The Board noted that the *Interpretation Act*, R.S.O. 1990, c. I.11 requires the word "shall" to be construed as imperative. While "shall" is always imperative, the context will determine whether the imperative is "mandatory" or "directory". The Board cited Ruth Sullivan, *Sullivan & Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 60, for the test used to determine whether "shall" is mandatory or directory: "...if breaching an obligation or requirement imposed by 'shall' entails a nullity,

the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory."

19 The Board concluded that the word "shall" in s. 128.1 (3) is mandatory because there are statutory consequences for failing to do what s. 128.1 (3) says the employer "shall" do which the Board cannot fix or disregard.

20 The first consequence identified by the Board was that s. 128.1 (4) requires the Board to only consider the information provided in the union's certification application if the employer fails to submit its information within the two-day time limit in s. 128.1 (3). The Board came to this conclusion by noting that s. 128.1 (4) says the Board "shall" determine the union's level of support based on the information provided by the union in the certification application and "the information provided...under subsection (3)". To be "information provided...under subsection (3)", the employer must deliver the information within the two-day time limit. Since the Board has no statutory authority to extend a time limit in the LRA, the consequence of an employer failing to provide information within the two-day time limit is that the Board may not consider it.

21 The second consequence identified by the Board was that a failure of the employer to provide information under s. 128.1 (3) may result in the Board finding that the union has more than 55 percent employee support and deciding that the union may be certified without a representation vote pursuant to s. 128.1 (13).

22 The Board said that its interpretation was supported by s. 128.1 (5), which expressly allows the Board, in assessing the union's level of support under s. 128.1 (4), to consider allegations of unfair labour practices, fraud or misrepresentation. The Board noted that there is no express prohibition preventing the Board from considering such allegations, yet the Legislature felt it necessary to expressly permit the Board to consider such matters, which suggests that the Legislature intended s. 128.1 (4) to give the Board very little discretion to act.

23 Finally, the Board said that its interpretation was also consistent with the statutory context, since the Legislature has drafted the provisions in the LRA dealing with the establishment of collective bargaining rights in a strongly prescriptive manner (i.e. the Legislature has chosen to "closely manage" the manner in which the Board conducts a certification application).

24 It is also instructive to recite the Board's own comments on the analysis set out in the *Air Kool Ltd.* decision. At para. 8, the Board said,

> In *Air Kool*...the Board has determined that the time limits in section 128.1(3) are mandatory and that the Board is obliged in section 128.1(4) to make its determination

> about [the union's level of support]...on the basis of only the information in the application and timely information from the responding party... [emphasis added]

25 At para. 9, the Board rejected Maystar's submission that the time limits in s. 128.1 (3) are directory, saying,

> The responding party asserts that the time limits in section 128.1(3) are directory, largely because there are no direct consequences for non-compliance. The Board specifically addressed that argument in *Air Kool*. The Board concluded that section 128.1(4) sets out the consequences for failing to meet the time limits, that is, the Board will certify the application, a significant consequence. Further, section 128.1(5) bolsters the analysis that the time limits are mandatory by carving out the circumstances in which the Board may consider otherwise untimely information, that is, where there is fraud, misrepresentation, coercion, etc. that strikes at the heart of the reliability of the membership evidence provided by an applicant. [emphasis added]

26 With respect, the Board has made two fundamental errors in concluding that the word "shall" in s. 128.1 (3) is mandatory. First, s. 128.1 (4) does not describe the consequences of failing to file information within the two-day time limit. Subsection 128.1 (4) simply directs the Board to determine the union's level of support as of the certification date, and instructs the Board as to the information upon which it is to make that determination. *Subsection 128.1 (4) does not direct the Board to* not *consider late-filed information*. This conclusion is consistent with the highly prescriptive nature of the certification provisions in the LRA as noted by the Board and emphasized by the Union in this application. Given that the Legislature's clear intent is to "closely manage the establishment of bargaining rights by certification", if the Legislature intended the Board to *always* refuse to consider late-filed information, it would have expressly said so.

27 In addition, contrary to the Board's assertion at para. 9 of its decision, s. 128.1 (4) does not require the Board to certify the union if the employer does not file its information within the two-day time limit. The decision to certify the union without a representation vote is discretionary and requires evidence that more than 55 percent of employees in the proposed bargaining unit support the union (see s. 128.1 (13)).

28 Second, the Board erred in stating, at para. 9 of its decision, that s. 128.1 (5) sets out the "circumstances in which the Board may consider otherwise untimely information." This provision does not in any way address the timeliness of information placed before the Board. It simply provides the Board with the discretion to consider allegations of unfair labour practices, fraud or misrepresentation when determining the union's level of support at the date of the certification application. As indicated in *Air Kool Ltd.*, *supra* at para. 26, s. 128.1 (5) is demonstrative of the Legislature's intent to "closely manage" certification applications

by clarifying that the Board has discretion to consider certain evidence (like evidence of fraud). But it does not necessarily follow that this provision demonstrates the Legislature's intent to *prohibit* the Board from considering late-filed information. Again, if the Legislature intended such a consequence, it would have expressly said so.

29 In my view, the word "shall" in s. 128.1 (3) is directory. If an employer fails to deliver its information within the two-day time limit, the Board *may* remedy the breach in accordance with its Rules of Procedure (see *Easton's Group of Hotels Inc., Re* (Ont. L.R.B.) at paras. 11-20).

Disposition

30 For the reasons outlined above, the application for judicial review is allowed and the Board's September 6, 2006 Reconsideration Decision is set aside. The matter is remitted to the Board for reconsideration in light of these reasons for judgment.

31 Any party wishing to make submissions as to costs may do so by way of brief written submissions to the Court within 30 days of the release of these reasons for judgment.

Application granted.

Footnotes

∗ Additional reasons reported at *Maystar General Contractors Inc. v. I.U.P.A.T., Local 1819* (2007), 2007 CarswellOnt 4832, [2007] O.L.R.B. Rep. 851 (Ont. Div. Ct.).

End of Document

TAB 3

1979 CarswellNS 254
Nova Scotia Court of Appeal

R. v. Croft

1979 CarswellNS 254, [1979] N.S.J. No. 810, 35 N.S.R. (2d) 344, 62 A.P.R. 344

Basil Croft, Appellant and Her Majesty The Queen, Respondent

MacKeigan, C.J.N.S., Macdonald, Jones, JJ.A.

Heard: October 2, 1979
Judgment: December 4, 1979
Docket: S.C.A. 00465

Counsel: *Albert E. Bremner*, for the appellant
Dana W. Giovannetti, for the respondent

Subject: Criminal; Public

***MacDonald, J.A.*:**

1 The appellant appeals by way of stated case against the conviction entered against him by His Honour Joseph P. Kennedy, a provincial court judge, on the charge that he:

> did unlawfully have in his possession a shotgun upon a highway passing through woods during the period from one hour after sunset to one hour before sunrise without having it so encased or dismantled that it cannot be readily made operable in violation of and contrary to Section 123(2) of Part III of the Lands and Forests Act.

2 The facts as found by the trial judge are:

> On the 3rd day of October, 1978, at 8:30 P.M., Donald Wyman and Norman MacDonald [MacDougall] both Rangers of the Department of Lands & Forests, stopped a motor vehicle on a public road at Lapland, Lunenburg County. The motor vehicle was occupied by the driver, one Darell Naugler (also charged under, the same section), and three passengers. The accused, Croft, was a passenger in the front seat. In the back seat was the wife of the accused and a child. The Rangers immediately noted an uncased shotgun lying against the front seat between the driver and the accused, Croft.

I was satisfied on the evidence that the road in question was a 'highway passing through woods' and that 8:30 P.M. on the date in question was 'during a period from one hour after sunset to one hour before sunrise.'

I was further satisfied and determined that the shotgun was not 'so encased or dismantled that it could not be readily made operable.'

The accused, Croft, testified and I found him credible. He stated that the shotgun belonged to the driver, Naugler, and that he was aware of its presence in the motor vehicle but was not aware that its being there in that condition at that time and place was a violation of the Lands and Forests Act.

Although I believed the accused, when applying Section 203(1) of the Lands & Forests Act, I found him to be in possession of the shotgun. I then determined Section 123(1) to be an absolute liability section pursuant to Mr. Justice Macdonald's decision in *The Queen v. Morrison and MacKay* (SCA00375 Dated February 15/79) [now reported in 31 N.S.R. (2d) 195] and convicted the accused.

3 The two questions posed for our opinion are:

(1) Did I err in holding that Section 123(2) of the Lands & Forests Act is an absolute liability section rather than a strict liability section and thus precluded a mistaken set of facts that, if true, would render the act or omission innocent?

(2) Did I err in law in finding that Section 203(1) of the Lands & Forests Act is so worded as to require me to rule that the shotgun was in the possession of the accused as a passenger in the motor vehicle knowing the shotgun was present regardless of any ruling I might have made as to possession on the evidence before me.

4 In *R. v. Morrison and MacKay* (1979), 31 N.S.R. (2d) 195 this Court held that s.123(2) of the *Lands and Forests Act*, R.S.N.S. 1967, c.163, as amended, created an offence of absolute liability as such was defined by the Supreme Court of Canada in *R. v. Sault Ste. Marie* (1978), 21 N.R. 295, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353.

5 We are not persuaded by counsel for the appellant that we should here reconsider our judgment in *Morrison and MacKay*. The first question therefore should be answered in the negative.

6 Section 203(1) of the Lands and Forests Act, R.S.N.S. 1967, c.163, as amended, provides:

203(1) If there are two or more persons any one of whom with the knowledge or consent of the other or others has anything in his custody or possession, in violation of any of the

> provisions of this Part, it shall be deemed and taken to be in the custody and possession of each and all of them.

7 Section 203(1) is identical to s.86 of "*The Game Act*" *Stats. N.S.* 1908, c.17. It does not appear in any game legislation enaoted prior to 1908. Although I do not know the origin of the section I suspect that it is based upon s.3(K) of *The Criminal Code, Stats. Can.* 1892, c.32 which provided:

> 3(K) If there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, have any such thing in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

8 The word "such" before the word "thing" in s.3(K) was deleted by *Stats. Can.* 1893, c.32. The present *Code* section with respect to constructive possession is 3(4)(b) which states:

> 3.(4)(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

9 The only difference between the *Code* section and that of the *Lands and Forests Act* is that the former requires "knowledge *and* consent" whereas the latter speaks of "knowledge *or* consent". This difference is substantial. To make the element of consent an alternative to knowledge for liability purposes is in my view erroneous because although knowledge does not necessarily include consent, consent to be actionable always implies knowledge. If knowledge alone is sufficient to establish liability under s.203(1) then the words "or consent" are unnecessary and rendered meaningless. I do not think that the legislature intended to impose liability upon a person who had knowledge that another has something in his custody or possession in violation of the Act where it cannot be said that the former has consented to such custody or possession. To give such words a proper meaning the word "or" should be read as "and". This would make the section consistent with its *Code* counterpart. To carry out the intent of the legislature it is occasionally found necessary to read the conjunctions "or" and "and" one for the other - see Maxwell on *Interpretation of Statutes*, 11th ed., p.229. It should be noted that the *Summary Proceedings Act*, Stats. N.S. 1972, c.18 applies to prosecutions under the *Lands and Forests Act*. The former Act (unlike the *Summary Conviction Act* it replaced) provides that the provisions of the *Criminal Code* applicable to summary conviction offences shall apply mutatis mutandis to proceedings under that *Act* "except where and to the extent that it is otherwise specially enacted"; although because of s.203(1) it may be that Code s.3(4) does not apply to proceedings under the *Lands and Forests Act*. This does not matter if, as I suggest, both sections receive a uniform interpretation.

