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).

CLOSING SUBMISSIONS OF PLANET ENERGY (ONTARIO) CORP. (Heard November 14, 16-17, 27-28, 2017)

December 22, 2017

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PART 1 OVERVIEW

1. OEB Enforcement Staff's ("**Staff**") prosecution of Planet Energy (Ontario) Corp. (or "**Planet Energy**") is premised on allegations of ***systemic*** deficiencies in Planet Energy's training/testing, marketing and compliance-monitoring practices and the significant harm this has purportedly caused or poses to energy consumers.

2. Yet Staff has adduced no evidence of widespread or systemic problems, nor that consumers have or will be harmed as a result. Systemic claims — as distinct from individual claims — require proof of patterns of neglect or misconduct attributable to inadequate procedures and processes. Staff has failed to satisfy this burden of proof.

3. Staff did not undertake an inspection or investigation of Planet Energy's training/testing, marketing and compliance systems and determine that they were deficient, and that any deficiencies had caused or threatened to cause widespread or systemic harm.

4. Staff's case, as Staff's lead investigator Ms. Brigit Armstrong ("**Armstrong**") concedes, rests almost entirely on "the word" of two ACN independent business owners ("**IBOs**").

> "I focused on the two complaints and the two agents. I did not inspect Planet Energy on a broader scale."

Staff's claim of systemic deficiencies and customer harm is extrapolated solely from the word of these two IBOs and is the foundation for the $383,000 administrative monetary penalty sought against Planet, which is grossly disproportionate to the alleged conduct (if proven).

5. The evidence of these two IBOs does not demonstrate systemic failures and widespread harm; nor does it even meet the lower evidentiary standard for proving most of the alleged individual contraventions.

A. MacArthur Contracts

6. The "word" of one of the IBOs, James MacArthur ("**MacArthur**") should be disregarded in its entirety and all of the alleged contraventions relating to contracts enrolled through Mr. MacArthur should be dismissed.

7. Mr. MacArthur's evidence does not meet basic standards for reliability or trustworthiness. Mr. MacArthur admitted to acting unlawfully and deceptively as an IBO; he conceded to making false statements and lying to Planet Energy, the OEB and others about the matters at issue; and, his central allegation — that he enrolled all customers on his own over the internet — is belied by his own prior statements and Planet Energy's recorded quality assurance calls with over 60% of his customers. Mr. MacArthur also refused, in response to requests by Staff and a motion by Planet Energy, to disclose the identities of "unnamed persons" to whom he attributes his misconduct, thereby shielding his evidence from further scrutiny.

8. Mr. MacArthur's evidence is not bolstered by the evidence of the single customer of his called by Staff, Robert Hawkins ("**Hawkins**"). Mr. MacArthur and Mr. Hawkins conspired to make false statements and to say whatever they deemed necessary to Planet Energy, the OEB, the Better Business Bureau and the media to relieve Mr. Hawkins from early termination charges (which Board Staff concluded Planet Energy was authorized to charge).

9. Staff has the onus of adducing clear, convincing and cogent evidence to establish the alleged contraventions; it has not met that burden with regards to the contraventions attributed to Mr. MacArthur. It would be unjust to relax this burden in any way given that Staff was fully aware of Mr. MacArthur's and Mr. Hawkins' false statements and the inconsistencies in their evidence before issuing the Notice — yet did nothing to scrutinize and corroborate their evidence, which is the foundation for the Notice and the serious allegations against Planet Energy.

10. Alternatively, were Mr. MacArthur's and Mr. Hawkins' evidence to be believed, that necessarily means accepting that over 60% of Mr. MacArthur own customers (including Mr. Hawkins) conspired with him to lie in response to quality assurance calls from Planet

Energy in which Planet asked customers, among other things, whether they had enrolled on their own in the absence of Mr. MacArthur. Planet Energy cannot fairly be found liable in circumstances where the very customers it seeks to protect through quality assurance calls do not tell the truth. The uncontroverted evidence of Nino Silvestri ("**Silvestri**"), the co-CEO of Planet Energy, is that had Mr. MacArthur's customers told Planet Energy during quality assurance calls that Mr. MacArthur had enrolled them on his own, Planet Energy would have immediately terminated Mr. MacArthur and called every customer enrolled through him and offered to cancel their contracts without penalty.

11. All of the alleged contraventions associated with Mr. MacArthur should be dismissed.

B. Nahid Contracts

12. That leaves 16 contracts (and 10 customers) enrolled through Kayvan Nahid ("**Nahid**").

13. No customers of Mr. Nahid - with the exception of Roobinet Andrassin ("**Andrassin**"), whose principal complaint related to a cancellation penalty - complained to Planet Energy, the OEB or anyone else prior to Staff's commencement of the Inspection. Nor did Staff contact any of Mr. Nahid's customers to confirm Mr. Nahid's alleged promises of savings and manner of enrolment, or to ask if they had any complaints or wanted to be let out of their contracts. There is no evidence (with the exception of Ms. Andrassin) of any consumer harm.

14. Nor does the evidence of Mr. Nahid as a single IBO (out of 6,000 to 7,000 IBOs who marketed Planet Energy products to low volume consumers over the course of 7 years) and the 16 contracts enrolled through Mr. Nahid (out of approximately 120,000 low volume contracts enrolled through IBOs since 2010) constitute evidence of systemic deficiencies or wrongdoing.

C. No Evidence of Systemic Problems

15. Staff adduced no evidence to show any record or pattern of misconduct caused by systemic inadequacies in Planet's business practices, nor evidence of any widespread harm or potential harm to consumers.

16. The evidence is to the contrary; over the 11 years that Planet Energy has been marketing to low-volume consumers:

(a) The very business practices and processes which are impugned by Staff in this proceeding - Planet's training and testing programs which are alleged to be "wholly inadequate", its MLM marketing practices which are alleged to be "very high risk" and its relationship with ACN which is pejoratively characterized as being a "pyramid scheme" — were rigorously inspected and scrutinized by the OEB as part of regulatory audits and investigations in 2011, 2013 and 2015, and the OEB did not identify any of the deficiencies or problems which are alleged in this proceeding;

(b) Planet Energy has never in the seven years it has been marketing to low-volume consumers through its MLM channel been found in contravention, let alone charged by the OEB, for any of the matters that are the subject of this proceeding;

(c) Planet Energy has customer protection systems in place to identify and address non-compliant conduct by IBOs — including making quality assurance calls to 25% of enrolled customers, sending confirmation letters/emails, receiving and investigating complaints from customers and the OEB, cancelling contracts without penalty if complaints are validated — and Planet has never previously been made aware of the sort of misconduct alleged to have been committed by Mr. MacArthur and Mr. Nahid; and

(d) Planet Energy has a very good compliance record and, by the OEB's own statistics, a low industry customer complaint ratio.

17. In its Closing Submissions Staff maligns Planet Energy's training/testing, MLM sales model, relationship with ACN and other processes and systems for their inherent dangers and potential harm to consumers. Yet all that Staff proffers as evidence in support of its allegations of systemic wrongdoing and customer harm is the say-so of two IBOs (one of whose evidence is unreliable).

18. To make up for the absence of actual evidence, Staff repeatedly throughout its Submissions implores the Panel to draw "obvious" or "common sense" inferences that all or most IBOs give false allegations, ignore training requirements, share test answers, misrepresent savings to consumers, enroll customers on their own, etc. This is ***not evidence*** of systemic deficiencies or harm. It is also an attempt to try to shift the burden of proof to Planet to, in effect, adduce ***evidence*** to rebut Staff's ***allegations***.

19. Distilled to its essence, Staff's case amounts to a claim that Mr. MacArthur and Mr. Nahid — two amongst 6,000 to 7,000 IBOs — say they contravened Planet Energy's rules and requirements for training/testing, marketing and enrollment, and the Board ***should infer*** that this demonstrates inherent deficiencies in Planet's business practices and widespread harm or potential harm to consumers. This is a *non sequitur* that does not satisfy the requisite standard of proof (and which is refuted by the evidence that there has not been widespread complaints).

D. Andrassin

20. Planet Energy concedes and apologizes for the fact that Ms. Andrassin received poor customer service and was provided with incorrect information when she initially sought to cancel her contract. In addition to canceling her contract without penalty (which Planet did one year before this proceeding was commenced), Planet Energy is willing to make restitution to Ms. Andrassin for the difference, if any, between the amount she paid to Planet Energy in commodity charges and the amount she would otherwise have paid to her distribution utility had she remained on standard supply.

21. Planet Energy respectfully submits that the balance of the allegations in the Notice are meritless, or do not warrant any administrative penalty or restitutionary remedy.

E. Administrative Penalty and Restitution

22. The large administrative penalty sought by Staff is also fundamentally premised on allegations of ***systemic*** deficiencies. Staff argues that it is warranted because of Planet Energy's "very high-risk sales model" and the "significant potential impact on consumers, who are enrolled in the contracts by poorly trained salespersons".

23. As stated above, Staff has failed to adduce evidence of systemic deficiencies and resultant harm or potential harm. This foundation for a large administrative penalty has not been established.

24. Staff's assertion that a large administrative penalty is also warranted because of the "number of deviations" and because Planet Energy "has previously contravened enforceable provisions of the Consumer Protection Regime" and was "put on notice about deficiencies in its online testing system" is likewise not supportable.

25. There are not a significant number of deviations. The 25 contraventions attributed to Mr. MacArthur should be dismissed, or Planet Energy should not be held accountable, for the reasons stated above.

26. The only two complaints arising from contracts enrolled through Mr. Nahid (which were not received until after the Staff commenced their Inspection) were resolved by Planet Energy's offer to allow the consumers (Doctors A.A. and B) to cancel without charge. The remaining alleged contraventions are relatively few compared to the approximately 120,000 low-volume consumer contracts enrolled by Planet Energy over the past seven years.

27. The only contraventions of enforceable provisions Planet Energy has ever been found liable for were minor infractions following the 2011 *Energy Consumer Protection Act* ("**ECPA**") audit, in which every retailer/marketer who was audited was found to have breached some provisions of the ECPA or regulations and was penalized.[1] During this

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[1] *Energy Consumer Protection Act*, S.O. 2010, c. 8 [**ECPA**].

audit, the Board specifically examined Planet Energy's training and open-book online testing processes and did not find any deficiencies.

28. Planet Energy opposes Staff's proposal that 37 contracts be unilaterally declared without having obtained the consent of the consumer-counterparties to those contracts. Staff's proposed refund also goes beyond the "restitution" sought in the Notice. Staff proposes that Planet refund to consumers all amounts paid under the contracts from it, not just the difference (if any) between the commodity charges paid by consumers to Planet Energy and the commodity charges they would have paid had they remained on standard supply.

F. Proposed Disposition

29. Staff has not proven its fundamental claims of systemic deficiencies in Planet Energy's business practices and resultant harm or potential harm.

30. Staff has likewise not proven the alleged individual contraventions attributed to Mr. MacArthur; and, even if it has, Planet Energy should not be held liable given the quality assurance calls made to the majority of Mr. MacArthur's customers.

31. That leaves the 10 customers enrolled through Mr. Nahid (including Ms. Andrassin). Staff did not call as witnesses (nor even contact and speak with) any of Mr. Nahid's customers (with the exception of Ms. Andrassin) and there is no evidence from any of these customers to corroborate Mr. Nahid's allegations or that they have been harmed. This lack of evidence from consumers is an important consideration that the Panel should take into account in determining whether Staff has met the onus of proving all of the contraventions attributed to Mr. Nahid.

32. Even if the Panel determines that Mr. Nahid committed all or some of the alleged contraventions, Planet submits this does not justify an administrative penalty or restitution.

33. Planet Energy employs training/testing, quality assurance and compliance-monitoring measures to prevent, detect and remedy non-compliance, including non-compliance by IBOs. That said, Planet's systems and processes like that of any business are not infallible and mistakes and regulatory infractions can occur. If Mr. Nahid is found to

have committed some or all of the alleged contraventions, these are isolated and anomalous contraventions – and Staff have not demonstrated otherwise.

34. The fact that the OEB Act and the ECPA equip the Board with extraordinary powers to enforce compliance and administer penalties does not mean those powers are to be exercised to address every infraction. The authority under the ECPA should be used judiciously by Staff and not exercised to penalize otherwise compliant retailers and marketers for occasional infractions.

PART 2 ISSUES & PLANET ENERGY'S POSITION

35. The issues for the Panel to decide in this proceeding, and Planet Energy's position on each issue, are:

(a) Are Mr. MacArthur and Mr. Nahid "salespersons" within meaning of ECPA?

Planet does not dispute that Mr. MacArthur and Mr. Nahid were "salespersons".

(b) Is Planet Energy liable under the ECPA, Regulation and Codes for acts/omissions of Mr. MacArthur and Mr. Nahid?

Planet does not agree with Staff's position that it is automatically liable for the acts/omissions of salespersons.

(c) Has Staff proved "systemic" deficiencies relating to Planet's training/testing, MLM marketing and quality assurance and compliance monitoring processes?

Planet submits that Staff has not.

(d) Do the circumstances under which Mr. MacArthur and Mr. Nahid enrolled consumers into energy contracts with Planet constitute door-to-door sales or internet sales for the purposes of the ECPA, Regulation and codes?

Planet submits that all enrollments were internet sales as defined by the ECPA.

(e) Did Planet breach the ECPA, Regulation and/or Codes or any part thereof?

Planet submits that it did not breach the ECPA, Regulation and/or Codes; and the refund proposed by Staff goes beyond restitution and is not authorized.

(f) If the Board determines that Planet breached the ECPA, the Regulation and/or Codes or any parts thereof, are the remedies sought by Staff, including an administrative penalty in the amount of $383,000 and restitution, appropriate?

Planet submits that if the Panel finds that it breached any provisions, the breaches do not warrant an administrative penalty or restitution. Penalty sought by Staff is also grossly disproportionate.

PART 3 EVIDENCE BEFORE THE PANEL

A. Planet Energy

36. Planet Energy is a licensed electricity retailer (Licence ER-2016-0385) and natural gas marketer (Licence GM-2013-0269) that has operated in Ontario since 2006. Planet Energy's electricity retailer licence was renewed by the Ontario Energy Board ("**Board**" or "**OEB**") on June 15, 2017 for a further 5-year term, without any conditions.[2]

37. Mr. Silvestri, the Co-CEO of Planet Energy, testified on behalf of Planet Energy.[3] Mr. Silvestri was knowledgeable, forthright and candid during his examination in chief and cross examination.

38. Mr. Silvestri has been the Co-CEO of Planet Energy since November 2012 when he and his partnership group purchased Planet Energy.[4]

39. Between 2010 and November 2016, Planet Energy exclusively marketed to low-volume consumers ("**consumers**") through All Communications Network of Canada Co. ("**ACN**"). ACN is a multi-level marketing ("**MLM**") company, active in 21 countries, which promotes and sells home utility products such as energy, internet, telecom, long-distance, cable, and home security systems. ACN markets through its independent business owners ("**IBOs**"), independent contractors who market or promote ACN's product lines to their warm network of family, friends and acquaintances.[5]

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[2] Agreed Chronology, para. 1.
[3] EB-2017-0007 Unredacted Confidential Hearing Transcript, Nino Silvestri Examination in Chief ("**Silvestri Chief**"), Vol. 4, p. 64, l. 11.
[4] Silvestri Cross, Vol. 4, p. 136, l. 20.
[5] Silvestri Chief, Vol. 4, p. 67, l. 14-28.

40. Planet Energy's contract with ACN expired in November 2016 and Planet decided not to renew the contract ACN due to the implementation of Bill 112, *An Act to amend the Energy Consumer Protection Act, 2010 and the Ontario Energy Board Act, 1998*.[6] Since then, Planet Energy has not promoted products through ACN or any other MLM company and Planet no longer markets contracts to new consumers. Planet's business in Ontario is limited to servicing and marketing to existing customers.[7]

B. Planet Energy's MLM Model

41. Planet Energy decided in 2010 to exclusively market to consumers through ACN's IBO network for a number of important reasons. First, Planet wished to avoid the issues associated with in-person sales, in particular door-to-door marketing.[8]

42. Second, ACN followed a strict policy that IBOs only market or promote products to their "warm network" of friends, family and known acquaintances.[9] ACN's Policies and Procedures, to which all IBOs agreed,[10] prohibited IBOs from conducting cold calls or door-to-door marketing:

> III. Cold Marketing in Customer Acquisition and Recruiting
>
> ACN is a network marketing company that is focused solely on relationship, or "warm marketing" techniques. **ACN strictly prohibits IBOs from engaging in any "cold marketing" techniques for purposes of customer acquisition at any time**. Cold marketing is defined as any promotional activity that is geared toward random individuals who have no personal, business, social or acquaintance relationship(s) with the promoter. Examples of cold marketing include, but are not limited to, mass advertising, purchased leads, trade show participation, door-to-door selling, telemarketing, pamphlet distribution, etc. ACN also strictly prohibits the purchase or sale of customers at any time.[11] [Emphasis added]

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[6] Silvestri Cross, Vol. 4, p. 140, l. 2-19.
[7] Agreed Chronology, para. 4.
[8] Silvestri Chief, Vol. 4, p. 72.
[9] Silvestri Chief, Vol. 4, p. 68; Planet Energy Documents Vol. 1, Tab 37, page 0611, "ACN Policies and Procedures."
[10] Planet Energy Documents Vol. 1 Tab 6C, page 0150, "ACN Canadian Independent Business Owner Agreement."
[11] Planet Energy Documents Vol. 1 Tab 37, page 0619, "ACN Policies and Procedures – Appendix 1 – Marketing

43. Planet believed that IBOs who marketed to friends, family and acquaintances would be encouraged to act in in a compliant manner and avoid high-pressure sales and other issues associated with cold calling and door-to-door sales. Mr. Silvestri testified that:

> [IBOs] ... are promoting these products to their friends and family, so we would expect them to be honest at all times, but especially in promoting products to friends and family, we expect them to maintain good compliance and good customer relations.[12]

44. Of particular importance, Planet's MLM model limited IBO marketing to promoting the potential benefits of Planet's products to consumers and directing them to Planet Energy's website where they could learn more about Planet's products and decide to enroll if they so chose. Mr. Silvestri said that the potential benefits included:

> The basic benefits are such as our stability product, where the electricity or natural gas supply could be fixed for up to a five-year period, and other types of products that we offer that a customer would not be able to obtain from the utility, such as our peak protection product that would lock-in electricity supply during peak hours, or -- and our [Reliabill] product, where a customer could purchase their natural gas on a fixed dollar monthly amount each month.
>
> […] in the case of electricity, there are businesses, for example, that operate Monday to Friday during peak hours that are interested in locking in their electricity supply.
>
> […] if someone is consuming power at peak hours, they are paying $0.16 for peak and 12 cents for mid-peak, which includes Global Adjustment. If they are paying 4.99, that may be of benefit to them.[13]

45. The objective of Planets MLM was to "leave it to the customer to decide if they wished to enroll via the website".[14] As Mr. Silvestri explained:

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and Advertising Policy."
[12] Silvestri Chief, Vol. 4, p. 74, l. 3-12.
[13] Silvestri Chief, Vol. 4, p. 71-72.
14 Silvestri Chief, Vol. 4, p. 72.

> … We wanted the customer to enroll via the Internet … so there would not be any pressure on the customer to sign … So we thought the multilevel channel, where an IBO would be selling to their friends and family to introduce our products and then leave it up to the customer to decide on their own. We felt we would end up with a customer that would appreciate the product and would understand what he or she would be entering into.[15]

46. Planet Energy's IBO Training Manual and IBO authorization requirements expressly prohibited IBOs from concluding sales and enrolling customers on their own. In addition, Mr. Silvestri noted that Planet's MLM approach — which prohibited IBOs from selling — placed more realistic obligations on IBOs:

> We don't expect the IBOs to end up becoming energy experts. We expect the IBO to have, you know, a working knowledge, high-level knowledge of the retail energy markets that our training provides and that meets the requirements of the Board's code of conduct. [16]

47. Staff suggests Mr. Silvestri "attempt[ed] to downplay and minimize the role of IBOs" as simply directing potential customers to Planet's website and enrollment portal and alleged that this was "irreconcilable with the terms of the [ACN] Sales Agency Agreement" which emphasizes selling.[17] The ACN Sales Agency Agreement, however, applies to all ACN product lines, whereas as Mr. Silvestri stated, training and testing of IBOs was unique to Planet Energy products; and Planet Energy's IBO training prohibited IBOs from selling Planet products and instructed IBOs to direct prospective customers to Planet's website and enrollment portal.

48. Planet and ACN also utilized a commission structure which further incented compliant conduct. It compensated IBOs with a trailing monthly residual commission payable to the IBO over the life of the contract, versus the higher "up-front" commission paid under the conventional in-person/door-to-door sales model.[18] Mr. Silvestri said this encouraged IBOs to maintain good customer relations and compliance with their customers,

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[15] Silvestri Chief, Vol. 4, p. 73, l. 1-12.
[16] Silvestri Chief, Vol. 4, p. 74, l. 3-12.
[17] Staff Written Closing Submissions, para. 65.
[18] Silvestri Chief, Vol. 4, p. 75, l. 6-21.

who are friends and family, whereas under a door-to-door model there are incentives to sign up the customer as agents receive the entire commission upon enrolment.[19]

49. IBOs were incentivized personally to comply with all regulatory requirements, and to ensure any IBOs that they recruited also complied, because violation of the rules could result in deactivation of the IBO and loss of future commissions paid to the IBO (and if they had been recruited by another IBO, commissions could be lost by the IBO who had recruited them).[20]

50. Finally, Planet's MLM model was paperless and so customers received electronic confirmations instantaneously following enrollment.[21]

C. The Enrollment Portal

51. Planet's enrolment portal, which customers navigated on their own, complied with all statutory and regulatory-prescribed consumer protection requirements. Among other things, it required customers to confirm or acknowledge that:

- Planet Energy does not represent an electricity distributor, the OEB or the province of Ontario;[22]
- in addition to the commodity charges in the contract price, customers will have to pay additional charges, such as the Global Adjustment, delivery and regulatory charges;[23]
- the IBO who introduced the customer provided an official Planet Energy business card, wore a badge during the meeting and was not present at the time the customer completed the internet application.[24]

52. The enrollment portal and process also required customers to download the OEB-prescribed Disclosure Statement and Price Comparison forms before being permitted to

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[19] Silvestri Chief, Vol. 4, p. 75, l. 6-21.
[20] Silvestri Cross, Vol. 5, p. 19, l. 3-5.
[21] Silvestri Chief, Vol. 4, p. 73, l. 17-22.
[22] Planet Energy Documents Vol. 1 Tab 2A, pages 0010-11, Planet Energy Enrollment Portal.
[23] Planet Energy Documents Vol. 1 Tab 2A, pages 0010-11, Planet Energy Enrollment Portal.
[24] Planet Energy Documents Vol. 1 Tab 2A, pages 0014-15, Planet Energy Enrollment Portal.

continue enrolling and customers were required to confirm that they had read and understood the forms and been provided an opportunity to download, save and print a PDF of the forms for future use.[25] The Disclosure Statement and Price Comparison forms provided further information on the Global Adjustment, other energy charges, cancellation fees and it made clear that there was no guarantee of savings by entering into a Planet contract.

53. The enrollment portal also required, as a condition of enrolment, that customers scroll through all of the Terms and Conditions of the contract and confirm that they had read them before proceeding[26] and confirm their understanding that entering into a contract did not guarantee savings.[27]

54. Shortly after contract enrollment, Planet Energy electronically sent text-based copies of the contracts, Disclosure Statements and Price Comparisons to the email address provided for the consumer for each of the energy contracts at issue. [28] Planet Energy also sent by direct mail within three to five days after contract enrollment Welcome Letters (enclosing contract terms and conditions) to the service address for the consumer for each of the energy contracts at issue in this proceeding.[29]

55. In this case, Planet Energy sent and consumers received confirmatory emails and Welcome Letters (inclusive of Disclosure Statements, Price Comparisons and Terms and Conditions) in respect of each of the contracts referenced in the Notice.[30]

D. Training and Testing

56. Planet Energy developed training and the testing for IBOs; ACN had no responsibility for the content of the training materials, and was solely responsible for hosting the training materials in the ACN IBO back office website.[31]

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[25] Planet Energy Documents Vol. 1 Tab 2A, page 0027, Planet Energy Enrollment Portal.
[26] Planet Energy Documents Vol. 1 Tab 2A, page 0043, Planet Energy Enrollment Portal.
[27] Planet Energy Documents Vol. 1 Tab 2A, page 0044, Planet Energy Enrollment Portal.
[28] Agreed Statement of Facts, paragraph 29.
[29] Agreed Statement of Facts, paragraph 29.
[30] Agreed Statement of Facts, paragraph 29.
[31] Silvestri Chief, Vol. 4, p. 76.

57. Planet reviewed its training manual ("**Training Manual**") and test questions on an annual basis and updated the materials as necessary to ensure that they were fully compliant with all the requirements of the Board's Code of Conduct and the regulations pursuant to the ECPA.[32] Planet Energy's Training Manual was reviewed by Board Staff during both the 2011 Audit and 2015 Compliance Inspection.

58. All IBOs were required to undergo training and successfully pass a test before marketing Planet Energy products. Planet Energy's system included two measures to ensure this requirement:

- First, Planet's enrollment portal did not allow entry of an IBO number for IBOs who had not completed training and successfully passed the test (which was a prerequisite to receiving commissions) .[33]

- Second, Planet Energy's system did not allow enrollment with the utility if the IBO was not in good standing, having completed the training and successfully passed the test.[34]

59. The requirements for training and testing were clearly set out in each IBO's online back office, [35] which explained how to complete training, testing and prepare an IBO badge and business cards, [36] as well as outlined the rules for marketing to customers:[37]

> **ACN Energy Badge Instructions - Ontario**
>
> How to become certified to acquire ACN Canada Energy customers:
>
> **STEP 1:** Complete ACN Energy Training on MyACN for Representatives.
> **STEP 2:** Download and print your ACN Energy Badge and Business Card. (All representatives must create a new badge. Previous badges are no longer valid).
> **STEP 3:** Once the representative has completed the training and printed their badge and business card, they will be able to access the certification test link
> **STEP 4:** Once you have completed all the required steps and have passed the certification test, you will be able to acquire ACN Energy customers in Ontario.

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[32] Silvestri Chief, Vol. 4, p. 77, l. 1-5.
[33] Silvestri Chief, Vol. 4, p. 78, l. 1-6.
[34] Silvestri Chief, Vol. 4, p. 78, l. 7-11.
[35] Silvestri Chief, Vol. 4, p. 78, l. 20-28; Planet Energy Documents Vol. 1 Tab 28, page 0568, ACN Back Office Login Screen.
[36] Planet Energy Documents Vol. 1 Tab 29, page 0569, Back Office Documents Screenshot.
[37] Planet Energy Documents Vol. 1 Tab 36, page 0609, ACN Energy Badge Instructions, Ontario.

When meeting with a prospective customer in person, a representative must do the following

1. Immediately identify themselves and Planet Energy
2. Immediately state that Planet Energy is not the customer's utility and is not associated with the Ontario Energy Board or the government of Ontario
3. Provide the customer with an official Planet Energy through ACN Canada Energy business card (even if a representative has an ACN business card, they must provide the business card that is printed with your badge.)

Important Reminders

- All representatives are required to complete the training, create a ACN Energy Badge and Business Card and pass the certification test in order to be eligible to acquire ACN Energy customers in Ontario
- The certification test is open book! Use the training slides to help ensure you pass the test
- You are allowed two attempts to pass the certification test, if you fail both attempts you may not sell energy in Ontario
- You will be notified immediately after completion of test whether you passed or failed
- After you have passed the test, customers will be able to place orders using your Team ID within the hour
- A representative must retake the training before attempting the test a second time.
- A representative must re-take the training and be re-tested annually
- Customers without a Team ID from a certified representative will not be able to order service
- Representatives will be able to sign up their own account without being certified

60. The IBO training included in each IBO's back office[38] required IBOs to access Planet's approximately 100-page Training Manual, which[39] IBOs had the option to save and print.[40] The Training Manual was organized in an easy to follow PowerPoint format which addressed the requirements of the ECPA and OEB Codes, including the matters set out in the Notice. The Training Manual made clear that customers had to enroll on their own and IBOs could not be involved and also emphasized that IBOs were not permitted to represent savings:

[38] Planet Energy Documents Vol. 1 Tab 29, page 0569, Back Office Documents Screenshot.
[39] Planet Energy Documents Vol. 1 Tab 6E, page 0170, Training Manual.
[40] Silvestri Cross, Vol. 4, p. 146, l. 24-26.

- Account Holders in Ontario must enter their own personal information and electronically sign the order when placing their Planet Energy order online; [41]

- IBOs may not be present on the premises or imminently return to the customer at the time the customer is signing up;[42]

- **IMPORTANT <u>DO NOT PROMOTE SAVINGS</u>** ACN IBOs should not position Planet Energy products as providing savings on the customer's bill;[43]

61. Part "B" of the Training Manual, entitled "Ontario Natural Gas and Electricity Training", [44] addressed:

- Ontario Regulatory Structure

- Training and testing

- Electricity and Natural Gas market structure — including that explained the Global Adjustment, which states:

> **Ontario Electricity Global Adjustment**
>
> The Global Adjustment (formerly the "Provincial Benefit") can be a credit or a charge to you.
>
> It is your share of the difference between the government's regulated and contract prices for electricity paid to certain generators and the market prices they would have received had they not been subject to government regulation or contracts.
>
> **If you buy electricity under the Regulated Price Plan, an estimate of the Global Adjustment is already reflected in the price for electricity set by the Ontario Energy Board, shown on the "Electricity" line of your bill.**
>
> Current and historical Global Adjustment rates can be found at www.ieso.ca[45] [Emphasis in original]

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[41] Planet Energy Documents Vol. 1 Tab 6E, page 0216, Training Manual.
[42] Planet Energy Documents Vol. 1 Tab 6E, page 0216, Training Manual.
[43] Planet Energy Documents Vol. 1 Tab 6E, page 0221, Training Manual.
[44] Planet Energy Documents Vol. 1 Tab 6E, page 0222, Training Manual.
[45] Planet Energy Documents Vol. 1 Tab 6E, page 0242, Training Manual.

- How electricity and gas pricing works and the customer's bill
- How to complete an online order
- Consumer cancellation rights and early termination charges — including the following slides, which state:

> **A consumer may cancel a retail energy contract <u>at any time for any reason</u>.**
>
> Termination Charges:
>
> If the consumer cancels their contract <u>after a 10 day cooling off period</u> they may be subject to early termination charges.
>
> Early termination charges are:
>
> <u>For gas residential</u>: $100 for each year or partial year remaining on the contract
>
> <u>For gas commercial or large residential</u>: 5 cents per m3 for the estimated remaining consumption on the contract.
>
> <u>For electricity residential</u>: $50 for each year or partial year remaining on the contract
>
> <u>For electricity commercial or large residential</u>: 1.5cents per kWh for the estimated remaining consumption on the contract.[46]
>
> **Reasons why a customer who cancels a contract after the 10 day cooling off period <u>may not be subject</u> to Early Termination Charges.**
>
> 1. A contract is non-compliant
> 2. A customer permanent moves from the serviced location
> 3. If an unfair practice has taken place
> 4. For electricity only: up to 30 days after the customer has received their first bill
> 5. If a customer is already on another retailer's service
> 6. If a customer requests a required recorded phone call and it is not produced within 10 days of the request.[47]

- Business cards and Identification badges

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[46] Planet Energy Documents Vol. 1 Tab 6E, page 0249, Training Manual.
[47] Planet Energy Documents Vol. 1 Tab 6E, page 0250, Training Manual.

- Disclosure Statements and Price Comparisons – these slides contain complete copies of the Disclosure Statement and Price Comparison forms.[48]

- Behaviours that constitute an unfair practice, including (i) the failure to provide a business card and wear a badge, (ii) failure to comply with the regulations, (iii) taking advantage of vulnerable customers by making representations the IBO knows or ought to know that the customer cannot understand, and (iv) failing to give a copy of any document presented to a customer upon request.

62. After completing training, the IBO back office instructions directed IBOs to print their identification badge and business cards.[49] However, before an IBO could print their badge and business cards, the IBO was required to agree and affirm that only customers could complete the online enrollment process, that they had read the Codes of Conduct and Training Manual, and that they would not make false statements to consumers.

63. After reviewing the Training Manual and preparing their badge and business cards, IBOs were entitled to click the online link for the "Planet Energy Test".[50] Prior to taking the test, the IBO was again required to affirm, that they had completed the training and that they would comply with all laws and regulations relating to the sale of energy in Ontario and that they would not share test answers:[51]

> **Planet Energy - Official Examination**
>
> You are about to take the Planet Energy Electricity Retailer and Natural Gas Marketer Examination.
>
> Before doing so you must electronically sign your agreement that you will comply with all laws and regulations relating to the sale of energy in Ontario AND affirm that you have completed the training.
>
> **My agreement to comply with laws and regulations relating to the sale of energy in Ontario (the "Agreement")**
>
> In my activities as a sales and marketing representative of electricity and natural gas for Planet Energy through ACN, I agree:

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[48] Planet Energy Documents Vol. 1 Tab 6E, page 0259-262, Training Manual.
[49] Silvestri Chief, Vol. 4, p. 80, l. 25-28.
[50] Planet Energy Documents Vol. 1 Tab 29, page 0569, Back Office Documents Screenshot.
[51] Planet Energy Documents Vol. 1 Tab 41, page 0636, Attestation.

> To always wear my Planet Energy through ACN badge on my outermost clothing and in plain view of my customer while speaking to friends, family and other customers about Planet Energy's products
>
> To always give my Planet Energy through ACN business card to each customer or potential customer
>
> To never mislead customers or potential customers with regards to price or savings
>
> …
>
> **My Attestation that I have completed the Planet Energy through ACN training. and that I will not share answers on the Exam (the "Attestation")**
>
> > 1. I hereby confirm - (i) if this is my first attempt at the official Planet Energy examination (the "Exam"), that I have completed the full 'Planet Energy through ACN' training (the "Training") prior to attempting the Exam, and (ii) if I have previously attempted the Exam (regardless of whether I passed or failed), I further confirm that I have re-completed the Training since my last attempt at the Exam.
> >
> > 2. I hereby confirm that I will not share answers with any other person taking the Exam.
>
> By checking this box, and clicking "Continue Test" below, I am electronically signing the Agreement and Attestation.
>
> □ I Agree

64. The specific test questions were generated randomly from the bank of questions, such that no two IBOs would receive the same test questions;[52] IBOs had one hour to complete the test, after which it timed out;[53] the minimum passing grade for the test was 80%;[54] and, IBOs were only allowed to take the test twice.[55] If an IBO received a grade lower than 80% a second time, the IBO was prohibited from marketing Planet Energy products for life.

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[52] Silvestri Cross, Vol. 5, p. 22, l. 21-22.
[53] Silvestri Cross, Vol. 5, p. 21, l. 18-19.
[54] Silvestri Chief, Vol. 4, p. 94, l. 16-20.
[55] To attempt the test a second time after achieving a grade of less than 80%, an IBO was required to re-access the training slides and could not access the test without doing so.[55]

65. IBOs were required to re-take the test each year or if they sought to market after 60 days of inactivity in marketing Planet Energy products.[56] If an IBO had missed his or her anniversary date and was not active, an IBO could take the test a couple months later, but would have been required to do so before enrolling any consumers.[57]

66. Mr. Silvestri's testimony is that Planet Energy's automated systems required IBOs to be tested annually and after any 60-day period of inactivity.[58] If an IBO had missed his or her anniversary date and was not active, an IBO could take the test a couple months later, but would have been required to do so before enrolling any consumers.[59]

67. In the six years that Planet Energy marketed its products through ACN, Planet only learned of one IBO (Mr. MacArthur) who did not (or said he did not) write the test on his own.[60]

E. Customer Care & Quality Assurance

68. Planet Energy's business included quality assurance and compliance monitoring processes to detect and address potential compliance issues, including any IBO-related compliance matters. These processes, which were addressed by Mr. Silvestri during his testimony, included:

- Automated systems to identify irregularities that warranted further investigation – e.g.: duplicate customer phone numbers, email addresses, residents addresses,

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[56] Silvestri Chief, Vol. 4, p. 93, l. 24-28.
[57] Silvestri Cross, Vol. 5, p. 52, l. 25-28.
[58] Silvestri Chief, Vol. 4, p. 93, l. 24-28.
[59] Silvestri Cross, Vol. 5, p. 52, l. 25-28. The Notice of Intention does not allege any failure to meet re-testing requirements under ss. 5.8 or 5.9 of the Codes, nor is it alleged that Planet Energy failed to maintain records for the testing of its salespersons under s. 5.10 of the Codes. Staff did not require production of any of Planet's salespeople during testing records during its compliance inspection (Agreed Chronology, Tab 12 May 27, 2016 Letter from Andy Chung – Request for Information). At issue in this proceeding is the substance of the training and testing. Planet takes issue with Staff's suggestion that Planet Energy "[failed] to enforce rigorous re-testing" which "aggravates the deficiencies in its testing program" on the basis of Mr. MacArthur's vague recollection that he only wrote the test twice and questions put to Mr. Silvestri in cross examination about a document that he did not prepare and about an issue that has never been the subject of this proceeding.
[60] Silvestri Cross, Vol. 5, p. 29, l. 4-8.

service addresses, utility account numbers; and, mismatches in account information.[61]

- Automated systems to "red flag" irregularities and suspend enrollments pending investigation and resolution.[62]

- Sending of email and Welcome Letter confirmations to email addresses and service addresses for all newly enrolled customers (enclosing contract Disclosure Statements, Price Comparison forms and Terms and Conditions).[63]

- Random telephone-recorded quality assurance calls to 25% of enrolled customers to confirm terms of enrollment[64] and, specifically, to confirm customers enrolled on their own and were not enrolled by their IBO or in the presence of their IBO[65] (verification calls were not a requirement for internet enrollments, but Planet Energy conducted this additional quality assurance measure for consumer protection purposes).[66]

- Investigation of potential non-compliance matters. Mr. Silvestri said that if, for instance, a customer told a Planet Energy customer service representative during a quality assurance call that the customer's IBO had enrolled the customer, Planet would: suspend the enrollment;[67] commence an investigation, including contacting the IBO through ACN;[68] deactivate/terminate the IBO if he/she did

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[61] Silvestri Chief, Vol. 4, p. 100, l. 13-21.
[62] Silvestri Chief, Vol. 4, p. 102, l. 23-27, p. 100, l.23-27.
[63] Silvestri Chief, Vol. 4, p. 100, l. 28, p. 101, l. 1-4; Silvestri Cross, Vol. 5, p. 48., l. 1-12.
[64] Silvestri Chief, Vol. 4, p. 104, l. 15-19. During the hearing, Member Janigan asked Mr. Silvestri why a copy of the contract that was the subject of Ms. Sturge's confirmation was not in the productions (Silvestri Cross, Vol. 5, Tab 110). Planet Energy did not re-produce copies of the contracts which were addressed in paragraph 29 of the Agreed Chronology: "29. The Notice of Intention references 45 energy contracts sold by Nahid and MacArthur as IBOs. Shortly after contract enrollment, Planet Energy electronically sent text-based copies of the contracts, disclosure statements and price comparisons to the email address provided for the consumer for each of the 45 energy contracts. Planet Energy also sent by direct mail within 3 to 5 days after contract enrollment Welcome Letters (enclosing contract terms and conditions) to the service address for the consumer for each of the 45 energy contracts."
[65] Silvestri Chief, Vol. 4, p. 105, l. 1-4.
[66] *Energy Consumer Protection Act,* S.O. 2010, c. 8, s. 17 as it appeared from May 18, 2010 until January 1, 2017, repealed by the *Sstrengthening Consumer Protection and Electricity System Oversight Act*, 2015, S.O. 2015, c. 29, s. 5.
[67] Silvestri Chief, Vol. 4, p. 108, l.6-15.
[68] Silvestri Chief, Vol. 4, p. 109, l. 4-22.

not respond or was determined to have acted in a non-compliant manner;[69] and, if Planet Energy concluded that any customer had been enrolled by their IBO, contact the customer and ask if they wanted to re-enroll on their own through the portal or cancel their contract without penalty.[70]

F. OEB Inspections and Audits

69. The Board is and has for a long time been very familiar with Planet Energy's business.

70. Since Planet Energy began marketing to consumers through ACN in 2010, it has been subject to a number of OEB audits, investigations and inspections. In the course of these, the OEB has reviewed and examined the details and application of Planet Energy's training and testing programs, MLM marketing processes and quality assurance and compliance monitoring procedures.

a) 2011 Ernst & Young Audit

71. In 2010/2011, following enactment of the ECPA, the OEB engaged Ernst & Young to conduct an audit of all active retailers and marketers to assess their compliance with the ECPA, Regulation and OEB Codes.[71] Planet Energy was subject to this audit, which among other things, reviewed Planet Energy's:

- Marketing activities
- Sales person and verification representatives
- Contracts
- Customer enrollment (internet and text based)
- Contract verification
- Contract renewals and extensions

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[69] Silvestri Chief, Vol. 4, p. 109, l. 25-28, p. 110, l. 16-24.
[70] Silvestri Chief, Vol. 4, p. 110, l. 25-28, p. 111, l. 1-13.
[71] Enforcement Team Documents, Tab 15, Ernst & Young Planet Energy Report.