10 The weight of judicial authority is that "knowledge and consent" as those words appear in the *Code* definition of construtive possession require some element of control. In *R. v. Calvin and Gladue* (1942), 78 C.C.C. 282 (B.C.C.A.) O'Halloran, J.A. said at p.287:

> The 'knowledge and consent' which is an integral element of joint possession in s.5(2) must be related to and read with the definition of 'possession' in the previous s.5(1)(b). It follows that 'knowledge and consent' cannot exist without the co-existence of some measure of control over the subject matter. If there is the power to consent there is equally the power to refuse and vice versa. They each signify the existence of some power or authority which is here called control without which the need for their exercise could not arise or be invoked....

11 Under s.203(1) knowledge by a person that his companion had in his custody or possession anything enjoined by the section puts the former in deemed or constructive possession of such thing. The position of the Crown is that such deeming of possession is absolute and does not admit of rebutting evidence.

12 In *Regina v. Sunbeam Corporation (Canada) Limited* (1967), 1 C.R.N.S. 183, Laskin, J.A. had this to say about the phrase "shall be deemed". (pp.208,209):

> ...I do not think it is trifling to wonder whether the concurrent use of 'prima facie' with the words 'be deemed' should be taken to soften the effect which "shall be deemed' would have if that phrase stood alone. I would myself think "shall be deemed' to be a stronger phrase to carry the meaning that unless contrary credible evidence is adduced the trier of fact must find that the agent had the accused's authority with respect to the specified matters. (My emphasis)

13 Finally, I could not find in my review of the reported cases concerned with the *Code* definition of constructive possession one in which the effect of the word "deemed" was specifically considered. It appears to have been judicially accepted that the mere presence in the section of the word "deemed" does not permit of a conclusive finding of but rather if all the elements of constructive possession are established by the prosecution then a finding of possession *must*, not may, follow in the absence of any contrary credible evidence.

14 I therefore do not find of assistance the cases of *Poole & Thompson Ltd. v. McNally*, [1935] 1 D.L.R. 161 (S.C.C.) and *Imperial Oil Ltd. v. Board of Commissioners of Public Utilities* (1974), 10 N.S.R. (2d) 415 cited by counsel for the respondent. Those cases were concerned with non-criminal legislation. More on point is *Regina v. Novak* (1955), 112 C.C.C. (Ont. C.A.). There Schroeder, J.A., after quoting s.3(4)(b) of the *Code* said:

> Although the motor car was being driven by the juvenile, the knowledge and consent of the appellant to the former's having the motor car in his custody and possession could be clearly inferred from the circumstances, and I have no doubt but that there was evidence to go to a jury that both of these young men were in actual physical possession of the thing stolen. This, in the absence of an explanation which might reasonably be true, affords proof either that the two boys stole the motor car or that they received it, knowing it to have been stolen. (My emphasis_

15 In view of the cases to which I have referred, particularly *Sunbeam*, and in light of the twin doctrines of the presumption of innocence and reasonable doubt it is my opinion that although s.203(1) of the *Act* operates to establish possession in an accused of anything his companion has in his custody or possession with the knowledge and consent of the accused the presumption is not conclusive but rather allows for credible contrary evidence.

16 In my opinion the constructive possession deemed by knowledge and consent may be rebutted by credible evidence that goes to either the issue of knowledge or the issue of consent with its attendant element of control. It is only with respect to such issues that contrary evidence should be received.

17 On the hearing of this appeal the Court invoked r.66.08 and ordered that a transcript of the trial evidence form part of the stated case.

18 The evidence shows that the appellant was the owner of the vehicle; that he was seated at the material time in the front seat on the passenger side; that the shotgun was located between him and the driver and on the front seat between them was some ammunition in a belt that "would be used in that firearm for the purposes of hunting". There is no evidence that the appellant could not exercise control over the shotgun. The appellant testified that the shotgun was not his, but Mr. Naugler's; that it had a shirt over it and "I thought as long as it was wrapped, that's all that was necessary". It is my opinion that such evidence does not go to rebut the elements of knowledge and consent.

19 In his reserved decision the trial judge said:

> ...I got the distinct impression from the evidence that the weapon was not that of Mr. Croft but that of the driver of the motor vehicle. Mr. Croft was aware it was there, but that was about it.
>
> . . . . .
>
> ...if the weapon is in such a position as to be obvious to that individual, then he is deemed to be in possession. Now, I'm not even sure that the weapon has to be in such a position as to be obvious to him. I've expressed my opinion of that particular section of the Lands

> and Forests Act at the time. I think it's a terrible section. I think it should be amended. It's one thing to create a prima facie section; it's an entirely different matter to create a situation where the Court must deem him to be in possession as I'm satisfied that section forces the Court to do.
>
> . . . . .
>
> ...If it were not for Section 203 Sub (1) of the Lands and Forests Act, I would not have found this accused to have been in possession of that weapon. Further, if that section only created a prima facie presumption, I would have on the evidence determined that that presumption was rebutted by the testimony of the accused.

20 The facts of this case activate Section 203(1) and fix the appellant with constructive possession of the shotgun. The operation of the section is rebuttable by credible evidence. The trial judge said that he would have determined that the presumption was rebutted by the testimony of the appellant. With respect, I disagree. His evidence does not go to lack of knowledge and consent and thus does not touch issues that could raise a reasonable doubt capable of displacing the inference of constructive possession.

21 The salient features of the appellant's evidence were:

> (1) that the shotgun belonged to Mr. Naugler.
>
> (2) that he thought it was properly wrapped which I take to mean in accordance with s.123 of the Act.

22 With deference to the trial judge it appears to me that he confused ownership with possession. Ownership in this case has nothing to do with possession. It is to be noted that the vehicle belonged to the appellant. Even without the intervention of s.203(1) he was faced with the *prima facie* presumption that as owner of the vehicle he was in actual possession of its contents including the shotgun.

23 With respect to the second feature of the appellant's evidence the trial judge specifically found "that the shotgun was not so encased or dismantled that it could not be readily made operable".

24 In summary, it is my opinion that there was no evidence presented capable of blunting the effect of the section.

25 The second question posed by the summary conviction court asks whether the wording of s.203(1) requires the appellant to be found in possession of the shotgun "regardless of any ruling I might have made as to possession on the evidence before me". The trial judge treated

s.203(1) as creating a conclusive presumption of possession. For the reasons given it is my opinion he was in error in so interpreting the section.

26 The answer to the second question as worded should technically be in the affirmative. Such does not affect my proposed disposition of the appeal because the evidence established that the appellant had the requisite knowledge and consent and there being no contrary credible evidence s.203(1) required the trial judge to rule as he did that the shotgun was in the possession of the appellant.

27 For the reasons given I would answer the first question in the negative, the second in the affirmative, dismiss the appeal and affirm the conviction.

MacKeigan, C.J.N.S., Jones, J.A.:

28 Concurred in.

TAB 4

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.

TAB 5

CARSWELL

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

BY

DONALD J.M. BROWN, Q.C.

AND

THE HONOURABLE JOHN M. EVANS

Public Law Counsel, Goldblatt Partners LLP
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WITH THE ASSISTANCE OF

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VOLUME 2

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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.

TAB 6

Ruth Sullivan

Sullivan on the Construction of Statutes, 6th Ed.

CHAPTER 2 - DRIEDGER'S MODERN PRINCIPLE

The Evolution of Statutory Interpretation

Equitable construction

§2.11 ***Equitable construction.*** Historically, common law courts recognized and practised four distinct approaches to statutory interpretation. First, there was the approach known as "equitable construction" which subsequently evolved into "the mischief rule". The definitive exposition of this approach is found in *Heydon's Case*[1] where the Court described the task of interpreting statutes in the following expansive terms:

> ... [T]he office of all the Judges is always to make such construction as shall suppress the mischief [for which the common law did not provide] and advance the remedy [chosen by Parliament to cure the disease of the commonwealth], and to suppress subtle inventions and evasions for continuance of the mischief, *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publiCo*.[2]

In equitable construction, the words of the legislative text are less important than achieving Parliament's actual intentions. Accordingly, legislation is construed so as to promote legislative purpose, cure any over- or under-inclusions in the implementing provisions and suppress attempts by citizens to avoid the intended impact of the legislation. This approach was appropriate in an era when judges were active participants in law-making and texts were difficult to access and apt to be unreliable.[3]

Natural law rights

§2.12 ***Natural law rights.*** By the 18th century, with the establishment of Parliament as a separate and primary source of power, there was less room for equitable construction. At the same time, however, judges were strongly influenced by the natural law theory espoused by Locke at the end of the seventeenth century. As Corry explains:

> The Stuart theory of the state was laid low in the revolution of 1688, and a new constitution and a new political theory took its place. The new political theory was fashioned by Locke who found in reason clear proof that men have certain rights which are beyond the reach of all governments ... This theory justified the revolution and became an article of faith in the eighteenth century [when] there grew to full flower that intense attachment of the common law to the liberty and the property of individuals ... Some things were so contrary to reason that Parliament could not be deemed to have intended them unless the words were painfully clear.4

This belief in reason and fundamental rights founded upon reason became the basis for the doctrine

of strict construction and for a number of presumptions aimed at preserving the life, liberty and property of citizens from state interference.

The plain meaning rule

§2.13 ***The plain meaning rule.*** In the nineteenth and twentieth centuries two doctrines dominated judicial thinking: parliamentary sovereignty and the rule of law. These doctrines paved the way for literal construction and the evolution of both the "plain meaning rule" and the "golden rule". Under the plain meaning rule, a court is obliged to stick to the "literal" meaning of the legislative text in so far as that meaning is clear. As explained by Chief Justice Tindal in the *Sussex Peerage* case:

> My Lords, the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.[5]

If the words of a legislative text are clear and unambiguous, the court must apply them as written despite any contrary evidence of legislative intent and regardless of consequences.

§2.14 Most proponents of the plain meaning rule emphasize Chief Justice Tindal's suggestion that courts should adhere to the plain meaning of the text because it offers the best evidence of the lawgiver's intent. Another justification for sticking to the plain meaning is rule of law and the need for certainty and predictability. Citizens should be able to rely on the apparent meaning of the legislation that governs them.[6]

§2.15 The uncompromising character of the plain meaning rule was emphasized by Lamer C.J. in *R. v. McIntosh* when he wrote:

> [W]here, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be ... The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.[7]

In *McIntosh*, the majority conceded that their reading of the legislation led to absurd results -- results that no rational legislature could have intended. But because the meaning (in their view) was plain, they refused to look at any evidence of legislative intent other than the text itself.

The golden rule

§2.16 ***The golden rule.*** While many courts and judges profess to be strongly committed to the plain meaning rule, this commitment invariably wavers when the consequences of applying the plain meaning are found to be intolerable. In such cases, resort is had to the so-called golden rule, which permits courts to depart from the apparent meaning of a text to avoid absurd consequences. As explained by Lord Wensleydale in *Grey v. Pearson*:

> [T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.[8]

The golden rule is grounded in the supervisory and mediating roles of the courts. Courts supervise the other players in the system by ensuring that those who exercise powers conferred by the legislature do so within the limits of those powers. Courts also complete the act of law-making by mediating between the rule as enacted -- which is an abstraction inferred from a string of words -- and the facts of the case in so far as they are known. As the Supreme Court of Canada noted in the *Secession Reference*, the judicial mandate in a constitutional democracy involves not only respect for democratic institutions -- the most important of which is the legislature -- but also adherence to the rule of law and other common law norms.[9] The legitimacy of courts derives in part from their duty to ensure an appropriate observance of, and balance among, these (sometimes conflicting) norms.

Golden rule as safety net

§2.17 ***Golden rule as safety net.*** Although the inconsistency between the plain meaning rule and the golden rule is evident, there are few judges who do not rely on one or the other as need arises. There is a point at which even the most committed literalist is prepared to sacrifice "literal" meaning to avoid the unthinkable. For example, on numerous occasions both before and after he wrote the majority judgment in *R. v. McIntosh*, Lamer C.J. was prepared to abandon the plain meaning of a text if it seemed the right thing to do. In *R. v. Paul*, he relied on the following passage from Maxwell[10] to virtually redraft s. 645(4)(c) of the *Criminal Code*:

> 1. Modification of the Language to Meet the Intention
>
> Where the language of a statute, in its ordinary and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify.[11]

This willingness to modify meaning or sentence structure in order to avoid absurd results seems to be an unavoidable aspect of interpretation. Although the legislature is sovereign, it is not omniscient; it cannot envisage and provide for, or against, every possible application of its general rules. It must rely on official interpreters to mediate between the text and the facts in particular cases so as to ensure an outcome that does not bring the law into disrepute.

§2.18 Each of the approaches described above -- equitable construction, presumed intent, the plain meaning rule and the golden rule -- emphasizes a particular aspect of interpretation at the expense of the others. Under the modern principle, however, these approaches are to be integrated. Today, as the modern principle indicates, legislative intent, textual meaning and legal norms are all legitimate concerns of interpreters and each has a role to play in every interpretive effort.[12]

Methodology entailed by the modern principle

§2.19 ***Methodology entailed by the modern principle.*** In practice, the modern principle requires courts to look at the entire context of the text to be interpreted. This point has been acknowledged by the Supreme Court of Canada. The following, from the majority judgment of Bastarache J. in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, is representative:

> This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading ... I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.[13]

If these contextual factors all point to the same interpretation, the work of the court is done. However, in hard cases the contextual factors point in different directions. In such cases, reading the text harmoniously with the scheme and object of the Act and the intention of the legislature requires a balancing act. Ideally, a court will acknowledge the factors that do not support its interpretation, as well as those that do, and will make an effort to indicate why some factors receive more weight than others.

§2.20 If the ordinary meaning of a text seems clear, if its meaning appears to be "plain", then a court is justified in attaching significant weight to this apparent meaning. The clearer it is, the greater the weight it receives. The weight accorded to the text is also affected by factors such as the following:

- How the text is drafted and in particular how detailed it is, how concrete and precise the language is.
- The audience to which the text is addressed, whether the public in general, a narrow and specialized section of the public or those charged with administering the legislation.
- The importance of certainty and predictability in the context.

If the text is precise and is addressed to a specialized audience that would understand it in a certain way and reasonably rely on that understanding, then the ordinary (or technical) meaning of the text appropriately receives significant weight. However, it does not follow that it should prevail over other considerations -- that depends on the weight appropriately afforded to the other considerations.

§2.21 For example, if the legislature's intention seems clear and relevant to the problem at hand, a court is justified in assigning it significant weight even if the clear ordinary (or technical) meaning is at odds with that intention. How much weight depends on:

- where the evidence of legislative intent comes from and how cogent and compelling it is; and
- how directly the intention relates to the circumstances of the dispute to be resolved.

If the evidence of intention comes from a reliable source, its formulation is fairly precise, there are no competing intentions and the implications for the facts of the case seem clear, then this factor appropriately receives considerable weight.

§2.22 Finally, courts are concerned by violations of rationality, coherence, fairness and other legal norms. The weight attaching to this factor depends on considerations such as:

- the cultural importance of the norm engaged;
- its degree of recognition and protection in law;
- the seriousness of the violation;
- the circumstances and possible reasons for the violation; and
- the weight of competing norms.

If a possible outcome appears to violate a norm that is well-established and widely shared, if the violation is serious and there are no competing norms, this factor should receive significant weight and may in a given case out-weigh a clear ordinary (or technical) meaning. Conversely, if there are equally important norms that point in a different direction, the factor appropriately receives less weight.

Footnote(s)

1 (1584), 3 Co. Rep. 7a, 76 E.R. 637, discussed *infra*, Chapter 9, at §9.4--9.5.

2 *Ibid.*, at 638 (E.R.).

3 For many centuries, legislation was recorded by hand on a Parliamentary scroll, and the clerk who did the recording controlled such matters as headings, marginal notes and punctuation. Before the printing press made accurate reproduction possible and inexpensive, copies of legislation were hard to come by and inevitably contained numerous variations and mistakes.

4 J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1936), 1 U. of Toronto L. J. 286, at 296-97.

5 *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85, 8 E.R. 1034.

6 This justification would be quite compelling were it not for the fact that individuals form different impressions of what a text means and have different intuitions about how "plain" (or incontestable) their particular impression might be.

7 [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686, at para. 34 (S.C.C.).

8 (1857), 6 H.L. Cas. 61, at 106, 10 E.R. 1216, at 1234, discussed *infra*, Chapter 10, at §10.8.

9 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at 247 (S.C.C.). For additional discussion of the role of norms in interpretation, see *R. v. Labaye*,

[2005] S.C.J. No. 83, [2005] 3 S.C.R. 728, at paras. 33-34 (S.C.C.).

10 See P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969), at p. 228.

11 *R. v. Paul*, [1982] S.C.J. No. 32, [1982] 1 S.C.R. 621, at 662 (S.C.C.). See also *Michaud v. Quebec (Attorney General)*, [1996] S.C.J. No. 85, [1996] 3 S.C.R. 3, at 30-31 (S.C.C.), where Lamer C.J. justified adding a third exception to a list of exceptions in s. 187(1)(a) of the *Criminal Code* because "a stark, literal reading" would not promote the purpose of the provision.

12 See *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at para. 34 (S.C.C.): "The modern approach recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms."

13 [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140, at para. 48 (S.C.C.). See also *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] S.C.J. No. 26, [2005] 1 S.C.R. 533, at para. 43 (S.C.C.); *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, [2005] S.C.R. 141, at para. 9*ff.* (S.C.C.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84, at para. 34 (S.C.C.).

TAB 7

Ruth Sullivan

Sullivan on the Construction of Statutes, 6th Ed.

CHAPTER 8 - TEXTUAL ANALYSIS

PART 1 PRESUMPTIONS ABOUT HOW LEGISLATION IS DRAFTED

The Presumption of Consistent Expression

§8.32 It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it follows that where a different form of expression is used, a different meaning is intended.

§8.33 The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.

Same words, same meaning

§8.34 ***Same words, same meaning.*** In *R. v. Zeolkowski*, Sopinka J. wrote: "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."[1] Reliance on this principle is illustrated in the majority judgment of the Supreme Court of Canada in *Thomson v. Canada (Deputy Minister of Agriculture)*.[2] The issue there was whether a Deputy Minister of the federal government could deny security clearance to a person, contrary to the recommendation made by the Security Intelligence Review Committee after reviewing the person's file. The governing provision was s. 52(2) of the *Canadian Security Intelligence Act* which provided that on completion of its investigation, the Review Committee shall provide the Minister "with a report containing any recommendations that the Committee considers appropriate". The majority held that the ordinary meaning of the word "recommendations" is advice or counsel and that mere advice or counsel is not binding on the Minister. However, Cory J. added:

> There is another basis for concluding that 'recommendations' should be given its usual meaning in s. 52(2).
>
> The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act. Section 52(1) directs the Committee to provide the Minister and Director of CSIS with a report ... and any "recommendations" that the Committee considers appropriate ...
>
> It would be obviously inappropriate to interpret 'recommendations' in s. 52(1) as a binding decision. This is so, since it would result in the Committee encroaching on the management powers of CSIS. Clearly, in s. 52(1) 'recommendations' has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word 'recommendations' in the subsequent subsection of the same section to receive a different interpretation. The word must have the same meaning in both subsections.[3]

§8.35 The reasoning of Cory J. is exemplary. He first notes that elsewhere in the legislation the word or expression to be interpreted has a single clear meaning; he then invokes the presumption of consistent expression to justify his conclusion that this meaning must prevail throughout. Finally, he points out that the presumption applies with particular force where the provisions in which the repeated words appear are close together or otherwise related. This way of resolving interpretation problems is often relied on in the cases.[4]

Different words, different meaning

§8.36 ***Different words, different meaning.*** Given the presumption of consistent expression, it is possible to infer from the use of different words or a different form of expression that a different meaning was intended. As Malone J.A. explains in *Jabel Image Concepts Inc. v. Canada*:

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.[5]

This reasoning was relied on in several Supreme Court of Canada decisions interpreting the insanity defence provisions of the *Criminal Code*. Section 16(1) provides that a person is insane only if he or she is "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong". In *R. v. Schwartz*, Dickson J. argued that the word "wrong" must mean morally wrong and not illegal because elsewhere in the Code the term "unlawful" is used to express the idea of illegality; by using the word "wrong" the legislature must have meant to express a different idea.[6] In *R. v. Barnier*[7] the issue was whether the trial judge had erred in instructing the jury that the words "appreciating" and "knowing" in s. 16(2) mean the same thing. Estey J. wrote:

> One must, of course, commence the analysis of a statutory provision by seeking to attribute meaning to all the words used therein. Here Parliament has employed two different words in the critical portion of the definition, which words in effect established two tests or standards in determining the presence of insanity ... Under the primary canon of construction to which I have referred, "appreciating" and "knowing" must be different, otherwise the Legislature would have employed one or the other only.[8]

As this passage from the *Barnier* case indicates, the presumption that using different words implies an intention to express different meanings is often reinforced by the presumption against tautology. In *R. v. Clark*,[9] for example, the issue was whether performing an indecent act in an illuminated room near an uncovered window violated s. 173(1)(a) of the *Criminal Code*. The relevant provisions were in the following terms:

> 150. In this Part,
>
> ...
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied;
>
> 173. (1) Every one who wilfully does an indecent act
>
> (a) in a public place in the presence of one or more persons,

> ...
>
> is guilty of an offence punishable on summary conviction.
>
> 174.(1) Every one who, without lawful excuse,
>
> (a) is nude in a public place, or
>
> (b) is nude and exposed to public view while on private property, ...
>
> is guilty of an offence punishable on summary conviction.