- Contract amendments
- Cancellations and retractions
- Complaint handling

72. Ernst & Young both inspected and undertook "transactional testing" of Planet's processes.[72]

73. Ernst & Young documented its findings in comprehensive audit reports addressed to the Board. The Board then determined whether individual retailers and marketers were non-compliant with any portions of the legislation and regulations.[73] In this case, the Board found non-compliance by all audited marketers and retailers, with regards to some provisions of the legislation and regulations. Planet Energy was found in contravention of three minor requirements:

- Form of business cards — Planet complied with business cards requirement, but business cards omitted Planet's website address
- Form of ID badges — Planet complied with ID badge requirements, but badges did not clarify that Planet representatives were not associated with utility or OEB
- Written confirmation of cancellation —Planet complied with cancellation requests, but in some cases written confirmation of cancellation was issued beyond 10 day requirement.[74]

74. This was the only occasion over Planet's 11 years of operations that it was ever found in contravention of any requirements of the applicable legislation or regulations.[75]

75. Following the Ernst & Young audit, Planet Energy, without being requested by the OEB and of its own volition, made some improvement to its online testing and automated its systems for sending cancellation emails and Welcome Letters. Also, in 2013, it

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[72] Enforcement Team Documents, Tab 15, Ernst & Young Planet Energy Report.
[73] *Ibid.*
[74] *Ibid;* [74] Silvestri Chief, Vol. 4, p. 118, l. 21-28, p. 119, l. 1-5.
[75] [75] Silvestri Chief, Vol. 4, p. 119, l. 6-12.

implemented a new state of the art customer care processes. Other than those changes, Planet's training and testing programs, MLM marketing and quality assurance and compliance processes remained materially the same up until the Notice.[76]

b) 2013 Inspection of Marketing and Promotional Materials

76. In October 2013, the Board commenced an inspection of Planet Energy's marketing and promotional materials to assess compliance with applicable consumer protection legal and regulatory requirements. This inspection, among other things, entailed a review and examination of Planet Energy's website and enrollment portal.[77]

77. A year later in September 2014, the Board completed its investigation. The Board did not identify any matters of non-compliance or other deficiencies with Planet Energy's marketing and promotional materials, including its website and enrollment portal, and the Board sent a letter to Planet Energy advising that no further action would be taken in the matter.[78]

c) July 2015 Compliance Inspection

78. In July 2015, the Board commenced an inspection of Planet Energy relating to alleged complaints concerning Planet Energy's internet enrollment process.[79] This was an in-depth and detailed investigation and examination of: Planet's business relationship with ACN; IBO compensation structure; IBO qualifications and recruitment processes; IBO education, training and certification; IBO selling techniques; IBO quality monitoring and quality assurance processes; monitoring of IBOs; complaint handling in relation to IBOs and investigation and remedial action.

79. In response to the OEB's extensive request for information, Planet Energy provided the Board with detailed answers, information and documentation relating to:

- Number of contract enrollments for gas and electricity low volume consumers

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[76] Silvestri Chief, Vol. 4, p. 117, l. 25-28, p. 118, l. 1-20.
[77] Planet Energy Documents, Vol. 1, Tab 3, October 15, 2013 Letter Re: Compliance Inspection.
[78] Planet Energy Documents, Vol. 1, Tab 10, September 22, 2014 Letter Re: Compliance Inspection.
[79] Planet Energy Documents Vol. 1, Tab 4, page 0104, July 29, 2015 Notice of Compliance Inspection.

- Number of active IBOs qualified to market or retail Planet Energy products (4,500 to 6,500 over inspection period)
- Number of customer complaints and complaint ratio
- ACN and IBO commission structure, including manner in which commissions paid to ACN as master agent; manner in which commissions paid to IBOs (residual); and, procedures for withholding/suspending commissions
- ACN corporate structure and Planet's relationship with ACN
- ACN IBO model for "warm network" marketing to friends, family and acquaintances
- Requirements that IBO direct customers to Planet/ACN online information center to provide further information to prospective customers; and prohibition on IBOs selling to prospective customers
- IBO recruitment based on referral basis from other IBOS; no interviews or background/reference checks
- Planet Energy and ACN cooperation and training of IBOs, including online training/testing; review of training manual
- IBO testing and retesting requirements
- Quality assurance and complaint handling, including Planet Energy processes for addressing disputed contracts and disciplinary/remedial measures[80]

80. Planet Energy also provided The Board with relevant documentation, including Planet Energy/ACN Sales Agency Agreement;[81] ACN IBO Agreement Terms and Conditions;[82] ACN IBO Policies and Procedures;[83] Planet Energy IBO Training Manual.[84]

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[80] Planet Energy Documents, Vol. 1, Tabs 5-6, August 20, 2015 Letter and Response to Notice of Compliance Inspection.
[81] Planet Energy Documents Vol. 1, Tab 6B, Sales Agency Agreement.

81. The Board concluded its inspection in November of 2015. The Board, having thoroughly reviewed Planet's practices, did not identify any deficiencies in Planet Energy's training and testing, MLM marketing or quality assurance and compliance processes.

d) Licence Renewals

82. Planet Energy's gas marketer and electricity retailer licenses have been regularly renewed, without conditions, since 2010.

83. Most recently, Planet's electricity retailer licence was renewed in June of 2017. Notably, OEB staff stated in its submissions on Planet's renewal application that Planet had a low level of complaints within or below average amongst licenced retailers and gas marketers:

> An important factor in the OEB's review of a licence application is the applicant's past conduct. According to the OEB records, Planet Energy has a relatively low level of complaints, within or below average among licensed retailers and gas marketers. As stated in response to interrogatory # 2b, since the majority of complaints fall within the category relating to the Global Adjustment, Planet Energy has ensured that its customer service representatives fully understand the Global Adjustment and are able to explain it to customers. Planet Energy also has ensured that it is compliant with all contract materials, disclosure statements and price comparison forms.
>
> […]
>
> In consideration of the evidence filed, OEB staff is of the view that Planet Energy has the adequate technical and financial capabilities to operate effectively in the Ontario market. OEB staff is of the view that Planet Energy has the appropriate systems, policies, procedures and controls in place to comply with its statutory and regulatory obligations.[85] [Emphasis added]

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[82] Planet Energy Documents Vol. 1, Tab 6C, ACN IBO Agreement.
[83] Planet Energy Documents Vol. 1, Tab 6D, ACN Policies and Procedures.
[84] Planet Energy Documents Vol. 1, Tab 6E, Training Manual.
[85] Planet Energy Documents Vol. 1, Tab 16, p. 553, March 17, 2017 Staff Submissions.

PART 4 ENFORCEMENT TEAM'S CASE

A. Inadequate and Deficient Inspection

1. Initial Complaints

84. Staff's Inspection was precipitated by complaints from Hawkins and Ms. Andrassin in January 2015. Both customers complained about early termination charges and requested cancellation of their contracts without penalty.

85. Planet agreed to cancel Ms. Andrassin's contract without penalty and did so on February 22, 2015.[86]

86. Planet Energy refused Mr. Hawkins' request to cancel without penalty. Planet advised Staff that Mr. Hawkins was well aware of his exposure to early cancellation fees when he enrolled and the assessed amount was properly calculated based on Mr. Hawkins' high usage.[87] Board Staff, after inquiring further with Planet and Mr. Hawkins' utility, did not contest Planet's early cancellation charge (Mr. Hawkins' complaint regarding early termination charges is not included in the Notice).[88]

2. Start of Inspection

87. Following Mr. Hawkins' and Ms. Andrassin's complaints, Staff's then-lead investigator Andy Chung spoke to the two IBOs, Mr. MacArthur[89] and Mr. Nahid,[90] and obtained witness statements from each of them. Mr. Chung commenced a formal Inspection on April 25, 2017.

88. On May 16, 2016, Mr. Chung sent Planet a Notice of Inspection and Request for Information.[91] This was followed on May 27, 2016, with an amended Notice of Inspection and Request for Information. In the amended Notice and Request, Mr. Chung confirmed that the focus of the Inspection was on alleged misconduct by two salespersons, Mr.

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[86] Andrassin Chief, Vol. 3, p. 69, l. 20-24.
[87] Planet Energy Documents Vol. 3, Tab 140, Hawkins CCR.
[88] Planet Energy Documents Vol. 1, Tab 12, March 15, 2016 Email from Jordan Small (Planet Energy) to Andy Chung; Planet Energy Documents Vol. 3, Tab 140, Hawkins CCR.
[89] Planet Energy Documents Vol. 2, Tabs 50-55A.
[90] Planet Energy Documents Vol. 3, Tabs 179-184.
[91] Planet Energy Documents Vol. 1, Tab 1, Letter Re: Compliance Inspection.

MacArthur and Mr. Nahid; the amended Notice and Request thereby deleted the original request for customer information and solely requested information relating to the two IBOs, Mr. MacArthur and Mr. Nahid.[92]

89. Planet Energy responded to the amended Notice and Request by providing the requested information. Planet also advised Staff that:

- Planet had not been made aware during the earlier complaint process of the new allegations relating to Mr. MacArthur and Mr. Nahid (i.e., insufficient training/testing, representing savings to customers and enrolling customers on their own). Accordingly, Planet had taken immediate steps to suspend Mr. MacArthur's IBO authorization (Mr. Nahid's IBO authorization had earlier been deactivated).

- Mr. Hawkins' complaint that he was "unaware of Planet's cancellation policy" was not correct as he had been expressly advised of Planet's cancellation policy in a telephone-recorded quality assurance call shortly after he enrolled. Planet provided Staff with a .WAV recording of the call and excerpted the relevant portions in its letter:

> Hawkins: Yeah, what's the cancellation policy?
>
> CSR: So, for electric it's $50 per year or partial year remaining on the contacts. If you stay within 15,000 kW per year.
>
> Hawkins: And if I decide to sell the place, what's the program?
>
> CSR: So if it's your permeant residence, you would just have to show us proof of move.
>
> Hawkins: Well, what if it's not a permeant residence?
>
> CSR: So if it's an investment property, the termination charge will always apply.
>
> Hawkins: You can't just assign it to the new people?
>
> CSR: You can, if they want to take over the contract.
>
> Hawkins: But, that's not automatic?

[92] Agreed Chronology, Tab 12, May 27, 2016 Replacement Notice of Compliance Inspection

> CSR: Exactly.
>
> Hawkins: Okay, thank you very much.
>
> CSR: No problem, have a nice day.

90. Mr. Chung left the Board and in June 2015 he was replaced as lead investigator by Birgit Armstrong. Ms. Armstrong had no prior experience in compliance and enforcement and no prior knowledge or familiarity with Planet Energy.[93]

91. Ms. Armstrong had primary responsibility for gathering and reviewing the information filed to date and making sure that Staff had accurate, complete and sufficient information to proceed with an enforcement action.[94]

B. Staff Did Not Investigate Planet Energy's Training/Test, MLM Marketing or Quality Assurance and Compliance Monitoring Processes

92. Ms. Armstrong had no involvement and only vague awareness of prior OEB audits and inspections of Planet Energy.[95]

93. Ms. Armstrong said Staff did not undertake any investigation or inquiry into Planet's training/testing and other business processes, other than what it learned through its two or three discussions with Mr. MacArthur and Mr. Nahid:

> MR. ZACHER: Ms. Armstrong, your counsel said in her opening remarks that there would be evidence about scrutinizing, training, and testing that would show deficiencies in that training and testing. Do you recall those remarks?
>
> MS. ARMSTRONG: Yes.
>
> MR. ZACHER: I take it that the extent of your investigation into Planet Energy's training and testing are your interviews with Mr. Nahid and Mr. MacArthur; is that right?
>
> MS. ARMSTRONG: Yes.

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[93] Armstrong Cross, Vol. 1, p. 73, l. 23.
[94] Armstrong Cross, Vol. 1, p. 88, l. 19.
[95] Armstrong Cross, Vol. 1, p. 119, l. 27, p. 121, l. 13-15, 24, p. 122, l. 6-7.

> MR. ZACHER: Didn't make any inquiries of Planet Energy about its training and testing and about protocols and quality-assurance measures, etc.? You didn't ask those questions?
>
> MS. ARMSTRONG: I was aware of their training materials from the previous inspections and also from their letter. I mean, they told me what their protocol is. My inspection revolved around the implementation of the training materials and that I relied on the witness statements of the agents.
>
> MR. ZACHER: So you limited -- your enquiry was limited to your discussions with the agents and what the questions that were asked and the answers that were provided by Planet in its June 2016 letter?
>
> MS. ARMSTRONG: That's correct.

94. Staff limited its investigation of Planet Energy's practices to what it was told by Mr. MacArthur and Mr. Nahid and made no efforts to determine whether McArthur and Mr. Nahid's accounts were broadly representative of Planet Energy's practices and IBOs dealings with customers, or were specific to Mr. MacArthur and Mr. Nahid's allegations:

> MR. ZACHER: Did you make any effort, Ms. Armstrong, as part of this investigation to assess whether what Mr. Nahid and Mr. MacArthur were telling you about Planet's systems were systemic problems or were anomalous or isolated issues?
>
> MS. ARMSTRONG: I focused on the two complaints and the two agents. I did not inspect Planet Energy on a broader scale.

95. In the approximate eight months between Staff's Notice and Request and Planet's response, Staff did not make any further efforts to follow-up and inquire with Planet Energy on this issue:

> MR. ZACHER: So you didn't enquire into how many contracts with low-volume consumers Planet Energy had enrolled?
>
> MS. ARMSTRONG: In total?
>
> MR. ZACHER: Correct.
>
> MS. ARMSTRONG: No, I did not.

> MR. ZACHER: Or how many IBOs out of -- that Mr. Nahid and Mr. MacArthur represented amongst all of the IBOs who had marketed Planet Energy products to low-volume consumers?
>
> MS. ARMSTRONG: Like I said, we had three agents come forward, but I did not ask how many agents Planet Energy had.
>
> MR. ZACHER: You didn't enquire into whether there were similar complaints in the past as part of Planet Energy's compliance history?
>
> MS. ARMSTRONG: No, I looked at the complaints in front of me.

96. Despite Planet having provided staff with Planet's quality assurance call with Mr. Hawkins, staff never asked Planet if such calls had been made to other of Mr. MacArthur's or Mr. Nahid's customers.

97. Staff also did not contact and speak with any of Mr. MacArthur's and Mr. Nahid's other customers to verify or corroborate Mr. MacArthur's and Mr. Nahid's stories:

> MR. ZACHER: Apart from the initial interviews done by Mr. Chung and Ms. Marijan of Mr. Hawkins and Ms. Andrassin, you didn't attempt to contact any of the customers relating to these 45 contracts?
>
> MS. ARMSTRONG: With the exception of [redacted].
>
> MR. ZACHER: Who didn't return your call?
>
> MS. ARMSTRONG: Yes.
>
> MR. ZACHER: You didn't ask any customers whether they were, in fact, misled?
>
> MS. ARMSTRONG: We worked off the two complaints that you have in front of you and the two agents' witness statement --
>
> MR. ZACHER: You appreciate that the allegation is that savings were represented to these customers.
>
> MS. ARMSTRONG: Yes.

> MR. ZACHER: All of them. That's your premise.
>
> MS. ARMSTRONG: Yes.
>
> MR. ZACHER: And that they were provided with misinformation about other energy charges.
>
> MS. ARMSTRONG: Yes.
>
> MR. ZACHER: You didn't contact a single customer to ask them whether, in fact, this was their experience?
>
> MS. ARMSTRONG: Our inspection was working with the two witness -- the two complaints we have and the two agents.
>
> MR. ZACHER: You didn't ask -- you didn't contact any customer to ask whether they were in fact provided with business cards, whether Mr. Nahid and Mr. MacArthur wore badges, or whether Mr. Nahid and Mr. MacArthur in fact enrolled them on their own over the Internet.
>
> MS. ARMSTRONG: No. The inspection was based on the two complaints and the two agents.
>
> MR. ZACHER: That's not the question I asked.
>
> MS. ARMSTRONG: No, we did not contact any of the other consumers.

98. Staff also did not contact any of the family and friends Mr. Nahid and Mr. MacArthur had enrolled to ask whether they had, in fact, authorized Mr. Nahid or Mr. MacArthur to enter into contracts on their behalf:

> MR. ZACHER: And you haven't asked any consumers relating to these 45 contracts what authority they gave Mr. Nahid and Mr. MacArthur.
>
> MS. ARMSTRONG: Since I did not contact any of the other consumers, that follows.
>
> MR. ZACHER: You don't know whether -- sorry, let me back up. You appreciate that these customers were friends and family, largely, of Mr. Nahid and Mr. MacArthur?
>
> MS. ARMSTRONG: That's my understanding from the business model that was used.

> MR. ZACHER: And you don't know whether any of these friends and family members provided Mr. Nahid or Mr. MacArthur with broad authority to enter into energy contracts or anything else for that matter; you don't know.
>
> MS. ARMSTRONG: What I know is that Mr. MacArthur or Mr. Nahid would have received the account numbers, usually a bill --
>
> MR. ZACHER: The answer to that question --
>
> MS. ARMSTRONG: -- and the e-mail address.
>
> MR. ZACHER: The answer to that question is you don't know because you didn't ask.
>
> MS. ARMSTRONG: I don't know.

99. Ms. Armstrong said the case was solely about "agent misconduct" and Staff therefore relied entirely on the two IBOs Mr. MacArthur and Mr. Nahid; Staff ultimately took "their word":

> MS. ARMSTRONG: Since this was agent misconduct and the agent alleged that they were doing that...
>
> MR. ZACHER: You took the agents at their word?
>
> MS. ARMSTRONG: Yes, I had their word.

C. Staff's Failure to Corroborate and Test Evidence

100. Ms. Armstrong's testimony that Staff relied entirely on the evidence of the two IBOs, Mr. MacArthur and Mr. Nahid, and took them at "their word" is of concern given what Staff knew. During Staff's inspection and prior to issuance of the Notice, Staff knew that:

Mr. MacArthur (and Mr. Hawkins)

(a) Mr. MacArthur had admitted to acting unlawfully and unethically as an IBO. Mr. MacArthur told Staff that:

- He twice cheated on his IBO test by obtaining answers from other friends/IBOs;[96]

- He knew he was required to wear a badge and provide business cards to consumers;[97]

- He knew he was not allowed to enroll customers on his own, but did so anyway;[98] and

- He told prospective customers to lie if they were contacted by Planet Energy to confirm the terms of their enrolment and the fact that Mr. MacArthur had not enrolled them and was not present when they enrolled.[99]

(b) Mr. MacArthur and Mr. Hawkins had made false statements to the Board that Mr. Hawkins was not aware of early termination charges at the time he was enrolled in his five contracts.[100]

(c) Mr. Hawkins had made false statements to the Board about not being aware he was enrolled in Planet contracts until he received notice of early termination charges.[101]

(d) Mr. MacArthur and Mr. Hawkins' objective was to get Mr. Hawkins early termination charges waived.[102]

(e) Despite Mr. MacArthur's alleged misconduct, no other customers of Mr. MacArthur's had ever come forward to the Board and complained.[103]

Mr. Nahid

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[96] Armstrong Cross, Vol. 1, p. 93, l. 27.
[97] Armstrong Cross, Vol. 1, p. 94, l. 8.
[98] Armstrong Cross, Vol. 1, p. 94, l. 3.
[99] Armstrong Cross, Vol. 1, p. 95, l. 1-9.
[100] Armstrong Cross, Vol. 1, p. 79, l. 11, 15-16, p. 82, l. 5., p. 91, l. 7.
[101] Armstrong Cross, Vol. 1, p. 82, l. 5.
[102] Armstrong Cross, Vol. 1, p. 91, l. 7.
[103] Armstrong Chief, Vol. 1, p. 61, l. 3-4; Armstrong Cross, Vol. 1, p. 108, l. 19-27.

(a) Mr. Nahid made a call to Board Staff in which he impersonated a customers, [redacted].[104]

(b) Mr. Nahid filed a complaint in June 2016 referring to his own enrolment with Planet; Mr. Nahid made false statements in this complaint and Staff did not further pursue it.[105]

(c) Despite Mr. Nahid's allegations, no other customers of Mr. Nahid came forward to complain prior to Staff's commencement of the Inspection.[106]

101. Ms. Armstrong said that despite Staff's knowledge of these inconsistencies and falsities in Staff's evidence, Staff did not believe it was necessary, and did not take any steps, to further verify and test its witnesses' evidence by:

- Calling any of Mr. MacArthur and Mr. Nahid's customers to confirm their allegations of representing savings, enrolling customers on their own, etc.[107]
- Making further enquiries of Planet Energy.[108]
- Demanding that Mr. MacArthur provide Staff with his relevant Planet Energy/IBO files and documents, which he said he had.[109]
- Contacting other IBOs, in particular, the IBOs referenced in Mr. MacArthur various witness statements, whose identities he refused to disclose.[110]

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[104] This call was made to Board Staff in June, 2016, although Ms. Armstrong says she did not become aware of it until after the Notice. Armstrong Cross, Vol. 1, p. 98, l. 18-19; Planet Energy Documents, Vol. 3, Tab 171, June 22, 2016 Call.
[105] Armstrong Cross, Vol. 1, p. 99, l. 18-20, p. 101, l. 6.
[106] Armstrong Cross, Vol. 1, p. 108, l. 26-27; Silvestri Cross, Vol 5, p. 107, l. 21-26.
[107] Armstrong Cross, Vol. 1, p. 108, l. 26-27.
[108] Armstrong Cross, Vol. 1, p. 109, l. 5-6, 14-16.
[109] Armstrong Cross, Vol. 1, p. 111, l. 1-2.
[110] Armstrong Cross, Vol. 1, p. 113, l. 19.

PART 5 LAW

A. Burden of Proof

102. Staff has the burden of proving its case in accordance with the civil standard on a balance of probabilities.[111]

103. The burden in a compliance and enforcement proceeding is exacting, commensurate with the seriousness of the allegations and proposed enforcement measures[112] — in this case, a substantial administrative penalty and restitution. Staff must adduce "clear, convincing and cogent" evidence to demonstrate that the allegations are "substantially the most probable of the possible views of the facts."[113]

104. In addition, where ***systemic*** deficiencies or inadequacies are alleged — as distinct, or in addition, to alleged individual contraventions — it is necessary to prove patterns of misconduct and the failure to have in place management and operations procedures that would reasonably have prevented the misconduct. This principle has been considered and applied by administrative tribunals and courts and in a variety of contexts. As has been held in the Ontario Labour Arbitration context when assessing allegations of systemic violations of the *Human Rights Code*:

> Any system or process created and administered by human beings is likely to have some failings in application if not in design, and the mere fact that there have been problems or failing in application, or that there has been some conduct that is contrary to the … legislation on one, two or more occasions will not necessarily establish a pattern of improper conduct or systemic failure.[114]

105. In that case, seven nurses alleged that the administration of their employer's short term disability benefits was contrary to the *Human Rights Code*. Upon hearing the evidence, the Labour Arbitrator held: "I am not satisfied that the evidence establishes a systemic violation of the Ontario *Human Rights Code*. I am also not satisfied that [the employer's benefits administrator] has shared information with the Hospital in a manner that is

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[111] *Re Energhx Green Energy Corp.,* EB-2011-0311, Decision and Order (March 26, 2012), at para. 43 [***Energhx***] Planet Energy Brief, Tab 1.
[112] *C. (R.) v. McDougall,* 2008 SCC 53 at para. 46, Planet Energy Brief, Tab 2.
[113] *Clark v. R* (1921), 61 SCR 608 (WL) at para. 34, Planet Energy Brief, Tab 3.
[114] *Re Hamilton Health Sciences and ONA* (2008), 93 CLAS 224 (ON LA) (Surdykowski) at para. 113, Planet Energy Brief, Tab 4.

systemically contrary to the collective agreement or legislation. My conclusions in these respects do not mean that there has been no violation of the collective agreement, or of the Code or other legislation in any individual case."[115]

106. To substantiate its claims that Planet's "training and testing program was wholly inadequate" or that the marketing of its products entailed "a very high risk sales model" — warranting a substantial administrative penalty and restitution — Staff must prove a pattern or record of noncompliance caused by the alleged deficiencies.

B. Planet Energy's Liability for Acts of IBOs

1. Salespersons under the ECPA

107. Planet Energy does not dispute that IBOs who market Planet Energy products, including Mr. MacArthur and Mr. Nahid at the time they were authorized to market Planet Energy products, fell within the broad definition of "salespersons" under the ECPA.

2. Planet Energy's liability for the acts of Mr. MacArthur and Mr. Nahid

108. Planet Energy is not automatically liable for the acts of its salespersons. Section 10(2)(b) of the ECPA states that "a supplier is ***deemed*** to be engaging in an unfair practice if… a salesperson acting on behalf of the supplier does or fails to do anything that would be an unfair practice if done or failed to be done by the supplier".

109. "Deeming" energy marketers and retailers liable for the acts of their salespersons creates a rebuttable presumption.[116] If the Legislature had intended otherwise, section 10(2)(b) would have stated "a supplier ***is*** engaging in an unfair practice… if a salesperson…".

110. The Board found (albeit in the context of determining whether retailers/marketers had a due diligence defence under the Supreme Court of Canada's decision in *Sault Ste. Marie*) that retailers/marketers may rebut the presumption of liability for the acts of their

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[115] *Ibid.* at para. 154.

[116] *St. Peter's Evangelical Lutheran Church v. Ottawa (City)*, [1982] 2 SCR 616 (WL) at 10, Planet Energy Brief, Tab 5; *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras. 117, 119, Planet Energy Brief, Tab 6; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada Inc., 2014) at §4.105, Planet Energy Brief, Tab 12.

salespersons, including by demonstrating that they have adequate systems in place to monitor and address noncompliance.[117] The interpretation of section 10(2)(b) urged by Staff would diminish the role of the Board, which is best placed to determine whether, in the circumstances of a particular case, a retailer or marketer should be held liable for the acts of its salespersons.

111. Alternatively, if Planet Energy is deemed liable for any alleged *individual* contraventions, this does not make it liable for alleged *systemic* deficiencies. Staff continues to have the burden of proof to show systemic deficiencies/harm and Planet Energy's evidence of past OEB inspections/audits, its compliance record and its customer care/compliance monitoring systems are all relevant to defending this allegation.

112. Further, as the Divisional Court stated in *Summitt*[118], evidence of due diligence is relevant to assessing whether a penalty or other remedy is warranted, and the quantum of any such penalty/remedy. Accordingly, even if the Panel were to find some contraventions by IBOs for which Planet is technically liable, the Panel may determine that no administrative penalty is warranted (or that only a minor penalty is).

PART 6 ARGUMENT AND RESPONSE TO ALLEGATIONS

A. Staff has failed to Prove Systemic Deficiencies in Planet Energy's Training and Testing

113. The ECPA and OEB codes do not prescribe specific content or other requirements for salesperson training and testing. They require that training and testing cover certain general topics and that training materials be "accurate and adequate".[119]

114. An assessment of a retailer or marketer's training and testing program is therefore a "subjective exercise" that requires consideration of whether the training and testing of salespersons is adequate in the circumstances.[120]

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[117] *Re Summitt Energy Management Inc.*, EB-2010-0221, Decision and Order (November 18, 2010) at paras. 51-56 [***Summitt OEB***], Planet Energy Brief, Tab 7.
[118] *Summitt Energy Management Inc. v. Ontario (Energy Board),* 2013 ONSC 318 at para. 72 [***Summitt***], Planet Energy Brief, Tab 8.
[119] *Electricity Retailer Code of Conduct*, s. 5.2(b).

(a) Planet Energy's Training and Testing

115. Planet Energy designed and administered an IBO training and testing program that was reasonable and adequate for the manner in which it marketed its products to consumers.

116. Planet Energy's IBOs did not engage in door-to-door or other in-person sales. They were trained and instructed to promote the potential benefits of Planet Energy's products to their customers and then direct them to Planet Energy's online enrollment portal where they could learn more and decide if they wished to enroll in a Planet contract. Planet Energy's enrollment portal, which had been reviewed by the Board on multiple occasions, included all prescribed information (Disclosure Statements, Price Comparisons, etc.) and other information on the Global Adjustment, other energy charges, cancellation, etc.

117. Mr. Silvestri said Planet Energy's model – which prohibited IBOs from concluding sales — imposed realistic expectations on IBOs by "not expect[ing] them to become energy experts" but to have "a working knowledge — high level knowledge of the retail energy markets that our training provides and that meets the requirements of the Board's Code of Conduct".

118. Planet Energy provided IBOs with an approximate 100 page user-friendly PowerPoint Training Manual. It remained accessible in IBOs' back offices for ongoing reference and it accurately and sufficiently addressed all of the necessary regulatory requirements including:

- Information on Ontario regulatory structure;
- Information on electricity charges, including the Global Adjustment;
- Information on consumer cancellation rights;
- Information on OEB prescribed disclosure statements and Price Comparison forms;

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[120] *Energhx, supra* note 123 at para. 70.

- Specific requirements and prohibitions for marketing to consumers including: not representing savings; not enrolling customers; wearing ID badges; and handing out business cards.

119. Planet Energy mandated that all IBOs undertake training and successfully pass Planet Energy's test before marketing to consumers and its systems were designed to ensure this. A consumer could not be enrolled under an IBO's number if the IBO had not passed the test.[121] Planet's systems were also designed to ensure that IBOs were retested annually or after more than 60 days of inactivity and marketing of Planet products.[122]

120. As set out in detail above, IBOs back office training, testing and authorization requirements also repeatedly cautioned IBOs about the requirements and prohibitions for marketing to consumers and required IBOs to undertake and attest that they would adhere to these requirements and prohibitions.

(b) Staff's Speculative and Unsubstantiated Allegations

121. Staff's allegations of systemic deficiencies in Planet Energy's training and testing (like all of their other allegations of systemic deficiencies) are not based on any investigation of Planet's training and testing programs and findings of defects; nor are they based on any complaints from, or inquires of, consumers evidencing the fact that such defects have caused or threaten to cause widespread or significant consumer harm.

122. As Ms. Armstrong stated, Staff's case is solely about agent misconduct:

> "…I focused on the two complaints and the two agents – I did not inspect Planet Energy on a broader scale"[123]

123. Staff's claims are premised on the say-so of Mr. MacArthur and Mr. Nahid, and the supposition that their allegations of flouting and contravening Planet Energy's training/testing and marketing requirements, ***must be*** endemic and broadly representative of all IBOs and all IBO-customer interactions.

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[121] Silvestri Chief, Vol. 4, p. 78, l. 1-6.
[122] Silvestri Chief, Vol. 4, p. 93, l. 24-28.
[123] Armstrong Cross, Vol. 1, p. 118, l. 27-28.

124. Staff argues for example, that "if there were any further doubt about the ***gross inadequacy*** of Planet Energy's training", ***the evidence of Mr. MacArthur and Mr. Nahid*** is that they believed savings were guaranteed by switching to Planet, were not aware of or did not understand the Global Adjustment and did not understand that ending an energy contract could result in cancellation fees[124] — the inference being that like Mr. MacArthur and Mr. Nahid all other IBOs must have been equally untrained and unknowledgeable.

125. Likewise, Staff posits a "a broader and deeper problem in Planet Energy's operations" since "Mr. Silvestri does not have personal knowledge of how IBOs completed their test, and is in no position to say that other IBOs did not engage in the same conduct as Mr. MacArthur in terms of having someone else complete their online, unsupervised test" — again the innuendo being that other IBOs must have done the same thing.

126. Staff also seeks to make up for the absence of any investigation and lack of evidence of actual harm or potential harm by asking the Board to draw "***obvious***" or "***common sense***" inferences or conclusions. For example:

(a) A "closed book test would *obviously* offer a better assessment than an open-book test when it came to testing an IBO's knowledge of the Training Manual". Staff offers no evidence or support for this assertion which it is not competent to make — the pedagogical effectiveness of one model of testing over is a matter of expert evidence. Notably, the Ontario Bar exam is conducted as a multiple choice, open book test; an online, multiple-choice test is also sufficient to obtain a boating license.[125]

(b) On a "*common sense*" understanding of how IBOs would interact with consumers, all IBOs must have promised savings and Mr. Silvestri's

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[124] The last point - not knowing that ending an energy contract could result in early termination fees - is at least, insofar is MacArthur is concerned, untrue. MacArthur admitted on cross-examination to being aware of cancellation fees. He was made aware of this when he cancelled his own contract early in 2013 and, of course, he was aware of this through his participation in Planet's quality assurance call to Mr. Hawkins. MacArthur Cross, Vol. 2, p. 128-129, l. 11-28, 1-11.

[125] The *Competency of Operators of Pleasure Craft Regulations*, SOR/99-53 made pursuant to the *Canada Shipping Act, 2001* provide that a pleasure craft operators card may be issued upon obtaining a 75% mark on a 36-question multiple choice test which may be taken online.

suggestion that IBOs direct potential customers to Planet's website "is disingenuous; at best, his expectation is naïve". Again, this bald assertion and questioning of Mr. Silvestri's truthfulness is made in the absence of any investigation — e.g., interviews of other IBOs, interviews of customers (including any of Mr. MacArthur and Mr. Nahid's customers).

(c) Staff argues that Mr. Silvestri's testimony is contrary to "*a common sense* understanding of how IBOs *would* interact with consumers and convince them to switch to Planet Energy".[126] Once again, this argument made in the complete absence of any evidence adduced by Staff as to how IBOs *actually do interact* with customers;

(d) Staff impugns Planet Energy's training on the basis that "an IBO could simply click on the Training Manual Link, and then immediately click out and move on to the next step"; and, Staff disparages the "attestation" [clauses as] nothing more than box[es] to be checked electronically…the attestation is a mechanically, *pro forma* step in the process…at best a version of the "honour system". Staff discounts Mr. Silvestri's evidence that Planet believes and expects IBOs to respect and take such legal obligations and attestations seriously and that Planet has a reasonable basis for this belief given the lack of prior complaints. Staff, without any evidentiary basis, dismisses Planet's acknowledgement and attestation requirements as "not meaningful or reliable measures to ensure compliance" with the Codes.[127]

127. Finally, Staff — again to substitute for the lack of any investigation and evidence of harm — engages in an after-the-fact parsing of Planet Energy's training and testing materials to pick out what Staff asserts must be harmful deficiencies, e.g.:

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[126] Staff Written Closing Submissions, paras. 65-67.
[127] Staff Written Closing Submissions, para. 154.

- The Training Manual references higher cancellation fees for large consumers, but "does not state that there is a 15,000 kWh threshold";[128]

- The Training Manual "only includes one slide on the global adjustment, and does not provide IBOs with any indication or examples of what the global adjustment rates have historically been";[129]

- The training test includes several "extremely easy question/answer pairings";[130]

- "Almost 60% of the question bank (30 of 65 questions) requires the test taker to choose between only two options";[131]

- "Because questions are randomly drawn from the question bank, there is no guarantee that someone writing the test would necessarily receive a question on any particular issue, even significant topics like the Global Adjustment or cancellation fees."[132]

128. Staff offers no evidence of how these alleged defects have or will cause harm. Staff simply speculates that they invariably must.

129. Remarkably, in parsing Planet's training and testing materials to identify defects, Staff overlooks the fact that all of Planet's training and testing materials, and all aspects of its training and testing program, were thoroughly audited and inspected by the Board in 2011 and 2015, and the Board did not find any of the incidences of non-compliance that Staff is now raising.

130. Staff's assertion that Planet Energy was forewarned in 2011 because Ernst & Young identified problems with Planet Energy's online testing procedures is a mischaracterization. As Ms. Armstrong stated in cross examination, Ernst & Young carried out the audit at the behest of the Board and provided audit findings reports (on all retailers and marketers) to

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[128] Staff Written Closing Submissions, para. 119.
[129] Staff Written Closing Submissions, para. 120.
[130] Staff Written Closing Submissions, para. 143.
[131] Staff Written Closing Submissions, para. 144.
[132] Staff Written Closing Submissions, para. 145.

the Board, which thereafter determined which matters reported by Ernst & Young constituted non-compliance. In this case, the Board having had the very matter of Planet's online open-book and unsupervised testing brought to its attention, determined that this did ***not*** constitute non-compliance. Moreover, despite the Board having not found any deficiencies, Planet Energy did take steps to address Ernst & Young's report, including generating randomized test questions.

131. Ultimately, Staff — having not undertaken the necessary investigation and adduced evidence of systemic deficiencies and harm — asks the Board to draw (unsubstantiated) inferences and ***reverse the onus of proof***. In effect, Staff seeks to impose on Planet the burden of dissuading the Board that its training and testing programs are deficient and have caused or will cause harm.

132. The burden of proof cannot be shifted to Planet; it remains for Staff to prove its case. Staff has not done so. It has not proven a pattern or record of widespread contraventions that may be attributed to the alleged deficiencies in Planet's training/testing and other business practices.

B. Staff Has Failed to Prove Alleged Individual Contraventions

133. Staff initially alleged in the Notice that Planet Energy had committed all of the alleged contraventions across all 45 contracts enrolled through Mr. MacArthur and Mr. Nahid (27 and 18, respectively).

134. For the reasons further explained below, Staff has not met the burden of proving most of the alleged individual contraventions because:

(a) Some contraventions relate to self-enrollment contracts by Mr. MacArthur and Mr. Nahid which do not attract liability.

(b) Some contraventions relate to commercial non-low volume consumers ("**Large Commercial consumers**"), which also do not attract liability.

(c) All alleged contraventions relating to contracts enrolled through Mr. MacArthur should be dismissed because the supporting evidence is

unreliable; alternatively, given the nature of these enrollments, Planet Energy should not be held liable for any of these alleged contraventions.

(d) Staff has misinterpreted Planet Energy's obligations under the applicable legislation and regulations.

1. Self-Enrollments

135. Ms. Armstrong admitted on cross examination that the allegations in the Notice do not apply to any contracts that were self-enrolled by Mr. MacArthur or Mr. Nahid.[133]

136. Following Ms. Armstrong's concession, Staff delivered an Amended Notice of Intention, consented to by Planet Energy, removing four self-enrolled contracts referenced in the Notice, thereby reducing the number of contracts from 45 to 41 (i.e., 25 relating to Mr. MacArthur and 16 relating to Mr. Nahid).

2. Large Commercial consumers

137. Ms. Armstrong also conceded during cross examination that it was an "oversight" to have included in the Notice the four contracts relating to Large Commercial consumers enrolled by Mr. MacArthur.[134]

138. Notwithstanding Ms. Armstrong's admission, Staff only agreed to forgo alleged contraventions relating to the four Large Commercial consumer contracts under the ECPA and Regulation (which solely apply to low volume consumers). Staff maintained the alleged contraventions under the Board's Codes.