§8.37 The Supreme Court of Canada held that although the indecent act in question was witnessed by two neighbours who were peeking through their windows into the accused's apartment, the act had not been done in a public place. In reaching this conclusion, Fish J. relied on both the presumption against tautology and the presumption of consistency:

> Section 174(1) makes it perfectly clear that the definition of "public place" in s. 150 of the *Criminal Code* was not meant to cover private places exposed to public view. Were it otherwise, s. 174(1)(*b*) would be entirely superfluous.
>
> Section 150 applies equally to s. 174(1) and s. 173(1)(*a*). If "public place" does not, for the purposes of s. 174(1), include private places exposed to public view, this must surely be the case as well for s. 173(1)(*a*). And I hasten to emphasize that ss. 173(1) and 174 of the *Criminal Code* were enacted in their present form *simultaneously*, as ss. 158 and 159, when the present *Code* was revised and enacted as S.C. 1953-54, c. 51. Parliament could not have intended that identical words should have different meanings in two consecutive and related provisions of the very same enactment.[10]
>
> [Emphasis in original]

The reasoning here is persuasive and is consistent with any purposive or consequential analysis the court might undertake.

Recurring pattern of expression

§8.38 ***Recurring pattern of expression.***[11] The presumption of consistent expression applies not only to individual words, but also to patterns of expression. In *Kirkpatrick v. Maple Ridge (District)*,[12] for example, the Supreme Court of Canada was concerned with a provision of British Columbia's *Municipal Act* which conferred on municipalities a power to require permits for the removal of soil or other substances and to "fix a fee for the permit". The question was whether this authorized the imposition of a flat fee for all holders, a fee proportionate to the amount of substance removed by each holder, or both. In concluding that the fee must be flat, the Court relied on the pattern apparent in the Act of setting out the basis for differential fees when such fees were contemplated, but simply providing for the imposition of the fee when the same rate was to be charged to all. La Forest J. wrote:

> The foregoing [conclusion] is strongly fortified by the terms of other taxing and licensing provisions in the Act ... Under s. 612(2), a council may vary the charge for sewerage or combined sewerage and drainage facilities in accordance with a number of outlets served and the quantity of water delivered. Development cost charges "may vary in respect of different defined or specified areas ... and sizes or number of units or lots ... " (s. 719(5)). Municipal councils are even empowered to vary the amount of the fees for dog

> licences according to sex, age, size or breed (s. 524). Flat fees have been set for many other licences (ss. 505(1), 520(1)) ... [13]

La Forest J. concluded that since the legislature had chosen the formula ordinarily used to authorize a flat fee, in contrast to the formula ordinarily used when the legislature intended to authorize differential fees, the only plausible inference was that in this case the legislature intended to authorize a flat fee.

§8.39 Similar reasoning is found in *Canada v. Antosko*,[14] where the Supreme Court of Canada had to interpret s. 20(14) of the *Income Tax Act*. It provided that when title in an interest-bearing security passes from transferor to transferee and interest accrued before the day of transfer is paid to the transferee, that amount:

(a) shall be included in computing the transferor's income for the taxation year in which the transfer was made, and
(b) may be deducted in computing the transferee's income for a taxation year in the computation of which there has been included [certain interest payments].

The issue was whether a transferee could have the benefit of para. (b) even though the transferor was not obliged to include the pre-transfer interest in its own income as contemplated by para. (a). The Court held that para. (b) applied independently of para. (a). Iacobucci J. wrote:

> In this regard I find helpful the comments of M.D. Templeton ... [[15]]
>
> The grammatical structure of subsection 20(14) is similar to a number of other provisions in the Act in which Parliament lists the income tax consequences that arise when certain preconditions are met. Usually, the preconditions are set out in an introductory paragraph or paragraphs and the consequences in separate subparagraphs. We do not know of any canon of statutory interpretation that makes a tax consequence listed in the text of a provision subject to the taxpayer's compliance with all the other tax consequences listed before it.
>
> To carry this observation further, where specific provisions of the *Income Tax Act* intend to make the tax consequences for one party conditional on the acts or position of another party, the sections are drafted so that this interdependence is clear: see, *e.g.*, ss. 68, 69(5), 70(2), (3) and (5).[16]

Iacobucci J. here describes a convention for drafting provisions in which tax consequences depend on the fulfilment of certain preconditions. A special pattern is used when the tax consequences of one person are conditional on another's circumstances. When this pattern is not used, the interpreter can fairly infer that such interdependence was not intended.

Counterfactual argument

§8.40 ***Counterfactual argument.*** The reasoning of Iacobucci J. in *Antosko* forms the basis for a form of argument that is frequently found in statutory interpretation, here labelled counterfactual argument. In this form of argument, X claims that Y's interpretation is implausible because if that were what the legislature intended, it would have expressed itself in a different way. X justifies this claim by pointing out examples of what the legislature says when it does intend what Y is claiming.

§8.41 In *Miller, McClelland Ltd. v. Barrhead Savings & Credit Union Ltd.*,[17] for example, the issue was whether a creditor lost his security interest because he registered the security under the name he used in practice (James Smith) as opposed to the name on his birth certificate (Robert James Smith). Subsection 17(1) of the *Personal Property Regulations* provided:

> If a debtor or secured party is an individual, the registering party shall specify the last name of that individual followed by his first name and middle name, if any.

The court held that "first name" could refer to the customarily used first name:

> The term "first name" is not defined. The *Vital Statistics Act* ... describes the name on the birth certificate as the "given name." The *Change of Name Act* ... defines "name" to mean ... a given name or surname or both." Had the legislators intended to circumscribe the registration requirement under the P.P.S.A. regulations as suggested, no doubt they would have adopted the more precise term "given name" found in other provincial legislation.[18]

§8.42 When the pattern on which a counterfactual argument is based is express reference to something, the implied exclusion maxim comes into play.[19] In *Ordon Estate v. Grail*,[20] for example, the Supreme Court of Canada had to determine whether the Ontario Court (General Division) had concurrent jurisdiction with the Federal Court, Trial Division over maritime fatal accident claims by dependants under s. 646 of the *Canada Shipping Act*. In concluding that it did, Iacobucci and Major JJ. wrote:

> As noted by the Court of Appeal below, when Parliament intended the Federal Court to have exclusive jurisdiction to adjudicate a particular matter in the *Canada Shipping Act*, it set this intention out in clear language in the Act. For example, ss. 209(2) and 453, as well as the newly enacted s. 580(1) (see S.C. 1998, c. 6, s. 2), state:
>
> > 209. . . .
> >
> > (2) Subject to this Part, no other court in Canada [referring to the Admiralty Court] has jurisdiction to hear or determine any action, suit or proceeding instituted by or on behalf of any seaman or apprentice for the recovery of wages in any amount.
> >
> > . . .
> >
> > 453. Disputes respecting salvage, whether of life or property, shall be heard and determined by and before the receiver of wrecks or the Admiralty Court, as provided for respectively by this Part, and not otherwise.
> >
> > . . .
> >
> > 580. (1) The Admiralty Court has exclusive jurisdiction with respect to any matter in relation to the constitution and distribution of a limitation fund pursuant to Articles 11 to 13 of the Convention.
> >
> > ...
>
> By contrast, s. 646 makes no express reference to exclusivity of jurisdiction in the Admiralty Court. In our opinion, if it was intended that s. 646 should grant exclusive jurisdiction to the Admiralty Court in maritime fatal accident claims, language similar to that in ss. 209(2), 453 and 580(1) would have been used.[21]

Factors affecting weight of presumption

§8.43 ***Factors affecting weight of presumption.*** The presumption of consistent expression varies in strength depending on a range of factors. An important consideration is the proximity of the words to one another. As Rothstein J.A. wrote in *Barrie Public Utilities v. Canadian Cable Television Assn.*, words in a statute may have different meanings depending on the context in which they are used, but "it seems unlikely that Parliament intended that a term in a single subsection should have different meanings depending upon different factual circumstances." [22] Other considerations include how often the language in question is repeated in the legislation, the similarity of the contexts in which it is repeated, the extent to which it constitutes a distinctive pattern of expression, the range of matters dealt with in the legislation and how often it has been amended.

§8.44 In *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*,[23] the Supreme Court of Canada insisted that the word "income" must have the same meaning throughout Part II of the *Income Tax Act* because formulating an exact definition of "income" and then indicating how it is to be taxed was the central concern of that Part. Wilson J. wrote:

> ... a taxing statute is a highly technical piece of legislation which requires an interpretation that will ensure certainty for the taxpayer. Many of the words used carry a very specific and technical meaning because they identify the fundamental concepts underpinning the legislation. 'Income' is one of those fundamental concepts.[24]

As Wilson J. suggests, technical terms and terms that play a key role in a legislative scheme are strongly presumed to have the same meaning throughout. The presumption is also strong where the repeated words are unusual or distinctive or contribute to a noticeable pattern.

§8.45 One problem with the presumption of consistent expression is that it does not necessarily reflect the realities of legislative drafting. Much legislation is lengthy and complicated; there is not always time for careful editing. In recent years, federal Budget Bills have introduced massive changes to the statute book affecting legislation administered by many departments and agencies. The time lines for these Bills do not permit drafters to conduct a proper review of the proposed changes to ensure consistency or coherence. In addition, amendments that are proposed by legislative committees during the legislative process are often drafted with little regard for their relation to the Act as a whole or the statute book. Some statutes, like Insurance Acts or the *Criminal Code*, are frequently amended year after year. It is not surprising, then, that inadvertent variations occur within a single Act.[25] It is even more likely that they would occur within the statute book as a whole.

§8.46 A second problem with the presumption, as pointed out by Côté, is that it conflicts to some extent with the contextual principle in interpretation, which emphasizes that meaning is dependent on context.[26] Identical words may not have identical meanings once they are placed in different contexts and used for different purposes.[27] This is particularly true of general or abstract words. These factors tend to weaken the force of the presumption so that in many cases the courts assign it little weight.[28]

§8.47 Finally, like all the presumptions of interpretation, the presumption of consistent expression must be weighed against relevant competing considerations. A good example is found in the dissenting judgment of Dickson C.J. in *Mitchell v. Peguis Indian Band*.[29] One of the issues in the case was whether the expression "Her Majesty" in s. 90(1)(b) of the *Indian Act* referred solely to the federal Crown or included provincial Crowns as well. Dickson C.J. conceded that in s. 90(1)(a) the words "Her Majesty" were clearly limited to the Crown in right of Canada and that this usage was found in many places in the Act. He also conceded that elsewhere in the Act other expressions were used when referring to the Crown in right of the provinces. All this amounted to a strong case for applying the presumption of consistent expression. Yet Dickson C.J. refused to be bound. In his view, the arguments based on the meaning of "Her Majesty" elsewhere in the text were not conclusive. [30] He preferred to give more weight to the presumption in favour of Aboriginal peoples than to the presumption of consistent expression.[31] The latter is merely a drafting convention, whereas the former embodies an important constitutional policy.

The presumption rebutted

§8.48 ***The presumption rebutted.*** The judgment of the Supreme Court of Canada in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*[32] is a good example of a case in which the presumption of consistency is rebutted. Subsection 3(1) of New Brunswick's *Human Rights Code* prohibited an employer from discriminating against any person in relation to employment on the basis of age. However, ss. 3(5) and (6) qualified the prohibition:

> 3(5) Notwithstanding subsections (1), (2), (3) and (4), a limitation, specification or preference on the basis of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity shall be permitted if such limitation, specification or preference is based upon a *bona fide* occupational qualification as determined by the Commission.
>
> 3(6) The provisions of subsections (1), (2), (3) and (4) as to age do not apply to
>
> > (*a*) the termination of employment or a refusal to employ because of the terms or conditions of any *bona fide* retirement or pension plan ...

In 2004, an employee of the respondent complained that the company had discriminated against him when it required him to retire at age 65 in accordance with the mandatory retirement policy in its pension plan. To determine whether the company's mandatory retirement policy was *bona fide*, the Commission applied the so-called *Meiorin* test[33] developed to determine whether discriminatory occupational requirements are *bona fide*.

§8.49 Given that the term "bona fide" is used in adjacent subsections in the Code, the Commission's approach was supported by the presumption of consistent expression. However, a majority of both the New Brunswick Court of Appeal and the Supreme Court of Canada concluded that the meaning of "bona fide" was different in the two subsections. Abella J. wrote:

> ... I do not accept that the words '*bona fide*' in s. 3(6)(*a*) attract the same analysis in s. 3(6)(*a*) as they do in s. 3(5) ...
>
> There is no doubt that the words '*bona fide*' have a unique pedigree in human rights jurisprudence. When the words are used together with 'occupational qualification', 'occupational requirement' or 'reasonable justification', they have a well-understood meaning and represent an accepted term of art in the human rights world. With respect for the contrary view, the importance of the words '*bona fide*' in Canadian human rights law is not undermined by the recognition that, when they are used to qualify a different provision in a different context, they are to be given their ordinary meaning of 'good faith'.[34]

She also pointed out that "If both ss. 3(6)(*a*) and 3(5) meant the same thing, both requiring a *Meiorin* analysis, s. 3(6)(*a*) would be redundant."[35]

Footnote(s)

1 [1989] S.C.J. No. 50, [1989] 1 S.C.R. 1378, at 1387 (S.C.C.).

2 [1992] S.C.J. No. 13, [1992] 1 S.C.R. 385 (S.C.C.).

3 *Ibid.*, at paras. 26-28.

4 See, for example, *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] S.C.J. No. 66, 2013 SCC 66, [2013] 3 S.C.R. 866, at paras. 41-42 (S.C.C.); *R. v. Knoblauch*, [2000] S.C.J. No. 59, [2000] 2 S.C.R. 780, at para. 85 (S.C.C.); *Canada v. Schwartz*, [1996] S.C.J. No. 15, [1996] 1 S.C.R. 254 (S.C.C.); *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85, at 123-24 (S.C.C.); *Henrietta Muir Edwards v. A.G. for Canada*, [1930] A.C. 124, at 124 (P.C.); *R. v. Hutchinson*, [2013] N.S.J. No. 1, 2013 NSCA 1, at paras. 124-126 (N.S.C.A.), affd [2014] S.C.J. No. 19 (S.C.C.); *Toronto-Dominion Bank v. Canada*, [2011] F.C.J. No. 1029, 2011 FCA 221, at paras. 37-38 (F.C.A.); *Swales v. I.C.B.C.*, [2011] B.C.J. No. 319, 2011 BCCA 95, at para. 16 (B.C.C.A.); *Sero v. Canada*, [2004] F.C.J. No. 71, at paras. 35-36 (F.C.A.); *Wishing Star Fishing Co. v. "B.C. Baron" (The)*, [1987] F.C.J. No. 1149, 81 N.R. 309, at 313 (F.C.A.); *R. v. Budget Car Rentals (Toronto) Ltd.*, [1981] O.J. No. 2888, 20 C.R. (3d) 66, at 82 (Ont. C.A.).

5 [2000] F.C.J. No. 894, 257 N.R. 193, at para. 12 (F.C.A.). See also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 81-84 (S.C.C.); *Lukács v. Canada (Transportation Agency)*, [2014] F.C.J. No. 301, 2014 FCA 76, at para. 41 (F.C.A.)*; British Columbia (Attorney General) v. Beacon Community Services Society*, [2013] B.C.J. No. 1465, 2013 BCCA 317, at paras. 25-26 (B.C.C.A.); *Swailes v. Insurance Corporation of British Columbia*, [2011] B.C.J. No. 319, 2011 BCCA 95, at para. 16 (B.C.C.A.); *Shier v. Manitoba Public Insurance Corp.*, [2008] M.J. No. 305, 2008 MBCA 97, at para. 52 (Man. C.A.).

6 [1976] S.C.J. No. 40, [1977] 1 S.C.R. 673, at 677-90 (S.C.C.), *per* Dickson J. dissenting; approved by Lamer C.J. for the majority of the Court in *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, at 39-41 (S.C.C.). See also *Frank v. The Queen*, [1977] S.C.J. No. 42, [1978] 1 S.C.R. 95, at 101 (S.C.C.), *per* Dickson J.: "I do not think 'Indians of

the Province' and 'Indians within the boundaries thereof' refer to the same group. The use of different language suggests different groups."; *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85, at 123-124 (S.C.C.), *per* La Forest J.: " ... whenever Parliament meant to include Her Majesty in right of a province, it was careful to make it clear by using explicit terms. In the absence of such specific indication, ... one would expect that an unqualified reference to 'Her Majesty' should be taken as limited to the federal Crown." See also *Walsh v. Mobil Oil Canada*, [2008] A.J. No. 830, 2008 ABCA 268, at para. 74 (Alta. C.A.).

7 [1980] S.C.J. No. 33, [1980] 1 S.C.R. 1124 (S.C.C.).

8 *Ibid.*, at 1135-36. See also *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36, 2014 SCC 36, at paras. 24, 53 (S.C.C.); *Marche v. Halifax Insurance Co.*, [2005] S.C.J. No. 7, [2005] 1 S.C.R. 47, at paras. 93-94 (S.C.C.); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625, at paras. 134-35 (S.C.C.).

9 [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6 (S.C.C.).

10 *Ibid*., at paras. 50-51. See also *R. v. Daoust*, [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at paras. 62-63 (S.C.C.); *343091 Canada Inc. v. Canada (Minister of Industry)*, [2001] F.C.J. No. 1327, [2002] 1 F.C. 421 (F.C.A.), leave to appeal dismissed [2001] S.C.C.A. No. 537 (S.C.C.), at para. 50: " ... by exempting 'advice and recommendations' from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter; otherwise it would be redundant."

11 For discussion of patterns of express reference, see below at §8.97*ff*.

12 [1986] S.C.J. No. 47, [1986] 2 S.C.R. 124 (S.C.C.).

13 *Ibid.*, at 129. In *Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, [2010] S.C.J. No. 28, 2010 SCC 28, [2010] 2 S.C.R. 61 (S.C.C.), an important issue was whether s. 124 of the *Act respecting labour standards*, (the A.L.S) was implicitly incorporated into the collective agreement in question. In concluding that it was not, LeBel J. wrote, at paras. 36-37, that the implicit incorporation argument "disregards the drafting techniques used by the Quebec legislature when it intends to incorporate a specific standard into collective agreements or individual contracts of employment ... There is no reason to think that the legislature chose to use two different drafting techniques to achieve the same result in the same statute. To conclude that it did so would be inconsistent with the presumption that a change in the term used to express a legal concept indicates a change in meaning and that a term generally retains the same meaning throughout a statute ... ". See also *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] S.C.J. No. 6, 2013 SCC 6, at paras. 147-148 (S.C.C.); *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, [2011] S.C.J. No. 60, 2011 SCC 60, at paras. 31-32 (S.C.C.); *Contino v. Leonelli-Contino*, [2005] S.C.J. No. 65, [2005] 3 S.C.R. 217, at paras. 23-24 (S.C.C.); *Montreal (City) v. Civic Parking Centre Ltd.*, [1981] S.C.J. No. 96, [1981] 2 S.C.R. 541

(S.C.C.); *R. v. Summers*, [2013] O.J. No. 1068, 2013 ONCA 147, at paras. 71-75 (Ont. C.A.), affd [2014] S.C.J. No. 26 (S.C.C.).

14 [1994] S.C.J. No. 46, [1994] 2 S.C.R. 312 (S.C.C.).

15 See M.D. Templeton, "Subsection 20(14) and the Allocation of Interest -- Buyers Beware" (1990), 38 Can. Tax J. 85, at pp. 87-88.

16 *Canada v. Antosko*, [1994] S.C.J. No. 46, [1994] 2 S.C.R. 312 at 332 (S.C.C.). See also *Wolsley Engineered Pipe Group v. C.B.S.A.*, [2011] F.C.J. No. 583, 2011 FCA 138, at paras. 17-18 (F.C.A.).

17 [1995] A.J. No. 167 (Alta. C.A.).

18 *Ibid.*, at para. 8. See also *Musqueam First Nation v. British Columbia (Assessor of Area #09)*, [2012] B.C.J. No. 837, 2012 BCCA 178, at para. 48 (B.C.C.A.); *Coast Capital Savings Credit Union. v. British Columbia (Attorney General)*, [2011] B.C.J. No. 76, 2011 BCCA 20, at para. 35 (B.C.C.A.); *Kerr v. Danier Leather Inc.*, [2005] O.J. No. 5388, 77 O.R. (3d) 321, at paras. 94-95 (Ont. C.A.); *Toronto Taxi Alliance Inc. v. Toronto (City)*, [2005] O.J. No. 5460, 77 O.R. (3d) 721, at para. 32. (Ont. C.A.).