139. Planet Energy asked Staff to reconsider its position based on Planet Energy's understanding and experience that the Board, as a matter of policy, declines jurisdiction over complaints/commercial disputes between retailers/marketers and Large Commercial consumers, on the basis that commercially sophisticated consumers do not require the Board's consumer protection. Staff, without correcting Planet Energy's understanding or providing further explanation, refused Planet Energy's request. Attached hereto at

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[133] Armstrong Cross, Vol. 1, p. 101, l 23-24.
[134] Armstrong Cross, Vol. 1, p. 106, l. 13-22.

Appendix A are copies of Planet Energy's counsel's November 22, 2017 letter and Staff's November 23, 2017 response.

140. Planet submits that, but for Ms. Armstrong's oversight, the Large Commercial consumer contracts would not have been included in the Notice and it is unfair and discriminatory for Staff to continue to pursue contraventions and penalties against Planet Energy in respect of these Large Commercial Consumer contracts.

3. Mr. MacArthur Contracts

141. Staff has failed to adduce "clear, convincing and cogent" evidence to prove the alleged contraventions relating to the contracts enrolled through Mr. MacArthur**.** Staff's assertion that "all four witnesses presented as reliable, truthful and honest" does not apply to Mr. MacArthur, or Mr. MacArthur's customer (landlord) Mr. Hawkins.

142. Mr. MacArthur, who was an insurance executive before becoming an IBO, told Staff and attested in his witness statement that he:

- twice cheated on Planet Energy's IBO test by having other friends/acquaintances provide him with answers;
- knew it was prohibited to enroll customers on his own, but did this anyway;
- knew he was required to wear a badge (and hand out business cards), but ignored this requirement; and
- coached his own friends/family to lie if they were contacted by Planet Energy to confirm the terms of their enrollment and the fact that they enrolled on their own in the absence of Mr. MacArthur.

143. Mr. MacArthur and Mr. Hawkins also told Staff and said in their witness statements that Mr. MacArthur enrolled Mr. Hawkins on his own and both were unaware that Mr. Hawkins could be exposed to early termination charges if he cancelled his Planet contracts before the end of their term. Staff knew the statements to be untrue since during their inspection (approximately eight months before the Notice was issued) Planet Energy

provided and brought to Board Staff's attention a recorded quality assurance telephone call between Planet Energy and Mr. Hawkins (and Mr. MacArthur) wherein Mr. Hawkins told Planet Energy that he enrolled on his own in the absence of Mr. MacArthur; and during which call, Mr. Hawkins asked and was told in no uncertain terms told about his potential exposure to early termination charges.

144. Staff did not make any further efforts to scrutinize, test or corroborate Mr. MacArthur and Mr. Hawkins' statements: Staff did not put any of these inconsistences to Mr. MacArthur or Mr. Hawkins or demand that they disclose relevant documents; did not contact any other of Mr. MacArthur's customers to corroborate his and Mr. Hawkins' accounts; and, did not further inquire with Planet Energy.

145. On cross examination Ms. Armstrong in seeking to square Staff's reliance on Mr. MacArthur/Mr. Hawkins with the inconsistencies and apparent untruths in their statements, gave the following answers:

> Mr. Zacher: Having reviewed the file, you know what Mr. Hawkins said in his witness statement is inconsistent with the information that you had when you made the determination to issue the notice?
>
> Ms. Armstrong: Yes.
>
> Mr. Zacher: Cause any alarm bells?
>
> Ms. Armstrong: That's why we did follow-up interviews specifically with the agents…In this case, it was the agent's misconduct, so we heavily relied on the agent's statements, which is why we conducted secondary interviews with the agent.
>
> …
>
> Mr. Zacher: So Mr. MacArthur, whose witness statement you are relying upon, is telling you that he encouraged his own prospective customers to lie?
>
> Ms. Armstrong: Yes….
>
> Mr. Zacher: So you told me that you were principally – when I asked you about the potential inconsistencies in Mr. Hawkins' statement you said, yes, but we were primarily relying upon the agents, their evidence, correct?

Ms. Armstrong: Yes.

Mr. Zacher: And so Mr. MacArthur is one of those two agents who you're primarily relying upon?

Ms. Armstrong: Yes.

Mr. Zacher: And he has told you in his witness statement that he has lied and he has encouraged prospective customers to lie?

Ms. Armstrong: Yes.

Mr. Zacher: And you agree with me that there is nothing in any of the interview notes, including your second interview of Mr. MacArthur, where you confronted him with these issues?

Ms. Armstrong: It's not in the notes, no.

Mr. Zacher: And you didn't do it?

Ms. Armstrong: We have asked him about the enrollment process. He went over the enrollment process, and ***I took his word for that***.

146. Mr. MacArthur further revealed on cross examination that he was highly motivated to tell Staff whatever was necessary to relieve Mr. Hawkins from early termination charges. Mr. Hawkins threatened to add his early termination charges to Mr. MacArthur's rent if he did not get the charges waived. Thereafter, Mr. MacArthur (with Mr. Hawkins' support) did whatever was necessary to get the early termination charges waived, including telling different stories to Planet Energy, the OEB, the Better Business Bureau ("**BBB**") and media, including lying to Planet Energy about Mr. Hawkins enrolling himself and making false statements to the BBB about Mr. Hawkins' knowledge of his contracts.

147. Mr. Hawkins likewise made false statements to Planet Energy about when he first became aware of being enrolled with Planet Energy and his knowledge of early termination charges. Mr. Hawkins was evasive on cross examination and gave variously inconsistent and conflicting answers, including:

- not conceding to having given untruthful answers to Planet Energy during the quality assurance call in which Planet asked him whether he enrolled in the contracts on his own in the absence of Mr. MacArthur.

- not admitting to having been made aware during the quality assurance call of potential exposure to early termination charges.

- at one moment, admitting to threatening to add termination charges to Mr. MacArthur's rent; then denying; then relenting when confronted with his own emails.

148. Mr. MacArthur's statements about being unaware of cancellation fees, having no knowledge of the Global Adjustment and being unaware that Planet Energy contracts did not guarantee savings, are likewise not credible or believable:

- Mr. MacArthur, though initially evasive about the level of his participation in the quality assurance call between Planet Energy and Mr. Hawkins later admitted that Planet had advised Mr. Hawkins on this call about cancellation fees;[135]

- Mr. MacArthur himself enrolled in a Planet Energy contract and was informed in a recorded telephone call with Planet Energy about early termination fees when he sought to move and cancel his own contract in 2013.[136]

- The Global Adjustment, apart from being explained in the IBO Training Manual, was referenced numerous times in Planet Energy's online enrollment portal — including in the OEB-prescribed Disclosure Statement included on the portal — which Mr. MacArthur admitted to having navigated more than 25 times in the course of enrolling customers.[137] Mr. MacArthur also included information on the Global Adjustment in his "sales binder" which he said he used when marketing to customers.[138]

- MacArthur had printed off the FAQ section of the enrollment portal (which included a detailed description of applicable early termination charges) and

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[135] MacArthur Cross p. 157.
[136] MacArthur Cross, Vol. 2, p. 120, l. 1-5.
[137] MacArthur Cross, Vol. 2, p. 115, l. 2.
[138] Planet Energy Documents, Vol. 2, Tab 88

included it in his "sales binder",[139] however he claimed he knew nothing about early termination fees "until the episode began with Mr. Hawkins",[140] which is again directly contradicted by his presence on the quality assurance call with Mr. Hawkins where he asked the Planet Energy customer service representative about termination fees.[141]

- The proscription that Planet Energy contracts do not guarantee savings was likewise included in both the Training Manual and referenced on the enrollment portal, including in the Disclosure Statement.

149. Particularly telling, with regards to Mr. MacArthur's veracity, was his admission on re-examination by Staff:

> Mr. Safayeni: … So you do remember my friend Mr. Zacher asked you whether it was true that ***you understood there is no guarantee of savings in respect of the Energy contracts*** but, based on advice you heard from friends and acquaintances, ***you nevertheless made representations to consumers about price savings***, and – you remember being asked that question?
>
> Mr. MacArthur: ***Yes***.
>
> Mr. Safayeni: And the answer you gave was "I would have to say yes". Do you remember giving that answer?
>
> Mr. MacArthur: ***Yes***.
>
> Mr. Safayeni: So my question is why did you make those representations to consumers?
>
> Mr. MacArthur: ***In the sales business, you say a lot of things that aren't true***.

150. Mr. MacArthur's unreliable evidence – which is not bolstered, but undermined further by the similarly unreliable evidence of Mr. Hawkins – does not meet minimum

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[139] Planet Energy Documents, Vol. 2, Tab 88 p. 818, Sales Binder – Enrollment Portal FAQ. "7. Can I cancel the program if I don't like it? Within 10 days of signing up with Planet Energy you may cancel your agreement without penalty. Should you wish to cancel your Natural Gas program after the 10 day period, you will be subject to early termination charges as set out in your terms and conditions or in regulations. You may cancel your Electricity contract, without penalty up to 30 days after you receive your first bill under the contract. After this period electricity customers will be subject to early termination charges as set out in your terms and conditions or in regulations. Please read your terms and conditions for the details.

[140] MacArthur Cross, Vol. p. 108, l. 4-6.

[141] Planet Energy Documents, Tab 139, May 5, 2015 Hawkins Quality Assurance Call

standards for reliability and trustworthiness. It should be disregarded in its entirety and all alleged contraventions attributed to Mr. MacArthur dismissed.

151. Alternatively, if Mr. MacArthur's (and Mr. Hawkins') evidence is to be believed, then by necessity the Panel ***must disbelieve*** the statements made by nine (more than 60%) of the customers enrolled through Mr. MacArthur, every single one of whom in response to quality assurance calls by Planet Energy confirmed the terms of their contracts and told Planet Energy that they had enrolled on their own in the absence of Mr. MacArthur.

152. Planet Energy should be entitled to assume that its customers are not conspiring with IBOs to undermine Planet's compliance processes. Consumer protection legislation is intended to protect the "average consumer." Though the average consumer may be hurried, credulous or inexperienced, the average consumer is not "rash", "careless," "unobservant" or deceptive.[142]

153. Planet Energy cannot fairly be held liable where the very customers it seeks to protect through quality assurance calls do not tell the truth. Mr. Silvestri's uncontroverted evidence is that had these customers told Planet Energy during these quality assurance calls that Mr. MacArthur had enrolled them on his own, Planet Energy would have immediately terminated Mr. MacArthur and called all his customers (not just the nine customers who received quality assurance calls) and offered to cancel their contracts without penalty.[143]

154. In other words, Planet Energy's customer protection measures of making random quality assurance calls to 25% of customers – or in the case of Mr. MacArthur, to the customers of IBOs who have been flagged for quality assurance reasons – would have functioned as designed and resulted in the termination of Mr. MacArthur and the remedying of any potential consumer harm.[144]

C. Misinterpretation of Planet Energy's Obligations

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[142] *Richard v Time Inc.*, 2012 SCC 8 at para. 72, Planet Energy Brief, Tab 9; *Mattel U.S.A. Inc. v. 3894207 Canada Inc.*, 2006 SCC 22 at para. 56, Planet Energy Brief, Tab 10.
[143] Silvestri Chief, Vol. 4, p. 108-109.
[144] Notably, even if the Board's prescribed verification script had been used, there is no reason to expect that consumers would have answered any differently, if they were in fact simply following MacArthur's alleged instructions to them.

155. Contrary to Staff's assertions, there is no obligation in the ECPA or Board Codes for salespersons to mention the Global Adjustment, cancellation fees or other charges to customers.

156. Planet IBOs, are trained and instructed to promote Planet's products and then direct customers to Planet's website and enrollment portal where there is information on the Global Adjustment, cancellations fees and other charges. These issues are also addressed in Planet Energy's contractual terms and conditions, which must also be reviewed prior to enrolment.

157. Staff's assertion that obligations to explain the Global Adjustment, cancellation fees and other charges were triggered by Mr. MacArthur and Mr. Nahid's statements to consumers about the contract price is not supported by the evidence. Staff did not call as witnesses any of Mr. MacArthur or Mr. Nahid's customers (other than Mr. Hawkins and Ms. Andrassin) and so it is not known what MacArthur or Nahid told to them about contract price; even Mr. Nahid and Mr. MacArthur did not state that they spoke about contract price to all of their customers.

D. The Contracts at issue are Internet Contracts

158. The characterization of contracts at issue in this proceeding is significant because:

(a) Staff's sole argument that the contracts in question ought to be deemed void is based on the prescribed requirements for "in-person" contracts not being met [145] (which is also the sole basis for the restitution order);[146]

(b) Staff's allegations relating to Planet's failing to meet the requirements for door-to-door sales (business cards, ID badges, providing text based copies of contracts, verification) and using contracts, disclosure statements and price comparisons that did not require signatures, are premised on the contracts **not** being internet agreements; and

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[145] Enforcement Team Written Closing Submissions, para. 292: "By operation of law, the 37 Contracts with consumers are deemed void, pursuant to: (a) s. 12(2) and 16(1)(a) of the ECPA, since these consumers did not provide the acknowledgments and signatures required; and (b) ss. 13 and 16(1)(b) of the ECPA and s. 10(1)(a) of the Regulation, since these consumers did not receive a text-based copy of the contract when they entered into the contract. (Even if they did, the contracts would be void under s. 15(1) of the ECPA, since these consumers did not receive verification calls)."

[146] Enforcement Team Written Closing Submissions, para. 294: Staff asks that Planet refund all amounts paid under the contracts, excluding the Global Adjustment or any RPP variance.

(c) Staff argues for an "elevated administrative monetary penalty" on the grounds that the prescribed requirements for in-person contracts were not met.[147] This issue is also addressed in the context of the AMP, below.

1. Plain Meaning indicates Contracts are Internet Agreements

159. The approach to statutory interpretation in Canada is the modern approach, which requires that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[148]

160. Each of the contracts in issue are, by definition, internet agreements — "internet agreement" means a consumer agreement formed by text-based internet communications.

161. At the time the contracts at issue were entered into, s. 17(1) of the ECPA exempted internet agreements within the meaning of Part IV of the *Consumer Protection Act, 2002* (the "CPA") from the verification call requirements in s. 15 of the ECPA and the provisions in s. 16 deeming the contract to be void in the absence of a verification call:

> 17. (1) Subsections 15(1) to (5) and clauses 16(1)(c) and (e) do not apply to the following contracts: […]
>
> 3. An internet agreement within the meaning of Part IV of the *Consumer Protection Act, 2002*.

162. The CPA provides the following definition of internet agreement:

> "consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment." […]
>
> 20(1) In this part […] "internet agreement" means a consumer agreement formed by text-based internet communications.

163. Read together, the complete definition of an "internet agreement" under Part IV of the CPA is "an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment, formed by text-based internet communications"

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[147] Enforcement Team Written Closing Submissions, para. 228.
[148] Sullivan, supra note 156 at § 2.1, Planet Energy Brief, Tab 12.

Planet's contracts in this case were all formed by "text-based internet communications" and, as such, fall squarely within the scope of s. 17(1) of the ECPA.

2. The ECPA does not provide "greater protections" to in-person contracts. All Consumers' have Equal Rights under ECPA. Staff's Purposive Reading is not reasonable or required.

164. Staff argues that the Panel must give a purposive reading to the ECPA and consider the statutory text, context and purpose of the ECPA to find that the contracts at issue are internet agreements.

165. Staff's argument is premised on its assertion that "in person" transactions attract a greater degree of consumer protections than online transactions under the ECPA. Staff essentially submits that if the Panel finds that the agreements are internet agreements, then consumers will necessarily be "deprived" of a higher degree of protection given to in-person enrollments under the ECPA. That is not the case.

166. It is inconsistent with the purpose and scheme of the ECPA to argue that the legislature intended to extend fewer or weaker substantive protections to consumers who entered into contracts online versus in person. The ECPA provides equal substantive rights and protections, regardless of the manner in which consumers enter into a contract, albeit tailored to in person or internet contracts.

167. The ECPA protects consumers by prescribing detailed information that must be contained in contracts with consumers,[149] providing that ambiguities in those contracts are interpreted in favour of consumers,[150] requiring that consumers are provided with a text-based copy of that information by suppliers within a certain time period,[151] enforcing this requirement against suppliers by provisions which void the contract if the requirement is not,[152] providing extremely broad cancellation rights to all consumers, once they have been

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[149] ECPA, s. 12.
[150] ECPA, s. 6.
[151] ECPA, s. 13.
[152] ECPA, s. 13(3)

provided with the required information,[153] and preserving the rights of consumers to commence proceedings in court.[154]

168. That the legislature did not require verification calls for online enrollments is simply a function of how information is exchanged online versus in person (handing over/speaking in person versus emailing online) and how best to establish that delivery of required information has taken place (as is evident from the verification call script).[155]

169. Similarly, section 10 of the Regulation sets out alternate methods of ensuring that consumers receive text-based versions of contracts that they enter into, depending on whether the transaction takes place in person, over the internet or by mail. The object of these acknowledgement provisions is to ensure that the consumer receives a text-based version of the contract. Contrary to the Staff's submission, either mode provides equivalent consumer protection in this respect. Any other interpretation is contrary to the scheme of the ECPA.

170. Staff's argument (based solely upon its own Interpretation Bulletin) that a consumer who enters into an agreement online is entitled to fewer substantive protections (if characterizing the verification requirements as such) because "they have had the opportunity to consider the matter at their leisure"[156] is antithetical to equality of protection afforded to all consumers under the ECPA and does not square with the prescribed "cooling off period". Under s. 19 of the ECPA all consumers have a ten day "cooling off period" after a written copy of the contract is delivered (and they have acknowledged such delivery) to retreat, review the contract at their leisure, and cancel it without penalty, if they so choose.[157] In this proceeding not a single consumer whose contract is at issue elected to do so.

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[153] ECPA, ss. 19-30.
[154] ECPA, ss. 4-5.
[155] Staff Documents Tab 13, OEB Verification Call Scripts.
[156] Staff Written Closing Submissions, para. 177, citing Staff's
[157] ECPA, s. 19 (1) "A consumer may, without any reason, cancel a contract at any time from the date of entering into the contract until 10 days after,(a) a text-based copy of the contract, or a copy of the contract in the form required under subsection 13 (2) if applicable, is delivered to the consumer; and (b) the consumer acknowledges its receipt in accordance with section 14."

171. Section 19(3) of the ECPA provides that "a consumer may cancel a contract at any time after the date of entering into the contract if the supplier engages in an unfair practice". Whether or not there has been an unfair practice has *no bearing whatsoever* on whether a contract is an internet agreement or an in-person agreement. The presence of an unfair practice instead gives rise to a cancellation right which is afforded to ***all*** consumers, regardless of the mode of enrollment. It does not *ex post facto* change the mode of enrollment. The CPA and ECPA have the same regime in that respect.[158]

172. The consumer protection objective of the statutory regime is equally served regardless of whether a contract is an internet agreement or an in-person agreement.

173. Moreover, the Board has characterized the ECPA scheme as "highly prescriptive and detailed, leaving little room for discretion for retailers and marketers."[159] In the context of a scheme that spells out every requirement in minute detail (e.g., font size of contracts, the contents of business cards, price comparison and disclosure form templates, etc.) it is inconsistent argue that the legislature intended a, principle-based approach when it comes to section 17 of the ECPA. Staff's position goes beyond a purposive interpretation offends the rule that "the interpretation ultimately adopted must be one that the words of the text can reasonably bear."[160]

3. A consumer may allow another person to complete online enrollment on their behalf; it does not change the mode of contract

174. Consistent with the consumer protection regime set out above a consumer may appoint another individual to complete an online enrollment on their behalf. The consumer may always change their mind later and cancel without penalty within the prescribed period of time (and in the event of an unfair practice, a may cancel).

175. Staff's interpretation that only consumers *themselves* may enter into an internet agreement is at odds with the entire scheme of the ECPA and ignores the practical realities of consumer transactions. For example, section 9(c)(iii) of the Regulation expressly

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[158] CPA, s. 18; ECPA s.
[159] *Energhx*, supra note 151 at para. 48, Planet Energy Brief, Tab 1.
[160] Sullivan, *supra* note 156 at §7.4, Planet Energy Brief, Tab 12.

contemplates that an account holder may appoint an agent for the purposes of entering into a contract:

> 9. If a contract is entered into over the internet, the supplier shall ensure,
>
> (c) that the web page includes statements with boxes to be checked off by the consumer in order to proceed with the transaction,
>
> (iii) that confirm that the consumer is the account holder with respect to any contract entered into through the website or is the account holder's agent for the purposes of entering into the contract; [Emphasis added].

176. Staff's interpretation would mean that an agreement completed by the spouse of an account holder or the bearer of a power of attorney could never enroll over the internet, which is expressly contrary to the Regulation. If accepted, for example, this interpretation would result in the anomalous result that a consumer with a physical disability requiring assistance from another individual to use a computer could not have entered into an internet agreement, although an able-bodied person in identical circumstances could have.

4. A consumer may appoint a salesperson as their agent

177. There is no prohibition against a consumer appointing a salesperson to complete the enrollment on their behalf. Again, this is consistent with the protections under the consumer protection regime and a consumer is not denied their informational entitlements or cancellation rights if they have asked a salesperson to complete the enrollment for them. The evidence is that every single consumer at issue in this case received the terms and conditions, disclosure statement and price comparison forms to their personal email accounts within the prescribed periods (Hawkins received five). Moreover, although not technically "verification calls", 60% of MacArthur's consumers still confirmed the terms of the contracts with Planet Energy over the telephone.

178. To be clear, Planet Energy's internal policy was that IBOs were not to enroll customers on their own.[161] That said, Mr. MacArthur and Mr. Nahid testified that they had express permission from customers to complete the enrollment on their behalf (inputting the

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[161] Silvestri Cross, Vol. 5, p. 80, l. 3-16.

consumers' own service and email addresses). Having done so, the contracts are internet agreements as defined by the statute.

179. Staff admits that Board Staff's Bulletin, which it relies upon to argue a purposive interpretation is required, does not explicitly address the question of salespersons directly enrolling consumers into energy contracts.[162] In any event, the Bulletin is a nonbinding expression of Board Staff's views that carries no more presumptive weight than Staff's submissions. Staff bulletins are not formally approved by the Board and are not imbued with its rule-making authority.[163] In *Re Proceeding on the Board's Own Motion Regarding Section 73 of the Act,* the Board held that:

> The Board is not bound in any way by Board staff bulletins. As all bulletins themselves note, they represent the views of Board staff and are not binding on the Board. The Board is not, however, required to ignore them. Similarly, Board staff's submissions are no more authoritative than any others, and have been considered by the Board with the same and no greater weight.[164]

180. None of the three "absurd consequences"[165] that Staff argue would result if a consumer were to appoint a salesperson to enter into a contract on the consumer's behalf actually relate to internet enrollments (which are expressly carved out by the statutory provisions cited). As they relate to in-person enrollments, the purportedly "absurd consequences" are based on incorrect statements of the law and ignore the actual facts in this proceeding:

(a) First it would not contravene s. 7(1)(17) of the Regulation if a salesperson signed a contract on behalf of a consumer and a supplier. That provision requires only that *a signature line be included* for the account holder to acknowledge receipt of a text-based copy of the contract and the disclosure statements. There is no requirement as to *who may sign the line and in what capacity they must do so.* In any event, the terms and conditions in all cases are signed by Planet Energy's Co-CEO, Nino Silvestri for the supplier. A

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[162] Enforcement Team Written Closing Submissions, para. 185.
[163] Ontario Energy Board, "Staff Bulletins," online: < https://www.oeb.ca/industry/tools-resources-and-links/staff-bulletins>.
[164] *Re Proceeding on the Board's Own Motion Regarding Section 73 of the Act,* EB-2012-0102, Decision with Reasons (December 13, 2012) at 18, Planet Energy Brief, Tab 11.
[165] Enforcement Team Written Closing Submissions, para. 202.

salesperson would never be in the position of signing on behalf of the supplier and the consumer (although no rule prohibits it).

(b) Second, s. 7(1)(18) of the Regulation again only requires that a contract *contain* "an acknowledgment to be signed and dated by the consumer or account holder's agent that he or she has received a text-based copy of the contract" – it does not proscribe who may be appointed to be that agent. The same is true for disclosure statements under ss. 8(1)(d), (2)(d), and (3)(d).

(c) The third purportedly "absurd consequence" - that "a salesperson for a supplier would receive a verification call from that same supplier (s. 13)" is also incorrect. A salesperson would only receive the verification call if they input their own phone number instead of the consumer, in which case there would be no verification. There is no evidence of that ever having occurred. The evidence in this case is that all quality assurance calls were made to Mr. MacArthur's customers directly. Each consumer who received a call confirmed the terms of the contract and confirmed to Planet Energy that they had completed the enrollment.

E. Remedy: Administrative Penalty and Restitution

(a) Administrative Penalty

181. Staff propose an administrative penalty of $383,000, the breakdown of which it calculates as follows:

- $10,000 for each of the remaining 36 contracts (same amount initially proposed by Staff, but number of contracts reduced from 45 to 36);
- $2,000 for each of the four Large Commercial consumer contracts (reduced from $10,000 initially proposed by Staff);
- $15,000 for failure to cancel Ms. Andrassin's contract (increased from $0; Staff initially did not propose any penalty in respect of this alleged contravention).

182. Staff argue that a large penalty is justified based on the five criteria prescribed by O. Reg. 51/16 and the alleged systemic deficiencies relating to Planet Energy's training and testing program and "very high-risk sales model".[166]

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[166] Enforcement Team Written Closing Submissions, paras. 12, 253, 285.

183. Planet submits, that: (i) Staff has not demonstrated systemic deficiencies/harm (for all the reasons stated above) and the administrative penalty is fundamentally overstated on this basis; and (ii) the criteria prescribed by O. Reg. 51/16 also do not support the proposed penalty amount. Staff's proposed "per-transaction" methodology for calculating the penalty amount is also not reasonable.

184. Planet's submission on each of these issues is addressed below.

(i) Deviations Are not Significant in Number

185. The number of alleged contraventions was reduced by Staff from 45 to 36. Also, the 21 of the contraventions attributed to Mr. MacArthur should, for the reasons stated above, be dismissed.

186. The remaining 16 contraventions attributed to Mr. Nahid, if the Panel determines any have been proven, are relatively few compared to the 120,000 contracts enrolled by Planet IBOs over the past 7 years (and which have not resulted in complaints).

(ii) No Significant Potential Adverse Impact to Customers

187. Staff have not provided any evidence of significant potential adverse impact to consumers.

188. Staff, again, proffer only the evidence of Mr. MacArthur and Mr. Nahid and two customers, Mr. Hawkins and Ms. Andrassin. This small sample size is not evidence of the potential for adverse harm to consumers generally.

189. Even in the limited case of Mr. Hawkins and Ms. Andrassin, their complaints were largely limited to post-enrolment concerns with early termination fees, not the complaints of IBO enrolment, representations of savings, etc. that are at the centre of Staff's case. Moreover, Mr. Hawkins' complaint about cancellations fees was rejected by OEB Staff and is not even included in the Notice.

190. In contrast to the lack of evidence from Staff, M. Silvestri testified that Planet has not received any complaints relating to the matters that are the subject of Staff's allegations.[167] Not surprisingly, Staff seek to discount Planet's evidence:

> The fact that only two consumers came forward to testify about their complaints in this case does not detract from the baseline level of adverse impact caused ...
>
> The suggestion that Planet Energy's business model has attracted a low number of complaints is not determinative in assessing the criterion of potential impact on consumers…

191. Planet's low number of complaints may not be "determinative, but this is the only evidence as to whether Planet's business practices are adversely impacting or have the potential to adversely impact consumers — Staff have not adduced any evidence of broader impact. As in *Energhx,* the Panel has not been "presented with any evidence upon which it could make a determination as to the potential of the contravention to adversely affect consumers".

(iii) Mitigation

192. Staff mischaracterize Planet Energy's mitigation measures as being limited to allowing three consumers enrolled by Mr. Nahid to cancel their contracts without penalty after those consumers complained to the OEB.

193. Staff ignore the important mitigation measures that are part of Planet's customer care and compliance monitoring systems and processes. These measures, which Mr. Silvestri addressed during his testimony, are designed to prevent, identify and address non-compliance and potential consumer harm. They include conducting random quality assurance calls to 25% of customers or to customers of any IBOs who are flagged. In this case, Planet called over 60% of Mr. MacArthur's customers and would have offered to cancel the contracts of all of Mr. MacArthur's customers without penalty had the customers it called told Planet that Mr. MacArthur enrolled them on his own — none of them did.

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[167] Silvestri Cross, Vol. 5, p. 107, l. 21-26.

194. Planet Energy offered to allow two customers (in addition to Ms. Andrassin) out of their contracts without penalty because these were the ***only*** customers who complained — and they only complained after Staff commenced its Inspection. Other than these two customers (and Ms. Andrassin and Mr. Hawkins), not a single customer relating to the 45 contracts referenced to in the Notice called Planet (or the OEB) to complain (Staff, of course, also did not contact any of these customers and has provided no evidence to suggest that any of these customers have complaints and/or would like to cancel their contracts).

195. Staff's assertion that Planet's mitigation measures are insufficient because it did not unilaterally cancel customers who never complained or asked to cancel their contracts is unreasonable.

(iv) No Previous Contraventions

196. Staff's reference to previous "contraventions" is misguided.

197. Planet has a largely unblemished compliance record and a low industry complaint ratio. Planet's only previous contravention relates to minor infractions following the 2011 Ernst & Young audit, an audit which resulted in findings of contravention and the payment of administrative penalties by every single retailer/marketer that was audited.

198. These minor violations from seven year ago which do not concern the matters that are at issue in this proceeding are not relevant.

(v) Other relevant criteria

199. None of the other criteria or features of Planet Energy's alleged "very high risk sales model" support a high administrative penalty — i.e., recruitment of IBOs, relationship between customers and IBOs, IBO commission structure, size of IBO salesforce, monitoring of IBOs.

200. All of these features of Planet Energy's training/testing program, MLM marketing process and compliance monitoring were extensively reviewed by the OEB as part of the Board's 2011 and 2015 audits and inspection.

201. There have been no material changes since the time of these audits and inspections. Planet Energy's training/testing, MLM marketing and compliance monitoring remain materially the same; Planet Energy has not received any complaints or been charged by the OEB for any non-compliance related to matters in issue; and, there is no evidence to demonstrate that the deficiencies alleged by Staff are causing or threatening to cause significant adverse impact to customers.

(vi) Methodology for calculating administrative penalty

202. Planet submits that an administrative penalty is not warranted; however, if a penalty is assessed, it should be assessed on a "subject-matter" basis as the Board did in *Re Energhx,*[168] as opposed to Staff's "transaction-based" approach.

203. In *Energhx*, the Board grouped allegations based on "subject-matter," not by transaction:[169]

> ... the Board has discretion to consider multiple allegations associated with the same transaction or subject matter as one contravention for the purposes of determining the level of administrative penalties to be imposed.

204. The Board accordingly grouped 12 distinct allegations concerning the training of all *Energhx* sales and verification personnel – including on completion of contracts; use of business cards, ID badges, Disclosure Statements and Price Comparisons; and cancellation rights – together as one contravention, subject to a $5,000 penalty. It then grouped all violations relating to contract content together as one contravention, subject to a further $5,000 penalty.[170] Though deficient training and contract content allegations underpinned each transaction, as Staff alleges in this case, the Board did not multiply these penalties by the number of transactions or friends, family, employees and unaffiliated customers the company had enrolled.[171]

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[168] *Re Energhx, supra* note 123 at para. 95.
[169] *Ibid.*
[170] *Ibid* at para. 96.
[171] Staff Written Closing Submissions, para. 285; *Re Enerhx, supra* at para. 83.

205. In this case, the alleged contraventions relating to deficient training/testing are not "transaction-based" - they are allegations of systemic deficiencies. Staff's proposed treatment of alleged contraventions relating to training/testing as "transaction-based" is artificial and inconsistent with the Board's treatment in *Energhx*.

206. Likewise, transactions with a single customer should not attract a penalty-multiple simply because the customer contracted for more than one property. For instance, Staff propose a $50,000 administrative penalty to be assessed with regards to Mr. Hawkins because Mr. Hawkins contracted for five properties, whereas Staff propose $10,000 penalties for other customers who contracted for single locations. This proposed treatment is not reasonable. In both cases, there was a single dealing between the IBO and the customer and a single alleged contravention. The alleged contraventions do not multiply simply because the dealings between the IBO and the customer give rise to more than one contract.

207. Staff is also misguided in its attempts to draw an analogy with *Summit*:

- Summitt addressed the training/testing, marketing and compliance obligations of agents conducting ***door-to-door sales***. The agents ***cold-called*** customers and ***negotiated sales*** on the doorstep. Planet Energy IBOs' marketing is limited to warm networking to their friends, family and acquaintances and IBOs are not permitted to conclude sales;
- Some Summitt salespersons ***fraudulently impersonated*** agents of the local utility; no such allegations are at issue in this proceeding;[172]
- Board Staff called ***19 consumer witnesses***, compared to two consumers called as witnesses by Staff in this case; [173]
- ***5 salespersons***' conduct was under review and at least ***four different consumer witnesses*** testified that each salesperson had committed unfair practices;
- Each penalty imposed was supported by the testimony of at least one consumer witness (whereas in this proceeding Staff ask the Board to impose $10,000

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[172] *Summitt OEB, supra* note 129 at paras. 107-8, 119, 162.
[173] *Ibid* at at para. 83.

penalties across all of the contracts with no input from almost all of the underlying consumers).

i. **Ms. Andrassin**

208. Staff originally did not propose any administrative penalty in respect of the allegation that Planet Energy misinformed Ms. Andrassin about her right to cancel.[174] Staff now propose a $15,000 administrative penalty, although Staff has not explained the reason for this change.

209. Planet Energy cancelled Ms. Andrassin's contract without penalty, although Planet initially gave Ms. Andrassin incorrect information and she had to call Planet Energy multiple times and eventually complained to the Board before her contract was cancelled. Planet regrets the incorrect information provided to Ms. Andrassin and the poor customer service she received. In addition to cancelling her contract without penalty, Planet would be willing to refund Ms. Andrassin the difference, if any, between what she paid Planet Energy for commodity charges and what she would have paid had she remained on standard supply.

210. Planet energy respectfully submits that an administrative penalty is not warranted. Planet energy made a mistake, but there is no evidence that this was anything more than an isolated error.

(b) Restitution

211. Planet opposes Staff's position that all 37 contracts be deemed void and Planet Energy be required to refund all amounts paid by consumers to Planet Energy for the energy commodity cost, with the exception of the Global Adjustment or as a final RPP variance settlement amount.

212. First, in support of its interpretation of sections xx of the ECPA, Staff relies upon its March 15, 2012 bulletin on the "Refund Payable to a Low-Volume Consumer Following

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[174] Agreed Chronology, Tab 17.

Cancellation of a Contract". That bulletin however, provides for refunds *after cancellation* as provided for by sections 19, 23 and 25 of the ECPA. In such cases, the consumer has chosen to cancel the contract.

213. By contrast, in this case, Staff proposes to void all 37 contracts notwithstanding that Staff has not contacted any customers to ask if they want their contracts voided. Staff's argument that the ECPA entitles the Board to unilaterally void contracts — in this case years after the contracts were entered into and without any complaint by customers — is not a reasonable interpretation or application of the ECPA.

214. Second, the Notice seeks "restitution", but Staff seek more than that. Staff propose that customers be refunded the ***full commodity cost*** — not just the difference between what customers pay to Planet Energy for their commodity cost and what they otherwise would have paid to their local distribution utility had they remained on standard supply. This would penalize Planet Energy and provide a windfall to customers. Customers would, in effect, end up getting the commodity supplied for free over the period covered by the refund.

215. This is not restitution, which requires the wrongful party to disgorge and restore to the innocent party the amount by which the wrongful party was enriched and the innocent party was deprived.[175]

216. In *Summitt*, the Board ordered the supplier to make restitution to customers by compensating them for "the difference between the sums paid by them pursuant to the contracts and the prevailing RPP prices," not "all amounts that the contract required or committed the consumer to pay."[176] Likewise, the *Consumer Protection Act, 2002*, provides for "refunds" to consumers, being the difference between their payment(s) and the value of goods or services received under a consumer contract that cannot be returned to the supplier.[177]

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[175] CED (Online), *Restitution,* "Introduction" at §1.
[176] *Summitt OEB, supra* note 129 at para. 198; Staff Written Closing Submissions, para. 294.
[177] *Consumer Protection Act, 2002,* S.O. 2002, c 30, s. 18(1) and (2) **[CPA]**.

F. Costs

217. Planet Energy agrees that costs may be addressed following release of the Panel's Decisions and Order.

All of which is respectfully submitted this 22nd day of December, 2017.

_____
Glenn Zacher and Genna Wood,
Counsel for Planet Energy

Appendix A

A

From: Glenn Zacher
Sent: Tuesday, November 21, 2017 5:55 PM
To: Justin Safayeni; Andrea Gonsalves (AndreaG@stockwoods.ca)
Cc: Genna Wood
Subject: OEB/Planet - EB-2017-0007

Andrea, Justin –

Ms. Armstrong stated in her evidence during the hearing last week that when a customer enrolls on his or her own over the internet, that is a compliant enrolment. She further stated that any self-enrolment contracts by Messrs. McArthur or Nahid were not objectionable. Any such transactions do not properly fall within the Notice which alleges contraventions based on conduct by Messrs. McArthur and Nahid in their capacity as salespeople.

Ms. Armstrong also stated in her evidence that in assessing the contracts entered into through Messrs. McArthur and Nahid as IBOs, it was an oversight not to exclude commercial accounts which entail annual consumption of over 150,000 kwh and are not governed by the ECPA. Mr. McArthur further confirmed, as he had earlier reported to Board staff during his interview, that 4 customers who were enrolled through him were commercial customers, including: [redacted]

These self-enrollment and commercial contracts should never have been included in the Notice and we request that you confirm that the Notice will be amended to eliminate the self-enrolled contracts by Mr. Nahid and Mr. McArthur (on his own and on behalf of his wife at the time, Ms. McNally) and the commercial contracts enrolled through Mr. McArthur.

Please also confirm the applicable contract numbers that will be deleted. This will, among other things, expedite the hearing of our client's evidence. We would be grateful if you would provide us with your response as soon as possible.

Regards,

Glenn Zacher

Direct: +1 416 869 5688
Email: gzacher@stikeman.com

STOCKWOODS
barristers

Justin Safayeni
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File No. 10659

November 23, 2017

VIA EMAIL

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5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Dear Glenn,

Re: Planet Energy enforcement matter (EB-2017-0007)

We have considered and sought instructions on your request, delivered on the evening of November 22, 2017, that the Notice of Intention in this matter ("**Notice**") be "amended to eliminate the self-enrolled contracts by Mr. Nahid and Mr. MacArthur (on his own behalf and on behalf of his wife at the time, Ms. McNally) and the [four large volume] commercial contracts enrolled through Mr. MacArthur."

We note that the OEB Enforcement Team cannot unilaterally amend the Notice, which was issued by the Board. However, the Enforcement Team could seek leave from the Panel to amend the Notice in order to withdraw certain allegations –presumably Planet Energy would support such a request, and it would be made to the Panel on consent. Alternatively, the Enforcement Team would be prepared to provide Planet Energy with an assurance that the Enforcement Team will seek a finding of "no contravention" in respect of certain allegations in the Notice.

Self-enrolled contracts

Based on our review of the evidence presented at the hearing last week, we are prepared to seek withdrawal of, or a finding of no contravention in respect of, all allegations in the Notice concerning the contracts self-enrolled by Mr. Nahid (10030038 – both electricity and gas) and Mr. MacArthur (93226841E), as well as the contract enrolled by Mr. MacArthur on behalf of his then-wife [redacted] (93207762G). If the Panel were prepared to amend the Notice, these contract numbers could simply be removed from the Appendices to the Notice.