19 This maxim is discussed below at §8.89*ff.*

20 [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.).

21 *Ibid*., at para. 60.

22 [2001] F.C.J. No. 1150, [2001] 4 F.C. 237, at para. 23 (F.C.A.), affd [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 (S.C.C.). See also *LeBlanc v. Boisvert*, [2005] N.B.J. No. 561, at para. 51 (N.B.C.A.), where Drapeau, C.J.N.B. wrote: "Because sections 265.1 and 232(1) are so closely related, it makes eminent good sense to attribute the same meaning to the phrase 'arising out of the use or operation' found in s. 265(1) and the phrase 'arising from the [...] use or operation' in s. 232(1)." [Brackets and ellipsis in original]. See also *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] S.C.J. No. 13, [1992] 1 S.C.R. 385 (S.C.C.), at 400-01.

23 [1988] S.C.J. No. 72, [1988] 2 S.C.R. 175 (S.C.C.).

24 *Ibid.*, at para. 20.

25 For example, see *I.R.C. v. Hinchy*, [1960] A.C. 748, at 766 (H.L.), where Lord Reid refused to infer that different words in the *Income Tax Act* implied a different meaning given that in fiscal legislation "quite incongruous provisions are lumped together and it is impossible to suppose that anyone, draftsman or Parliament, ever considered one of these sections in light of another ... ". See also *Newfoundland and Labrador Regional Council of Carpenters, Millwrights and Allied Workers, Local 579 v. Construction General Labourers, Rock and Tunnel Workers, Local 1208*, [2003] N.J. No. 127, at paras. 8-9 (Nfld. C.A.).

26 See P.-A. Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2010), p. 355.

27 See *R. v. Middleton*, [2009] S.C.J. No. 21, 2009 SCC 21, at paras. 14-16 (S.C.C.); *Jevco Insurance Co. v. Pilot Insurance Co.*, [2000] O.J. No. 2259, 49 O.R. (3d) 760, at 763 (Ont. S.C.J.); *Bapoo v. Co-operators General Insurance Co.*, [1997] O.J. No. 5055, 36 O.R. (3d) 616, at para. 28 (Ont. C.A.); *Coca Cola Ltd. v. Deputy Minister of National Revenue Customs and Excise*, [1983] A.C.F. no 143, [1984] 1 F.C. 447, at 454-56 (F.C.A.).

28 See *Marche v. Halifax Insurance Co.*, [2005] S.C.J. No. 7, [2005] 1 S.C.R. 47, at para. 18 (S.C.C.); *Sommers v. R.*, [1959] S.C.J. No. 49, [1959] S.C.R. 678, at 685 (S.C.C.).

29 [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.). See also the strong dissenting judgment in *Canada (Attorney General) v. Savard*, [1996] Y.J. No. 4 (Y.T.C.A.), where Wood J.A. appreciates the consistent pattern found in the legislation but concludes, at para. 47*ff.*, that the presumption of consistency must give way to the clear purpose of the legislature: "Where, as here, the application of the presumption of consistent expression would give rise to a result quite inconsistent with the apparent purpose or intention of Parliament, it ought to yield, as would a good servant, rather dominate as a master" (para. 60).

30 *Ibid.*, at 105-06.

31 *Ibid.*, at 107. For other examples where a word was given different meanings in the same section, see *Canadian Pacific Railway Co. v. Lac Pelletier (Rural Municipality)*, [1944] S.J. No. 66, [1944] 3 W.W.R. 637 (Sask. C.A.), and *Board v. Board*, [1919] A.C. 956 (P.C.). See also *Zacks v. Zacks*, [1973] S.C.J. No. 72, [1973] S.C.R. 891, [1973] 5 W.W.R. 289 (S.C.C.).

32 *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No. 46, 2008 SCC 45, [2008] 2 S.C.R. 604 (S.C.C.).

33 See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3 (S.C.C.), at paras. 50*ff.* for an explanation of this test.

34 *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No. 46, 2008 SCC 45, [2008] 2 S.C.R. 604, at paras. 17-18 (S.C.C.).

35 *Ibid.*, at para. 20.

TAB 8

Ruth Sullivan

Sullivan on the Construction of Statutes, 6th Ed.

CHAPTER 8 - TEXTUAL ANALYSIS

PART 2 TEXTUAL ANALYSIS AND THE MAXIMS OF INTERPRETATION

Implied Exclusion

§8.89 The final maxim to be considered here is *expressio unius est exclusio alterius*: to express one thing is to exclude another. This maxim reflects a form of reasoning that is widespread and important in interpretation. Côté refers to it as *a contrario* argument.[1] Dickerson refers to it as negative implication.[2] The term "implied exclusion" has been adopted here because it accurately describes the inference underlying this particular maxim.

§8.90 An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied.As Laskin J.A. succinctly put it, "legislative exclusion can be implied when an express reference is expected but absent".[3] The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

§8.91 An expectation of express reference can arise in a number of ways. It may arise from the conventions of ordinary language use or from presumptions relating to the way legislation is drafted. It is often grounded in presumptions about the policies or values the legislature is likely to express in its statutes.[4] Two common forms of the implied exclusion argument are examined below under the headings (1) failure to mention comparable items and (2) failure to follow an established pattern.

Failure to mention comparable items

§8.92 ***Failure to mention comparable items.*** When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned. As explained by Noel, J.A. in *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, dealing with a series of express exceptions, "if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended."[5]

§8.93 The reasoning here is essentially counterfactual:[6] if the legislature had intended to include comparable items, it would have mentioned them expressly or used a general term sufficiently broad to encompass them; it would not have mentioned some while saying nothing of the others. This reasoning is grounded not only in drafting convention but also in basic principles of communication. If I am with a group of people arranging rides and announce that my car can carry four passengers, my statement would be true and informative even if the car was capable of carrying six. However, my listeners would rightly assume that four was the maximum I could carry. A basic convention of communication is that speakers say as much as is required to achieve the communicative goal.[7] When I send my employee to the store to buy apples, oranges and pears, he or she has no reason to suppose that I also want peaches or grapes. Similarly, when a drafter lists some but not all members of a class, the interpreter fairly infers that only the listed members are to be included.

§8.94 A good example of this form of reasoning is found in *Re Medical Centre Apartments Ltd. and City of Winnipeg*.[8] Section 6 of the *Winnipeg General Hospital Act* exempted the hospital's property from certain taxation "if that property is used for hospital purposes". The section went on to provide that "property used ... for necessary parking facilities, interns' quarters, school of nursing, nurses' residence, power house or laundry shall be deemed to be used for hospital purposes". The issue was whether two apartment buildings rented to hospital staff were included in the exemption. Monnin J.A. began his analysis by drawing attention to the dilemma created when comparable items do not receive comparable treatment:

> Why were these two apartment blocks, already in existence and used for some ten years prior to this legislation, not specifically listed in the "shall be deemed" proviso like the other six categories? ...
>
> ... If it had been the intention to apply the exemption specifically to these two blocks, then they could easily have been listed or detailed in the proviso.[9]

The failure to mention the two apartment blocks was either inadvertent or deliberate. Since the legislature is presumed to know everything and not to make mistakes, the better view is that it was deliberate and reflected a decision by the legislature to exclude the apartment blocks from the exemption. As Monnin J.A. explained:

> The language of the Act is precise and expressed in such detail that it negatives the suggestion of any intent on the part of the Legislature to mean more than it has said ...
>
> ... The legislators, in their wisdom ... chose to indicate six types of building or land uses which "shall be deemed to be used for hospital purposes"; it would appear that any reference to these two apartment blocks was studiously avoided ...
>
> ... I can reach no other conclusion but that the failure to include them in the nomenclature of the proviso was intentional on the part of the legislators.[10]

§8.95 In the *Medical Centre Apartments* case the legislature provided an explicit list of structures deemed to be within the exemption. This, in the view of the Court, suggested that any gap in the

legislative scheme was deliberate rather than inadvertent. The legislature addressed its mind to the possibility of including all items in the class and chose to include some and exclude others. It is not for the Court to second-guess the choices of the legislature.

§8.96 In *R. v. Hunter*,[11] the Court had to determine whether possession of viable cannabis seeds for the purpose of trafficking was contrary to s. 4(2) of the *Narcotic Control Act*, which prohibited trafficking in prohibited substances. The substances prohibited under the Act were set out in a schedule and included *Cannabis sativa*, its preparations and derivatives, including *Cannabis* resin and marihuana "but not including ... non-viable cannabis seed." The defendant argued that his viable seeds were not a prohibited substance within the meaning of the Act. Not surprisingly, this argument failed. Hall J.A. wrote:

> [I]t seems to me to be an inescapable conclusion that if Parliament states that "non-viable" seeds of the plant are to be excluded from the definition, then it must be the case that viable seeds will be included ... The exclusion of non-viable seeds appears to admit of no other inference ... [12]

By excluding "non-viable seeds", as opposed to "seeds", the legislature shows first that it has considered how seeds should be dealt with under the Act and second that it wants to treat non-viable seeds differently from viable ones. Otherwise, the word "non-viable" in front of "seeds" would serve no purpose, contrary to the presumption against tautology.

Failure to follow a pattern of express reference

§8.97 ***Failure to follow a pattern of express reference.*** As described above, consistent expression is an important convention of legislative drafting.[13] As much as possible, drafters strive for uniform and consistent expression, so that once a pattern of words has been devised to express a particular purpose or meaning, it is presumed that the pattern is used for this purpose or meaning each time the occasion arises. This convention naturally creates expectations that may form the basis for an implied exclusion argument. This point is made by Iacobucci J. in *R. v. Ulybel Enterprises Ltd.* when he writes:

> [H]ad Parliament intended the phrase "any proceeds of its disposition" [in s. 72(1) of the *Fisheries Act*] to be limited to proceeds of [seized] perishables ... , it could have done so expressly, as it did in s.72(2) and 72(3). Instead, a pattern in the use of the phrase at issue is evident whereby in some sections it is expressly limited to the proceeds of perishables and in other sections it refers more generally to all forms of property seized under the Act and the proceeds thereof.[14]

Patterns in legislation are assumed to be intended rather than inadvertent. Once a pattern has been established, it becomes the basis for expectations about legislative intent.[15]

§8.98 An example of how such expectations play out is found in *Prassad v. Canada (Minister of Employment and Immigration)*.[16] The issue in *Prassad* was whether a person who is the subject of an inquiry under the *Immigration Act* is entitled to an adjournment to permit an application to the Minister for permission to remain in Canada. The Supreme Court of Canada ruled that no such

entitlement existed. Subsection 35(1) of the Act conferred discretion on adjudicators presiding at an inquiry to adjourn at any time for the purpose of ensuring a full and proper inquiry. Subsection 37(1) authorized applications to the Minister for permission to remain in Canada, but said nothing about granting an adjournment for this purpose. Commenting on the absence of an express reference to adjournment in the provision, Sopinka J. wrote:

> [Subsection 37(1)] may be usefully contrasted with other provisions of the Act which explicitly require an adjournment for specified purposes. The adjudicator shall adjourn the inquiry if the subject of the inquiry is under eighteen years of age and unrepresented by a parent or guardian (s. 29(5)); the subject of the inquiry who is to be removed from Canada claims, during the inquiry, to be a Canadian citizen (s. 43(1)); or the subject of the inquiry who is to be removed from Canada claims, during the inquiry, to be a Convention refugee (s. 45(1)).[17]

Sopinka J. here calls attention to a pattern of expression: when the legislature wishes to deprive adjudicators of discretion in the matter of adjournments, it does so by giving them an express and mandatory direction. If the legislature is consistent, it will use the same pattern each time it intends this result. Since it did not use this pattern in connection with applications to the Minister, the legislature must not have intended to deprive adjudicators of their discretion in this matter.