Large Volume Consumers

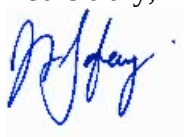
With respect to Mr. MacArthur's large volume commercial electricity contracts (*i.e.* customers using more than 150,000 kWh annually at a single location), let us first clarify that based on Mr. MacArthur's evidence last week we understand those four customers and contract numbers to be [redacted] (10033212), [redacted]. (10033779), [redacted] (10024558), and [redacted] (10020679 – electricity only) (together, the "**Large Volume Consumers**").

For the Large Volume Consumers, we agree that it would be appropriate to seek withdrawal of any allegations relating to breaches of the *Energy Consumer Protection Act* or O. Reg. 389/10. However, it is the Enforcement Team's position that the evidence supports the allegation, set out in paragraph 1 of the Notice, that Planet Energy breached sections 1.1(d), (f) and (h) of the *Electricity Retailer Code of Conduct* in respect of the Large Volume Consumers . The Enforcement Team intends to seek findings of contravention in this regard at the end of the case. For that reason, we do not agree to ask the Panel to strike the contracts associated with the Large Volume Consumers from the Appendices to the Notice.

Rather than propose what will be a rather cumbersome series of amendments to the Notice to capture the position set out above, we are prepared to advise the Panel on the record when the hearing resumes that the Enforcement Team will seek a finding of "no contravention" in respect of any allegation that Planet Energy breached the *Energy Consumer Protection Act* or O. Reg. 389/10 in respect of the Large Volume Consumers.

We look forward to hearing from you on the steps outlined above, in advance of Monday morning.

Yours truly,



Justin Safayeni

cc: Andrea Gonsalves (*via email*)

Genna Wood (*via email*)

TAB 1

9 of 29 DOCUMENTS

Case Name:

Energhx Green Energy Corp. (Re)

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B); AND IN THE MATTER OF a Notice of Intention to Make an Order under sections 112.3, 112.4 and 112.5 of the Ontario Energy Board Act, 1998 for Compliance, Suspension and an Administrative Penalty against Energhx Green Energy Corporation.

2012 LNONOEB 119

No. EB-2011-0311

Ontario Energy Board

Panel: Marika Hare, Presiding Member; Paula Conboy, Member

Decision: March 26, 2012.

(99 paras.)

DECISION AND ORDER

1 On August 25, 2011 the Ontario Energy Board (the "Board"), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act") issued a Notice of Intention to Make an Order (the "Notice") against Energhx Green Energy Corporation ("Energhx").

2 The Notice provides that the Board intends to make an Order: (i) under sections 112.3 and 112.5 of the Act, requiring Energhx to comply with certain enforceable provisions as defined in section 3 of the Act and to pay an administrative penalty in the amount of $32,500 for breaches of

those enforceable provisions; and, (ii) under section 112.4 of the Act, to suspend Energhx's activities with respect to sales, renewals, extensions or amendments of contracts using the following channels: Door-to Door, Exhibitions, Trade Shows and Direct Mail. The Notice describes the allegations of non-compliance as follows:

> *It is alleged that Energhx has contravened sections of Ontario Regulation 90/99, Ontario Regulation 389/10, section 12 of the Energy Consumer Protection Act, 2010... and the Electricity Retailer Code of Conduct and the Code of Conduct for Gas Marketers.*[1]

3 The particulars in support of the allegations are set out in the Notice, and are reproduced below.

4 On September 9, 2011, Energhx filed a letter with the Board requesting a hearing on the matter, as it was entitled to do under the Notice and the Act.

5 On November 11, 2011, the Board issued a Notice of Hearing and Procedural Order No. 1 setting January 23, 2012 and January 24, 2012 as dates for an oral hearing.

6 On January 18, 2012, Compliance counsel requested adjournment of this proceeding to a later date due to the unavailability of its main witness. The Board approved that request.

7 On January 20, 2012, the Board issued Procedural Order No. 2 setting February 7, 2012 as the date for the oral hearing.

I. BACKGROUND

A. Energhx's Licences

8 Energhx initially received a Gas Marketer Licence (GM-2009-0188) and an Electricity Retailer Licence (ER-2009-0189) (collectively, the "Licences") on October 22, 2009, which authorized it, among other things, "to sell or offer to sell" gas or electricity, respectively, to a consumer. The Licences require that Energhx comply with all applicable provisions of the Act and the regulations made under the Act. The Licences also require that Energhx comply with applicable rules (gas) or codes (electricity), for present purposes these being the Electricity Retailer Code of Conduct (in the case of the Electricity Retailer Licence) and the Code of Conduct for Gas Marketers (in the case of the Gas Marketer Licence) (collectively, the "Codes"). The Licences were issued for a one year period and were to expire on October 20, 2010.

9 By its terms, the Gas Marketer Licence applies only in relation to marketing activities pertaining to "low volume" consumers. Although the Electricity Retailer Licence applies to retailing activities in respect of all consumers, the allegations in the Notice relate only to retailing activities pertaining to "low volume" consumers.[2]

10 On June 8, 2010, Energhx filed applications to renew its Licences (the "Licence

Applications").[3] The Licences were extended to January 31, 2011.[4] On January 28, 2011 the Board re-opened the record of the Licence Applications proceeding to provide Energhx an opportunity to submit evidence of compliance with the legislative and regulatory requirements, and also extended the Licences until March 31, 2011.[5] Energhx filed the requested evidence on February 4, 2011 and, while the evidence was being considered, on March 24, 2011 the Board ordered that the Licences be extended until "the final determination of the [Licence Applications] or October 31, 2011, whichever is earlier.[6] On October 31, 2011, the Board ordered that, while certain compliance inspections were underway, the Licences be extended until "the final determination of the [Licence Applications] or April 30, 2012, whichever is earlier".[7] The current versions of the Licences state that they are "valid by extension until April 30, 2012."

B. Compliance Inspection

11 The *Energy Consumer Protection Act, 2010* (the "ECPA") came into effect on January 1, 2011. It is designed to protect energy consumers by ensuring that retailers and marketers follow fair business practices and that consumers are provided with essential information before they sign energy contracts. The Board's compliance activities which resulted in issuance of the Notice against Energhx were initiated shortly after the ECPA and the restated Codes came into effect on January 1, 2011.

12 The record indicates that Energhx filed Certificates of Compliance dated December 15, 2010 with the Board in which Dr. Emmanuel Ogedengbe, on behalf of Energhx, certified that, as of January 1, 2011, Energhx will meet all applicable legal and regulatory requirements pertaining to the following in relation to all sales channels that Energhx identified in the Certificates of Compliance as being those that it intended to use: training and testing for salespersons and verification representatives; business cards; identification badges; text-based contracts; disclosure statements; price comparisons; use of verification scripts; and adequate processes and controls to ensure compliance for each of the foregoing, as well as for contract cancellations.

13 Starting in early 2011, the Board conducted compliance inspections of all retailers and marketers who had filed Certificates of Compliance. Staff from Ernst and Young LLP ("Ernst & Young") were appointed to serve as "inspectors" pursuant to the power set out in section 106 of the Act. Ernst & Young conducted an inspection of Energhx between March 7 and April 13, 2011, covering the period from January 1, 2011 to February 28, 2011. In the process, Ernst &Young attended Energhx's premises, made inquiries and observations, inspected documents, communicated with Energhx representatives and retained copies of certain documents. After the compliance inspection was complete, Ernst & Young provided to the Board its observations, as well as the documents related to those observations.

14 On August 25, 2011, following the completion of Board Compliance staff's review and validation process regarding the compliance inspection, the Board issued the Notice. At the commencement of the hearing on February 7, 2012, Compliance counsel indicated that an order to

suspend Energhx activities with respect to sales, renewals, extensions or amendments of contracts using all its sales channels was no longer being sought.[8]

II. ALLEGATIONS AND PARTICULARS OF NON COMPLIANCE

15 As noted above, in the Notice the Board alleges that Energhx has contravened sections of Ontario Regulation 90/99, Ontario Regulation 389/10, section 12 of the ECPA and the Codes.

16 The particulars set out in the Notice in support of the allegations are described below.

A. Training Materials - Salespersons

17 Section 7 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that every person acting on behalf of the licensee has successfully completed such training as may be required by a code, rule or order of the Board before meeting in person with a low volume consumer. Section 5 of the Codes requires a retailer or marketer to ensure that salespersons acting on its behalf have successfully completed training (as demonstrated by a minimum 80% pass mark on the required training test), and also requires that the training materials used be adequate and accurate and cover certain specified subject matter.

18 The Notice indicates that the electricity and gas training material used by Energhx for prospective salespersons was reviewed during the inspection and that, at the time of the inspection, three prospective salespersons had completed the Energhx training. The Notice alleges that the training materials used by Energhx did not include adequate and accurate material in the following areas as they pertain to low volume consumers:

1. How to complete a contract application; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(ii) of the Codes.

2. Use of business cards; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(iv) of the Codes.

3. Use of Identification badges; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(v) of the Codes.

4. Disclosure statements; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(vi) of the Codes.

5. Price Comparisons; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(vii) of the Codes.

6. Consumer cancellation rights set out in section 21 of Ontario Regulation 389/10; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(ix) of the Codes.

7. Renewals and extensions; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(x) of the Codes.

8. Persons with whom Energhx may enter into, verify, renew or extend a contract; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(xii) of the Codes.

B. Training Materials - Verification Representatives

19 The legal and regulatory regime regarding the training of verification representatives is largely the same as that for salespersons as described above (the subject matter to be covered by the training is different in some respects).

20 The Notice indicates that the electricity and gas training materials used by Energhx for prospective verification representatives were reviewed during the inspection and that, at the time of the inspection, one prospective verification representative had completed the Energhx training. The Notice alleges that the training materials used by Energhx did not include adequate and accurate material in the following areas as they pertain to low volume consumers:

9. Disclosure statements; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(iii) of the Codes.

10. Price comparisons; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(iv) of the Codes.

11. Consumer cancellation rights set out in section 21 of Ontario Regulation 389/10; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(vi) of the Codes.

12. Persons with whom Energhx may enter into and verify a contract; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(viii) of the Codes.

C. Training test

21 The Notice indicates that the electricity and gas training test questions used by Energhx which are designed to assess the state of the salesperson's or verification representative's knowledge of the required topic areas stated in the Codes were reviewed during the inspection. As noted above, the Codes require a minimum pass mark of 80% on the required training test. Section 5.6 of the Codes also states that a prospective salesperson or verification representative may re-take the training test once, but only after having re-taken the full training required by the Codes.

22 The Notice alleges as follows:

> 13. Energhx confirmed with the inspector that it requires a salesperson or verification representative to achieve a minimum 75% pass mark on the training test; contrary to section 5.6(c) of the Codes which requires a pass mark of 80%.
>
> 14. In one case reviewed the prospective salesperson (initials A. Z.) attempted the test twice but scored 70% each time however, the individual was considered to have passed the test; contrary to section 5.6(c) and (d) of the Codes.

D. Record retention

23 Section 5.10 of the Codes requires that complete records relating to training and testing be retained for a period of not less than two years from the date on which a salesperson or verification representative ceases to act on behalf of the retailer or marketer in relation to low volume consumers.

24 The Notice alleges that Energhx has contravened the following requirements in relation to record retention pertaining to salespersons and verification representatives for electricity and gas:

> 15. Energhx does not have its salespersons and verification representatives sign a statement that he or she will comply with all applicable legal and regulatory requirements in relation to the activities the person will conduct on behalf of Energhx in relation to low volume consumers. The required records are therefore not retained; contrary to section 5.10(g) of the Codes.
>
> 16. Energhx stated during the inspection that it plans on maintaining salesperson and verification representative records for a period of one year; contrary to section 5.10 of the Codes.

E. Business cards

25 Section 5 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that every person acting on behalf of the licensee offer a business card at every meeting in person with a low volume consumer. That business card must comply with the requirements set out in section 5 of Ontario Regulation 90/99 and with any other requirement as may be set out in a code, rule or order of the Board. Sections 2.1 and 2.2 of the Codes address requirements for business cards.

26 The Notice indicates that, during the inspection, Energhx confirmed that all business cards issued to salespersons who meet in person with low volume consumers are in the same format and contain the same content. The Notice alleges that Energhx has contravened the electricity and gas business card requirements as follows:

> 17. During the inspection it was observed that the business card does not state the electricity and gas licence numbers issued to Energhx under the Act nor does it state Energhx's toll-free telephone number; contrary to section 5 of Ontario Regulation 90/99 and section 2.2(a) and (d) of the Codes.
>
> 18. As the content of the business cards provided by Energhx are in breach of section 2.2(a) and (d) of the Codes, it is likely that the use of such business cards by Energhx salespersons in their current form will result in a breach of section 5(6)(ii) of Ontario Regulation 389/10 and sections 1.1(b) and 2.1 of the Codes.

F. Identification badges

27 Section 6 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that the licensee issue a photo identification badge ("ID badge") to every person who meets in person with a low volume consumer while acting on behalf of the licensee, and that the person at all times prominently display that ID badge. That ID badge must comply with the requirements set out in section 6 of Ontario Regulation 90/99 and with any other requirement as may be set out in a code, rule or order of the Board. Sections 2.3 to 2.5 of the Codes address requirements for ID badges.

28 The Notice indicates that, during the inspection, Energhx confirmed that ID badges issued to salespersons who meet in person with low volume consumers are in the same format and contain the same content. The Notice alleges that Energhx has contravened the following in relation to the electricity and gas ID badge requirements:

> 19. During the inspection, it was noted that the ID badge does not state that the salesperson is (a) not associated with any electricity or gas distributor

or government, contrary to section 6 of Ontario Regulation 90/99; and (b) not a representative of the consumer's electricity or gas distributor and is not associated with the Ontario Energy Board or the Government of Ontario. It was also observed that the ID badge does not state an expiry date. This is contrary to section 2.4(a) and (g) of the Codes.

20. As the content of the ID badges provided by Energhx are in breach of section 2.4(a) and (g) of the Codes, it is likely that the use of such ID badges by Energhx salespersons in their current form will result in a breach of section 5(6)(i) of Ontario Regulation 389/10 and sections 1.1(c) and 2.3 of the Codes.

G. Contract content requirements for new contracts

29 Section 12 of the ECPA states that a contract with a low volume consumer must, among other things, contain the information prescribed by regulation. The information required to be contained in a contract is listed in section 7 of Ontario Regulation 389/10.

30 The Notice indicates that one transaction for electricity and one transaction for gas were reviewed. In respect of both transactions, the Notice alleges that Energhx contravened the following content requirements in relation to electricity and gas contracts:

21. The contract fails to include a statement that if the consumer cancels the contract within the 10-day period, the consumer is entitled to a full refund of all amounts paid under the contract; contrary to section 12 of the ECPA and section 7(1)9 of Ontario Regulation 389/10.

22. The contract fails to include a description of any other circumstances in which the consumer or Energhx is entitled to cancel the contract with or without notice or cost or penalty, the length of any notice period, the manner in which notice can be given and the amount of any cost or penalty; contrary to section 12 of the ECPA and section 7(1)13 of Ontario Regulation 389/10.

23. The contract fails to include the applicable conditions/rights under section 21(a), (b) & (e) of Ontario Regulation 389/10 which provide that the consumer can cancel the contract without cost or penalty; contrary to section 12 of the ECPA and section 7(1)13 of Ontario Regulation 389/10.

24. The signature and printed name of the consumer, or the account holder's agent signing the contract on behalf of the consumer, and of the person signing the contract on behalf of Energhx, is contained below the acknowledgment to be signed and dated by the consumer or account holder's agent that he or she has received a text based copy of the contract. The signature of the person signing on behalf of Energhx and the acknowledgement of the consumer are therefore in the reverse order to the specified requirements in Ontario Regulation 389/10; contrary to section 12 of the ECPA and section 7(1)17 & section 7(1)18 of Ontario Regulation 389/10.

H. Completion of price comparisons for new contracts

31 Section 12 of the ECPA states that a contract with a low volume consumer must, among other things, be accompanied by the information or documents prescribed by regulation or required by a code, rule or order of the Board. Under section 8(3) of Ontario Regulation 389/10, a price comparison that complies with the requirements of a code, rule or order of the Board must accompany the disclosure statement that itself is required to accompany a contract. Sections 4.6 to 4.9 of the Codes address requirements for price comparisons, including the requirement that a price comparison be completed using the template approved by the Board and in accordance with the instructions contained in that template.

32 The Notice alleges as follows:

25. Energhx advised that it has one five-year contract offer available to residential and non-residential electricity and gas consumers. Board staff observed that the price comparison had been completed accurately according to the template instructions with the exception of the document control number box which also includes a date which is not in accordance with instruction number 8; contrary to section 12 of the ECPA, section 8(3) of Ontario Regulation 389/10, and section 4.6(b) of the Codes.

I. Verification call (use of the applicable Board-approved script)

33 Subject to certain exceptions, under section 15 of the ECPA a contract with a low volume consumer must be verified within the time and in the manner required by the ECPA, Ontario Regulation 389/10 and any applicable code, rule or order of the Board. Sections 4.10 to 4.12 of the Codes address requirements for verification, notably the obligation to use a Board-approved script.

34 The Notice indicates that Energhx had only conducted one verification call during the period covered by the inspection (January 1 to February 28, 2011), and that this was a dual fuel verification call to verify both electricity and gas contracts. The Notice alleges that Energhx contravened the following requirements and deviated from the Board-approved script in the following areas:

26. The verification representative did not introduce her name to the consumer and did not identify herself as calling on behalf of Energhx; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/ 10, and section 4.10 and section 4.11(a) of the Codes.

27. The verification representative did confirm the consumer's name but did not confirm if she was speaking to the account holder or the account holder's agent; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

28. The verification representative did not ask if the customer was comfortable to proceed with the call in English; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

29. The verification representative did not advise the consumer that the call was being recorded; contrary to section 15 of the ECPA, section 13(2) and section 13(3) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

J. Compliance monitoring and quality assurance program

35 Sections 7.4 and 7.5 of the Codes require that a retailer maintain a compliance monitoring and quality assurance program that enables the retailer or marketer to monitor compliance with the Act, the ECPA, the regulations and all applicable regulatory requirements in relation to retailing or marketing to low volume consumers and to identify any need for remedial action. Such a program must meet the minimum requirements specified in the Code.

36 The Notice alleges that Energhx contravened the requirement as follows:

30. During the inspection, Energhx confirmed that it does not maintain a compliance monitoring and quality assurance program as required by section 7.4 and section 7.5 of the Codes.

III. BOARD FINDINGS ON ISSUES BEFORE THE BOARD OTHER THAN THE SPECIFIC ALLEGATIONS

37 The following issues emerged during the oral hearing and in written submissions.

Certificates of Compliance

38 On December 15, 2010, Energhx filed Certificates of Compliance in the form required, certifying to a variety of matters regarding compliance with "all applicable legal and regulatory requirements" in respect of all sales channels that Energhx indicated it intended to use as of January 1, 2011.[9]

39 In its submissions, Energhx characterized its certification as follows:

> *The Certificates of Compliance confirm Energhx's obligation to comply with the stated retailing activities, relating to the retailing/marketing channels, recruitment, training and conduct of salespersons, contracts, verification, handling of cancellations, complaints and retractions. These are statements of* ***intentions*** *and not* ***actions****. For example, the certification confirms retailing/marketing activities as "...channels that the gas marketer/retailer intends to use..*"[10]

40 The Board is of the view that the Certificates of Compliance, by their terms, attest to the state of compliance by the signing retailer or marketer, and do not represent "statements of intentions". For example, the Certificates of Compliance refer to salespersons having undergone training and testing in accordance with all applicable legal and regulatory requirements, to contracts having been revised as required to comply with all applicable legal and regulatory requirements and to the company using only compliant contracts on and after the "Effective Certification Date" (being the later of the date of signature of the Certificate and January 1, 2011). Execution by Energhx of the Certificates of Compliance certified Energhx's compliance with those requirements. The Board agrees with the submission of Compliance counsel that Ontario Regulation 90/99 and the Certificates of Compliance make it clear that Energhx was subject to all applicable legal and regulatory requirements.[11]

41 All retailers and marketers doing business in Ontario must understand and abide by the statutory and regulatory requirements regardless of whether they are new businesses or established sector participants. The Board notes that the legal and regulatory requirements should have been known and understood by all marketers and retailers in advance of the January 1, 2011 implementation date. The ECPA was tabled in Bill form on December 8, 2009 and received Royal Assent on May 18, 2010. Proposed drafts of Ontario Regulation 389/10 and of the amendments to Ontario Regulation 90/99 were posted for comment on July 2, 2010, and final versions were filed on October 13, 2010. The two Codes, as restated, were issued on November 17, 2010 following a notice and comment process that commenced in August of that year.

42 As will be discussed in detail later in this Decision, the evidence shows that Energhx was not in full compliance with the ECPA, the relevant regulations and the Codes during the period covered by the compliance inspection. While the evidence also indicates that Energhx later addressed these deficiencies,[12] which is reassuring to the Board, it does not mitigate the fact that at the time of the

inspection a number of infractions of the ECPA, the relevant regulations and the Codes were noted.

Standard of proof

43 Compliance counsel acknowledges that it bears the burden of proving the allegations set out in the Notice and that this is a civil standard, often referred to as a "balance of probabilities".[13] The Supreme Court of Canada has described the applicable test as "whether it is more likely than not that an alleged event occurred".[14]

44 Energhx did not comment on who bears the burden of proving the allegations set out in the Notice or on the standard of proof.

45 There is no dispute, and the Board agrees, that the onus of proving the allegations rests with Compliance counsel, and that the standard is "whether it is more likely than not that an alleged event occurred".

Prescriptive nature of legal and regulatory requirements

46 Compliance counsel submits that the Act, the ECPA, the relevant regulations and the Codes are highly detailed and prescriptive and thus provide little room for discretion on the part of retailers and marketers.[15] Furthermore, Compliance counsel submits that it is incumbent on the Board to give full effect to the legal and regulatory scheme and to require full compliance with its requirements.[16]

47 Energhx did not comment on Compliance counsel's submissions as to the prescriptive nature of the legal and regulatory scheme.

48 The Board agrees that the requirements of the ECPA, the relevant regulations and the Board's Codes are highly prescriptive and detailed, leaving little room for discretion for retailers and marketers. Nonetheless, the Board must consider whether the burden of proof has been met in relation to each allegation, and must then also consider in each case the appropriate enforcement action to be taken.

Interim licence versus extension of existing licences

49 During oral testimony, the Energhx witness spoke to the issue of licence extensions versus interim licences.[17] In its written submissions, Energhx submits that, without an "interim licence", it could not commence its general public offering of its electricity retailing and gas marketing services during the period covered by the compliance inspection.[18]

50 Compliance counsel submits that, even if there is a distinction between an "interim licence" and an extension of an existing licence, it is irrelevant to the question of whether Energhx was bound to follow the various legislative and regulatory requirements set out in the Notice.[19]

51 The Board also notes that the record of the Licence Applications proceeding clearly shows

that Energhx's existing Licences were extended, which allowed it to continue with any marketing and retailing activities in accordance with those Licences. It is also clear that the Licences issued to Energhx do not themselves contain limitations on the nature of the retailing or marketing activities that can be carried out by Energhx, beyond those that apply by operation of law or that devolve from the Codes. Contrary to the position taken by Energhx, an "interim licence" issued under section 59 of the Act does not inherently confer any additional benefits on the licensee relative to licences issued in the normal course under section 57 of the Act as far as permitted activities go.

52 In any event, the Board agrees with Compliance counsel that the distinction between an interim licence and a licence extension, if any, is not in any way relevant to the issue of the obligation on Energhx to comply with applicable legal and regulatory requirements.

Whether Energhx engaged in retailing and marketing activities

53 Compliance counsel submits that Energhx was engaged in "retailing" and "marketing" to "consumers", as those terms are defined in the Codes and the ECPA.[20] In particular, Compliance counsel relies on the following facts, all of which were admitted by Energhx in the course of the proceeding:

(a) Energhx representatives interacted with "acquaintances" and "friends" in order to offer them the opportunity to become Energhx "associates" -- which later was understood by the Board to be a synonym for consumer;

(b) A single verification call was made by Energhx; and

(c) At the time of the compliance inspection, Energhx had approximately 10 customers, three of whom were not affiliated with Energhx as employees or sales agents.[21]

54 During the oral hearing and in its submissions, Energhx submits that it has consistently set its focus on developing a unique supply service which would be marketed as the Green Energy Credit[TM]. According to Energhx, the Green Energy Credit[TM] was submitted for patent protection in December 2010, and there was a lag in time to market caused by technical development and administrative setup procedures.[22] Energhx asserts that, in the absence of an interim licence, it could not commence its electricity retailing and gas marketing services during the period covered by the compliance inspection, and that it was constrained to "limit its activities to the training of associates, using their accounts for setup implementation procedures".[23]

55 The Board finds the evidence of Energhx internally contradictory with respect to the degree of retailing and marketing that it carried out during the period covered by the compliance inspection.[24] On the one hand, the witness insisted that Energhx only dealt with "associates", but on the other hand it was clear that a verification call was made and that at least three customers were signed up for the Energhx offer who were not affiliated with the company,[25] and it is not clear how those

customers came to be enrolled with Energhx in the absence of some type of sales activity.

56 It was, however, evident that at the time of the compliance inspection the company was in a start-up phase and it appears that no marketing and retailing was undertaken beyond friends, family or company employees.[26] The testimony of Energhx's witness to that effect was not challenged by Compliance counsel. However, the Board is mindful that the statutory and regulatory requirements apply in relation to retailing and marketing to all low volume consumers, even those that are friends, family or company employees. There is nothing in the legal and regulatory framework governing the activities of retailers and marketers that diminishes or eliminates the entitlement of friends, family or company employees to the protections that form part of that framework. As a general proposition then, the legal and regulatory framework does not provide for greater tolerance simply because the consumer may be in some way affiliated or associated with the marketer or retailer.

Administrative penalties

57 Energhx submits that the administrative penalty assessed against a person under section 112.5 of the Act "is designed to follow the Board's Cost Assessment Model".[27] The Board understands Energhx's argument in this regard to be that, in determining the amount of any administrative penalty, the Board should apply the principles of the Cost Assessment Model ("CAM") and consider Energhx as a start up business with no significant record of sales (few electricity customers and no gas customers enrolled during the period covered by the compliance inspection).

58 Energhx appears to misunderstand the applicability of the CAM. The CAM is the methodology that the Board uses to apportion its costs amongst the persons or classes of persons who pay cost assessments under section 26 of the Act. These persons and classes of persons are identified in Ontario Regulation 16/08 (Assessment of Expenses and Expenditures), and include licensed retailers and marketers. The CAM has nothing to do with the assessment of administrative penalties, in respect of which Ontario Regulation 331/03 (Administrative Penalties) applies.

59 Energhx also submits that the Board has unjustly imposed a "high-handed barrier to fair competition in the deregulated energy market" and that the administrative penalty "represents an undue burden against new technology-driven competition".[28] The Board does not agree with this characterization.

60 Compliance counsel submits that any purported benefit Energhx presents to the market in terms of advancing competition or green energy technology as a start up business is irrelevant for the purposes of setting an administrative penalty.[29] The Board agrees.

61 The Board notes that a number of the allegations set out in the Notice relate to the same underlying subject matter or transaction. For example, four allegations of non-compliance are associated with a single verification call, and 12 allegations are associated with the same training materials. Compliance counsel acknowledges that "the presentation of certain allegations as

'distinct' contraventions may be more a matter of style than substance".[30] Although Compliance counsel submits that, once proven, it is appropriate to consider each allegation as a distinct contravention for the purposes of calculating the appropriate administrative penalty as long as the allegation cites a breach of a unique requirement, Compliance counsel also concedes that the Board may consider at least some of the allegations as a single contravention.[31] For the reasons discussed later in this Decision, the Board believes that this is an appropriate case in which to assess administrative penalties on a transaction-by-transaction basis rather than on the basis of each allegation individually.

62 The Board also notes that the imposition of an administrative penalty in respect of any given instance of non-compliance is a matter for the discretion of the Board. Specifically, section 112.5(1) of the Act states that, "if the Board is satisfied that a person has contravened an enforceable provision, the Board *may*, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order..." (emphasis added). Where the Board considers it appropriate to impose an administrative penalty, the amount of that penalty must be determined in accordance with the rules set out in Ontario Regulation 331/03 (Administrative Penalties), which sets the minimum penalty at $1,000.

IV. BOARD FINDINGS ON SPECIFIC ALLEGATIONS

63 During the oral hearing and in its written submissions, Compliance counsel reviewed in detail each allegation in the Notice. The focus of the evidence and hearing was on the compliance inspection of Energhx during the two month period from the beginning of January to the end of February, 2011 and the allegations arising from that inspection. Of interest to the Board however was also to understand the compliance process following the inspection. The two witnesses who were presented were not able to provide evidence of that process or to address the assessment of the severity of the allegations[32]. In cases such as these, the Board expects witnesses who are familiar with the *entire* compliance process, not just the inspection phase, to be available to provide evidence to the Board.

64 In Energhx's written submissions, comments on the specific allegations were largely restricted to the alleged deficiencies of its training program.[33]

65 The Board's findings with respect to the specific allegations are set out below.

A. Training of Sales Representatives -- Allegations 1 to 8

66 The Notice contains eight allegations of inadequate training of sales representatives. Deficiencies in the training materials identified by Compliance counsel were presented relative to the power point presentation provided by Energhx to its trainees.

67 Allegation 1 pertains to training regarding how to complete a contract application, allegation 5 pertains to training regarding price comparisons and allegation 7 pertains to training regarding

renewals and extensions. The power point presentation did not contain any information in relation to these topics. The Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in this respect, and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly.

68 Allegations 2, 3, 4, 6 and 8 pertain to training regarding the use of business cards, the use of ID badges, disclosure statements, consumer cancellation rights and persons with whom a retailer or marketer may enter into, verify, renew or extend a contract. These topics are referred to in the power point presentation. In the opinion of Compliance counsel, however, they are not addressed in sufficient detail, and the training material is not adequate in terms of thoroughness.

69 In his testimony, Dr. Ogedengbe stated that the power point presentation was augmented by an "in-classroom" session for sales representatives.[34] However, in the Board's view, the Code requirement for "adequate and accurate material" that covers certain topics is a requirement for written material. As such, while an oral component may usefully supplement written materials, it is not a substitute for them.

70 Gauging the adequacy of training materials is necessarily a subjective exercise. The references to the topics referred to in allegations 2, 3, 4, and 8 in the power point presentation are limited to identifying that it is an unfair practice for a retailer or marketer to be in non-compliance with requirements relating to those topics. The Board notes that the Codes require training material on "behavior that constitutes an unfair practice" separate and apart from material on the use of business cards, the use of ID badges, disclosure statements and the persons with whom a retailer or marketer may enter into, verify, renew or extend a contract. With respect to allegation 6, the reference in the power point presentation to consumer cancellation rights is limited to noting the 10-day cooling off period and the "reaffirmation option". The ECPA and Ontario Regulation 389/10 include cancellation rights beyond the 10-day cooling off period, refer to verification and not "reaffirmation", and make it clear that a contract that is not verified as and where required is void. The Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in respect of the topics referred to in allegations 2, 3, 4, 6 and 8, and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly

B. Training of Verification Representatives -- Allegations 9 to 12

71 The training material used by Energhx for verification representatives consists of the same power point presentation as that used for sales representatives. The allegations of inadequate training of verification representatives are therefore similarly based on Compliance counsel's assessment of that power point presentation.

72 Allegation 10 pertains to the absence of training material on the topic of price comparisons, and allegations 9, 11 and 12 pertain to the inadequacy of training material on the topics of disclosure statements, consumer cancellation rights and the persons with whom a marketer or retailer may enter into, verify, renew or extend a contract. For the reasons noted above, the Board

finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in respect of these topics and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly.

C. Training test -- Allegations 13 and 14

73 Energhx admits that it initially required a passing score of 75% on the training test, contrary to the Code requirement.[35] Energhx also admits that a person was allowed to take the training test twice, scoring 70% on both attempts.[36] As noted by Compliance counsel, there was no evidence that the person re-took the training program.[37] The Board finds that Energhx contravened section 5.6(c) and section 5.6(d) of the Codes.

D. Record retention - Allegations 15 and 16

74 The Board finds that Energhx has contravened section 5.10(g) of the Codes in relation to the records required to be maintained in relation to salespersons and verification representatives, as set out in allegation 15.

75 Energhx admits that it advised Ernst & Young that Energhx plans on maintaining records pertaining to salespersons and verification representatives.[38] It is understood that the Codes require that such records be maintained for a period of two years. The Board notes, however, that at the time of the compliance inspection the two-year period had not yet elapsed. As such, a finding of a contravention would necessarily be prospective (i.e., that Energhx is likely to contravene this requirement of the Code). Allegation 16 is not cast in such terms.

76 The Board notes that it may, under section 112.3 of the Act, make an order requiring a person to comply with an enforceable provision and to take such action as the Board may specify to prevent a contravention in circumstances where the Board is satisfied that a contravention is likely. However, administrative penalties may only be levied where the Board is satisfied that a contravention has occurred.

77 As noted earlier in this Decision, the evidence indicates that Energhx has addressed this deficiency (as well as all others identified in the Notice).[39] The Board therefore does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 16.

E. Business cards -- Allegations 17 and 18

78 At the time of the Board's compliance inspection, the business cards issued to Energhx salespersons who meet in person with low-volume consumers did not include the numbers of the Licences issued to Energhx, as required by section 5 of Ontario Regulation 90/99 and section 2.2 of the Codes. The business cards also did not include a toll-free number for Energhx, as required by section 2.2 of the Codes. While it is arguable that a toll-free number (i.e., a "1-800" number) should

not be required for a company only doing business in one area code, it is a requirement of the Codes. Accordingly, the Board finds there have been breaches of the Codes and of Ontario Regulation 90/99, as set out in allegation 17.

79 Allegation 18 alleges that the business card deficiencies noted above will result in a breach of section 5(6)(ii) of Ontario Regulation 389/10 and sections 1.1(b) and 2.1 of the Codes. These sections pertain to the use of business cards that fail to meet the requirements of the Codes and Ontario Regulation 90/99. Compliance counsel argues that, given the deficiencies in the business cards, Energhx is likely to contravene these sections, and that the Board may take action accordingly under section 112.3 of the Act.[40]

80 The evidence indicates that Energhx has addressed the deficiencies in its business cards,[41] and the Board therefore does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 18.

F. Identification badges (ID badges) -- Allegations 19 and 20

81 As with the business cards, it was not disputed that the ID badges did not conform with section 6 of Ontario Regulation 90/99 and sections 2.4(a) and (g) of the Codes. The Board therefore finds that Energhx was in contravention of those sections, as set out in allegation 19.

82 With respect to allegation 20, for the same reason as noted in relation to business cards the Board does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 20.

G. Contract content requirements for new contracts -- Allegations 21 to 24

83 Energhx did not refute the allegations regarding the format or content of the contracts at issue in the transactions reviewed during the compliance inspection. The Board finds that Energhx's contracts were non-compliant as set out in allegations 21 to 24, and that there have been contraventions of the legal and regulatory requirements set out in those allegations.

H. Completion of price comparisons for new contracts -- Allegation 25

84 The Board notes that, with one exception, the price comparison document used by Energhx is fully compliant with the legal and regulatory requirements. The exception, which Energhx did not refute, is that a date has been included in the place that has been set aside for a document control number. As noted earlier in this Decision, the legal and regulatory framework is highly prescriptive and leaves little room for discretion on the part of retailers and marketers. The Board finds that Energhx has failed to comply with the Board's instructions for completing the price comparison, and that there has been a violation of section 12 of the ECPA, section 8(3) of Ontario Regulation 389/10 and section 4.6(b) of the Codes accordingly.

I. Verification call (use of the applicable Board-approved script) -- Allegations 26 to 29

85 Allegations 26 to 29 all pertain to the same verification call. Dr. Ogedengbe confirmed during oral testimony that this one verification call was to a family friend.[42] As noted previously, the Board is of the view that all low volume consumers, including persons that are friends with or the family of the retailer or marketer, are entitled to the same protections under the legal and regulatory framework that is currently in place. Although the verification script may not lend itself as well to circumstances where the consumer is a friend of or related to the retailer or marketer, the fact remains that strict adherence to the script is required. Allegations 26 to 29 are therefore upheld, and the Board finds that there were contraventions of the legal and regulatory requirements as set out in those allegations.

J. Compliance monitoring and quality assurance program -- Allegation 30

86 The Board finds that Energhx contravened sections 7.4 and 7.5 of the Codes in failing to maintain a compliance monitoring program. This was not disputed.

Administrative Penalties

87 As also noted earlier in this Decision, the imposition of an administrative penalty in respect of any given instance of non-compliance is a matter for the discretion of the Board. The Board believes that it is appropriate in this case to refrain from imposing an administrative penalty in respect of the contraventions pertaining to the training test, record retention, business cards, ID badges, completion of price comparisons, verification call and compliance monitoring. The evidence is that Energhx has come into compliance in respect of all of these items; that the company had a very limited number of customers at the relevant time and was not offering its product to the public on a widespread basis; that the one salesperson cited with a failing score of 70% did not engage in any sales activities until she achieved a pass score of 90%;[43] and that a sole verification call was made.

88 The Board emphasizes that its decision not to impose an administrative penalty in this case should not be misunderstood as indicative of a view that violations of these legal and regulatory requirements are unimportant or trivial. The Board also emphasizes that it expects Energhx to take whatever steps are necessary to ensure that it has a comprehensive and accurate understanding of all applicable legal and regulatory requirements and remains fully compliant with them if it intends to continue business operations as a retailer and/or marketer.

89 Where the Board intends to impose an administrative penalty, the Board must do so in accordance with Ontario Regulation 331/03 (Administrative Penalties). Ontario Regulation 331/03 requires that the Board first determine the following: (a) whether the contravention was a minor, moderate or major deviation from the requirements of the enforceable provision; and (b) whether the contravention had a minor, moderate or major potential to adversely affect consumers, other licensees or other persons. The determination on these two questions then establishes the range of

administrative penalties that applies, as set out in the Schedule to Ontario Regulation 331/03. In selecting the appropriate amount from within that range, the analysis involves a consideration of the extent of mitigation by the person that committed the contravention; whether that person is a repeat offender; whether that person derived any economic benefit from the contravention; and any other criteria the Board considers relevant.

90 The range of administrative penalties for contraventions as per Ontario Regulation 331/03 are shown below.

	Deviation from the requirements of the enforceable provision that was contravened			
Potential to adversely affect consumers, persons licensed under the Act or other persons		Major	Moderate	Minor
	Major	$15,000 - $20,000	$10,000 - $15,000	$5,000 - $10,000
	Moderate	$10,000 - $15,000	$5,000 - $10,000	$2,000 - $5,000
	Minor	$5,000 - $10,000	$2,000 - $5,000	$1,000 - $2,000

91 Compliance counsel submits that, at least for certain of the allegations, the appropriate range is from "major" to "moderate" in terms of deviation from the requirement and/or potential adverse affect as set out in Ontario Regulation 331/03.[44]

92 The onus is on compliance staff to satisfy the Board of the contraventions and the factors leading to the level of administrative penalty proposed. In this case, the Board was not presented with any evidence upon which it could make a determination as to the potential of the contravention to adversely affect consumers. For this reason, the Board finds the potential to adversely affect consumers to be minor. This does not undermine the importance of these contraventions or their impact -- the matter is simply one of lack of evidence.

93 In assessing the administrative penalties the Board also took into consideration that Energhx did not appear to derive any economic benefit from these contraventions and the very limited marketing and retailing that was undertaken beyond friends, family or company employees. It also reflects that Energhx has brought itself into subsequent compliance with all issues as indicated by the Board's letter of September 2011.

94 The ECPA is designed to protect energy consumers by ensuring that retailers and marketers follow fair business practices, have been adequately trained and that consumers are provided with essential information before they sign energy contracts. Contraventions of the legal and regulatory framework that derogate from these requirements are, in the Board's view, matters of particular

concern.