§8.99 In *65302 British Columbia Ltd. v. Canada*,[18] the Supreme Court of Canada had to determine whether fines paid for violating legislation were deductible under the *Income Tax Act* as a business expense. A majority of the Supreme Court of Canada concluded that such fines were indeed deductible. Iacobucci J. wrote:

> This approach and conclusion are supported by the fact that Parliament has expressly disallowed the deduction of certain expenses on what appear to be public policy grounds. For example, s. 67.5 ... prohibits the deduction or any outlay or expense made "for the purpose of doing anything that is an offence under [certain enumerated sections] of the Criminal Code ... [19]
>
> ...
>
> Since the Act is not silent on the issue of restricting the deduction of some expenses incurred for the purpose of gaining income, this is a strong indication that Parliament did direct its attention to the question and that where it wished to limit the deduction of expenses or payments of fines and penalties, it did so expressly.[20]

The expectation of express reference on which implied exclusion depends may be created by examining a single Act or related Acts within the statute book of the enacting jurisdiction or other jurisdictions as well.[21] In *Canada (Attorney General) v. Public Service Alliance of Canada*,[22] for example, the Court considered whether the Public Service Staff Relations Board had jurisdiction under the federal *Public Service Staff Relations Act* to determine who is an employee within the meaning of the Act. Sopinka J. wrote:

> There is no provision in s. 33 or indeed in this statute that gives the Board exclusive jurisdiction to determine who is an employee on the basis of the Board's expertise. Such provisions are not uncommon in labour statutes when it is intended that the Board have the final word as to whether persons employed by the same employer are employees or independent contractors. One example of such a provision is s. 106(2) of the Ontario *Labour Relations Act* ... Other examples of this express grant of jurisdiction to determine who is an employee are ... [23]

Sopinka J. went on to list examples from Alberta, British Columbia, Manitoba, Nova Scotia and Quebec. He ended by quoting from the *Canada Labour Code* to illustrate the typical wording of such provisions. The absence of any comparable language in the *Public Service Staff Relations Act* was one of several reasons for concluding that Parliament did not intend to confer this power on the Board.

The role of policy

§8.100 ***The role of policy.*** The expectation of express reference on which implied exclusion depends may be created or reinforced by policy considerations. In *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)*,[24] for example, the question was whether a board of referees under the *Unemployment Insurance Act* had the power to interpret law. Although this power was expressly conferred on umpires, there was no mention of it in the provisions establishing the board of referees. La Forest J. explained:

> It is significant that the umpire has been expressly provided with this power, while the board of referees has not.
>
> The maxim *expressio unius est exclusio alterius*, like all general principles of statutory interpretation, must be applied with caution. However, the power to interpret law is not one which the legislature has conferred lightly upon administrative tribunals, and with good reason. Although curial deference will not be extended to an administrative tribunal's holding on a Charter issue, such deference is generally applied to the interpretation of a statute within the tribunal's area of expertise, when the tribunal has been given the power to interpret law. It is unlikely, therefore, that the failure to provide the board of referees with a power similar to that given to the umpire was merely a legislative oversight.[25]

Here, the expectation of express reference created by the way the statute was drafted was reinforced by the expectation that the courts' own jurisdiction to interpret law would not be casually conferred on an inferior body. At the least, express words would be used.

§8.101 Similar reasoning was relied on in *University Health Network v. Ontario (Minister of Finance)*, where the issue was whether a hospital created by legislation amalgamating three existing hospitals was entitled to a tax exemption. Laskin J.A. wrote:

> The inclusion of an explicit tax exemption in the Sunnybrook amalgamation statute and the absence of an explicit exemption in either of the two amalgamation statutes under consideration in this appeal together indicate that the Legislature did not intend to continue the tax exemptions granted to TGH, Toronto Western and OCI.[26]
>
> Tax exemptions must be expressly granted by statute and therefore if they are to be granted an express reference is expected. The absence of any express exemptions in the amalgamation statutes suggests that the Legislature did not intend to grant them.[27]

As in the *Tétreault-Godoury* case, the linguistic pattern was reinforced by traditional norms applicable to tax legislation.

Rebuttal

§8.102 ***Rebuttal.*** There are several ways to rebut an implied exclusion argument.[28] One is to offer an alternative explanation of why the legislature expressly mentioned some things and was silent

with respect to others. The legislature may have wished, for example, to emphasize the importance of the matters mentioned or, out of excessive caution (*ex abundanti cautela*), to ensure that the mentioned matters were not overlooked.[29] The express references may have been included in the legislation merely as examples to illustrate a general principle.[30] Or the court may find that there is an insufficient basis for an expectation of express reference.[31] Express reference to something may be necessary or appropriate in one context but unnecessary or inappropriate in another.[32]

§8.103 In *Dersch v. Canada (Attorney General)*,[33] for example, the Supreme Court of Canada considered the provisions governing the interception of private communications under Part IV.1 of the *Criminal Code*. The issue was whether an accused whose communication had been intercepted was entitled to have access to the so-called sealed packet which contained the evidence relied on in granting the wiretap authorization. A line of cases took the view that because the *Criminal Code* contained no express provisions allowing for access to the packet, in contrast to the provisions found in American legislation, no right of access was intended. This reasoning, based on implied exclusion, was adopted, for example, by Martin J.A. in *R. v. Rowbotham* :

> It was determined that, since there is a specific provision for production in the United States legislation and there is no such provision in the Canadian legislation, Parliament intended to deny access to the sealed packet by the accused.[34]

This reasoning was rejected by the Supreme Court of Canada. Sopinka J. wrote:

> The restrictive approach to the interpretation of these provisions ... fails to take account of a fundamental difference between Title III in the United States and Part IV.1. While Title III contains specific provisions designed to protect various interests affected, Parliament was content to leave such protection in the hands of the judiciary ... [T]he Canadian equivalent of s. 2518(5) of Title III is the discretion in s. 178.13(2)(*d*) vested in a judge.[35]

Here the failure to follow the American pattern is explained not by an intention to exclude the safeguards found in the American legislation but by the intention to adopt a different means of protection.

§8.104 In *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, Gonthier J. wrote:

> I have found that, within the statutory scheme established by the *Railway Act* and the *National Transportation Act*, the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force. The fact that this power is provided explicitly in other statutes cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole.[36]

In this case the inferences drawn from the Court's examination of the commission's structure and mandate outweighed the inferences drawn from the legislature's failure to follow its usual pattern of expressly conferring the power to revise interim rates.

§8.105 The judicial attitude toward implied exclusion and the grounds on which courts may reject an implied exclusion argument are summarized by Cameron J.A. in *Dorval v. Dorval*:

> ... [T]he maxim *expressio unius est exclusio alterius* is only an aid to statutory construction. As Laskin C.J. noted in *Jones v. New Brunswick (Attorney General)*, [37] "This maxim provides at the most merely a guide to interpretation; it does not pre-ordain conclusions." And its application calls for a considerable measure of caution lest too much be made of it ...
>
> ... First, much depends on context, including the particular subject-matter. Second, express reference to a matter may have been unnecessary and been made only out of abundant caution. Third, the lack of express reference may have been the product of inadvertence. Fourth, the express and the tacit, incongruous as they may be, must still be such as to make it clear they were not intended to coexist. And, finally, the indiscriminate application of *expressio unius* to the particular subject-matter may lead to inconsistency or injustice.[38]

Distrust of implied exclusion

§8.106 *Distrust of implied exclusion.* In *Turgeon v. Dominion Bank*, Newcombe J. wrote:

> The maxim, *expressio unius est exclusio alterius*, enunciates a principle which has its application in the construction of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur; that there may be inadvertence; that sometimes unnecessary expressions are introduced, *ex abundanti cautela*, by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not to be of universal application.[39]

These observations are insightful and they have been taken to heart by both courts and commentators, so much so that they have led to an unwarranted distrust of this maxim as compared to others. In addition to the *Turgeon* case, the following passage from Côté is frequently relied on:

> *A contrario*, especially in the form *expressio unius est exclusio alterius*, is widely used. But of all the interpretive arguments it is among those which must be used with the utmost caution. The courts have often declared it an unreliable tool, and ... it is frequently rejected.[40]

While it is true that implied exclusion arguments are often rightly rejected, it does not follow that implied exclusion is unreliable or less reliable than the other maxims or other techniques for analyzing legislative text. Implied exclusion is frequently invoked because it is an essential tool of efficient communication and is likely to play a role in most successful communication efforts. In legal contexts, it is reinforced by the conventions of consistent expression and no tautology. Like all arguments based on these presumptions, its weight depends on a range of contextual factors and the weight of competing considerations. However, it is no more likely to mislead than any other of the inferences examined in this chapter and in some cases it rightly receives considerable weight.[41]

Footnote(s)

1 See Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Cowansville: Les Éditions Yvon Blais Inc., 1991), at p. 334.

2 R. Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown & Co., 1975), p. 234.

3 *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485, at para. 31 (Ont. C.A.).

4 For discussion of the presumptions of legislative intent, see Chapter 15.

5 [2004] F.C.J. No. 2115, at para. 96 (F.C.A.).