95 As noted earlier in this Decision, the Board has discretion to consider multiple allegations associated with the same transaction or subject matter as one contravention for the purposes of determining the level of administrative penalties to be imposed. The Board believes that it is appropriate to do so in this case, including consolidating all 12 allegations pertaining to training 1 to 8 being in relation to salespersons and 9 to 12 being in relation to verification representatives. In the context of these 12 violations, the Board finds the deviations in training from the requirements of the enforceable provisions that were contravened to be major and because of the lack of evidence as to the potential adverse affect on consumers, a default of "minor adverse impact" is will be used. An administrative penalty of $5,000 is therefore imposed.

96 The contraventions pertaining to the contract content are considered in this case to be major deviations from the requirements of the enforceable provisions that were contravened but with minor potential adverse effect on consumers, due to the lack of evidence supporting any other finding. It is also noted that there were only 3 customers unaffiliated with the company who had signed contracts during this period, and that marketing and retailing was not undertaken to the general public. The administrative penalty is therefore $5,000.

97 The Board fixes the amount of the administrative penalties at $10,000.

Costs

98 Although Compliance counsel submits that this is an appropriate case in which to seek costs against Energhx, Compliance counsel has decided not to do so.[45] The Board makes no order as to costs in this proceeding.

99 THE BOARD ORDERS THAT:

1. Energhx shall, by December 31, 2012, pay to the Ontario Energy Board an administrative penalty in the amount of $10,000.

ISSUED at Toronto, March 26, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

qp/e/qlspi

1 The statutory and other references noted in this excerpt from the Notice are as follows: Ontario Regulation 90/99 (Licence Requirements -- Electricity Retailers and Gas Marketers) made under the Act, as most recently amended by Ontario Regulation 390/10 filed on October 13, 2010 and effective January 1, 2011; Ontario Regulation 389/10 (General) made under the *Energy Consumer Protection Act, 2010,* also filed on October 13, 2010 and effective January 1, 2011; the *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8, in force on January 1, 2011; Ontario Energy Board *Electricity Retailer Code of Conduct*, as restated November 17, 2010 and in force January 1, 2011; and Ontario Energy Board *Code of Conduct for Gas Marketers*, as restated November 17, 2010 and in force effective January 1, 2011.

2 A "low volume" consumer is, in the case of gas, a consumer that annually uses less than 50,000 cubic meters of gas and, in the case of electricity, a consumer that annually uses less than 150,000 kilowatt hours of electricity. The Board's Code of Conduct for Gas Marketers applies on in relation to low-volume consumers, while the Board's Electricity Retailer Code of Conduct contains provisions that apply only in relation to low volume consumers and others that apply in relation to all consumers.

3 EB-2010-0236 and EB-2010-0237.

4 Decision and Procedural Order No. 1 issued in respect of the Licence Applications on October 1, 2010.

5 Decision and Procedural Order No. 3 issued in respect of the Licence Applications on January 28, 2011.

6 Decision and Order issued in respect of the Licence Applications on March 24, 2011.

7 Decision and Order issued in respect of the Licence Applications on October 31, 2011.

8 Transcript of the oral hearing, page 2, lines 17 to 23.

9 In the Certificates of Compliance, Energhx indicated that it did not intend to use certain sales channels (Energhx's place of business, internet and telephone renewals). The Certificates of Compliance are available for viewing on the Board's website at: http://www.ontarioenergyboard.ca/OEB/Consumers/Consumer+Protection/Retail+Energy+Contracts/List+of+Retail ers+and+Marketers

10 Energhx written submissions dated February 16, 2012, at page 6.

11 Compliance counsel written submissions dated February 10, 2012, at pages 9-10.

12 Letter dated September 9, 2011, Exhibit K, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

13 Compliance counsel written submissions dated February 10, 2012, at page 11.

14 *F.H. v. McDougall*, [2008] S.C.R. 41 at para. 49.

15 Compliance counsel written submissions dated February 10, 2012, at page 11.

16 *Ibid*.

17 Transcript of the oral hearing, page 117, line 16 to page 120, line 8; and page 142, line 18 to page 144, line 14.

18 Energhx written submissions dated February 16, 2012, at pages 2-3.

19 Compliance counsel written submissions dated February 10, 2012, at page 10.

20 *Ibid*, at page 12.

21 *Ibid*, at page 13, referring to various portions of the transcript of the oral hearing.

22 Energhx written submissions dated February 16, 2012, at page 2.

23 *Ibid*., at page 3.

24 Transcript of the oral hearing, page 120, line 15 to page 124, line 1.

25 Transcript of the oral hearing, page 138, line 25 to page 139, line 10.

26 Transcript of the oral hearing, page 145, line 20 to page 147, line 14.

27 Energhx written submissions dated February 16, 2012, at page 6.

28 *Ibid*., at pages 1 and 4.

29 Compliance counsel written submissions dated February 10, 2012, at page 40.

30 *Ibid*, at page 34.

31 *Ibid*, at page 35.

32 Transcript of the oral hearing, page 111, lines 12 to 20.

33 Energhx written submissions dated February 16, 2012, at pages 4-5.

34 Transcript of the oral hearing, page 140, lines 7 to 10.

35 Admitted Fact #4, Document Binder, Exhibit K1 at Tab 6.

36 Admitted Fact #5, Document Binder, Exhibit K1 at Tab 6.

37 Compliance counsel written submissions dated February 10, 2012, at page 25.

38 Admitted Fact #7, Document Binder, Exhibit K1, Tab 6.

39 Letter dated September 9, 2011, Exhibit K4, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

40 Compliance counsel written submissions dated February 10, 2012, at pages 27-28.

41 Letter dated September 9, 2011, Exhibit K4, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

42 Transcript of the oral hearing, page 134, lines 7 to 8.

43 *Ibid*, pages 141 to 142, lines 27 to 29 and 1 to 3.

44 Compliance counsel written submissions dated February 10, 2012, at pages 36 to 39.

45 *Ibid*, at page 41.

TAB 2

2008 SCC 53
Supreme Court of Canada

C. (R.) v. McDougall

2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, [2008] 11 W.W.R. 414, [2008] 3 S.C.R. 41, [2008] A.C.S. No. 54, [2008] S.C.J. No. 54, 169 A.C.W.S. (3d) 346, 260 B.C.A.C. 74, 297 D.L.R. (4th) 193, 380 N.R. 82, 439 W.A.C. 74, 60 C.C.L.T. (3d) 1, 61 C.R. (6th) 1, 61 C.P.C. (6th) 1, 83 B.C.L.R. (4th) 1, J.E. 2008-1864

F.H. (Appellant) and Ian Hugh McDougall (Respondent)

F.H. (Appellant) and The Order of the Oblates of Mary Immaculate in the Province of British Columbia (Respondent)

F.H. (Appellant) and Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development (Respondent)

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: May 15, 2008
Judgment: October 2, 2008 *
Docket: 32085

Proceedings: reversing *C. (R.) v. McDougall* (2007), 2007 CarswellBC 723, 2007 BCCA 212, 41 C.P.C. (6th) 213, 68 B.C.L.R. (4th) 203, (sub nom. *F.H. v. McDougall)* 396 W.A.C. 222, [2007] 9 W.W.R. 256, (sub nom. *F.H. v. McDougall)* 239 B.C.A.C. 222 (B.C. C.A.)**Proceedings: reversing in part *C. (R.) v. McDougall* (2005), 2005 BCSC 1518, 2005 CarswellBC 2578 (B.C. S.C.)**

Counsel: Allan Donovan, Karim Ramji, Niki Sharma for Appellant
Bronson Toy for Respondent, Ian Hugh McDougall
F. Mark Rowan for Respondent, The Order of the Oblates of Mary Immaculate in the Province of British Columbia
Peter Southey, Christine Mohr for Respondent, Her Majesty The Queen

Subject: Torts; Civil Practice and Procedure; Evidence; Family

APPEAL by plaintiff from judgment reported at *C. (R.) v. McDougall* (2007), 2007 CarswellBC 723, 2007 BCCA 212, 41 C.P.C. (6th) 213, 68 B.C.L.R. (4th) 203, (sub nom. *F.H. v. McDougall)* 396 W.A.C. 222, [2007] 9 W.W.R. 256, (sub nom. *F.H. v. McDougall)*

239 B.C.A.C. 222 (B.C. C.A.), allowing in part defendant supervisor's appeal from judgment allowing plaintiff's action against defendants for physical and sexual assault.

POURVOI du plaignant à l'encontre d'un jugement publié à *C. (R.) v. McDougall* (2007), 2007 CarswellBC 723, 2007 BCCA 212, 41 C.P.C. (6th) 213, 68 B.C.L.R. (4th) 203, (sub nom. *F.H. v. McDougall)* 396 W.A.C. 222, [2007] 9 W.W.R. 256, (sub nom. *F.H. v. McDougall)* 239 B.C.A.C. 222 (B.C. C.A.), ayant accueilli en partie l'appel interjeté par le surveillant défendeur à l'encontre d'un jugement ayant accueilli l'action du plaignant pour voies de fait et agression sexuelle.

***Rothstein J.*:**

1 The Supreme Court of British Columbia found in a civil action that the respondent, Ian Hugh McDougall, a supervisor at the Sechelt Indian Residential School, had sexually assaulted the appellant, F.H., while he was a student during the 1968-69 school year. A majority of the British Columbia Court of Appeal allowed the respondent's appeal in part, and reversed the decision of the trial judge. I would allow the appeal to this Court and restore the judgment of the trial judge.

I. Facts

2 The Sechelt Indian Residential School was established in 1904 in British Columbia. It was funded by the Canadian government and operated by the Oblates of Mary Immaculate. F.H. was a resident student at the school from September 1966 to March 1967 and again from September 1968 to June 1974. Ian Hugh McDougall was an Oblate Brother until 1970 and was the junior and intermediate boys' supervisor at the school from 1965 to 1969.

3 The school building had three stories. Dormitories for junior and senior boys were located on the top floor. A supervisors' washroom was also located on the top floor and was accessible through a washroom for the boys. The intermediate boys' dormitory was on the second floor. McDougall had a room in the corner of that dormitory.

4 F.H. claims to have been sexually assaulted by McDougall in the supervisors' washroom when he was approximately ten years of age. At trial, he testified that McDougall sexually abused him on four occasions. The trial judge set out his evidence of these incidents at paras. 34-38 of her reasons:

> As to the first occasion, F.H. had been in the dormitory with others. The defendant asked four boys to go upstairs to the main washroom where they were to wait before going to the supervisors' washroom for an examination. F.H. was the last to go into the washroom to be examined. When he went in, he was asked to remove his pyjamas and while facing the defendant, he was checked from head to toe. His penis was fondled.

> The defendant then turned him around, asked him to bend over and put his finger in his anus. He removed his clothing, grabbed F.H. around the waist, pulled him onto his lap and raped him. The defendant had put the cover of the toilet down and was using it as a seat. After the defendant ejaculated, he told the plaintiff to put on his pyjamas and leave the room.
>
> F.H. was shocked. He did not cry or scream, nor did he say anything. When he went to the main communal washroom, he could see that he was bleeding. The next morning, he noticed blood in his pyjamas. He went downstairs to the boys' washroom and changed. The bloody pyjamas were rinsed and placed in his locker.
>
> The second incident was approximately two weeks after the first. F.H. was in the dormitory getting ready for bed when the defendant asked him to go to the supervisors' washroom so he could do an examination. There were no other boys present. F.H. was asked to remove his pyjamas and again, he was raped. He went to the communal washroom to clean himself up. In the morning, he realized that his pyjamas were bloody. As it was laundry day, he threw his pyjamas in the laundry bin with the sheets.
>
> The third incident occurred approximately one month later. F.H. testified that once again he was asked to go to the supervisors' washroom, remove his pyjamas and turn around. Again, the defendant grabbed him by the waist and raped him. He was bleeding, but could not recall whether there was blood on his pyjamas.
>
> The fourth incident occurred approximately one month after the third. As he was getting ready for bed, the defendant grabbed him by the shoulder and took him upstairs to the supervisors' washroom. Another rape occurred.

(2005 BCSC 1518 (B.C. S.C.))

5 F.H. did not tell anyone about the assaults until approximately the year 2000. He and his wife were having marital difficulties. She had learned of his extra-marital affair. He testified that because of the problems in his marriage he felt he had to tell his wife about his childhood experience. At his wife's recommendation, he sought counselling.

6 F.H. commenced his action against the respondents on December 7, 2000, approximately 31 years after the alleged sexual assaults. In British Columbia there is no limitation period applicable to a cause of action based on sexual assault and the action may be brought at any time (see *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(4)(1)).

II. Judgments Below

A. British Columbia Supreme Court, 2005 BCSC 1518 (B.C. S.C.)

7 F.H.'s action was joined with the action of R.C., another former resident of the school who made similar claims against the same parties. The parties agreed to have a trial on the following discrete issues of fact (para. 1):

> 1) Was either plaintiff physically or sexually abused while he attended the school?
>
> 2) If the plaintiff was abused
>
> a) by whom was he abused?
>
> b) when did the abuse occur? and
>
> c) what are the particulars of the abuse?

8 The trial judge, Gill J., began her reasons by noting that the answer to the questions agreed to by the parties depended on findings as to credibility and reliability. Few issues of law were raised. She referred to *Francis v. Canada (Attorney General)*, [2002] B.C.J. No. 436, 2002 BCSC 325 (B.C. S.C.), in which the court stated that in cases involving serious allegations and grave consequences, the civil standard of proof that is "commensurate with the occasion" applied (para. 4).

9 The trial judge then went on to review the testimony of each plaintiff, McDougall and others who worked at the school or were former students. McDougall denied the allegations of sexual abuse and testified that he could not recall ever strapping F.H. He also denied ever conducting physical examinations of the boys and gave evidence that boys were not taken into the supervisors' washroom.

10 In determining whether F.H. was sexually assaulted, the trial judge dealt with the arguments of the defense that F.H.'s evidence was neither reliable nor credible. Gill J. rejected the defense position that F.H.'s inability to respond to certain questions should lead to an adverse conclusion regarding the reliability of his evidence. She found F.H.'s testimony credible while acknowledging that the commission of the assaults in the manner described by F.H. would have carried with it a risk of detection. Gill J. also rejected the contention of defense counsel that F.H.'s motive to lie must weigh heavily against his credibility. Rather she agreed with counsel for F.H. that the circumstances surrounding his disclosure were not suggestive of concoction.

11 The trial judge pointed out areas of consistency and inconsistency between F.H.'s testimony and that of the other students at the school. She also noted that there were significant discrepancies in the evidence given by F.H. as to the frequency of the abuse. At trial, F.H. said there were four incidents. On previous occasions, he said the abuse occurred every two weeks or ten days. Despite these inconsistencies, the trial judge concluded F.H.

was a credible witness and stated that his evidence about "the nature of the assaults, the location and the times they occurred" had been consistent (para. 112). She concluded that F.H. had been sexually abused by McDougall, the sexual assaults being four incidents of anal intercourse committed during the 1968-69 school year.

12 In relation to the issue of physical abuse, the trial judge limited herself to deciding whether the plaintiffs had proved that they were strapped while at school. To answer this question, the trial judge reviewed the evidence of McDougall and the testimony of another Brother employed at the school as well as the testimony of several of F.H.'s fellow students. She concluded that strapping was a common form of discipline and that it was not used only in response to serious infractions. She concluded that F.H. was strapped by McDougall an undetermined number of times while at the school.

13 With respect to the claims made by R.C., the trial judge found that he had not proven that he had been sexually assaulted, but found that he had been strapped by a person other than McDougall.

B. British Columbia Court of Appeal (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212 (B.C. C.A.)

14 The decision of the Court of Appeal was delivered by Rowles J.A., with Southin J.A. concurring. Ryan J.A. dissented.

(1) Reasons of Rowles J.A.

15 Rowles J.A. concluded that McDougall' s appeal from that part of the order finding that he had sexually assaulted F.H. should be allowed; however his appeal from that part of the order finding that he had strapped F.H. should be dismissed.

16 Rowles J.A. found that it was obvious that the trial judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made, i.e. proof that is "commensurate with the occasion". However, in her view, the trial judge was bound to consider the serious inconsistencies in the evidence of F.H. in determining whether the alleged sexual assaults had been proven to the standard "commensurate with the allegation". She found that the trial judge did not scrutinize the evidence in the manner required and thereby erred in law.

17 In allowing the appeal in respect of the sexual assaults alleged by F.H., Rowles J.A. was of the opinion that in view of the state of the evidence on that issue, no practical purpose would be served by ordering a new trial.

(2) Concurring Reasons of Southin J.A.

18 In her concurring reasons, Southin J.A. discussed the "troubling aspect" of the case — "how, in a civil case, is the evidence to be evaluated when it is oath against oath, and what is the relationship of the evaluation of the evidence to the burden of proof?" (para. 84).

19 Southin J.A. held that it was of central importance that the gravity of the allegations be forefront in the trier of fact's approach to the evidence. It was not enough, in her view, to choose the testimony of the plaintiff over that of the defendant. Instead, "[t]o choose one over the other... requires... an articulated reason founded in evidence other than that of the plaintiff (para. 106). Moreover, Southin J.A. found that Cory J.'s rejection in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.), of the "either/or" approach to evaluating evidence of the Crown and the accused as to the conduct of the accused in criminal cases also applied to civil cases.

20 In the end, she could not find in the trial judge's reasons a "legally acceptable articulated reason for accepting the plaintiff's evidence and rejecting the defendants' evidence" (para. 112).

(3) Dissenting Reasons of Ryan J.A.

21 While sharing the concerns of the majority about "the perils of assigning liability in cases where the events have occurred so long ago", Ryan J.A. disagreed with the conclusion that the trial judge did not apply the proper standard of proof to her assessment of the evidence (para. 115).

22 Ryan J.A. noted that the trial judge set out the test — a standard of proof commensurate with the occasion — early in her reasons. "Having set out the proper test, we must assume that she properly applied it, unless her reasons demonstrate otherwise" (para. 116).

23 In the view of Ryan J.A., alleging that the trial judge misapplied the standard of proof to her assessment of the evidence was to say that the trial judge erred in her findings of fact. To overturn the trial judge's findings of fact, the appellate court must find that the trial judge made a manifest error, ignored conclusive or relevant evidence or drew unreasonable conclusions from it.

24 Ryan J.A. was of the view that the trial judge had made no such error. The trial judge had acknowledged the most troubling aspect of F.H.'s testimony — that it was not consistent with earlier descriptions of the abuse — and decided that at its core, the testimony was consistent and truthful. The inconsistencies were not overlooked by the trial judge.

25 Having found no error in the reasons for judgment, Ryan J.A. was of the view that the Court of Appeal should have deferred to the conclusions of the trial judge. Accordingly, she would have dismissed the appeal.

III. Analysis

A. The Standard of Proof

(1) Canadian Jurisprudence

26 Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors. As explained by L. R. Rothstein, R. A. Centa, and E. Adams, in "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2003), 455, at p. 456:

> ...These types of allegations are considered unique because they carry a moral stigma that will continue to have an impact on the individual after the completion of the civil case.

27 Courts in British Columbia have tended to follow the approach of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (Eng. C.A.). Lord Denning was of the view that within the civil standard of proof on a balance of probabilities "there may be degrees of probability within that standard" (p. 459), depending upon the subject matter. He stated at p. 459:

> It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

28 In the present case the trial judge referred to *Francis v. Canada (Attorney General)*, at para. 154, in which Neilson J. stated:

> The court is justified in imposing a higher degree of probability which is "commensurate with the occasion"....

29 In the constitutional context, Dickson C.J. adopted the *Bater* approach in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). In his view a "very high degree of probability" required that the evidence be cogent and persuasive and make clear the consequences of the decision one way or the other. He wrote at p. 138:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements

> of a s. 1 inquiry and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

30 However, a "shifting standard" of probability has not been universally accepted. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 (S.C.C.), Laskin C.J. rejected a "shifting standard". Rather, to take account of the seriousness of the allegation, he was of the view that a trial judge should scrutinize the evidence with "greater care". At pp. 169-71 he stated:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities....
>
> . . . . .
>
> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.
>
> . . . . .
>
> I do not regard such an approach (the *Bater* approach) as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

31 In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence" (see *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (Ont. Div. Ct.), at para. 53).

(2) Recent United Kingdom Jurisprudence

32 In the United Kingdom some decisions have indicated that depending upon the seriousness of the matters involved, even in civil cases, the criminal standard of proof should apply. In *R. (on the application of McCann) v. Manchester Crown Court* (2002), [2003] 1 A.C. 787 (U.K. H.L.), Lord Steyn said at para. 37:

> ... I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563, 586 D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these

> views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.

33 Yet another consideration, that of "inherent probability or improbability of an event" was discussed by Lord Nicholls in *H., Re* (1995), [1996] A.C. 563 (Eng. H.L.), at p. 586:

> ... the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

34 Most recently in *B (Children), Re*, [2008] 3 W.L.R. 1 (U.K. H.L.), a June 11, 2008 decision, the U.K. House of Lords again canvassed the issue of standard of proof. Subsequent to the hearing of the appeal, Mr. Southey, counsel for the Attorney General of Canada, with no objection from other counsel, brought this case to the attention of the Court.

35 Lord Hoffman addressed the "confusion" in the United Kingdom courts over this issue. He stated at para. 5:

> Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

36 The unanimous conclusion of the House of Lords was that there is only one civil standard of proof. At para. 13, Lord Hoffman states:

> ... I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.

However, Lord Hoffman did not disapprove of application of the criminal standard depending upon the issue involved. Following his very clear statement that there is only one civil standard of proof, he somewhat enigmatically wrote, still in para. 13:

> ... I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case, at p. 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

37 Lord Hoffman went on to express the view that taking account of inherent probabilities was not a rule of law. At para. 15 he stated:

> I wish to lay some stress upon the words I have italicised ["to whatever extent is appropriate in the particular case"]. Lord Nicholls [*In re H*] was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

38 *B (Children), Re* is a child case under the United Kingdom *Children Act 1989*. While her comments on standard of proof are confined to the 1989 Act, Baroness Hale explained that neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. At paras. 70-72, she stated:

> My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31 (2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.
>
> As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.

> As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable.

(3) Summary of Various Approaches

39 I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

> (1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;
>
> (2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;
>
> (3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;
>
> (4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and
>
> (5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.

(4) The Approach Canadian Courts Should Now Adopt

40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

41 Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154 (S.C.C.), at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the

presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. As explained by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.), at para. 27:

> First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice, then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

42 By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence* (2nd ed. 1999), at p. 154:

> ... Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

43 An intermediate standard of proof presents practical problems. As expressed by L. Rothstein et al., at p. 466:

> As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" leads one inevitably to inquire what percentage of probability must be met? This is unhelpful because while the concept of "51% probability", or "more likely than not" can be understood by decision-makers, the concept of 60% or 70% probability cannot.

44 Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffman explained in *B (Children), Re* at para. 2:

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the

> burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

47 Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *B (Children), Re* at para. 72:

> ... Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

48 Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffman observed at para. 15 of *B (Children), Re*:

> ... Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account

in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) Conclusion on Standard of Proof

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

50 I turn now to the issues particular to this case.

B. The Concerns of the Court of Appeal Respecting Inconsistency in the Evidence of F.H.

51 The level of scrutiny required in cases of sexual assault was central to the analysis of the Court of Appeal. According to Rowles J.A. at para. 72, one of the issues was "whether the trial judge, in light of the standard of proof that had to be applied in a case such as this, failed to consider the problems or troublesome aspects of [F.H.]'s evidence". The "troublesome aspects" of F.H.'s evidence related to, amongst others, inconsistencies as to the frequency of the alleged sexual assaults as between F.H.'s evidence on discovery and at trial, as well as to an inconsistency between the original statement of claim alleging attempted anal intercourse and the evidence given at trial of actual penetration.

52 In the absence of support from the surrounding circumstances, when considering the evidence of F.H. on its own, the majority of the Court of Appeal concluded that the trial judge had failed to consider whether the facts had been proven "to the standard commensurate with the allegation" and had failed to "[s]crutinize the evidence in the manner required and thereby erred in law" (para. 79).

53 As I have explained, there is only one civil standard of proof — proof on a balance of probabilities. Although understandable in view of the state of the jurisprudence at the time of its decision, the Court of Appeal was in error in holding the trial judge to a higher standard. While that conclusion is sufficient to decide this appeal, nonetheless, I think it is important for future guidance to make some further comments on the approach of the majority of the Court of Appeal.

54 Rowles J.A. was correct that failure by a trial judge to apply the correct standard of proof in assessing evidence would constitute an error of law. The question is how such failure may be apparent in the reasons of a trial judge. Obviously in the remote example of a trial judge expressly stating an incorrect standard of proof, it will be presumed that the incorrect standard was applied. Where the trial judge expressly states the correct standard of proof,

it will be presumed that it was applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied:

> Trial judges are presumed to know the law with which they work day in and day out.
>
> (*R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.), at p. 664, *per* McLachlin J. (as she then was)).

Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was applied. However, in determining whether the correct standard has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

55 An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 (S.C.C.), at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.), at para. 27 of her reasons (para. 22 of *Housen*).

56 Rowles J.A. was satisfied that the trial judge was aware of the standard of proof that had heretofore been applied in cases of moral blameworthiness. At para. 35 of her reasons she stated:

> ... From her reasons it is obvious that the judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made.

That should have satisfied the Court of Appeal that the trial judge understood and applied the standard of proof they thought to be applicable to this case.

C. The Inconsistency in the Evidence of F.H.

57 At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. B. (R.W.)* (1993), 24 B.C.A.C. 1 (B.C. C.A.), at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of

supporting evidence. Although *R. v. B. (R.W.)* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

58 As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

59 It is apparent from her reasons that the trial judge recognized the obligation upon her to have regard for the inconsistencies in the evidence of F.H. and to consider them in light of the totality of the evidence to the extent that was possible. While she did not deal with every inconsistency, as she explained at para. 100, she did address in a general way the arguments put forward by the defence.

60 The trial judge specifically dealt with some of what the Court of Appeal identified as the troublesome aspects of F.H.'s evidence. For example, Rowles J.A. stated at para. 77, that F.H.'s evidence with respect to inspections in the supervisors' washroom was not consistent with the testimony of other witnesses:

> ... There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor's washroom so as to lend support to the respondent's recollection of events. In fact, the defense evidence was to the opposite effect, that is, the boys did not line up outside the staff washroom for any reason or at any time.

61 However, Gill J. dealt with the washroom inspections as well as the inconsistent recollection of the witnesses regarding these inspections. She also made a finding of fact that inspections were performed and were routine at the school. At para. 106 of her reasons she stated:

> It was argued that the evidence of F.H. was not consistent with the evidence of others. No inspections were done in the supervisors' washroom or in the way that F.H. described. I agree that no other witness described inspections being done in the supervisors' washroom. However, evidence about inspections was given by defence witnesses. I have already referred to the evidence of Mr. Paul. I accept that inspections were done in the manner he described. The boys were sometimes inspected on shower days and supervisors regularly checked to ensure that they had washed themselves thoroughly. Admittedly, Mr. Paul did not say that the defendant had conducted such examinations, but he described the inspections as a routine of the school. In fact, Mr. Paul's evidence is not consistent with the evidence of the defendant, who stated that the only examination of the boys was for head lice and it was done by the nurse.

62 In this passage of her reasons, the trial judge dealt with the inconsistency between the evidence of F.H. and other witnesses. She also considered McDougall's testimony in light of other evidence given by witnesses for the defence. From the evidence of Mr. Paul she concluded that examinations were routinely carried out. She found that Mr. Paul's evidence about examinations was not consistent with that of McDougall who had testified that examinations were only for head lice and were carried out by the nurse. The necessary inference is that she found McDougall not to be credible on this issue.

63 The majority of the Court of Appeal was also concerned with the testimony of F.H., that each time he was sexually assaulted by McDougall, he would go upstairs from his dorm to the supervisors' washroom. At para. 77 of her reasons, Rowles J.A. stated:

> However, [F.H.] was a junior boy rather than an intermediate one at the relevant time and his dorm would have been on the top floor. Based on the evidence of where the boys slept, [McDougall] could not have taken [F.H.] "upstairs" from his dorm.

Counsel for F.H. points out that in his evidence at trial, F.H. testified that he was an intermediate boy when the sexual assaults occurred and that as an intermediate boy he would have to go upstairs to the supervisors' washroom. Although there was contradictory evidence, there was evidence upon which F.H. could have been believed.

64 It is true that Gill J. did not deal with F.H.'s inconsistency as to the frequency of the inspections inside the supervisors' washroom as identified by Rowles J.A. at para. 75:

> The respondent also told Ms. Stone that the young boys regularly lined up outside the staff washroom, which they referred to as the "examination room", every second week in order to be examined. At trial he testified this lining up only happened the first time he was sexually assaulted. Again, this is a substantial change in the respondent's recounting of events.

Nor did Gill J. specifically address the change in the allegations of attempted anal intercourse and genital fondling in the original statement of claim and the evidence of F.H. at trial of actual penetration. Rowles J.A. stated at para. 76:

> The respondent's original statement of claim only alleged attempted anal intercourse and genital fondling. There was no allegation about the appellant actually inserting his finger in F.H.'s anus or having forced anal intercourse. The respondent's evidence at trial was of actual penetration. As the trial judge found, the respondent acknowledged that he had reviewed the statement of claim, including the paragraphs which particularized the alleged assaults, and that he was aware of the difference between actually doing something and attempting to do something.

65 However, at paras. 46 and 48 of her reasons, Gill J. had recounted these inconsistencies as raised in cross-examination. Her reasons indicate she was aware of the inconsistencies.

66 As for the inconsistency relating to the frequency of the sexual assaults, Rowles J.A. stated at para. 73:

> At his examination for discovery the respondent said that the sexual assaults took place "weekly", "frequently", and "every ten days or so" over the entire time he was at the School. The respondent admitted at trial that he had said on discovery that he had told the counsellor, Ms. Nellie Stone, that the sexual assaults by the appellant had taken place over the entire time he was at the School, while he was between the ages of eight and fourteen years. At trial, the respondent testified that the sexual assaults occurred on only four occasions over a period of two-and-a-half months.
>
> [Emphasis added.]

67 Counsel for F.H. points out that F.H.'s evidence was that he was subjected to physical and sexual abuse while he was at the residential school perpetrated by more than one person, that the question to which he was responding mixed both sexual and physical abuse and that the majority of the Court of Appeal wrongly narrowed F.H.'s statement only to assaults perpetrated by McDougall. Counsel says that F.H. was commenting on all of the physical and sexual abuse he experienced at the school which involved more than McDougall and took place over his six years of attendance.

68 The Court of Appeal appears to have interpreted his evidence on discovery that he was sexually assaulted by McDougall over the entire time he was at the school, while in his evidence at trial it was only four times over two and a half months. Although the evidence is not without doubt, it is open to be interpreted in the way counsel for F.H. asserts and that there was no inconsistency between F.H.'s evidence on discovery and at trial.

69 As to the frequency of the alleged sexual assaults by McDougall, the trial judge did not ignore inconsistencies in the evidence of F.H. In spite of the inconsistencies, she found him to be credible. At para. 112 of her reasons, she stated:

> There are, however, some inconsistencies in the evidence of F.H. As the defence has also argued, his evidence about the frequency of the abuse has not been consistent and there are differences between what he admittedly told Ms. Stone, what he said at his examination for discovery and his evidence at trial. At trial, he said there were four incidents. On previous occasions, he said that this occurred every two weeks or ten days. That is a difference of significance. However, his evidence about the nature of the assaults, the location and the times they occurred has been consistent. Despite differences about frequency, it is my view that F.H. was a credible witness.

70 The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

71 All of this is not to say that the concerns expressed by Rowles J.A. were unfounded. There are troubling aspects of F.H.'s evidence. However, the trial judge was not oblivious to the inconsistencies in his evidence. The events occurred more than 30 years before the trial. Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities. Notwithstanding its own misgivings, it was not for the Court of Appeal to second guess the trial judge in the absence of finding a palpable and overriding error.

72 With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. c. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17 (S.C.C.), at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

73 As stated above, an appellate court is only permitted to intervene when "the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*L. (H.)*, at para. 4 (emphasis deleted)). The Court of Appeal made no such finding. With respect, in finding that the trial judge failed to scrutinize F.H.'s evidence in the manner required by law, it incorrectly substituted its credibility assessment for that of the trial judge.

D. Palpable and Overriding Error

74 Notwithstanding that the Court of Appeal made no finding of palpable and overriding error, the Attorney General of Canada submits that the trial judge did indeed make such an error. This argument is based entirely on the inconsistencies in the evidence of F.H. The Attorney General says that in light of these inconsistencies, the trial judge was clearly wrong in finding F.H. credible.

75 I do not minimize the inconsistencies in F.H.'s testimony. They are certainly relevant to an assessment of his credibility. Nonetheless, the trial judge was convinced, despite the inconsistencies, that F.H. was credible and that the four sexual assaults alleged to have been committed by McDougall did occur. From her reasons, it appears that the trial judge's decision on the credibility of the witnesses was made in the context of the evidence as a whole. She considered the layout of the school and the fact that the manner in which F.H. described the assaults as taking place would have carried with it the risk of detection. She also considered whether F.H.'s evidence about inspections taking place in the supervisors' washroom and the availability of sheets and pyjamas was consistent with evidence of other witnesses. She acknowledged that F.H. had a motive to lie to save his marriage and decided that the circumstances surrounding disclosure were not suggestive of concoction. She also factored into her analysis the demeanor of F.H.: that "[he] was not a witness who gave detailed answers, often responding simply with a yes or no, nor did he volunteer much information" (para. 110), and that "[w]hen [he] testified, he displayed no emotion but it was clear that he had few, if any, good memories of the school" (para. 113).

76 In the end, believing the testimony of one witness and not the other is a matter of judgment. In light of the inconsistencies in F.H.'s testimony with respect to the frequency of the sexual assaults, it is easy to see how another trial judge may not have found F.H. to be a credible witness. However, Gill J. found him to be credible. It is important to bear in mind that the evidence in this case was of matters occurring over thirty years earlier when F.H. was approximately ten years of age. As a matter of policy, the British Columbia legislature has eliminated the limitation period for claims of sexual assault. This was a policy choice for that legislative assembly. Nonetheless, it must be recognized that the task of trial judges assessing evidence in such cases is very difficult indeed. However, that does not open the door to an

appellate court, being removed from the testimony and not seeing the witnesses, to reassess the credibility of the witnesses.

E. Corroboration

77 The reasons of the majority of the Court of Appeal may be read as requiring, as a matter of law, that in cases of oath against oath in the context of sexual assault allegations, that a sexual assault victim must provide some independent corroborating evidence. At para. 77 of her reasons, Rowles J.A. observed:

> There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor's washroom so as to lend support to [F.H.]'s recollection of events.

At para. 79 she stated:

> ... No support for [F.H.]'s testimony could be drawn from the surrounding circumstances.

78 In her concurring reasons at para. 106, Southin J.A. stated:

> ... To choose one over the other in cases of oath against oath requires, in my opinion, an articulated reason founded in evidence other than that of the plaintiff.

79 The impression these passages may leave is that there is a legal requirement of corroboration in civil cases in which sexual assault is alleged. In an abundance of caution and to provide guidance for the future, I make the following comments.

80 Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

81 Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Modern criminal law has rejected the previous common law and later statutory requirement that allegations of sexual assault be corroborated in order to lead to a conviction (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1), mandating the need for corroboration and its subsequent amendments removing this requirement (*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125), as well as the current *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, stipulating that no corroboration is required for convictions in sexual assault cases). Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis

of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

F. Is W. (D.) Applicable in Civil Cases in Which Credibility is in Issue?

82 At paras. 107, 108 and 110 of her reasons, Southin J.A. stated:

> It is not enough for the judge to say that I find the plaintiff credible and since he is credible the defendant must be lying.
>
> What I have said so far is, to me, no more than an application to civil cases of *R. v. W. (D.)*, [1991] 1 S.C.R. 742.
>
> . . . . .
>
> I see no logical reason why the rejection of "either/or" in criminal cases is not applicable in civil cases where the allegation is of crime, albeit that the burden of proof on the proponent is not beyond reasonable doubt but on the balance of probabilities.

83 *W. (D.)* was a decision by this Court in which Cory J., at pp. 757-58, established a three-step charge to the jury to help the jury assess conflicting evidence between the victim and the accused in cases of criminal prosecutions of sexual assaults:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

84 These charges to the jury are not sacrosanct but were merely put in place as guideposts to the meaning of reasonable doubt, as recently explained by Binnie J. in *R. v. S. (J.H.)*, [2008] 2 S.C.R. 152, 2008 SCC 30 (S.C.C.), at paras. 9 and 13:

> ... Essentially, *W. (D.)* simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the "credibility contest" error. It teaches that trial judges are required to impress on the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.
>
> . . . . .

> In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

85 The *W. (D.)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.

86 However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. *W. (D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

G. Did the Trial Judge Ignore the Evidence of McDougall?

87 In an argument related to *W. (D.)*, the Attorney General of Canada says at para. 44 of its factum, that "[s]imply believing the testimony of one witness, without assessing the evidence of the other witness, marginalizes that other witness" since he has no way of knowing whether he was disbelieved or simply ignored.

88 The Attorney General bases his argument on the well-known passage in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.), which concludes at p. 357:

> ... a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

89 Thus, the Attorney General contends, at para. 47 of its factum, that:

> ... In a civil proceeding alleging a sexual assault, if the trier of fact accepts the plaintiff's evidence and simply ignores the defendant's evidence, that conclusion would breach the requirement described in *Faryna*, that every element of the evidence must be considered.

90 I agree that it would be an error for the trial judge to ignore the evidence of the defendant and simply concentrate on the evidence submitted by the plaintiff. But that is not the case here.

91 The trial judge described the testimony given by McDougall with respect to his vocational beliefs, his subsequent marriage, his role at the school, the routine at the school, the laundry procedure and his denials as to having sexually assaulted either R.C. or F.H.. She also dealt with the defense arguments with respect to the credibility and reliability of the testimony of R.C. and F.H. regarding the sexual assaults. Indeed, she found that R.C. did not prove he was sexually assaulted by McDougall.

92 In determining whether McDougall had ever strapped R.C. or F.H., she summarized McDougall's evidence as follows at para. 131:

> As stated, it was the defendant's evidence that during his years at the school, he administered the strap to only five or six intermediate boys. He did so as punishment for behavior such as fighting or swearing. It was always to the hand and was always done in the dorm. He denied the evidence of Mr. Jeffries that he had frequently disciplined him for the reasons Mr. Jeffries described. He denied going to his grandmother's home or mocking him about wanting to visit his grandmother. He denied the evidence of F.H.

93 She also highlighted a contradiction in McDougall's testimony at para. 135:

> It is also my view that the defendant minimized his use of the strap as a form of discipline. Further, while he testified that no child was ever strapped in his room, when testifying about one specific incident, he said that he brought the boy "upstairs to my room and I administered the strap three times to his right hand".

Although McDougall later "corrected himself to say that he had strapped the boy in the dorm and not in his room, it was open to the trial judge to believe his first statement and not his "correction".

94 And as earlier discussed, at para. 106 of her reasons, she pointed out inconsistency between the evidence of McDougall and one of the defence witnesses, Mr. Paul, on the issue of routine physical inspections of the students.

95 At para. 66 of her reasons for the majority of the Court of Appeal, Rowles J.A. stated:

> From the reasons the trial judge gave for finding that the appellant had strapped the respondent, one can infer that the judge did not accept the appellant's evidence on that issue. Disbelief of a witness's evidence on one issue may well taint the witness's evidence

> on other issues, but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that can be used to prove a fact in issue.

96 I agree with Rowles J.A. However, the trial judge's unfavourable credibility findings with respect to McDougall's strapping evidence together with her belief in Paul's evidence in preference to that of McDougall with respect to routine physical inspections, indicates that she did not ignore McDougall's evidence or marginalize him. She simply believed F.H. on essential matters rather than McDougall.