6 For an explanation of the counterfactual form of argument, see above at §8.40*ff*.

7 See Paul Grice, *Studies in the Way of Words* (Cambridge: Harvard University Press, 1989), p. 26.

8 [1969] M.J. No. 47, 3 D.L.R. (3d) 525 (Man. C.A.). See also *Yugraneft Corp. v. Rexx Management Corp.*, [2010] S.C.J. No. 19, 2010 SCC 19, [2010] 1 S.C.R. 649, at para. 39 (S.C.C.); *R. v. B.W.P.*, [2006] S.C.J. No. 27, [2006] 1 S.C.R. 941, at para. 23 (S.C.C.); *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] S.C.J. No. 14, [2006] 1 S.C.R. 513, at paras. 31, 45 (S.C.C.); *Québec (Communauté urbaine) v. Corp. Notre Dame de Bon-Secours*, [1994] S.C.J. No. 78, [1994] 3 S.C.R. 3, at 27-28 (S.C.C.); *Waldick v. Malcolm*, [1991] S.C.J. No. 55, [1991] 2 S.C.R. 456, 125 N.R. 372, at 395-96 (S.C.C.); *R. v. Shubley*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3, at 18 (S.C.C.); *Canada (Combines Investigation Act Director of Investigation and Research) v. Newfoundland Telephone Co.*, [1987] S.C.J. No. 79, [1987] 2 S.C.R. 466, at 483-94 (S.C.C.); *Reference re Judicature Act (Alberta), s. 27(1)*, [1984] S.C.J. No. 64, [1984] 2 S.C.R. 697, 14 D.L.R. (4th) 546, at 555-56, 557 (S.C.C.); *Abrahams v. Canada (Attorney General)*, [1983] S.C.J. No. 2, [1983] 1 S.C.R. 2, at 6 (S.C.C.); *Pfizer Co. v. Canada (Deputy Minister of National Revenue, Customs and Excise)*, [1975] S.C.J. No. 126, [1977] 1 S.C.R. 456, at 461-62 (S.C.C.); *Lamont Management Ltd. v. Canada*, [2000] F.C.J. No. 529, at para. 44 (F.C.A.); *R. v. R.J.H.*, [2000] A.J. No. 396, at paras. 15-17 (Alta. C.A.).

9 *Ibid.*, at 541.

10 *Ibid.*, at 543-44.

11 [2000] B.C.J. No. 1145 (B.C.C.A.).

12 *Ibid*., at para. 9.

13 For discussion of the presumption of consistent expression, see above at §8.32*ff*.

14 [2001] S.C.J. No. 55, [2001] 2 S.C.R. 867, at para. 42 (S.C.C.). See also *R. v. Summers*, [2014] S.C.J. No. 26, 2014 SCC 26, at paras. 7, 38-41 (S.C.C.).

15 See discussion of patterns of expression, above at §8.38-8.39.

16 [1989] S.C.J. No. 25, [1989] 1 S.C.R. 560 (S.C.C.). See also *Németh v. Canada (Justice)*, [2010] S.C.J. No. 56, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 29 (S.C.C.); *Yugraneft Corp. v. Rexx Management Corp.*, [2010] S.C.J. No. 19, 2010 SCC 19, [2010] 1 S.C.R. 649,

at para. 47 (S.C.C.); *Century Services Inc. v. Canada (Attorney General)*, [2010] S.C.J. No. 60, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 45 (S.C.C.); *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, 2009 SCC 9, [2009] 1 S.C.R. 222, at para. 116 (S.C.C.); *GreCon Dimter Inc. v. J.R. Normand Inc.*, [2005] S.C.J. No. 46, [2005] 2 S.C.R. 401, at para. 25 (S.C.C.); *Hickman Motors Ltd. v. Canada*, [1997] S.C.J. No. 62, [1997] 2 S.C.R. 336, at paras. 79-80 (S.C.C.); *R. v. Multiform Manufacturing Co.*, [1990] S.C.J. No. 83, [1990] 2 S.C.R. 624, 79 C.R. (3d) 390, at 395 (S.C.C.); *R. v. Hajivasilis*, [2013] O.J. No. 253, 2013 ONCA 27, at para. 35 (Ont. C.A.); *Lukács v. Canada (Transportation Agency)*, [2014] F.C.J. No. 301, 2014 FCA 76, at paras. 42-44 (F.C.A.); *First Majestic Silver Corp. v. Santos*, [2014] B.C.J. No. 526, 2014 BCCA 115, at para. 30 (B.C.C.A.); *Balancing Pool v. TransAlta Corp.* , [2013] A.J. No. 1278, 2013 ABCA 409, at para. 24; *R. v. Hajivasilis*, [2013] O.J. No. 253, 2013 ONCA 27, at para. 35 (Ont. C.A.); *Conservative Fund Canada v. Canada (Elections)*, [2010] O.J. No. 5543, 2010 ONCA 882, at paras. 72-78 (Ont. C.A.), leave to appeal refused [2011] S.C.C.A. No. 65 (S.C.C.); Ontario (*Liquor Control Board) v. Magnotta Winery Corp.*, [2010] O.J. No. 4453, 2010 ONCA 681, at para. 45 (Ont. C.A.); *R. v. Geisbrecht (E.H.)*, [2008] M.J. No. 311, 2008 MBCA 102, at para. 16 (Man. C.A.); *Jager Industries Inc. v. Canada (Minister of National Revenue - M.N.R.)*, [1991] F.C.J. No. 1250, 137 N.R. 66, at 69-70 (F.C.A.); *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, [1985] B.C.J. No. 2517, 23 D.L.R. (4th) 161, at 176-78 (B.C.C.A.).

17 *Ibid.*, at 681-82.

18 [1999] S.C.J. No. 69, [1999] 3 S.C.R. 804 (S.C.C.).

19 *Ibid*., at para. 63.

20 *Ibid*., at para. 65. See also *R. v. Knoblauch*, [2000] S.C.J. No. 59, [2000] 2 S.C.R. 780, at paras. 106-07 (S.C.C.); *R. v. Brooks*, [2004] N.S.J. No. 41, at paras. 19-21 (N.S.C.A.); *R. v. Collymore*, [1999] O.J. No. 2759, 45 O.R. (3d) 713, at 721 (Ont. C.A.).

21 *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485, at para. 32 (Ont. C.A.). See also *Re B.C. Teachers' Federation*, [1985] B.C.J. No. 2517, 23 D.L.R. (4th) 161, at 176-78 (B.C.C.A.); *Murphy v. Welsh*, [1991] O.J. No. 711, 3 O.R. (3d) 182, at 189-90 (Ont. C.A.), revd in part [1993] S.C.J. No. 83, [1993] 2 S.C.R. 1069 (S.C.C.). See also *Margach v. The King*, [1933] Ex. C.R. 97, folld in *Winmill v. Winmill*, [1974] F.C.J. No. 86, [1974] 1 F.C. 686 (F.C.A.).

22 [1991] S.C.J. No. 19, [1991] 1 S.C.R. 614 (S.C.C.).

23 *Ibid.*, at 631.

24 [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22 (S.C.C.).

25 *Ibid.*, at 33.

26 *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485, at para. 33 (Ont. C.A.).

27 *Ibid*., at para. 31. See also *R. v. B.W.P.*, [2006] S.C.J. No. 27, [2006] 1 S.C.R. 941, at para. 24 (S.C.C.), where Charron J. said " ... deterrence, as a general principle of sentencing, is well known. Had Parliament intended to make deterrence part of the youth sentencing regime, one would reasonably expect that it would be expressly included in the detailed purpose and principles set out in the statute."; *R. v. Campbell*, [1999] S.C.J. No. 16, [1999] 1 S.C.R. 565, at para. 26 (S.C.C.).

28 For a master class in ways to rebut an implied exclusion argument, see *R. v. D.A.I.*, [2012] S.C.J. No. 5, 2012 SCC 5, at paras. 41-52 (S.C.C.).

29 See, for example, *R. v. Shubley*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3, at 8 (S.C.C.); *Alberta v. Canada (Transport Commission)*, [1977] S.C.J. No. 40, [1978] 1 S.C.R. 61, at 68 (S.C.C.); *Martineau v. Matsqui Institution*, [1977] S.C.J. No. 44, [1978] 1 S.C.R. 118, at 130 (S.C.C.); *Normandin v. Canada (Attorney General)*, [2005] F.C.J. No. 1768, at para. 30 (F.C.A.).

30 *Kusnierz v. Economical Mutual Insurance Company*, [2011] O.J. No. 5908, 2011 ONCA 823, at paras. 29-30 (Ont. C.A.).

31 *Surdivall v. Ontario (Disability Support Program)*, [2014] O.J. No. 1505, 2014 ONCA 240, at paras. 57-59 (Ont. C.A.); *Keizer v. Slauenwhite*, [2012] N.S.J. No. 89, 347 D.L.R. (4th) 629, at paras. 9, 22 (N.S.C.A.).

32 See, for example, *Investors Group Trust Co. v. Eckhoff*, [2008] S.J. No. 95, 2008 SKCA 18, at para. 46 (Sask. C.A.); *British Columbia Telephone Co. v. R.*, [1991] F.C.J. No. 340, 46 F.T.R. 94, at 105-06 (T.D.), affd [1992] F.C.J. No. 27, 139 N.R. 211 (F.C.A.).

33 [1990] S.C.J. No. 113, [1990] 2 S.C.R. 1505 (S.C.C.).

34 *Per* Martin J.A., reviewing the relevant case law, in *R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1, at 40 (Ont. C.A.).

35 *Dersh v. Canada*, [1990] S.C.J. No. 113, 77 D.L.R. (4th) 473 at 479-80 (S.C.C.); see also *Swan v. Canada (Minister of Transport)*, [1990] F.C.J. No. 114, [1990] 2 F.C. 409, at 426 (T.D.).

36 [1989] S.C.J. No. 68, [1989] 1 S.C.R. 1722 (S.C.C.).

37 [1974] S.C.J. No. 91, [1975] 2 S.C.R. 182 (S.C.C.).

38 [2006] S.J. No. 94, at paras. 13-14 (Sask. C.A.).

39 [1929] S.C.J. No. 56, [1930] S.C.R. 67, at 70-71 (S.C.C.). See, for example, *Dorval v. Dorval*, [2006] S.J. No. 94, 2006 SKCA 21, at paras. 11*ff* (Sask. C.A.); *Goodman v.*

Manitoba (Criminal Injuries Compensation Board), [1980] M.J. No. 187, [1981] 2 W.W.R. 749 (Man. C.A.).

40 P.-A. Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Cowansville: Les Éditions Yvon Blais Inc., 1991), at p. 337. See, for example, *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, [2008] O.J. No. 3164, 2008 ONCA 587, at paras. 98-100 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.); *Whitehorse (City) v. Darragh*, [2009] Y.J. No. 108, 2009 YKCA 10, at para. 40 (Y.T. C.A.). See also J.M. Keyes, "Expressio Unius: the Expression that Proves the Rule" (1989), 10 Statute Law Rev. 1, at 12-17.

41 See, for example, *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] S.C.J. No. 40, 2014 SCC 40, at paras. 41-42 (S.C.C.).

TAB 9

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.).

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

EB-2017-0007

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).

ONTARIO ENERGY BOARD

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