H. Were the Reasons of the Trial Judge Adequate?

97 The Attorney General alleges that the reasons of the trial judge are inadequate. The same argument was not accepted by the Court of Appeal. At para. 61, Rowles J.A. stated:

> Generally speaking, if a judge's reasons reveal the path the judge took to reach a conclusion on the matter in dispute, the reasons are adequate for the purposes of appellate review. To succeed in an argument that the trial judge did not give adequate reasons, an appellant does not have to demonstrate that there is a flaw in the reasoning that lead to the result. In this case, the judge's reasons are adequate to show how she arrived at her conclusion that the respondent had been sexually assaulted.

Where the Court of Appeal expresses itself as being satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince this court that the reasons are nonetheless inadequate.

98 The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 (S.C.C.). In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34 (S.C.C.), Binnie J. summarized the duty to give adequate reasons:

> (1) To justify and explain the result;
>
> (2) To tell the losing party why he or she lost;
>
> (3) To provide for informed consideration of the grounds of appeal; and
>
> (4) To satisfy the public that justice has been done.

99 However, an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is a failure to give adequate reasons a free standing basis for appeal. At para. 20 of *Walker*, Binnie J. states:

> Equally, however, *Sheppard* holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself (para.

> 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue.... The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (para. 53).

100 An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *R. c. Gagnon*). But that does not make the reasons inadequate. In *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), released at the same time as this decision, McLachlin C J. has explained that credibility findings may involve factors that are difficult to verbalize:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge in saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter, that does not always lend itself to precise and complete verbalization. [para. 49]

Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

101 Rowles J.A. found that the reasons of the trial judge showed why she arrived at her conclusion that F.H. had been sexually assaulted by McDougall. I agree with her that the reasons of the trial judge were adequate.

IV. Conclusion

102 I am of the respectful opinion that the majority of the Court of Appeal erred in reversing the decision of the trial judge. The appeal should be allowed with costs. The decision of the Court of Appeal of British Columbia should be set aside and the decision of the trial judge restored.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the court on November 4, 2008 has been incorporated herein.

TAB 3

1921 CarswellNB 3
Supreme Court of Canada

Clark v. R.

1921 CarswellNB 3, [1921] 2 W.W.R. 446, 35 C.C.C. 261, 59 D.L.R. 121, 61 S.C.R. 608

Rex v. Clark

Idington, Duff, Anglin, Brodeur and Mignault, JJ.

Judgment: March 11, 1921

Counsel: *W.P. Jones, K.C.*, for accused, appellant.
W.B. Wallace, K.C., for Crown, respondent.

Subject: Criminal; Evidence; Family

Appeal by accused from judgment of the Court of Appeal for New Brunswick sustaining the refusal of the trial Judge to reserve a case founded upon the objection that there was error in charging the jury. Appeal allowed, Idington, J. dissenting.

Idington, J. **(dissenting):**

1 The appellant was indicted for murder and convicted thereof. The defence set up was insanity. The facts bearing upon his actual commission of the crime charged seem to have been of such a conclusive character as to leave no room for doubt of his guilt unless he could be excused on the ground of insanity, or rather a doubt of his sanity which is sought to serve the same purpose.

2 Stripped of undue verbiage confusing or tending to confuse the mind, the issue raised is whether or not if there might have been or ought to have been created by the evidence adduced a doubt as to his sanity in the minds of the jurors who tried him, then should he have been acquitted?

3 The law in Canada ever since the enactment of *The Criminal Code* of 1892, is that declared by sec. 11 thereof continued in sec. 19 of *The Criminal Code*, ch. 146 of the Revised Statutes of Canada, 1906, as follows:

> 19. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent

> as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.
>
> 2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.
>
> 3. Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

4 In submitting the question of appellant's sanity to the jury, the learned trial Judge told them that the burden was placed upon the accused to make out his insanity at the time of the commission of the offence, beyond a reasonable doubt.

5 Inasmuch as that precise form of direction had been then recently, unanimously, approved by the Court of Appeal for New Brunswick in the case of *Rex v. Kierstead*, 45 N.B.R. 553, 30 C.C.C. 175, the learned trial Judge refused to reserve a case for said Court, founded upon the objection that there was error in so charging the jury. That Court upon appeal thereto decided to abide by its ruling in said case and refused to interfere.

6 The Court of Appeal for Alberta in a similar case of *Rex v. Anderson*, 7 Alta. L.R. 102, 5 W.W.R. 1052, 26 W.L.R. 783, 22 C.C.C. 455, having, in 1914, by a bare majority decided that a charge, using similar language to that now in question, was erroneous and granted a new trial, the appellant obtained from my brother Anglin leave to appeal to this Court, under and by virtue of ch. 43, sec. 16, of the Dominion Statutes of 1920, which provides as follows:

> 16. The following section is inserted immediately after section one thousand and twenty-four of the said Act: —
>
> 1024A. Either the Attorney General of the province or any person convicted of an indictable offence may appeal to the Supreme Court of Can ada from the judgment of any court of appeal setting aside or affirming a conviction of an indictable offence, if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case...

and continues to provide for a Judge of this Court giving in such case leave to appeal.

7 It has been argued before us not only that there is a substantial conflict between the judgment in question and that in the *Anderson Case*, but also that the ruling of the Supreme Court of the United States in *Davis v. United States*, 160 U.S.R. 469, is the correct view to adopt.

8 The headnote to that report is as follows:

> If it appears on the trial of a person accused of committing the crime of murder, that the deceased was killed by the accused under circumstances which — nothing else appearing — made a case of murder, the jury cannot properly return a verdict of guilty of the offence charged if, upon the whole evidence, from whichever side it comes they have a reasonable doubt whether, at the time of killing the accused was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing.
>
> No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

9 Such is the result of an argument in which about a hundred authorities were cited, and many of them are referred to in the judgment of the Court.

10 Such is, as it seems to me the drift and probable result of accepting the law as laid down in the *Anderson Case* in preference to that by the New Brunswick Court of Appeal.

11 The grave consequences of our so deciding would be almost tantamount to repealing the above-quoted enactment of our *Code*, obviously designed to put an end to what was presumably an undesirable state of our law as administered, and place it upon clear and, but for what has happened, I should have supposed, unmistakable grounds.

12 In the *Anderson Case* Mr. Justice Stuart was, I respectfully submit, apparently unable to define the difference between a defence to the "satisfaction of the jury" or "clearly proven" and one "beyond reasonable doubt."

13 And, with great respect, I cannot see how, for a moment, the protection thrown around a prisoner is, as he suggests, necessarily interfered with by the due limitation of the defence set up.

14 Mr. Justice Beck, cited therein as authority *Cyc's* definition which tends in the same direction as ultimately decided in the *Davis Case* I refer to above.

15 None of the other authorities which he cites, to my mind, I respectfully submit, when closely examined and considered, really touch the kernel of what is involved herein.

16 On the other hand such decisions as Chief Justice Harvey relies upon, aptly present the identical view he took of the *Anderson Case*, as that which had been presented by eminent

Judges in England, using the phrase "byond reasonable doubt" in the same sense in relation to the proof of insanity as did the learned trial Judge in that case.

17 He cited *Bellingham's Case*, decided in 1812; *Reg. v. Stokes*, 3 Car. & K. 185, decided in 1848, only five years after *Macnaghten's Case*, by Baron Rolfe, who had been appointed to the Exchequer Chamber in 1839, and hence possibly one of the Judges called to answer the question in the *Macnaghten Case*, 10 Cl. & F. 200, 8 Scott (N.R.). 595 (8 E.R. 718) and (though best known as a leader of the Chancery Bar) had had considerable experience in criminal trials as recorder of Bury St. Edmunds, and in presiding at the trial of many notable criminal cases; and the case of *Rex v. Jefferson*, 72 J.P. 467, 24 T.L.R. 877, where Mr. Justice Bigham, as late as 1908, charged the jury in the same terms as now objected to.

18 And although that case went to appeal no one ever thought of raising such a ground as now taken herein. Why so unless clearly untenable?

19 The truth would seem to be that the law as laid down in the *Macnaghten Case, supra*, that in order to establish the defence, on the ground of insanity it must be "clearly proven" and that "to the satisfaction of the jury" has always been, for at least a hundred years the law in England; and that it has been so presented to juries concerned in the language now complained of without challenge.

20 *Mr. Tremeear*, in the second edition of his work on our Code, in his notes upon the section thereof now in question, says that it was in the draft code prepared by the Imperial Commission, but never adopted by Parliament.

21 Law seemingly was found to be more stabilized, as it were, in England, without a code, than in some other countries with one.

22 That, however, is no reason for our departing from our *Criminal Code* which seems to me in its terms to be more imperatively adverse to appellant's contention than the logical result of the judicially made law of England.

23 The word "satisfaction" has given to it, in *Murray's Dictionary*, as one of its many meanings, the following:

> 6. "Release from suspense, uncertainty, or uneasiness" (J.); information that answers a person's demands or needs; removal of doubt, conviction.
>
> Phrase, *to* (*a person's*) *satisfaction*.

24 I am unable to find the thing proved, as our *Code* so expressly requires, unless it is so beyond reasonable doubt. I should dislike very much to hold any man proved insane, either in a civil or criminal proceeding, unless I could do so beyond reasonable doubt.

25 And I venture to think that the safety and protection of society is just as important as is the protection of a member thereof, when that member is placed upon trial. On the one hand he or she has been most justly protected for ages by the use of a judicial formula, as it were, lest passion and prejudice should prevail and injustice be done.

26 And in relation to the defence of insanity, those who have given thought to the matter at all, must realize how easy it has been and still is to abuse the defence by suggestions, for example, of temporary insanity, and mislead those moved by pity or passion, to the deterioration of the due administration of justice.

27 I respectfully submit that society as a whole is quite as much entitled to be protected as a single member thereof. Such illustrations as proof of an alibi, which forms part of the evidence of the actual facts pro and con, bearing upon the issue raised relative to the actual perpetration of the offence in question are quite beside the collateral substantive issue of mental and moral responsibility.

28 That is only permitted to be raised as a defence in law to the actual commission of the offence when rebutting the presumption of sanity declared by said section until the insanity is proved.

29 The charge against an accused person should in regard to the acceptance of and weight to be given the evidence of fact for or against him or her so far as bearing upon the actual offence charged, be kept clearly and distinctly severable from the defence of insanity, and each of the issues thus raised be given its own proper place in the presentation thereof, made by the Judge's charge, or otherwise.

30 It must be determined first whether or not upon the evidence bearing upon the actual perpetration of the offence, the accused can be found "beyond reasonable doubt" guilty, and then due consideration be given to the alternative of whether or not at the time in question the accused was of sound mind within the meaning of the statute and that finding must be subject to the like limitations of proof "beyond reasonable doubt."

31 The appeal, in my opinion, should be dismissed.

***Duff, J.*:**

32 On the trial of an accused person indicted for murder where the defence of insanity is set up, it is incumbent upon the accused in order to negative his responsibility for an act otherwise criminal to prove to the satisfaction of the jury that he was insane at the time he committed the act. *Macnaghten's Case*, 10 Cl. & F. 200, 8 Scott (N.R.) 595 (8 E.R. 718), and *The Criminal Code*, sec. 19, subsec. 3. The trial Judge told the jury that they ought to

convict the prisoner unless the defence of insanity was established by the prisoner beyond a reasonable doubt, and he added:

> If you entertain any reasonable doubts as to the sanity of the prisoner at the time he committed the act, why then it is your duty to convict.

33 This direction was, in my opinion, an erroneous one and calculated to mislead the jury.

34 Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigourous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has produced such a preponderance of evidence as to show that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts. This proposition is referred to by Mr. Justice Willes in *Cooper v. Slade*, 6 H.L. Cas. 746, at p. 752, 27 L.J.Q.B. 449, in these words:

> The elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for the verdict.

35 The distinction in this respect between civil and criminal cases is fully explained in a judgment of Mr. Justice Patteson speaking for the Judicial Committee in the case of *Doe d. Devine v. Wilson*, 10 Moore P.C. 502, at pp. 531 and 532. The whole passage is so instructive and so apt that it is worth while reproducing it in full:

> Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the *onus* of proving the genuineness of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the *onus* of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.
>
> Now, the charge of the learned Judge appears to their Lordships to have in effect shifted the *onus* from the Defendants, who assert the deed, to the Plaintiff, who denies it, for in substance he tells the jury that whatever be the balance of the probabilities, yet, if they have a reasonable doubt the Defendants are to have the benefit of that doubt, and the deed is to be established even against the probabilities in favour of the doubt. Certainly, it has been the practice so to direct the jury in a criminal case; whether on motives of

> public policy or from tenderness to life and liberty, or from any other reason, it may not be material to inquire, but none of those reasons apply to a civil case. If, indeed, by the pleadings in a civil case, a direct issue of forgery or not, be raised, the *onus* would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even then the reasons for suffering a doubt to prevail against the probabilities, would not, in their Lordships' opinion, apply.

36 This exposition of the distinction between the two classes of cases brings out the point that the rule in criminal cases is a rule based upon policy.

37 The distinction may be illustrated by a reference to another class of proceedings in which a similar rule applies, namely, proceedings to establish illegitimacy and proceedings in which the validity of a *de facto* marriage is called in question. Where a child is born of a married mother and husband and wife have had access during the relevant period the presumption of legitimacy is of such a character that it can only be overcome by evidence producing in the mind of the tribunal a moral certainty. And this moralcertainty is contrasted by Lord Lyndhurst in a celebrated passage in *Morris v. Davies*, 5 L.J. (O.S.) Ch. 177, with a conclusion reached by weighing the probabilities and resting upon a mere balance of probabilities. The like rule prevails where a marriage having been solemnized, there have been cohabitation and issue and a question arises as to whether the marriage ceremony was formally sufficient. In such a case it is incumbent upon those who impeach the validity of the marriage to demonstrate the existence of the defect.

38 All this is sometimes expressed by saying that the law presumes innocence and legitimacy but in truth the fact that in given circumstances there is a rebuttable presumption of law in favour of a certain conclusion does not necessarily afford any guide as to the weight or strength of the evidence required to rebut the presumption. The law presumes, for example, that a promissory note is given for a valuable consideration; a presumption which has only the effect of establishing a *prima-facie* case. The law presumes innocence but it prescribes also a supplementary rule, namely, that in criminal proceedings, at all events, the presumption of innocence is not rebutted unless the evidence offered for that purpose demonstrates guilt in the sense of excluding to a moral certainty all hypotheses (not in themselves improbable) inconsistent with guilt.

39 The precise question to be determined is whether the same rule governs where the presumption to be overcome is a presumption of sanity. Where the question arises on a criminal prosecution the practice has been to treat the presumption as a presumption of law and this practice seems to be sanctioned both by the answers given by the Judges in *Macnaghten's Case* and by the provisions of *The Criminal Code* of Canada above referred to; but as I have just pointed out the circumstance that the presumption is a presumption of

law tells us nothing as to the weight of the proof required to overcome it. Is there a special rule as to this?

40 I am unable to think of any principle or any reason of policy comparable in importance to those upon which rest the rules touching the presumptions of innocence and legitimacy for holding that a similar rule should be applied as touching the character of the proof to be exacted where the presumption to be overcome is the presumption of sanity; or why the general principle should not be adhered to that in judicial proceedings conclusions of fact may legitimately be founded upon a substantial preponderance of evidence.

41 I have moreover no doubt that the expressions which have now for generations been used by Judges in instructing juries in criminal proceedings as to the degree of certainty justifying a conviction (as "the prisoner must be given the benefit of the doubt," "guilt must be established to the exclusion of reasonable doubt"), are expressions which have passed into common speech; and that a Canadian jury receiving instructions couched in similar terms as to the probative weight of the evidence necessary to justify a given conclusion would in the great majority of cases attach to these expressions the significance which they ordinarily bear and are intended to bear when used in relation to the presumption of innocence. A jury being instructed that a finding of insanity would only be proper if they should be satisfied to the exclusion of all reasonable doubt upon that point, would not, I am quite sure, understand that an affirmative conclusion would be justified by proof consisting only of a substantial preponderance in the weight of evidence.

42 It will be necessary to refer very briefly to some authorities that have been mentioned, and first to the charge of Mans field, C.J. in *Bellingham's Case* which is said to have been approved by Lord Lyndhurst, C.B. in *Offord's Case*, 5 Car. & P. 168. The report of Sir James Mansfield's charge seems to be a newspaper report only, and Lord Lyndhurst's words of approval seem to be rather directed to the Chief Justice's definition of insanity than to his remarks upon the burden of proof. Lord Lyndhurst indeed in *Offord's Case* contents himself with stating that the jury must be satisfied that the prisoner was insane before they can properly acquit him. *Bellingham's Case* was a very painful case and I do not think it can be regarded as a satisfactory authority upon this point. See *Reg. v. Oxford*, 4 State Trials 508, 9 Car. & P. 309; *Reg v. Macnaghten*, 4 State Trials 847, and especially the speech of Mr. Cockburn. In *Oxford's Case*, just referred to, Lord Denman, C.J. who with Alderson, B. and Patteson, J. presided, limited himself to remarking as regards the burden of proof that all persons "*prima facie* must be taken to be of sound mind till the contrary is shown." In similar terms the jury was charged in *Reg. v. Vaughan*, 1 Cox C.C. 80; *Reg. v. Higginson*, 1 Car. & K. 129; *Reg. v. Davies*, 1 F. & F. 69, at p. 70; *Reg. v. Barton*, 3 Cox C.C. 275; *Reg. v. Townley*, 3 F. & F. 839; *Reg. v. Layton*, 4 Cox C.C. 149.

43 It is quite true that in *Reg. v. Stokes*, 3 Car. & K. 185, Rolfe, B. is reported to have said that if the jury were left in doubt it would be their duty to convict, and similar language is attributed to Bigham, J. in *Reg. v. Jefferson*, 72 J.P. 467, 24 T.L.R. 877. When the remarks of these learned Judges are read as a whole, however, the fair interpretation of them seems to be that the jury must be satisfied with the evidence of insanity. They were not, I think, intended to convey to the jury the impression that they must arrive at that degree of moral certainty which is necessary to justify a conviction upon a charge of crime. As against these observations may be put the language of Tindal, C.J. in addressing the jury in *Macnaghten's Case* where he presided with Williams, J. and Coleridge, J. The learned Chief Justice used these words:

> If on balancing the evidence in your minds you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes. If not so, and if in your judgment the subject should appear involved in very great difficulty, then you will probably not take upon yourselves to find the prisoner guilty. If that is your opinion, then you will acquit the prisoner.

44 It seems clear that there has been no uniform practice of directing the jury on the issue of insanity in the manner adopted by the trial Judge in this case and as it appears, as I have said, to be more consistent with principle that the jury should be told that insanity must be clearly proved to their satisfaction but that they are at liberty to find the issue in the affirmative if satisfied that there is a substantial, that is to say, a clear, preponderance of evidence, I am constrained to the conclusion that there was substantial error in the conduct of the trial and that a new trial should be directed.

***Anglin, J.*:**

45 Is it misdirection to instruct a jury that to justify a verdict of acquittal on that ground (sec. 966 *Criminal Code*) in a prosecution for murder the defence of insanity must be established beyond a reasonable doubt? The Supreme Court of Alberta *en banc* (Harvey, C.J. dissenting) held that it was in *Rex v. Anderson* (1914) 7 Alta. L.R. 102, 5 W.W.R. 1052, 26 W.L.R. 783, 22 C.C.C. 455. The Appeal Division of the Supreme Court of New Brunswick, following its own previous judgment in *Rex v. Kierstead*, (1918) 45 N.B.R. 553, at p. 565, 30 C.C.C. 175, has unanimously held in this case that it is not. Hence this appeal — the first brought to this Court under sec. 1024A of *The Criminal Code*, enacted by 10 Geo. V., ch. 43, sec. 16.

46 If this question were entirely open, I should be disposed to accept as more logical and humane than that approved in English law (however defensible the latter may be on grounds of policy) the view which has prevailed in the Supreme Court of the United States and in many States of the Union (*Lawson on Presumptive Evidence*, p. 537; 16 *Corpus Juris* 775) that,

while the presumption of sanity relieves the prosecutor in the first instance from proving that fact, if, upon the whole evidence, a reasonable doubt remains in the mind of the jury whether at the time of the killing the accused was mentally competent to distinguish between right and wrong or to understand the nature of his act, it cannot properly render a verdict of guilty. *Davis v. U.S.*, 160 U.S. 469; *German v. U.S.*, 120 Fed. Rep. 166. The reasoning of Mr. Justice Harlan, delivering the judgment of the Court in the *Davis Case*, seems to me unanswerable. How can a man rightly be adjudged guilty of a crime

> if upon all the evidence there is reasonable doubt whether in law he was capable of committing crime? [p. 484].
>
> . . . . .
>
> How upon principle or consistently with humanity, can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, viz., the capacity in law of the accused to commit that crime? [p. 488].

47 Where, as in murder, intent is an essential element in the crime, if the evidence as a whole so far rebuts the presumption of intent that it is left doubtful whether the accused was capable of forming the necessary intent — could have had *mens rea* — how can it be held that all the constituent elements of criminality are established beyond reasonable doubt? *Professor Thayer* in his excellent *Treatise on the Law of Evidence* (1st ed., pp. 381-4) discusses this question with his customary lucidity.

48 The defence of insanity, which goes to negative an essential ingredient of the crime — criminal intent — just as does the defence of inevitable accident — and as the defence of an alibi goes to negative another essential element, the identity of the accused — is thus put on the same footing as other defences. Evidence in support of them which creates in the minds of the jury a doubt whether some essential element of the crime has been established — a doubt which on the whole evidence is not removed — entitles the accused to an acquittal, since the burden of satisfying the jury of his guilt beyond reasonable doubt, which always rests on the prosecutor and never changes, has not been discharged. *Rex v. Schama*, 84 L.J.K.B. 396, 24 Cox C.C. 591, 594; *Rex v. Stoddart*, 2 Cr. App. R. 217, at pp. 243-4; *R. v. Myshrall*, 35 N.B.R. 507, 8 C.C.C. 474.

49 But, this is not the law of England with regard to the defence of insanity as is stated by the Judges in their answers to questions propounded to them by the House of Lords, in *Macnaghten's Case*, (1843) 10 Cl. & F., 200, at p. 210, 8 Scott (N.R.) 525 (8 E.R. 718), which, notwithstanding criticism by eminent Judges and writers, have ever since been generally accepted in English Courts as authoritative. It does not suffice in English law that a defendant pleading insanity should create a doubt as to his sanity in the minds of the jury. He must

prove his irresponsibility "to their satisfaction" — it must be "clearly proved." So said Lord Chief Justice Tindal, speaking for himself and his fellow Judges.

50 As the learned Chief Justice of Alberta says (7 Alta. L.R. at p. 109), the authority of *Macnaghten's Case* not having been accepted in the United States

> a reference to American text writers and cases can furnish no aid in determining the law in Canada on this subject.

51 On the other hand our Parliament has seen fit in sec. 19 (3) of *The Criminal Code* to define the law which is to govern Canadian Courts in these terms:

> Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

52 It is noteworthy that, although the codifiers undoubtedly had the language of *Macnaghten's Case* before them, our legislators have not said that, in order to overcome the pre sumption of sanity, mental irresponsibility must be "clearly proved" or even that it must be "established to the satisfaction of the jury" — but merely that it must be "proved."

53 Another point of difference between our statutory law and that of England, perhaps not devoid of significance, is that whereas here on insanity being "proved" the verdict is to be "not guilty," (the jury being required to find the insanity specially and, if that be the case, to state that the acquittal is on account of it, sec. 966), thus indicating that insanity with us goes to the question of guilt or innocence, in England since 1883 (46-7 Vict., ch. 38) in like circumstances the verdict must be guilty of the act or omission charged but insane at the time when he did the act or made the omission, thus indicating that insanity is there not an absolute defence but rather matter available in arrest of judgment. This would seem to be a logical outcome of the view that, notwithstanding reasonable doubt as to sanity raised by the evidence, criminality involving intent may exist beyond reasonable doubt.

54 No doubt, however, "proved" in subsec. 3 of sec. 19 of our *Code* must mean "proved to the satisfaction of the jury," which, in turn, means to its reasonable satisfaction. *Braunstein v. Accidental Death Insur. Co.*, 1 B. & S. 782, at p. 797, 31 L.J.Q.B. 17. It may possibly have been meant to cover the phrase "clearly proved" used in *Macnaghten's Case*. "Clear and positive proof," however, was held in an Indian case cited in *Stroud's Judicial Dictionary* (2nd ed.) 323, (the report is not available here) to mean "such evidence as leaves no reasonable doubt." If the adverb "clearly" adds to the force of the participle "proved" its use, in my opinion, is not warranted under our *Code*. Still less is it justifiable to add to the "proved" of *The Code* such a distinctly qualifying phrase as "beyond all reasonable doubt," if a higher degree of certainty is thereby required than the word "proved" itself imports.

55 "Proved" is not a word of art. *Aaron's Reefs v. Twiss*, [1896] A.C. 273, at p. 282, 65 L.J.P.C. 54. It may have different shades of meaning varying according to the subject-matter in connection with, and the context in which, it is used. "Tested" or "made good" or "established" are its ordinary equivalents. *Murray's Dictionary, Crampton v. Swete*, 58 L.T. 516. It may require only evidence of the *factum probandum* sufficient to be left to a jury. *Tatam v. Hasler*, 23 Q.B.D. 345, at pp. 348, 349, 58 L.J.Q.B. 432; see too *People v. Winters*, 125 Cal. 325. Here I find nothing to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof had been discharged — that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, or if he did know it, did not know that he was doing what was wrong. That I believe to be the law of Canada, as it appears to be that of most of the States of the American Union. *Underhill on Criminal Evidence*, sec. 158.

56 The latter clause of the ancient maxim, *stabitur praesumptioni donec probetur in contrarium*, does not import that any special amount or degree of evidence is required to rebut the presumption. Its whole office is to shift to him against whom it operates the burden of adducing such evidence as will satisfy the tribunal that the presumption should not prevail (*Best on Evidence*, [11th ed.] p. 314), such proof as may render the view which he supports reasonably probable. To require that a particular presumption must be negatived beyond reasonable doubt is to superadd to the force of the presumption a rule of substantive law — and that has been done in the case of the presumption of innocence. *Thayer, Law of Evidence*, 1st ed. pp. 336 and 384. The history of this presumption of law and the distinction between it and the doctrine of reasonable doubt is dealt with by Mr. Justice (now Chief Justice) White in *Coffin v. U.S.*, 156 U.S. 432, at pp. 452-60.

57 I quite appreciate the difficulty experienced by Harvey, C.J. (7 Alta. L.R., at pp. 109-10), and by White, J. (45 N.B.R. 515-6) in formulating the distinction between proof to the satisfaction of the jury and proof beyond reasonable doubt. How can I be satisfied of a fact if I have reasonable doubt that it is so? But, with Mr. Justice Beck (7 Alta. L.R., at p. 117) I am convinced that the expression "proved beyond reasonable doubt" has become consecrated by long judicial usage as pointing to an amount or degree of proof greater than is imported by the word "proved" standing alone or by the expression "established to the satisfaction of the jury," or even by "clearly proved" — certainly greater than is required to discharge the burden of proof in civil matters. That learned Judge quotes an extract from the judgment delivered by Sir John Patteson in *Doe d. Devine v. Wilson*, 10 Moore P.C. 502, at p. 531, and a passage from *Taylor on Evidence* (par. 112) as illustrating this difference. But the actuality of the distinction in law between an instruction that the existence of a fact or condition must be proved and that it must be proved beyond a reasonable doubt is perhaps

best tested by the inquiry whether an accused would not have ground for complaint if the trial Judge having charged that the jury must be satisfied of his guilt — that it is clearly proven — should refuse to direct them that they must be so satisfied beyond reasonable doubt. I put that question to counsel for the Crown during the argument. It was not answered. I find it was anticipated by Mr. Justice Stuart in *Anderson's Case* (7 Alta. L.R., at pp. 113-4). With that learned Judge "I think the rule is well established that an accused person is entitled to have such a direction given," accompanied by an explanation of what is reasonable doubt. *Rex v. Stoddart, supra; Rex v. Schama, supra* at p. 594 (24 Cox. C.C.); *Reg v. White*, 4 F. & F. 383, are instances of the recognition of this right in English law. In *Reg. v. Sterne*, cited in *Best on Evidence* (11th ed.) 84, Baron Parke instructed that there should be "such a moral certainty as convinces the mind of the tribunal as reasonable men, beyond all reasonable doubt."

58 I also agree with Mr. Justice Stuart that

> If the expression [beyond reasonable doubt] was not improper in the present case, then it inevitably follows that it is not necessary in the ordinary case,

i.e., in directing the jury as to the burden of the prosecution.

59 The case of *Reg. v. Layton* (1849) 4 Cox C.C. 149, at p. 156, in which the trial took place shortly after *Macnaghten's Case*, where the direction given by Rolfe, B. was:

> The question, therefore, for the jury would be, not whether the prisoner was of sound mind, but whether he had made out *to their satisfaction* that he was not of sound mind

may perhaps be referred to as an instance of a correct appreciation of the effect of the *Macnaghten Case*. Lord Lyndhurst had delivered a similar charge in *Reg. v. Offord*, (1831) 5 Car. & P. 168. The charge of Bigham, J. in *Rex v. Jefferson* (1908) 72 J.P. 467, at p. 469, 24 T.L.R. 877, that the prisoner has to make out the charge of insanity

> to your satisfaction without any reasonable doubt. If you have reasonable doubt as to whether he knew that he was doing wrong or not, you must find him guilty

though similar to that in *Bellingham's Case*, as noted in 5 Car. & P. 168, and to that in *Reg. v. Stokes*, 3 Car. & K. 185, was, I venture to think, a misapprehension of the effect of the answer of the Judges in the House of Lords. Such a charge would, in my opinion, be clearly wrong in Canada. These *nisi prius* reports, however, are really of little value.

60 On appeal in *Jefferson's Case* Lawrance, J., delivering the opinion of the Court setting aside the verdict on another ground, was careful to state that no question had been raised as to the direction of the trial Judge (p. 470 [72 J.P.]), probably to make it clear that approval of it was not to be inferred.

61 I am, for these reasons, of the opinion that there was misdirection at the trial of the appellant and that it is not possible to say that substantial wrong did not result therefrom. The application of the appellant for leave to appeal should, therefore, be granted and his conviction set aside and a new trial directed.

***Brodeur, J.*:**

62 I concur with my brother Duff.

***Mignault, J.*:**

63 A presumption being, by definition, a deduction from a known or ascertained fact, or, as the old writers expressed it, *ex eo quod plerumque fit*, it is clear that the presumption of sanity of mind, entailing civil and criminal responsibility, would be fully recognized even if it had not been made the subject of a statutory declaration. So par. 3 of sec. 19 of *The Criminal Code*, which states that

> every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved

merely gives an unnecessary, I do not say a useless, legislative sanction to a universally recognized presumption of fact, entitling us to consider it as a presumption of law — although that does not add to its evidential force — which will stand as proof of the basic element of criminal responsibility, until it is rebutted or, to use the words of *The Code*,"until the contrary is proved."

64 This shows that although we have an express declaration by the Legislature, *The Code* really adds nothing to the common law; in fact, the presumption of sanity of mind, involving criminal responsibility, is recognized in England as well as in all countries, and our inquiries need not carry us further, which are subject to the common law.

65 We may therefore take the rule stated by the Judges in *Macnaghten's Case*, 10 Cl. & F. 200, 8 Scott (N.R.) 595 (8 E.R. 718) that the jurors should be told that every man is presumed to be sane, until the contrary is proved to their satisfaction, (I do not here refer to the further statement of the Judges, speaking by Tindal, C.J., that insanity must be "clearly proved") as being in effect the rule of our *Criminal Code*, for although the words "to the satisfaction of the jury" are not contained in par. 3 of sec. 19, inasmuch as the contrary of the presumption must be proved, and the proof must be passed on by the jury, this proof must be sufficient to satisfy the jury that the presumption has been rebutted.

66 I do not think that it is necessary to consider cases that have been decided in the United States, although I have read with interest and with some measure of sympathetic

consideration the able opinion of the late Mr. Justice Harlan in *Davis v. United States*, 160 U.S. 469, to the effect that if on the whole evidence any reasonable doubt exists as to the sanity of the accused, the jury should acquit. This manifestly would transgress the rule of our *Code*, for instead of proving his insanity, it would be sufficient for the accused to create in the minds of the jury a reasonable doubt whether he was sane when he committed the crime, which would, in my judgment, deprive the legal presumption of its legitimate effect.

67 Here the learned trial Judge in charging the jury emphasized that it was their duty to convict the accused unless in their opinion he had proved his insanity beyond a reasonable doubt. Is this misdirection in law? The Supreme Court of New Brunswick, whose judgment in the case of *Rex v. Kierstead*, 45 N.B.R. 553, 30 C.C.C. 175, the learned trial Judge followed, has unanimously held that it was not. Inasmuch, however, as the Appellate Division of Alberta, in *Rex v. Anderson*, 7 Alta. L.R. 102, 5 W.W.R. 1052, 26 W.L.R. 783, 22 C.C.C. 455, had decided that such a direction was wrong, the appellant was enabled to appeal to this Court by reason of a recent amendment of *The Criminal Code*: 10 & 11 Geo. V., ch. 43, sec. 16.

68 My first impression at the hearing was that if the jury entertained a reasonable doubt whether the plea of insanity was proved, the legal presumption was not rebutted. Further reflection has, however, led me to think that it is sufficient that the jury be satisfied on all the evidence that the plea of insanity has been established, and for that reason I fear that the direction which was given in this case may have been, to say the least, misleading. It is moreover open to the objection that something is added to the law, which is content with requiring that the contrary be proved, without specifying the degree of proof to be adduced. It is unquestionable that guilt must be proved beyond a reasonable doubt, so that the presumption of innocence is stronger, and rightly so, than the presumption of innocence is stronger, and rightly so, than the presumption of sanity. Proof in ordinary matters does not suppose that the evidence removes all doubt; it is the result of a preponderance of evidence, or of the acceptance on reasonable grounds of one probability in preference to another, and, in the case of insanity, the evidence generally is largely a matter of expert opinion. To say that insanity must be proved to the satisfaction of the jury does not weaken the legal presumption, but it places the plea of insanity on the same footing as all other defences which must be established so as to satisfy the jury. I would certainly not say that if the jury be in doubt whether the accused was sane or insane they should acquit him, because, if they accept his plea of insanity, they must expressly find that he was insane and return a verdict of not guilty because of insanity (sec. 966 *Criminal Code*). But while unquestionably all the onus here is on the accused, still the jury may accept his evidence as having greater weight than that of the Crown, although they might not feel that all reasonable doubt has been removed. Such a doubt might be caused by the testimony of one reputable expert against the opinion of other experts, and, in such a case, it is certainly within the province of the jury to accept the views of the latter in preference to those of the former. I would therefore think that a proper direction would be to call the attention of the jury to the legal presumption of sanity and to

inform them, the onus being on the accused, that insanity must be proved by him to their satisfaction. Further than that I would not go.

69 A serious wrong or miscarriage may have resulted from the direction given by the learned trial Judge, so on full consideration I concur in the judgment allowing the appeal and ordering a new trial.

TAB 4

2008 CarswellOnt 10183
Ontario Arbitration

Hamilton Health Sciences and ONA, Re

2008 CarswellOnt 10183, 93 C.L.A.S. 224

In the Matter of an Arbitration between Hamilton Health Sciences, (the "Hospital") and Ontario Nurses' Association, ("the Union")

In the Matter of the arbitration of Union policy grievances concerning the administration of the sick leave benefits plan under the collective agreement between the parties

G.T. Surdykowski Member

Judgment: March 30, 2008
Docket: MPA/Y502361

Counsel: Mark Zega, Jane Gooding, Cristina Vallonio, Colleen Lynas, Kelly Corp, Mary Gingrich, Meaghan Hastie, for the Hospital
Kate Hughes, Nicole Butt, Colleen Ionson, Connie Ross, B.J. Swanson, Cynthia Mascoll, Gail Molnar, for the Union

Subject: Public; Labour

***G.T. Surdykowski Member*.:**

I. Introduction

1 Until 2005 the Hospital administered the HOODIP short term disability ("STD") benefits program under the collective agreement between the parties through its own Employee Health Services ("EHS") Department. In early 2005 Cowan and the Hospital entered in to a contract pursuant to which Cowan provides sick leave adjudication and medical case management services to the Hospital.

2 The grievances raise several severable issues. Accordingly (after hearing from the parties on the issue) I bifurcated the hearing into three phases. Phase 1 dealt with the form issues and the Hospital's objection to arbitrability. Phase 2 dealt with an *Employment Standards Act* ("*ESA*") repayment issue. Phase 3 concerns the Union's allegations of systemic misconduct

bargaining unit by Cowan. The Phases did not proceed consecutively as numbered because as the matter proceeded the parties were able to agree to the factual basis for Phase #2 and argued it separately but as the same time as the preliminary issue in Phase #1. In the result, I heard the parties' evidence and submissions for the preliminary issue part of Phase #1 and the *ESA* issue first. Then I heard the parties' evidence and submissions with respect to the Medical Certificate of Disability ("MCD") issue in Phase #1, followed by the allegations of misconduct in Phase #3.

3 The Award numbers reflect the phase that the particular Award relates to. I have already issued four full previous Awards in this lengthy proceeding. In a January 30, 2006 Preliminary Award I dealt with particulars and production issues. In "Award #1A - Preliminary Issue" (dated January 13, 2007) I dismissed the Hospital's preliminary objection to arbitrability and reiterated my oral ruling that bifurcated the proceeding into three stages. "Award #2 - Employment Standards Act Issue" (dated January 14, 2007) dealt with the Union's claim that in the absence of statutory authority, a court (or arbitrator's) order, or the employee's written authorization, the Hospital is not entitled to unilaterally deduct from an employee's wages either alleged or established short term disability ("STD") benefits overpayments made to the employee. "Award #1 'Medical Certificate of Disability' Form Issue" (dated October 5, 2007) dealt with the Union's allegation in Phase #1 that the MCD form (also referred to in previous Awards as the "Cowan form") being used for short term sick leave benefits purposes is improper.

4 This Award concerns Phase #3; that is, the Union's allegation that Cowan is administering the STD benefits program in a manner that systemically violates the collective agreement and the Ontario *Human Rights Code*.

5 Although these are policy grievances, the Union used the examples of individual cases to try to prove its case and I cannot entirely avoid referring to confidential medical information. Having regard to the privacy concerns in that respect, I will refer to the bargaining unit employee witnesses by initials and be as discreet as I can. However, I cannot guarantee that identities will be concealed or that privacy will be protected.

6 I will not repeat yet again all of the general introductory information set out and available in the previous Awards. Nevertheless, several things are worth reiterating.

7 The issues are raised as a policy grievance. The focus of the proceeding is on the process and general administration of the HOOD IP STD benefits program. During the first day of hearing on January 17, 2006, I observed that this matter concerns a policy grievance, not an individual or group grievance, which observation and concerns I reiterated in my January 30, 2006 Preliminary Award (at paragraphs 21-23). A number of individual grievances which raise some or all of the same issues have also been filed. All seven of the bargaining unit

nurses who testified have filed such a grievance. But the parties would not agree to put any of the individual grievances before me, and neither of them tried to force the issue.

8 A policy grievance is one that primarily concerns the interpretation or application of the collective agreement as it applies to the bargaining unit as a whole. An individual grievance is just that. It concerns management action that only or primarily affects the collective agreement rights of an individual employee. A group grievance concerns management action that directly affects more than one employee, but generally not the bargaining unit as a whole, in substantially the same way. Of course an individual grievance may raise policy as well as individual issues, and group grievances tend to have a policy component to them. Although the policy components of an individual or group grievance might also form the basis of a Union policy grievance, the collective agreement between these parties distinguishes between a policy grievance on one hand, and an individual or group grievance on the other. Article 7 of the collective agreement establishes a grievance and arbitration procedure and draws significant procedural and substantive distinctions between the different types of grievances. Normally relief that is individual to an employee or group of employees cannot be claimed in a policy grievance. The Union quite properly does not seek individual relief in this case. To the extent that any of the Union's complaints relate to individual grievances, I will say no more than I need to about individual circumstances in order to determine the policy issues herein, in order not to prejudice anyone's position in any of the individual grievances. Neither this nor any other Award that I have issued in this proceeding is determinative of any individual grievance (except to the extent that the parties accept it as such).

9 Cowan received notice of this proceeding. Notwithstanding that it was made clear that its conduct is under scrutiny Cowan decided not to participate in any way. By letter from counsel dated April 26, 2006 in that respect Cowan advised that:

> . . .
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> ... [Cowan] is not bound to the collective agreement with either of your clients, and accordingly, [Cowan] is not party to the arbitration before Arbitrator Surdykowski. As I advised by telephone, [Cowan] neither seeks third party status, nor participation status, and would oppose any request by a party, or Order of the Arbitrator, that we be added as third party to these proceedings. [Cowan] does not agree to submit to, or be subject to, the Arbitrator's jurisdiction (with the exception of subpoena).
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> . . .

Accordingly, notwithstanding the focus on its role and conduct Cowan played no role in the proceeding, with the exception of Helene Santerre appearing as a witness in Phase #2 to testify about the Cowan form. Santerre has no role in the day-to-day administration of the STD program which is the focus of Phase #3 and this Award. Cowan was entitled to take

the position it did, and to decline to participate in the proceeding. But as a result, although the Cowan files relating to the individual bargaining unit nurses who testified are before me, I have no evidence from Cowan to explain these records or any of its conduct complained about by the Union. I can only infer that there is no explanation and that Cowan's records speak for themselves.

10 I ended up hearing a great deal of evidence that is directly relevant to the individual grievances but which is at best only marginally relevant to the policy grievances. I cannot help but think that not having the individual grievances before me also diminishes the quality of the systemic picture. It seems likely that I would have heard more from Cowan if the individual grievances had been put before me even if Cowan maintained its refusal to participate as an interested party, because Cowan employees or representatives would probably (but not necessarily) have been called to testify with respect to the individual grievances. In addition, although the extent to which proceeding in this manner has delayed the resolution of any individual grievance is unclear, at the very least the individual grievors may have to go through the ordeal of testifying twice before all is said and done. It also raises the spectre of arguably inconsistent or mixed messages to the parties. I am aware that at least one of the individual grievances has gone to and been determined at arbitration since the hearings in this proceeding concluded. This raises an issue which I will have to address below.

II. Opening, Preliminary and Selected Evidentiary Matters

11 In its opening statement, the Union stated that it did not know exactly what Cowan is or exactly what Cowan was doing, but alleged that since Cowan entered the scene there has been a significant negative change in attitude and approach to applications for short term disability ("STD") sick leave benefits and in Cowan's treatment of the nurses who make them, and a concomitant increase in the number of grievances filed in that respect. The Union did not take issue in opening with the Hospital contracting out the STD benefits administration function to Cowan, or with the "proof of disability" requirement as such. The focus of the Union's misconduct allegations was on the conduct of Cowan; namely, that Cowan is denying STD claims unreasonably and contrary to the collective agreement and legislation. The Union alleged that Cowan's administration of the STD benefits program is unreasonable, harassing and discriminatory. The Union claimed that Cowan has been making verbal representations that concerning the STD form or forms being used that are threatening, coercive, or otherwise improper and that Cowan has a practice of making repeated and unnecessarily intrusive telephone calls to the homes of employees who have applied for or are receiving sick leave benefits, to the extent that these calls constitute harassment and intimidation contrary to the collective agreement and the *Human Rights Code*. The Union also expressed a concern about the personnel who Cowan has engaged to handle employees' confidential medical information, and the manner and extent to which Cowan is sharing such information with the Hospital, which the Union asserts is contrary to law.

12 After the Hospital responded to the production orders in the January 30, 2006 Preliminary Award, the Union filed particulars of its allegations pursuant to my direction in that same Award. These particulars, contained in a letter from counsel dated April 7, 2006, went beyond the allegations and bargaining unit employees identified in the Union's opening statement, and included particulars of alleged misconduct that went into August, September and early October 2005; that is, well beyond the July 27, 2005 date of the second policy grievance which I had specified as the end date for particulars and production purposes. By letter to counsel dated May 3, 2006 I noted for the parties that the Hospital had previously signalled its intention to object to post-grievance evidence, and that although no such objection had actually been raised, and therefore had not been dealt with, the issue was clearly raised. I noted that if the Hospital was content to permit the post-grievance particulars pleaded by the Union to be considered within the ambit of this proceeding, it would be appropriate for me to amend my order accordingly, and that if not, the issue would have to be dealt with in due course. In order to avoid delay I considered it appropriate to have the appropriate post-grievance records (i.e. those that appeared may be relevant from the particulars pleaded) available at the hearing in the event that it was agreed or I determined that those records should be produced in this proceeding. I therefore ordered the Hospital's EHS Department to make the contents of the medical files of KM, PW, AB, KH, and KS for specified periods after July 27, 2005 that were in its possession, power or control available when the hearing continued, or to provide those records to the Hospital in sealed form to be brought to the hearing, pending my determination of the issue.

13 As it happened, the complete Cowan files for all seven of the bargaining unit witnesses were produced to both parties (i.e. for TT and KP as well as KM, PW, AB, KH, and KS), unsealed and including records extending beyond July 27, 2005. The issue of post-grievance evidence was not raised until January 31, 2007, the eighth day of hearing after I flagged the issue in my May 3, 3006 letter to counsel. When Union counsel sought in examination-in-chief to question KS about a December 15, 2005 letter from Dr. Tessier to KS' family and treating physician at all material times, the Hospital objected that this evidence went beyond the scope of the grievance.

14 Obviously anticipating this objection, Union counsel responded with a fully prepared argument, which included reference to the decisions in *Re Bowater Mersey Paper Co. and C.E.P., Loc. 141* (1998) 76 L.A.C. (4th) 411 (Outhouse - N.S.), *Re Maple Leaf Pork and U.F.C. W., Loc. 175* (2002) 112 L.A.C. (4th) 97 (Abramsky), and *Re Hydro Ottawa and I.B.E. W., Loc. 636* [2003] O.L.A.A. No. 609 (R. Brown). In essence, the Union pointed out that the full Cowan file was not delivered until May 5, 2006 and was not available when it filed the particulars I had ordered. Counsel noted that the Cowan "problem" was a continuing one and that I had already ruled in Award #1A that this was a continuing grievance situation. She argued that I should adopt the "practical" solution that other arbitrators have adopted

to post grievance evidence and admit the evidence I issue in order to ensure that the parties could obtain a decision which would be of greatest assistance to them. Counsel submitted that there was no prejudice to the Hospital, that the hearing would not be extended unduly, and that there were good policy reasons to admit evidence of events up to the first day of hearing.

15 The Hospital submitted that the evidence in issue went beyond the timelines established in my decision dealing with preliminary matters and the Union's particulars, which were the bases upon which the Hospital prepared its case.

16 I sustained the objection in a brief oral ruling substantially as follows.

> In my January 30, 2006 Preliminary Award I ordered the Hospital's EHS and Cowan to forthwith produce to both the Union and the Hospital the contents of the medical files of KS and TT that were in their possession, power or control for the period April 1, 2004 to July 27, 2005 (the date of grievance #05-41), and I ordered the Hospital and the Union to forthwith produce to each other copies of all documents upon which they intend to rely in this proceeding that had not already been produced, and that were not otherwise covered by the production orders in the Award. I also ordered the Union to provide particulars of its allegations of Cowan misconduct. The Union delivered a 17-page statement of particulars by letter dated April 7, 2006. These particulars included allegations relating to employees who had not been previously identified. I considered the Hospital to be entitled to production of the EHS files of these additional employees (KM, KP, PW, AB and KH) in the same way and for the same reasons as I had previously ordered for KS and TT. I was also satisfied that the Hospital is entitled to any records of communications between the personal physicians of the anticipated employee witnesses and Cowan relating to the allegations or claims being advanced in this case. By letter dated April 28, 2006 I therefore ordered the Hospital's EHS to produce the contents of the employees' medical files for the period April 1, 2004 to July 27, 2005 to both the Union and the Hospital. I further ordered the Union to make its best efforts to obtain and forthwith produce to the Hospital any notes or other records of communications prior to July 25, 2005 between the personal physicians of the employees identified in its particulars and Cowan that related to the matters in issue. Accordingly, the time frame for particulars and production ended with the date of the second (in time) policy grievance herein; namely, July 27, 2005.
>
> The grievances are in substance continuing policy grievances. Most policy grievances have a significant continuing element to them. Otherwise they are largely moot. Continuing grievances often raise significant evidence containment issues, because continuing grievance or not, as a matter of fairness and practical hearing management all arbitration proceedings have to have defined litigation parameters. As the decisions cited

by Union counsel as well as others I am aware of illustrate, there are many cases in which the first day of hearing has been designated as the "end date" for evidence admissibility purposes for the case specific reasons given in those cases. As these decisions also illustrate (and the Union rightly concedes), the first day of hearing is not automatically or necessarily the appropriate end date for evidence admissibility purposes in every case. Every case is different. It is, however, often the easiest date to select, especially if there has been little or no exchange of particulars or production and the issue is raised early on in the proceeding.

One of the significant concerns raised in many of the cases is the prospect of a multiplicity of proceedings. An arbitrator's primary concern should always be with the case before him, but in any event, there was no real additional multiplicity of proceedings concern in this case because that is already present (in the form of the individual grievances that have been filed) when this proceeding commenced. But the parties could not agree to put any of the individual grievances before me in this proceeding, notwithstanding the concerns I voiced in that respect in my January 30, 2006 Preliminary Award.

Although the nature of the proceeding is a relevant consideration it offers only general guidance in evidence admissibility issues. The litigation parameters of the particular case are a far more important consideration. In this case the Union (and the Hospital) have in fact obtained greater production than I ordered because both Cowan and (it appears) the individual employees' doctors have produced documents dated after July 27, 2005 (i.e. the end date for production purposes). The fact that they have done so is no reason to expand the evidentiary base of the proceeding beyond the date that I established before the hearing began on the merits, particularly when the post-grievance evidence issue was not addressed before the hearing began on the merits notwithstanding that I had flagged it.

I consider it neither necessary nor appropriate in this case to permit either party to call any further evidence of events beyond the date of the second policy grievance, notwithstanding that the Hospital had post-grievance information available well before any evidence was led. I see nothing unfair or prejudicial in this. The Union obtained generous early production and could have sought leave to file the additional particulars or to adduce evidence beyond July 27, 2005 after it had obtained full production and before the hearing proceeded on the merits. It did not do so.

Finally, to the extent that evidence that I have already admitted is arguably relevant, that is without prejudice to the Hospital's right to argue that such evidence is not actually relevant, which is the test for determination as opposed to admissibility.

I have one further observation. It is reasonable to expect that when a union files a grievance it has a basis for doing so and that the matter should be litigated on the basis crystallized by the filing of the grievance. Particularly where the onus is on the union (as it is in this case), no part of the purpose of the process is to give the union an opportunity to discover if it has a basis for the grievance. There is no more reason to permit the union to expand that basis than there is to allow an employer to expand upon the reasons it gave when it disciplined an employee (with the possible exception of after-discovered but pre-grievance (or pre-discipline) that the union (or employer) could not reasonably have been aware of). That is, a union is generally no more entitled to expand its grievance than an employer is entitled to expand its assertion of just cause. The fact that a grievance concerns a continuing issue is irrelevant to evidentiary issues. The fact that a grievance is a continuing grievance is relevant when timeliness issues arise (as they did and were dealt with in Award #1 A).

17 In the result I sustained the Hospital's objection.

18 This ruling was more honoured in the breach because I subsequently heard a great deal of testimony about post-grievance events and records, including evidence that even went beyond the Union's particulars, without objection. Not only did the Hospital not object, it cross-examined the witnesses on this evidence, and both parties argued the case on the basis of all of the evidence led. The manner in which the parties proceeded makes my evidentiary ruling largely moot, and I have only set it out for the sake of completeness and to point out that the issue was raised and then largely ignored. I consider it appropriate to accept the parties' implicit agreement that I should consider all of the evidence led, and determine the issues on the basis that the matter has actually been litigated. Accordingly, the effect of my January 31, 2007 ruling is negated except for the particular document that was the subject of that objection.

19 I note that, upon objection by the Hospital (at the hearing on February 13, 2007), I disallowed evidence of a note dated 2005/10/06 and an October 6, 2005 e-mail exchange on the basis that the e-mails had been in KM's possession since October 2005 and in accordance with my May 3, 2006 orders should have been produced in a timely way, and certainly before February 12, 2007 when it was provided to Hospital counsel.

20 I also heard a great deal of evidence about the return to work process beyond Cowan's involvement. Not only does this evidence appear to be directly relevant to only the individual grievances which are not before me, the focus of the "main" policy grievance is on Cowan's process and conduct. Although the grievances, particularly the July 27, 2005 grievance which is the focus of the proceeding, arguably raise return to work issues with the Hospital, all of the relief sought by the Union relates to Cowan as the Hospital's agent. All of the particularized

allegations and relief sought relate to Cowan and only indirectly to the Hospital (other than the "immunization orders" sought by the Union).

21 This proceeding concerns the process and administration by Cowan of the STD benefits program under the collective agreement between the parties. I repeat that the focus of the proceeding is on systemic issues. I am not concerned with the merits of any individual claim for benefits or with the problems that may have arisen in any individual case except to the extent that these suggest systemic issues. I do not intend to review all of the many days of testimony or hundreds of pages of documentary evidence before me. I will only refer to the evidence that I consider material and necessary to my determination of the matter.

III. Evidence

(a) KS

22 KS has been a Registered Nurse ("RN") since 1989. She has been employed by the Hospital since January 9, 1989; that is, for her entire nursing career. She regularly works in the Intensive Care Unit ("ICU"), the Step Down Unit ("SDU"), the Emergency Room ("ER") and Critical Care Unit ("CCU") at the General site. These are all units in which patients require greater care and attention than on the nursing "floors". The nurse to patient ratio is typically 1:1 or 1:2 compared to the usual 1:4 on the floors. Although KS was off work and in receipt of STD benefits from April 1-10, 2005, the absence in issue began on April 16, 2005.

23 KS' claim for STD benefits was referred to Cowan in early May 2005. The Cowan file indicates that its Marilyn Smith telephoned KS at home on May 9, 2005. KS says that after Smith introduced herself and explained why she was calling and the Cowan benefits process. She says she had no knowledge of Cowan before this. KS says that Smith asked her about her symptoms, medication and treatment and the Cowan file confirms that Smith obtained significant detailed information in that respect. KS testified that Smith offered no documents and obtained no consents before asking these questions. This contact ended with Smith saying that she would send KS a MCD (also referred to in prior Awards as the "Cowan Form") to be completed by her family doctor at her next appointment on May 11, 2005. KS says she "consented" to this because she was told that she wouldn't be paid for any time off until the completed MCD was returned. The Cowan file reveals that another Cowan representative (Geil) telephoned KS at home three times on May 25, 2005. In the first call Geil left a message, the line was busy on the next call, and in the third call Geil left a second message. KS called back that same day. She testified and the Cowan file confirms that she told Geil that her doctor was not happy about having to fill out the MCD, and that her doctor questioned the need for it and what she thought was a challenge to her treatment plan. KS and Geil also discussed KS' upcoming tests and treatment by a specialist she had consulted. KS says that she received many telephone calls inquiring about the MCD and

suggesting that Cowan's Medical Director (Dr. Tessier) could call her doctor to explain why the MCD was required. KS says that someone from Cowan, usually Smith, would call after all of her medical appointments. In examination-in-chief KS testified that she does not recall the May 30, 2005 telephone call recorded by Cowan. But in cross-examination she agreed that the contents of a communication between Cowan and the Hospital (which she also agreed was not unreasonable) in that respect accurately reflects the information in the record of the call to her, and the contents of the Cowan record are also substantially consistent with KS recollection of what was occurring at the time.

24 The Cowan file contains a record of a June 1, 2005 e-mail exchange between the Hospital and Cowan. The Hospital initiated the exchange with a request for information about return to work estimates for three employees, including KS. KS expressed a concern that her confidential information was improperly disclosed in this exchange. I do not understand this concern. It is not apparent that any confidential information was revealed to anyone. The Hospital and Cowan both knew that all three employees were absent from work, and the information was not disclosed to any of the employees who were the subject of the e-mails. In any event, there was no confidential medical information in this routine administrative communication.

25 KS' family doctor signed a MCD on May 31, 2005 and provided it to Cowan. On the basis of this MCD, Cowan approved STD benefits until June 17, 2005. In a letter dated June 6, 2005 to KS, however, Smith asked KS to contact her in the event that she was "unable to resume work on June 18, 2005 as expected". It is not apparent from the MCD or anything else in the Cowan file where June 18, 2005 (or any other return to work date) might have come from. When asked in cross-examination whether she was asserting that any of the telephone calls prior to June 6, 2005 were improper or recorded inaccurately, KS responded that she couldn't say because she doesn't recall the conversations.

26 On June 6, 2005 Smith also placed a telephone call to and left a voice-mail message for KS to call her back. There is no record of any other communication between KS and Cowan until June 14, 2005. It is not clear who called who on that occasion, but it appears from the Cowan record of the call that the conversation detailed the grievor's situation at the time, including that a colonoscopy was being scheduled for her. Once again, KS' testified that although she kept no notes she recalls that there were many more telephone calls that are not recorded in the Cowan file.

27 On June 21, 2005 Smith telephoned KS again. It is apparent from the Cowan record of this call that Smith again obtained a great deal of information from KS about her condition and symptoms. It was in this conversation that KS also revealed for the first time (to Cowan) that she has epilepsy and that the specialist (Dr. Upton) who treated her for that condition was concerned that she was having night seizures that could be contributing to the severe

fatigue she was experiencing. In cross-examination, KS agreed that Smith did not say that this concern was not valid, and that she said that she would pass it on to the Hospital. The Cowan file contains a record of a June 21, 2005 e-mail from Smith to the Hospital recommending a continuation of STD benefits and indicating that further medical information was being requested.

28 The Cowan file records that KS called on July 4, 2005 and left a voice-mail for Smith advising that her colonoscopy had been scheduled for July 25, 2005 and that her medications had been increased. Smith called back and left a voice-mail asking KS to call her back on July 6, 2005. It not clear why that was necessary. In any case, Smith did not wait for KS to call back. Instead, she called KS again on July 6. They discussed KS' current status and return to work planning, which it is apparent Smith raised. KS testified that Smith raised the issue of Employment Insurance ("EI") and asked whether she was aware that she would have to "go on EI" at $413.00 per week once she had used up her STD benefits. Notwithstanding that this was accurate information KS says that this upset her because she felt Cowan was trying to get her to return to work prematurely and threatening to penalize her if she did not do. KS testified that Smith initiated a return to work discussion and seemed determined that she do so. KS conceded that return to work is a legitimate operational objective, but contrary to the Cowan record of this conversation, KS says that she had not had any return to work discussion with her family doctor, and denies that she had any interest in doing so at that time. She also says that there was a continuing issue about the start date for this period of STD benefits. I observe that this appears to have been a transition and communication problem between the Hospital and Cowan, which was resolved in KS' favour. In cross-examination KS agreed that there was nothing wrong with discussing return to work options, and even offered that up to this point (July 6, 2005) she had no reason to grieve.

29 The Cowan records show that KS telephoned Smith on July 7, 2005 and left a voice-mail message requesting that clarification of sick time issues, and that Smith called back and left her own voice-mail message. KS and Smith had another telephone conversation on July 8, 2005. It is not clear who called who. In any event, the Cowan record of this call describes a return to work discussion. KS testified that Smith said that Cowan's Dr. Tessier felt she should be able to return to work and would send "information" to her doctor in that respect. KS says she was upset that someone who did not know and had never examined her would be making such a determination and effectively overruling her own doctor, particularly when she didn't feel able to return to work. KS says that her doctor had never advised her to return to work, and that they had discussed the transition to EI and subsequently long term disability ("LTD") benefits when her STD benefits ran out. But in cross-examination she agreed that Cowan's records of these calls are accurate.

30 The Cowan file records and internal communication on July 11, 2005 from Smith to Dr. Tessier in which she advises that KS had reported a positive response to specified medication

and was scheduled for a colonoscopy on July 25, 2005, and that Smith had prepared a Case Management Report ("CMR") on KS and a fax to her family doctor for Dr. Tessier's review and "tweaking". KS denies reporting a positive response to the medication referred to.

31 The Cowan file includes a fax message addressed to KS' family doctor from Dr. Tessier. The date shown on this is "2007/9/05" and bears the handwritten notation "draft". The content of the message suggests that that the date on the document should be July 9, 2005, but KS denies seeing it before the hearing and there is no evidence that it was in fact sent. In any event, KS again denies that she expressed any interest in returning to work or that she was able to do so, as suggested in this document.

32 A CMR dated July 9, 2005 is in the Cowan file. Although it shows KS and her attending physician as being among those to whom a copy was sent, she does not recall receiving it or discussing it with her family doctor (who she says was on vacation at the time). That is, although KS does not deny that it was sent, there is no evidence from Cowan that it was in fact sent to everyone noted on the document and there is no evidence that either she or her doctor did or did not receive it. The CMR states that KS had been very forthcoming with information regarding her medical condition. Notwithstanding Cowan's opinion in the CMR that she was capable of returning to work on a progressive (i.e. graduated) basis, KS testified that she was still "sick as a dog" and concerned about patient safety in she return to work. She says that during a telephone conversation with her Smith told her that her family doctor's input was not necessary and "didn't matter", and that all that mattered was that Cowan's Medical Director (Dr. Tessier) felt she was ready to return to work. There is nothing in the Cowan file to that effect.

33 The Cowan file contains a record of a July 18, 2006 telephone conversation initiated by Smith which refers to a return to work discussion, including that there was no medical "contraindication" to her return to work, and to KS saying that her family doctor "felt" she should not return to work before her colonoscopy on July 25, 2005, and that she could not work nights because of her epilepsy. KS testified that Smith stipulated a return to work meeting date of July 20, 2005 with a return to work date of July 21, 2005 and a schedule that included night shifts. She says that she was very upset by this, because she wasn't feeling any better and felt she couldn't work, and was concerned that patient safety could be compromised. She says that when she told Smith she had a medical appointment in Guelph on July 20, 2005 Smith told her that she would have to change the appointment and that if she didn't attend the meeting she would not be "paid". The Cowan file includes a record of a telephone contact on July 19, 2005. KS agreed in cross-examination that this record is accurate. It states that KS left a voice-mail message asking that Smith call her back and that when Smith did so they reviewed the CMR, that KS was aware that there was no medical contraindication to her returning to work before her colonoscopy, that she was aware of the July 20, 2005 return to work meeting, and that KS said that in light of

her continuing symptoms she would have to "book off" work on July 24 in order to prepare for her colonoscopy the following day. There is no explanation for Cowan's insistence that KS attend the return to work meeting and return to work mere days before her scheduled colonoscopy.

34 The Cowan record also indicates that KS told Smith she would fax a medical note from Dr. Upton (with respect to her epilepsy) that afternoon. KS says that she provided the Hospital and Cowan, and the Cowan file includes, a note from Dr. Upton. This note, which is dated June 16, 2005, states that KS "... cannot do night duty for medical reasons. She is able to do day shifts." This was a scheduling issue between KS and the Hospital which had nothing directly to do with Cowan. There is no evidence that Cowan contacted Dr. Upton (or that it should have done so).

35 KS testified that she felt that she had no option but to return to work, and that she couldn't financially afford not to. The return to work meeting was in fact held on July 20, 2005, as scheduled.

36 The Hospital conducts return to work meetings. Cowan does not attend such meetings, and did not do so in KS' case. I heard a great deal of evidence about this meeting and other direct dealings between KS and the Hospital regarding the efforts to return her to work (including testimony from Colleen Lynas, a Labour Relations Associate in the Hospital's Human Resources Department). Although obviously of great significance at the time and probably to KS' individual grievances, most of this evidence is irrelevant to the issues and my considerations in this case. This is, as KS agreed in cross-examination, a matter between her and the Hospital, and not a Cowan issue. However, the Hospital's contract with Cowan provides, and Lynas and Vivian Wilkinson (employed in a non-bargaining unit capacity at the material times) testified, that Cowan plays a role in the return to work process. Cowan's role is to identify an appropriate return to work date and what if any accommodations are necessary to facilitate an employee's return to work on the basis of the medical information it obtains through the STD benefits assessment and adjudication process.

37 The Cowan file records a July 27, 2005 telephone conversation between KS and Smith. It indicates that when Smith responded to a voice-mail message KS complained that she was short 22 hours on her paycheque because the start date for her current absence had been incorrectly recorded as April 1, instead of April 16, 2005, and that Smith said she would call the Hospital to clarify that point. The Cowan file records that Smith did so that same day (and that the appropriate correction was made). KS claims that she called Cowan (as well as the Hospital) to complain that she had been assigned a full patient load instead of being designated as an "extra" as specified in her return to work program and that no one returned her call. These are implementation issues that had nothing to do with Cowan at that point. It is far from clear why KS thought Smith was the person to contact regarding this issue (as

opposed to the Hospital or the Union). In any case, Smith acted properly. The Cowan file contains a record of a telephone conversation on August 11, 2005 between KS and Smith regarding KS' concerns with the way she had been returned to work, and that KS expressed the view that she was being "set up to fail", which KS testified was how she felt. KS feels that Smith was to blame for this because she instigated the return to work process and promised to make sure she was kept safe. Once again, this was a scheduling and implementation issue directly between KS and the Hospital, not Cowan. The Cowan file records that Smith brought KS' concerns to the Hospital's attention two days later. The evidence includes a note dated August 3, 2005 in which KS' family doctor suggests modification of her duties to facilitate ready unplanned washroom facilities access, but which I note does not express any concern about KS' return to work as such. It is not clear who KS provided this note to.

38 KS testified that Smith continued to telephone her at home and at work to see how things were going and how she was feeling while she was on her graduated return to work program, and also after she completed the program on August 17, 2005.

39 KS went off work again on Sept 9, 2005. Another MCD was completed and signed by KS and her family doctor on that date. The Cowan file records a telephone conversation between KS and Smith on September 1, 2005. This document, which KS agrees is accurate, records that KS reported her symptoms and expressed the view that this absence was not related to her previous absence, and that she was frustrated with the process and about having to provide another MCD. In the circumstances, including that KS had been absent from work since August 24 and reported that she was feeling "nauseated, light headed, and had a killer headache", and that she asserted that this absence was not related to the previous one, she should not have been surprised that another MCD was required, notwithstanding that she says that her family doctor (not Dr. Upton) "felt" that her symptoms "could be" viral or epilepsy related.

40 The Cowan file indicates a telephone contact on September 13, and another on September 14, 2005 in which KS advised another MCD with a corrected "date of first visit" was being faxed to Cowan by her family physician and that she was also getting a note clearing her to return to work on September 16, 2005. The Cowan file also records another telephone conversation on September 14, 2005 between KS and Smith about her latest MCD, KS' concern that her pay had been withheld pending receipt of the MCD, and the question of whether this was a new or continued absence for STD purposes.

41 The Cowan file records an internal exchange that KS could not have known about at the time. It indicates that on September 19, 2005 Smith e-mailed Dr. Tessier advising that she had completed a "decline letter" for his review and revision, and records Dr. Tessier's September 27, 2005 reply that the decline letter was fine and that: "It is OK to be short and sweet, keeping more arguments if she comes back yet again." The decline letter is dated September 26, 2005,

the day before Dr. Tessier's approval of Smith's draft. Contrary to the Hospital's assertion that it makes the final determinations of claims for STD benefits, Cowan wrote directly to KS that:

> ... it is our opinion that the resulting functional limitations could not be deemed as totally disabling. In the absence of a clearly documented medical condition, s\we cannot recommend that you receive compensation though Short Term Disability Benefits for the current claimed period off work.
>
> . . .
>
> Based on review of the medical documentation submitted, it is our opinion that this absence should be considered a continuation of your previous absence.
>
> . . .

The letter, which shows as being copied to KS' doctor but not to the Hospital, concludes with a recommendation that KS contact the Hospital to review alternative compensation or allowances, and that her attending physician would be sent a copy of the letter and could submit additional medical information. This letter appears to have been signed by both Smith and Dr. Tessier. Smith also sent a separate and apparently redundant (although less fulsome) letter, this time copied to the Hospital, also dated September 26, 2005 to KS, advising that her claim for STD benefits for the absence beginning August 24, 2005 was denied.

42 There was a further series of absences beginning with one from September 30 through October 6,2005 (for which KS received STD benefits), and again on October 24 and 25, 2005, and thereafter in December 2005 and continuing on until her completion of another return to work program in February 2006. I do not consider it appropriate to delve into those events, both because they extend so far beyond July 27, 2005 and the latest of the Union's particulars, and because the parties paid scant attention to them in the hearing.

43 A recurring theme in KS' testimony is that Cowan made many more telephone calls to her than are recorded in the Cowan's record. She claimed that Cowan called "every day" and required her to explain what she was doing. But this was as specific as she could be. KS made no notations of the fact much less of the content of these alleged numerous calls. In cross-examination KS recanted to the extent that she said that Cowan called every other day, and then to every time she had a doctor's appointment. She also admitted that she had no complaint about communications with Cowan prior to June 6, 2005, and nothing to grieve about before July 6, 2005. Undoubtedly feeling more comfortable with Union counsel in re-examination, KS returned to asserting that she recalled getting 3-4 calls in a day when she was sick in bed. This begs the question: just when did Cowan allegedly begin to make an untoward number to telephone calls to her? I understand that KS was suffering from

debilitating symptoms, but I would have thought that she would have made some record of the alleged calls once she began to consider them to be harassing. It is also apparent that KS is still quite angry with Cowan. Whether that anger is justified or not is a matter for her individual grievances, but it suggests a perhaps subconscious motivation for her very general feeling that she was being harassed. I also consider it unlikely that anyone would make so many calls to one STD claimant. I simply cannot credit KS' vague, uncorroborated and implausible assertions. Evidence must be assessed on the basis of probability, not possibility. Even if there were calls that are not recorded in the Cowan file, I cannot find it more probable than not that a Cowan representative called KS every day or every other day.

(b) TT

44 As of the date she testified TT had been a RN in the ER at the General site for four years. This ER is a regional unit for trauma, cardiac and neurological patients. TT says it is chronically short-staffed.

45 TT was 33 weeks pregnant when she went off work on May 18, 2005. She testified that she was hypotensive, fatigued, vomiting, experiencing Braxton Hicks signs, and felt unable to provide proper patient care.

46 Cowan took over as STD benefits administrator for the General site on April 4, 2005. Notwithstanding that that was well before TT's first day of absence it appears that her case was not referred to Cowan until mid-June 2005. This suggests another transition glitch. The first record in the Cowan file for TT is a Hospital "Employee Profile - Sick Leave" dated June 13, 2005. The first record of any Cowan contact is of Smith leaving a June 17, 2005 voice-mail message for TT.

47 TT testified that Smith said that a MCD was required and asked why she hadn't provided one. She says that her Nurse Manager had told her that all that was required was a doctor's note, and that she told Smith that she had no idea an MCD was required and had never heard of Cowan. The Cowan record states that Smith explained the purpose of the call and requested a call back. In cross-examination, TT denied that Smith explained her or Cowan's role, but she conceded that she assumed that it this was part of the STD claims process. She also conceded that she knew that Cowan would be making a recommendation to the Hospital regarding her eligibility for benefits. In light of TT's assertion that she knew nothing of Cowan prior to the call, this suggests that Smith told her something about Cowan and its role in the STD process. It also makes her assertion that she signed the MCD before she knew why she was providing the information rather disingenuous. Further, if she had read the document, as she should and is deemed to have done, its purpose would have been apparent. Further, it is clear from her evidence that she knew the purpose and extent of

the consent and information requested by the time her family doctor submitted an amended MCD, which must have been done with her knowledge.

48 In any event, TT says that Smith said that she would fax a MCD form to her and that she should have it filled out and returned. She says that she took the MCD form to her doctor the next day. Although there is no record of this conversation in the Cowan file it is more likely than not that it occurred because the Cowan file does contain a record of a June 21, 2005 voice-mail message Smith received from TT confirming that she had received the MCD from the Hospital (not Cowan) and that she had asked her doctor to submit it to Cowan as soon as possible after he returned from vacation the following week. A MCD was duly submitted. The consent (Section B) indicates that TT signed in on June 24, 2005 and the medical information portion (Section C) indicates that the doctor signed in on June 26, 2005.

49 The Cowan file contains a sort of "memo to file" dated June 27, 2005 in which Smith briefly reviews the MCD and opines that TT is experiencing "normal physiological change r/t pregnancy" and that this is a normal complication of pregnancy which does not support a claim for STD benefits. The Cowan file also records that Smith telephoned TT on June 27, 2005, that after reintroducing herself and explaining the purpose of the call she confirmed that Cowan had received the completed MCD, and that TT related the particulars of her situation to her, including that she had experienced light headedness and feeling faint at work, and also nausea and vomiting. TT testified that Smith was abrupt and unprofessional in this telephone conversation. The record includes a notation that further information was required to establish eligibility for STD benefits and that Smith planned to discuss the matter with Dr. Tessier. It is not clear whether Smith told TT any of this. However, the Cowan file contains another "memo to file" which indicates it was made by Dr. Tessier on June 27, 2005 after Smith's telephone conversation with TT. This note records Dr. Tessier's opinion that TT's MCD describes expected physiological changes in pregnancy and no disabling condition, including hypotension, or apparent concern about premature labour is described in it. The note concludes that: "In order to kee [sic] a degree of consistency in our evaluations, I believe we should decline this claim and let her and her physician come up with something describing a more medical complication of preganancy [sic]." Although unwilling to agree with Union counsel that this note was inappropriate and unprofessional, Lynas does agree that it is poorly written and raises questions about the objective medical basis for the notation. Cowan recommended that the TT's claim for STD benefits be declined and in a telephone conversation and by letter dated June 27, 2005 advised TT that her claim for benefits was denied because it described an expected physiological change rather that a medical complication of pregnancy, and did not describe a total disability that prevented her from performing her RN duties. TT's doctor delivered an amended MCD stipulating that she required total rest, including bed rest at times, but Cowan maintained its position and again advised TT by telephone and letter dated July 7, 2005 that her claim for benefits was still being rejected.

50 TT testified that hypotension and syncopy (feeling faint) are not normal symptoms of pregnancy. (Taber's Cyclopedic Medical Dictionary corroborates this.). She says that Cowan was not specific about what its concerns were, and that Smith did not help or guide her in any way. She also says that she received STD benefits until they were cut off when Cowan became involved and that Meaghan Hastie (the Hospital's liaison for the claim) told her that she would have to repay the benefits she had received. There is no evidence that Cowan raised any repayment issue with TT.

51 Apparently prompted by Smith's telephone call advising that Cowan was not altering its position, TT obtained and faxed a July 7, 2005 note from her obstetrician, Dr. Hunter, which essentially corroborated her family doctor's opinion that she should stay off work and have bed rest at home. The Cowan file indicates that Smith passed this information on to Dr. Tessier. In a "Note Report" dated July 8, 2005 Dr. Tessier in effect questioned the obstetrician's opinion and whether he had actually examined TT, and maintained his view that that there was no indication of a medical complication of pregnancy that justified the payment of STD benefits. The note indicates his intention to ask Dr. Hunter for specifics about his concerns but to maintain the denial of benefits in the meantime. TT testified that she was appalled by this because the examinations mentioned in this note are personal and that she would not have provided the results to prove that she was at risk. I note that TT could not have been aware of this note before this proceeding began. I also note that the Dr. Hunter's note does not say that that he met with or examined TT, or that he was doing anything more than reporting what TT had told him. Dr. Hunter could and should have provided some basis for his opinion in that respect, and the fact that he examined TT would not have revealed any unnecessary personal information. I cannot say that it was entirely unreasonable for Cowan to follow up on this.

52 The Cowan file contains a record of a telephone conversation initiated by TT in which Smith confirmed that the obstetrician's note had been received, that Dr. Tessier would be communicating with Dr. Hunter by fax in that respect and that she would update TT when she received further information. Although TT testified that she had concerns about Dr. Tessier communicating with Dr. Hunter because she didn't want her personal information available for everyone to read, the Cowan file does not record that she expressed any such concern to Smith until July 12, 2005 after Dr. Tessier did in fact communicate with Dr. Hunter by fax that day without obtaining TT's further or specific consent to do so. According to the Cowan file, Smith responded to TT's objection to direct contact with Dr. Hunter by advising her that the consent on the MCD she had signed was broad enough to include such contact. TT maintains that the MCD consent that she signed was for her family doctor, not for Dr. Hunter. After advising Cowan on July 13, 2005 that she did not agree with Cowan's determination of her claim and intended to involve the Union and seek legal advice, TT

withdrew her medical consent by note dated July 19, 2005. This ended Cowan's contact with her.

53 In fact, the Union had already contacted the Hospital on July 12, 2005 and brought its attention to Article 12.10 of the collective agreement and complained about the way that the Hospital and Cowan had handled TT's claim The Union reiterated its concerns and complaint on July 14, 2005.

54 During the hearing, the Hospital stipulated that it is satisfied that TT was eligible for STD benefits from May 18, 2005, and TT agreed in cross-examination that she has been paid all of the STD benefits she was entitled to.

55 (I note that a medical note dated May 5, 2005 from TT's family doctor was entered into evidence as Exhibit #53. This not was produced by the Union and was not in the EHS file. This note predates Cowan's involvement in the matter and has no apparent relevance to the matter in issue before me.)

(c) KP

56 KP is an RN. She was hired by the Hospital in February 1991 is employed as a primary care nurse in the Juravinski Cancer Centre. Her first day of absence was May 16, 2005 in preparation for gynaecological surgery on May 17, 2005.

57 KP received a standard form letter dated June 10, 2005 from the Hospital advising that a properly completed MCD was required to justify her absence and establish her entitlement to STD benefits under the collective agreement, and that Cowan was acting on behalf of the Hospital to review and assess the medical information and advise the Hospital. This letter states that: "If employees do not consent to providing the Medical Certificate of Disability to the appropriate Health Professional, then we will not be able to establish if proof of disability has been met, and as a result, the employee will not be paid sick pay benefits." Although there no documented record, KP believes that she received a telephone call on June 10 in that respect. In cross-examination KP testified that when she went off work on May 16, 2005 she was aware from information included with her pay stub and a brochure (Exhibit #16) regarding Cowan's role in the STD benefits claim process.

59 KP says that she received the MCD in the mail on June 15, 2005 and that she took it to her doctor to complete the following day. The completed MCD, which confirms and describes the surgery, was completed and faxed to Cowan on June 17, 2005. Cowan reviewed the form and KP's claim for STD benefits was accepted until July 3, 2005, the day before her then expected return to work date of July 4, 2005.

59 KP testified, and Cowan file confirms, that a Cowan representative (Manon Lacroix) telephoned her on June 23, 2005 and left a voice-mail message asking her to call back to discuss her return to work. KP says that she returned the call on June 24, 2005 and left a voice-mail message, and received a return voice-mail asking her to call again on Monday, June 27, 2005. KP says that she did so and that the Cowan record showing June 28, 2005 as the date of the call is incorrect (which appears from page 27 of the Cowan file (Exhibit #58) is probably the case). However, she agrees with the Cowan record that she told Lacroix that she was feeling unwell, and that she was seeing her doctor on June 29, 2005 and would call back after that.

60 KP says and the Cowan file records that she telephoned Lacroix on June 29, 2005. She reported that her doctor had told her she should take another month off. She says that Lacroix seemed unhappy to hear this, and that she told her that this was outside the normal convalescent period for her surgery and that Cowan would have to clarify this with her doctor. The Cowan file substantially corroborates this, and also records that Lacroix asked if KP could do modified or part-time work and that Pine responded that she didn't feel up to it. KP disputes Lacroix's recording that she was taking "Dansitron to help her sleep". She says she was taking Ondansetron (an antiemetic used as the hydrochloride salt, in conjunction with cancer chemotherapy, radiotherapy, or after surgery for nausea - per Dorland's Medical Dictionary). I do not know what "Dansitron" is. It may be a reference to Ondansetron. KP testified that she was taking a form of estrogen as a sleep aid.

61 The Cowan file records an e-mail from Lacroix to the Hospital dated June 30, 2005 in which she reported to the Hospital, advised that Dr. Tessier would be trying to contact KP's doctor and determine when she would be returning to work, and recommended that benefits be extended to July 10, 2005 and then stopped if KP's doctor could not be contacted "by the end of next week".

62 KP says that she telephoned her Nurse Manager, Carol Robertson, to explain her situation. The Cowan file contains a record of an e-mail exchange on June 30, 2005, in which Meaghan Hastie (an Attendance Analyst at the Hospital) passed along to Cowan a message from Robertson that she was "... concerned about this extended absence. I have just received information that leads me to conclude this absence should be challenged..." There is no evidence about what this means. On or about July 3, 2005 (or so it appears from a fax header - which in my experience cannot always be trusted), KP forwarded a copy of a medical note from her doctor to Cowan. This not particularly revealing note simply states that: "This patient [KP] requires another month off work for medical reasons. If you have any questions or concerns please do not hesitate to contact me."

63 On June 30, 2005, after she received Hastie's e-mail, Lacroix couriered a Medical Certificate of Continuing Disability ("MCCD") to her. The form was completed and sent to Cowan on or about July 7, 2005. Nothing in the Cowan file suggests it was not. By telephone call on and letter dated July 7, 2005 Cowan advised KP that it had received and considered additional medical information submitted (which may be reference to the MCCD) and determined that her claim for STD benefits beyond July 10, 2005 should not be accepted.

64 KP objects to Lacroix' tone in their telephone conversations. She says she felt like she was being interrogated as though she was on trial, and that it was as though Lacroix was trying not to believe her. She testified that the calls were disruptive. She objects to what she characterizes as intrusive calls while she was at home trying to get well, and to being challenged on her doctor's decisions. KP did not speculate about the number of telephone calls that she received from Cowan. It may be that not all of the calls made to her are recorded in the Cowan file, but it contains a record of only 4 actual telephone conversations before she filed her individual grievance on July 27, 2005 (June 23, 27 (or 28, but not both), 29, and July 8, 2005).

65 The Cowan file contains a copy of a page from a "Disability Guidelines" publication by the "Work Loss Data Institute" which indicates that the return to work "best practice" guideline for the sort of surgery that KP had is 21-42 days for clerical/modified work and 56 days for manual work. Since the evidence is that there is a significant manual component to KP's duties and responsibilities, that latter seems to be applicable. That would have made her "best practices" return to work date on or about July 12, 2005. But this guideline also indicates that return to work takes longer in some 20% of cases, and does not take into account that the actual surgery in question included more than that referred to in the manual guideline.

66 The Cowan file also includes a "Note Report" from Dr. Tessier dated August 17, 2005 in which he records a telephone conversation with Mary Gingrich, a Hospital Human Resources Associate, in which he indicated "... with advice from previous arbitration cases, that we have the backing to hold off the recommendations from the attending physicians if we do not feel the employee is totally disabled by an objective medical condition ...", and also a copy of an excerpt form a disability benefits publication by the law firm of Hicks Morley. Lynas agreed that providing labour relations advice is not within Cowan's mandate, and that it is neither expected of nor appropriate for Cowan to do so.

67 Finally, KP complains about a synopsis of events the Lacroix e-mailed to Gingrich on August 22, 2005. She agrees that the summary is accurate, but objects to the decision. This synopsis summarizes Cowan's involvement with KP's claim for STD benefits. It contains no confidential medical information and appears to be an unobjectionable factual overview prepared for the Hospital's purposes with respect to the individual grievance KP filed on

July 27, 2005. I see nothing wrong with this. The correctness of Cowan's or the Hospital's determination of the STD claim is not before me. That is an issue for her individual grievance.

(d) AB

68 AB is an OR nurse at the MUMC site. She has been employed by the Hospital for 19 of her 33 years as an RN (some 30 years as an OR nurse). After AB's spouse became seriously ill with terminal cancer, she went off work on August 22, 2005. She provided a medical note from her long-time doctor (Dr. Tsuchida) dated August 23, 2005 which states only: "off work for medical reasons from 22/8/05 -> est 26/9/05". AB says she believed this was sufficient for the purpose.

69 AB testified that she went off work because she felt she couldn't cope and was concerned about patient safety. She says her doctor thought she was depressed so he referred her to a psychiatrist and prescribed an antidepressant and a sedative.

70 AB testified that Kelly Luke from the Hospital's Health and Wellness Department contacted her on August 25, 2005 and informed her of the "new" STD benefits claim process (which had been in place at the MUMC site since April 25, 2005). She says that Luke sent her a MCD and told her that it had to be completed before her claim could be considered. AB testified that she felt she "had to do it" and that she told Luke about her husband's condition, and that she felt she was having difficulty coping an on medication and under a doctor's care. She says that she felt that Luke was working for both her and the Hospital and that she would hold what she told her in confidence.

71 After there telephone conversation, Luke sent AB and e-mail outlining the STD benefits claim process and Cowan's role in it, and advising that if employees do not consent to providing an appropriate MCD proof of disability cannot be established and STD benefits will not be paid. An MCD form was included as an attachment for AB's doctor to complete and return to Cowan by September 5, 2005. The Hospital also sent a letter dated August 25, 2005 to AB's doctor. This letter advised that Cowan would be adjudicating AB's claim for STD benefits and enclosed a MCD form to be completed and sent to Cowan by September 9, 2005, for which the doctor would be reimbursed up to as maximum of $35.00. (The $35.00 payment issue was dealt with in Award #1.)

72 AB signed the MCD consent and her doctor completed the form on August 29, 2005. Cowan received it on August 30, 2005. The doctor's diagnosis was that AB was suffering a situational crisis and had been referred to a psychiatrist, and expressed the opinion she was "not fit to work nursing". She says that Cowan representative Laurie Higginbotham telephoned her. The Cowan file records a telephone conversation on August 31, 2005. AB testified that she was surprised by Higginbotham's apparent familiarity with her personal situation, and that Higginbotham told her that the Hospital had provided the information.

AB says that this made her angry and agitated, and that she called Luke and told her that she had breached her confidentiality by sharing the information with a third party. I note that AB's complaint in this respect is against the Hospital, not Cowan. It is also not entirely clear what AB means by this complaint because in cross-examination she testified that her manager and co-workers were all aware of her husband's condition.

73 AB says, and the Cowan record substantially confirms that Higginbotham told her that her claim was only being accepted for two weeks because hers was a situational crisis and not a medical condition. The Cowan record also indicates that Higginbotham explained that AB could inquire about El compassionate benefits and that she advised Bell to talk to her manager when she asked about return to work options. The Cowan record includes an August 30, 2005 "Note Report" created by Higginbotham in which she describes a telephone discussion with Dr, Tessier as follows:

> "Discussed this with Dr. T. As there is no medical cure for treating her condition, the ER [employer] can't be financial [sic] responsible. Therefore, we would recommend she receive her 2 wks & than [sic] apply for EI compassionate leave benefits."
>
> (Emphasis added.)

In cross-examination, Lynas rightly disagreed with this conclusion and recommendation.

74 By letter dated August 31, 2005, Cowan confirmed to AB that her claim for STD benefits had been accepted until only September 4, 2005. AB returned to her doctor, who amended the diagnosis on the MCD previously submitted from "situational crisis" to "depression". On September 2, 2005 Higginbotham confirmed receipt of the amended MCD and advised that Cowan's decision remained the same. AB testified that she is insulted by the suggestion that the amended diagnosis "was only changed to allow for benefits beyond the 2 wks time." She also offered that different consents are required for psychiatric issues, but I note that there is no indication that she, her doctor, or anyone else on her behalf raised that as an issue at any material time. I also note that in cross-examination AB testified that the original August 23, 2005 medical note was wrong to estimate a September 26, 2005 return to work date, and that even the amended MCD was inaccurate because it did not say anything about the weight loss she says she experienced and indicates "nil" medications. That cannot be a complaint against Cowan.

75 Exhibit #75 is a "Note Report" dated September 9 or 10, 2005 (both dates appear on the document as entered) which indicates on its face that it was authored by Dr. Tessier and copied to Dr. Tsuchida. AB testified that she did not see this document before it was produced from Dr. Tsuchida's files in this proceeding, and that although Dr. Tsuchida told her that he had had a discussion with Dr. Tessier he did not tell her about the contents of

this document or what they had discussed as such. AB agrees that she is not aware of any attempt by Dr. Tsuchida to contact Cowan to correct anything in the letter.

76 Exhibit #75 is a troubling document; both because of its unexplained absence from the Cowan file for AB and because of its contents. In this document, Dr. Tessier acknowledges that AB:

> "...cannot concentrate at work which may present a safety issue with patients in the OR. We duly recognize that she may not be fit for work but the problem is that this state is directly result of a situational, external factor upon which no treatment could effect a change, other than an evolution of [AB's] problems. [AB] is making the choice of caring for her husband ...
>
> . . .
>
> As much as she is suffering from reactive depression symptoms, her treatment is supportive and we discuss the opportunity for [AB] to meet with EAP at no cost and potentially a psychologist (under her health plan benefits) to help her cope with her situation.
>
> If lack of income is central to [AB's] claim, she can ask for Compassionate Care Benefits under the Employment Insurance Program (the Hospital will top-up the benefits from EI) or ask for an advance payment on the face value of her husband's life insurance policies. All insurance companies will readily pay up to 25% of the value as a living benefit if the insured is deemed to have a life expectancy of less than 12 months.
>
> . . . "
>
> (*Sic*; emphasis added.)

77 Then, by letter dated September 13, 2005, just days later, a Cowan letter to AB signed by Higginbotham and Dr. Tessier confirmed the negative STD benefits decision as follows:

> "This letter is an explanation of our decision not to accept your claim for Short-Term Disability benefits beyond September 4, 2005.
>
> Upon revision of the amended Medical Certificate of Disability, your physician indicated that you were afflicted with depression. While your symptoms include poor concentration and sleep, weepiness, and fatigued [sic], there is no medication prescribed and you are only seeing your physician on what appears to be a monthly basis. The prognosis of your problem is essentially dependent on the outcome of your husband's illness. There has been a referral to a specialist, but you do not have a date for this consultation yet

> The medical information has been, reviewed by our medical consultant on staff and he communicated with Dr. Tsuchida to discuss our observations. There was no clinical evidence provided to indicate your condition is disabling as you are able to function in other ways. The overall description of your situation is not a reflection of a severe and totally disabling condition. Fitness to work is not the issue but rather the responsibility for payment by the Hospital for what amount to be personal and family reasons more so than an illness.
>
> Given the above information, we are unable to determine your condition is of such a severity, that it would prevent you from performing the functions of your own occupation. We regret we are unable to offer you a more favorable recommendation, but we cannot recommend to your employer that benefits be paid beyond September 4,2005.
>
> You may wish to contact Employment Insurance as you may qualify for Compassionate Care benefits. Other avenues for monetary indemnity have been suggested to Dr. Tsuchida who may be in a position to assist you.
>
> Should you have any further questions, please feel free to contact me at 1-800-609-5549, ext. 556."
>
> (Emphasis added)

Although she would not go further, even Lynas acknowledged that fitness to work is a factor.

78 Under the 1980 HOODIP (which covers AB) a bargaining unit nurse who is unable to perform the *regular* duties pertaining to her occupation due to injury or illness is entitled to STD benefits. Absent an explanation from him (or anyone else) I do not understand how Dr. Tessier can acknowledge in his Note Report that AB may be unfit to work at her occupation and state that she is suffering from reactive depression symptoms, say that her treatment is supportive, and raise EAP and psychological assistance, and then sign a letter that denies STD benefits while acknowledging that her physician indicates she is suffering from depression. I note that Cowan's "User-defined fields Report" dated October 11, 2005 describes AB's diagnosis as "Adjustment Disorder reaction". Nothing in the Cowan file or elsewhere in the evidence explains where this could have come from or what it is, but it does suggest a medical condition. In addition, AB testified that she did not absent herself from work in order to care for her dying spouse but because she was ill and unable to work. There is nothing in the evidence that suggests that Cowan had any reason other than its own speculation to think otherwise.

(e) KH

79 KH is an RN who has been employed in the orthopaedic/surgical/GI unit at the MUMC site for five years. This is a 28-bed post-operative acute care unit. She says it is heavy work, and there is nothing in the evidence to suggest it is not. Her absence for work and Cowan's dealing with her claim for STD benefits all occurred after the July 27, 2005 grievance was filed.

80 KH went off work on August 17, 2005 because of lower back pain shooting into her leg which made it difficult for her to move. This was similar to pain she experienced in August 2004 which caused her to miss a week of work. On this occasion KH tried to do some "unofficial" modified duties but she could not take anti-inflammatory medication because she was 28-30 weeks pregnant (with a November 11, 2005 due date). She provided a medical note on Rosedale Medical Group prescription note paper that simply reads "pregnant EDC [expected date of confinement] Nov. 11/05; off sick until delivery".

81 The Hospital advised KH that the proper form had to be completed (i.e. a MCD), which it appears she received from the Hospital and not from Cowan, which was not aware of her claim until it received the completed MCD on August 15, 2005 (i.e. before her actual first day of absence).

82 KH testified, and her Cowan file confirms that Higginbotham telephoned her on August 22, 2005 and spoke to her about her situation. KH says that Higginbotham left her with the impression that her claim for STD benefits would probably be denied unless there were "complications". Higginbotham's recording of their conversation tends to confirm this. KH says that no one asked her for her antenatal records but the Cowan file contains a fax dated August 23, 2005 in which Higginbotham asks KH's physician for those records.

83 The Cowan file indicates that Higginbotham's attempts to contact KH by telephone after she received and reviewed KH's antenatal records failed. However, she left a September 16, 2005 telephone message advising KH that her claim for benefits was being denied, and confirmed this by letter dated that same day. In this denial letter, Higginbotham writes that the documentation submitted "does not outline a total disability preventing you from fulfilling your duties as a Registered Nurse" and that the "information provided does not describe a medical complication of pregnancy, but rather an expected physiological change of pregnancy."

84 KH couldn't understand Cowan's decision so she telephoned Higginbotham, presumably in response to Higginbotham's voice-mail message and before she received the denial letter. KH says, and the Cowan record of the call confirms, that she told Higginbotham that she was unable to work because of severe back pain and that Higginbotham told her that back pain is associated with pregnancy, and that Cowan required medical evidence that her condition was "of a severity that she could not even do a sedentary type of work." This

demonstrates a misunderstanding of both the collective agreement (specifically Article 12.10 of the Central Agreement) which Higginbotham either ignored or was unaware of, and the definition of "total disability" for STD benefits purposes under the 1980 HOODIP. Lynas testified that the Hospital expected Cowan to be aware of Article 12.20 of the collective agreement, that pregnant employees are eligible for STD benefits, and that the Hospital's expectation was (and is) that the STD benefits adjudication process and parameters will be the same for pregnant employees as it is for other employees. That is quite right.

85 By letter dated October 3, 2005, Dr. Janice Koole advised Cowan that KH's back pain was greater than normally expected in pregnancy and in effect suggested that it was a debilitating complication of her pregnancy. By letter also dated October 3, 2005, Dr. Carmela Sciarra, KH's obstetrician, wrote that KH was to be off work "due to pregnancy related complications (gestational hypertension)." This is synonymous with pregnancy-induced hypertension or high blood pressure; clearly a medical condition. The Cowan file indicates that these letters were received but not accepted at face value. Surprisingly a Note Report apparently created by Dr. Tessier on October 26, 2005 directing that a "second and final" denial letter be sent, stating that "It appears that time off work was determined by [KJT] herself as there is no mention of a complication or a recommendation for time off by her obstetrician." I don't understand how anyone could have interpreted the available medical information that way, but a second denial letter was in fact sent to KH that same day. KH did nevertheless receive STD benefits until she began her (early) maternity leave.

(f) PW

86 PW has been a RN at the Henderson site since January 4, 1988. At the material times she worked in the Orthopaedic Surgery Unit. There is no denying that there is a significant physical component to the duties and responsibilities of this job.

87 PW went off work on May 31 and returned to work on July 11, 2005. She went off in order to undergo a laparoscopic fundoplication, which is elective surgery for gastroesophageal reflux disease. She says that her doctor was aware of her RN duties and responsibilities and instructed her that she was unable to perform her regular duties for six weeks. Cowan took over the STD adjudication function to the Henderson site on May 16, 2006. Although aware of this, PW obtained a "Treatment Memorandum" form from the Hospital's intranet which was not the Cowan form, but she says her Unit Manager told her she believed was the correct form.

88 PW testified and the Cowan file confirms that her first contact with Cowan was on June 29, 2005 when Shannon Geil telephoned her at home. Geil's recording of this call states that PW said that she didn't want to return to the doctor to have the Cowan form filled out. PW denies this, but agrees that she agreed that Cowan could fax the form directly

to him, and that she understood that Cowan was seeking information to substantiate her claim for STD benefits. PW did eventually sign an MCD on August 15, 2005 (Exhibit #57). PW says that she never provided a written consent and that she did not see the completed MCD (presumably meaning prior to this proceeding). I consider PW's assertion in cross-examination that she believed that her (verbal) consent was only to the communication to be disingenuous. What would the purpose of the communication have been other than to obtain medical information? Nevertheless, it would have been appropriate to obtain PW's written consent before seeking her confidential medical information.

89 PW testified that her next contact with Cowan was on July 4, 2005. There is no record of this in the Cowan file. The Cowan file records a telephone attempt and voice-mail message left on July 5, 2005. PW says that her next contact with Cowan was two voice-mail messages she received after her technical return to work but while she was on vacation. The Cowan file contains a Note Report dated July 27, 2005 in which Kathy Hicks records that she received a telephone call from PW in which she advised that she had had her surgery on May 31 and was told to stay off work for six weeks, and that PW was angry about Cowan's involvement and wanted her file to be closed. In cross-examination, PW explained that she thought that she had provided enough information. The note indicates that Hicks told PW that she would be reviewing the matter with Dr. Tessier and that the Hospital was expecting a decision on her claim. Further entries by Hicks indicate that she called PW again and advised that the medical information provided was insufficient and that she and PW agreed she would refax the MCD to PW's doctor, which Hicks did. PW testified that she felt angry and badgered, and that she and Cowan lacked information about each other.

90 There was a delay in obtaining a completed MCD for PW's doctor, apparently as a result of some fax issues. On July 30, 2005, according to the Cowan file, Dr. Tessier sent Hicks an e-mail in which he acknowledges that he had found what he considered to be an Official Disability Guideline ("ODG") equivalent return to work guideline and he notes that: "The "Best Practice" is 42 days so we would have to tread softly but going further down, the median (50th centile) for RTW is 18 days so I think we are right to question..." I cannot understand why a best practices return to work guideline that is consistent with the most responsible physician's opinion in a particular case would be dealt with this way.

91 PW says that she was not aware of a July 31, 2005 fax the Cowan file indicates Dr. Tessier sent to her surgeon in which he asks for a completed MCD notwithstanding that the Cowan file contains an MCD that indicates on its face was received by Cowan of July 29, 2005. In any event, the inference in the last paragraph of this fax that a more rapid return to work was appropriate is disingenuous when it refers to the 18-day median centile while ignoring the 42-day best practices return to work guideline.

92 By letter dated August 12, 2005 Hicks advised PW that STD benefits had been approved until June 21, 2005. By letter dated August 15, 2005 benefits were approved only to June 30, 2005 and not beyond, apparently because of the delay in receiving the necessary medical documentation due to her and her doctor's alleged lack of cooperation, and because she had not considered the possibility of returning to work to modified duties between June 30 and her actual return to work on July 15, 2005. I can discern no basis for Cowan's conclusions. PW testified that no raised the issue of modified work with her and that she was unaware that any such work was available. In any event, the 1980 HOODIP contemplates an inability to perform regular, not modified duties.

93 However, it appears that PW did in fact receive STD benefits for the entire period of her absence without interruption.

(g) KM

94 KM has been a RN since 1995. She was hired by the Hospital in May 2000. At the material times she worked in the MUMC Neonatal ICU, for which MUMC is a Regional Centre.

95 KM's absence from work began on June 1, 2005. She testified that she injured her right shoulder in a fall in 2003 and began to experience pain again in 2005. Her doctor prescribed anti-inflammatory, muscle relaxant and narcotic pain medication, and also physio and massage therapy. KM says that she understood that Cowan was there to facilitate treatment and help employees return to work, and to monitor and manage sick time. She says that after she had been off for a while and had not been contacted by Cowan she asked if she should initiate contact but that she was told to wait for Cowan to contact her. However, it appears that she signed the consent portion and had a MCD completed by her doctor on June 24, 2005, which MCD was forwarded to Cowan before Cowan's first attempt to contact her on July 4, 2005.

96 KM disputes Dr. Tessier's July 5, 2005 Note Report notation that the limitation indicated for her should not be a problem in the NICU because she wasn't much lifting, repetitive motion or work above shoulder height in the job. She says the job requires a lot of equivalent reaching and turning.

97 The Cowan file indicates that on July 5, 2005 Dr. Tessier and Higginbotham determined that KM should be able to return to modified work and that her claim for STD benefits should be approved until July 11, 2005 (giving her six weeks of benefits). KM was so advised by letter dated July 6, 2005, and further that she was expected to be able to resume her regular duties by July 29, 2005. Cowan also prepared a Case Management Report ("CMR") in that respect. KM testified that she did not receive these documents until the day before she was

meant to return to work (presumably July 10, 2005 - which would be odd since that is a Sunday). She says that when she called Higginbotham was way on vacation but that she spoke with Smith, and that she told Smith that she was unable to return to work. It was during this call that Cowan discovered that the telephone number in the Cowan records for KM was incorrect - which explains why there were communication issues before then.

98 KM and Higginbotham connected and discussed the situation on July 13, 2005. As a result of their discussion Cowan referred KM to physiotherapist Dave Bennett. Cowan received Bennett's report dated July 29, 2005 on (it appears) August 2, 2005, which KM agrees is accurate. On the basis of this report, Higginbotham left a voice-mail message advising KM that the medical information indicated that she could return to modified hours and duties, and that her STD benefits would expire in one month "and we do not want her to have a financial strain as she will need to come back on modified duties" and "if not she will need to go on EI sick benefits." KM objects to this, because she says it made her feel like she had to try to return to work even if she wasn't ready to do so in order to avoid the financial strain of going on EI benefits. In addition, she says and the Cowan file confirms that she told Higginbotham that she was taking the narcotic Percocet 6-8 times daily to control her pain, and that she was concerned about jeopardizing her nursing licence if she tried to return to work while taking that medication. A Cowan Note Report dated August 17, 2005 records a telephone conversation between Higginbotham and Dr. Tessier in which Higginbotham told him about this and according to Higginbotham's note Dr. Tessier responded that: "... the EE is an RN & if the medication was such a concern than (sic) she should take some action & reduce the levels herself. He wanted to know if the EE was able to drive ..."

99 The Cowan file also contains a troubling Note Report apparently created by Dr. Tessier on (it appears - although it also has an August 17, 2005 date on it)) August 11, 2005. In it Dr. Tessier observes that KM's problem has been ongoing for two years (which is not exactly the case in the HOODIP disability sense), and that her behaviour does not show her adapting as she should have (despite Bennett's conclusion to the contrary in his July 29, 2005 report). Dr. Tessier also states that that KM has avoided returning calls (conveniently ignoring the fact that Cowan had an incorrect telephone number for her until mid-July). He also writes that KM did not raise the issue of patient safety and her narcotic medication until she was faced with a return to work ultimatum (which is not the case, and which is irrelevant in any event), and that KM should find other methods to control her pain (without suggesting any) and should not be driving (without knowing whether and in what circumstances she is driving). Indeed, the Cowan file contains a record of a telephone conversation in which KM told Higginbotham that she wasn't driving, had sold her car and that either her father drove her or she walked to her medical appointments. (However, KM also testified that she was driving her mother's car for groceries but that she organized her medication around this activity.) Dr. Tessier also notes that KM's physician is not playing a "solidifying role" (not an obviously warranted criticism on the evidence before me) and that contacts with him may

not prove productive (presumably because he expects that her doctor will support KM). It seems patently obvious, and Lynas testified, that anyone in the nursing field should know that an RN who is on a prescribed course of narcotic medication cannot return to work, and that Cowan should not have suggested that KM do so.

100 Notwithstanding this, KM's STD benefits were continued from July 11 to August 14, 2005 (Exhibit #79 and page 115 of Exhibit #76), with an estimated gradual return to work date of August 15, 2005 (per CMR dated August 11, 2005 - Exhibit #80). This note also records a discussion that same day in which Dr. Tessier suggested to Higginbotham that KM was not following the physiotherapist's recommended treatment plan, that they should recommend to the Hospital that payment of benefits was not justified, and that KM should undergo an independent medical examination (an "IME"). His August 16 and 17, 2005 Note Reports tend to confirm that Dr. Tessier viewed KM as a malingerer, and his belief that an IME would show that to be the case. KM testified that she was following her doctor's prescribed treatment plan, although she also tried to reduce her medication to permit and that she tried to return to work in accordance with the CMR but was unable to tolerate it.

101 Cowan then received an August 19, 2005 letter from KM's doctor which specifically sets out her restrictions and states that she should not return to her RN duties because of her limitations and treatment requirements. By fax on August 22, 2005 Higginbotham passed this along to Dr. Tessier, and picking up on his antipathy toward KM suggests that "we should play hard ball" and that if the MRI she was scheduled to undergo didn't show anything they could insist on a four week modified return to work at which time she would have no remaining sick benefits to top up her income, and that if KM "is having such severe trouble, we should let her stop her from working and see how she copes with reduced income (sic)." Lynas agreed that she was "troubled" by this approach. She also agreed that it would concern her if Cowan was consistently asking employees how they will do on reduced income in order to force them to return to work. It is apparent from Dr. Tessier's August 22, 2005 Note Report in the Cowan file that he rejected KM's doctor's letter out of hand.

102 An IME was arranged and attended by KM. Dr. Peter Parker of Lorak Medical Assessments conducted the examination on September 1, 2005 and delivered a detailed report dated September 2, 2005. Dr. Parker's primary diagnosis was regional myofascial pain syndrome with a secondary diagnosis of chronic subacromial bursitis and rotator cuff tendonitis of the right shoulder and a chronic sprain of the right subacromial-clavicular joint. He specifically rejected Dr. Tessier's implication of a subjective disability and expressed the opinion that KM could not tolerate the static posturing required either in her position as a NICU nurse or by the accommodated duties outlined in the Cowan CMR, and that the requirements of the job would only exacerbate her neck and shoulder girdle pain. Dr. Parker wrote that he was unaware of any accommodations that could facilitate or accelerate KM's return to work without further treatment, but that following a graduated return to

work she could probably return to her regular duties 6-12 weeks after successful injection therapy as suggested in his report. That is, Dr. Parker rejected all of Cowan's suggestions and suggestions.

103 In a September 9, 2005 Note report in the Cowan file, Higginbotham acknowledged Dr. Parker's report, but suggested that notwithstanding that report that KM "is unable to do her own occupation" she should be able to do sedentary work and Cowan would help look for suitable modified work in that respect. This demonstrates either a surprising ignorance of the 1980 HOODIP, or a bull-headed refusal to accept that KM was in fact entitled to benefits. I feel free to make this observation because it is so patently obvious, and because KM was in fact paid the maximum amount of STD benefits available to her (i.e. until September 15, 2005).

104 Anything after September 15, 2005 is beyond the scope of this proceeding, which is limited to the Cowan conduct with respect to the STD portions of the HOODIPS. However, a letter dated September 20, 2005 from Dr. Tessier to the Hospital is revealing. Dr. Tessier wrote as follows:

> Our Medical Disability Adjudication and Case Management service has been involved with [KM] ever since the referral of her file because of an absence from work dating back to June 1 st, 2005. We have worked with you and [KM] at identifying accommodations that would be suitable for the safe perfomance (sic) of some of her duties as a Registered Nurse in the Neonatal Intensive Care Nursery at MUMC.
>
> In July, we had issued recommendations, contained in two successive Case Management Reports, aiming at a return to work to adapted duties. We had based our suggestions on the functional limitations described by [KMs] physiotherapist, who had been seeing [KM] on a regular basis since the start of her current absence. Unfortunately, despite the best efforts of her manager to have her work as an extra, within the restrictions outlined [KM] did not pursue the modified return-to-work plan for more than a few days. She was supported as totally disabled by her family physician whose care to [KM] consisted of strong analgesics and suggestions for rest while waiting for more diagnostic testing.
>
> Faced with this rather passive therapeutic approach, we suggested that a consultation with an expert in Physical and Rehabilitation Medicine would allow a better definition of her clinical problem that has lasted for two years without a clear diagnosis to orient a definitive treatment With the Hospital's financial support, an Independent Medical Examination took place on September 1st The specialist who examined [KM] was able to offer a diagnosis and recommendations of treatment; Dr. Parker's report is forwarded to Dr. Urn for his consideration of treatment options. However, the suggestions for

treatment are not issued as a "sine qua non" with regards to reintegrating [KM] to the workplace.

Dr. Parker, in answer to our specific questions, clearly outlined [KM's] functional limitations and described very explicitly the type of physical activities that [KM] Is still capable of performing. These are forwarded to you in appendix, with the omission of medical data. With these restrictions, we" strongly feel that [KM] can still be an active contributor to the workplace, simply avoiding some physical postures.

In his answer to Question 6., Dr. Parker leaves the door open to you and the manager to identify suitable sedentary work matched with the physical limitations described in. his answer to 5. on the previous page. We trust that you will be in a position to incorporate the described limitations within an adapted return-to-workplan. [KM] should not be opposed to returning to work in adapted circumstances, especially that she is now facing a financial shortfall, having completed the salary continuance phase of he leave and relying currently on Employment Insurance benefits, since September 15th.

As mentioned above, the recommendations from the specialist are being shared with [KM's] family physician and physiotherapist. Any recommendations for treatment made by Dr. Parker can be put into gear by Dr. Urn, in parallel to your efforts to reintegrate [KM] at work. At this point, with the specialist's recommendations, [KM] does not require Dr. Urn's clearance to return to work once you identify a suitable job attributioa

Feel free to contact me to discuss any of the proposals put forward.

(Emphasis added.)

IV. Argument

105 In addition to oral argument, both parties filed supplementary materials and casebooks in aid thereof. I am grateful for counsel's comprehensive assistance in that respect. I am not going to set out the parties' arguments in any detail. Further, this phase of the proceeding is fact driven, and the applicable law is reasonably well settled. I am therefore not going to analyze or even list the numerous authorities referred to.

106 The essence of the Union's submission is that the issues are whether the Hospital, through its agent Cowan, is properly administering the HOODIP STD benefits plans, and whether it has acted reasonably, in good faith, and in accordance with the collective agreement and the legislation in that respect. The Union submits that the Hospital has not done so, and that the totality of the evidence and the Hospital's failure to call any evidence to explain Cowan's conduct or to suggest that it does no reflect Cowan's general approach, demonstrates that Cowan consistently applies the wrong test for entitlement to STD benefits,

and that bargaining unit RNs seeking STD benefits are being harassed, coerced, intimidated and abused. The Union submits that the evidence discloses significant systemic problems that require a remedy, ands that I should therefore allow the grievances and award the appropriate remedy.

107 The Hospital reiterates the position that it has taken throughout; namely, that its expectation is that Cowan will carry out the functions contracted for properly and in accordance with the collective agreement and applicable professional responsibilities. It submits that the system in place is the gold-plated standard for administering STD claims. It reminds me that I must consider the Hospital's interests as well as those of bargaining unit employees, and submits that what is really behind these grievances is the Union's and bargaining unit employees' opposition to the closer scrutiny that Cowan has brought to STD claims. The Hospital submits that the issue in this proceeding concerns the implementation of the claim assessment system as a general or policy matter, and that I should be careful about extrapolating from individual examples to arrive at any systemic conclusions. The Hospital submits that there is nothing before me that suggest any systemic failing and that I ought to so find and leave the individual cases to be adjudicated as such.

108 On March 5, 2008, more than six months after the hearing had been concluded and while I was well into preparing this Award, the Union provided and asked me to consider Arbitrator Devlin's January 31, 2008 Award in AB's individual grievance. The Hospital's immediate response was that Arbitrator Devlin's decision is irrelevant to the policy issues in this case, and expressed the concern that the Union was seeking to re-open argument without any indication that this would serve any real purpose. I advised both counsel that my inclination was not to consider the Devlin decision because I was not sure how another arbitrator's determination of an individual grievance based on the evidence and argument she heard would assist me in determining policy issues based on the evidence and argument that I heard. I expressed the view that this seemed quite different from a post-arbitration Court (or even arbitration decision, I might add) decision that speaks to a question of law that is in issue in a policy grievance proceeding. I also indicated that even in that event it would be appropriate to invite submissions on the effect of the post-arbitration decision in issue. The Union took this as an invitation to make submissions, because Union counsel delivered them by letter dated March 20, 2008.

109 The Union submits that I should consider the Devlin decision because it involves not only a decision between the same parties under the same collective agreement, but one of the identical fact situations in evidence before me in this policy proceeding. The Union argues that it is appropriate to consider the decision in order to avoid the danger of inconsistent decisions on the same facts. Counsel writes that Arbitrator Devlin cited my Award #1 with approval at length, describes Arbitrator Devlin's findings, and submits that:

> ... it is important for you to consider this decision for although you must make your own factual findings, it would be a very unfortunate situation if the parties were left with two decisions that caused greater confusion rather than guidance to them. We are not submitting that you are bound by the factual findings of Arbitrator Devlin, but just as she found your decision helpful in a number of respects, and referred to it at length, it is our submission that you may also find her decision of assistance and if there are any factual conflicts, you may want to address them based on the evidence that you heard, rather than leave the parties confused. There is good labour relations sense in having consistent decisions, or having decisions that explain the reasons for the inconsistency in the event that your decision will not be consistent with Arbitrator Devlin regarding the Bell matter, it would be helpful if you could address juts that for the guidance of the parties.

Despite my continued reservations, I felt constrained to read Arbitrator Devlin's decision. Having done so, I considered it unnecessary to hear further from the Hospital.

V. Decision

110 Arbitrator Devlin is a respected senior arbitrator whose decisions merit careful attention. However, I do not find her determination of AB's individual grievance helpful to me in this case. First, as a general matter a policy grievance determination will tend to do more to inform an individual rights arbitration decision than vice versa. Second, although there are questions of law in both cases, the applicable law is really quite well settled in both, which means that Arbitrator Devlin's decision and mine are both fact driven. (Indeed, I feel no need to analyze or even cite law except to a limited extent.) Although there is an inevitable overlap between the factual bases in the two proceedings these are not congruent. Arbitrator Devlin had more evidence about AB's individual situation than I do in this case, and I have more evidence about the overall situation. This is not surprising. Arbitrator Devlin's focus was on AB's individual grievance while mine is on the more general policy issues with respect to which AB's case was put forward as one of seven examples. To the extent that there are differences between Arbitrator's findings of fact and mine, that is probably due largely if not entirely to the differences in evidence and focus in the two proceedings. Finally, consistency is not necessarily a virtue. Not only is the first look not always the best, "foolish consistency is the hobgoblin of small minds" (per Ralph Waldo Emerson on *Self-Reliance* in *Essays: First Series*). Consistency in grievance arbitration is desirable but it is not a primary objective. The primary objective is to "get it right" on the basis of the evidence and submissions presented in the particular case. Hopefully consistency will emerge, but decisions should not be fashioned merely to achieve it if an apparently inconsistent result is warranted on the basis of the evidence or by the evolution of thought about a particular issue.

111 The parties will undoubtedly have noticed that I have made no reference to the evidence or argument about the number of STD benefits grievances that have been filed since Cowan took over the function of adjudicating and advising the Hospital with respect to such claims. The Union claims, and the Hospital disputes, that there has been a telling increase in such grievances and that that Cowan's improper conduct is the cause of this. I have not ignored the evidence or argument in that respect. I simply do not find it helpful. To the extent that this evidence is not hearsay or anecdotal, it is statistical. The statistical evidence extends beyond the Union's bargaining unit to include the CUPE and OPSEU bargaining units. The case before me concerns only the Union's RN bargaining unit. Even if there has been a statistically meaningful increase in the number of RN bargaining unit STD grievances (which appears not to be the case), there is no way of ascertaining from the evidence presented whether there is any merit to grievances with respect to which I have no evidence, or whether there is any correlation between that increase and any systemic misconduct for which Cowan is at fault. There mere fact that there may have been an increase in the number of STD grievances may suggest that there may be something worth investigating, but does not by itself establish that it is more probable than not that there is a systemic problem that could arguably constitute a violation of legislation or the collective agreement.

112 The fact that the Hospital expects Cowan to carry out the functions contracted for properly and in accordance with the collective agreement and applicable professional responsibilities is not an answer to the grievance. The question is whether Cowan, for whose conduct the Hospital is responsible, has met these expectations. On any view of the evidence, including Lynas' testimony, Cowan has clearly not done so. Similarly, saying that the STD benefits adjudication process in place is the gold-plated standard does not make it so. The test is in the application.

113 It is difficult to examine any process in the abstract without regard to how that process has actually worked. This requires the examination of individual cases. However, just as "hard cases can make bad law", there are STD benefits claims that will challenge any assessment and adjudication process. Any system or process created and administered by human beings is likely to have some failings in application if not in design, and the mere fact that there have been problems or failing in application, or that there has been some conduct that is contrary to the collective agreement or legislation on one, two or more occasions will not necessarily establish a pattern of improper conduct or systemic failure.

114 There is some merit to the Hospital's submission that part of the motivation for the Union's and bargaining unit employees' complaints about Cowan is the mere fact of Cowan's insertion into the process and the scrutiny, increased or not, of STD claims by an outsider to the workplace. I note, for example, that TT seemed annoyed by Cowan's request for an MCD and that one of KS' assertions is that "it is no one's business why a nurse is off'. As the Union

implicitly acknowledged in opening, there is nothing inherently wrong with the Hospital contracting with Cowan to provide STD benefits assessment and adjudication services, or with requiring employees to provide information to establish STD benefits entitlement. Why a nurse is off work is the Hospital's business, particularly if the nurse is claiming STD benefits under the collective agreement. Employees who claim STD benefits have to understand that they must provide sufficient personal medical information (the extent of which will depend on the particular case) to establish their right to the benefits. As I stated in Award #1 'Medical Certificate of Disability' Form Issue' (at paragraphs 24 and 25):

> 24. ... the onus is on the employee to establish that an absence is legitimate in the sense that she is genuinely unable to report for work due to illness or injury. As a general matter, the employer is entitled to sufficient "proof of the employee's assertion that she is unable to attend work due to illness or injury and entitled to benefits. Also as a general matter, even if there are no paid benefits available, or the employee elects to forgo them, the employer is entitled to notice of the fact and expected duration of an absence for the legitimate business purposes of work force management and absenteeism control purposes...
>
> 25. ... what is required is sufficient reliable information to satisfy a reasonable objective employer that the employee was in fact absent from work due to illness or injury, and to any benefits claimed ...

115 I have dealt with appropriate scope of the consent to release confidential medical information in Award #1, but more needs to be said. As I noted in Award #1 'Medical Certificate of Disability' Form Issue' and above, employees who claim STD benefits have to understand that they are going to have to provide some personal information (the extent of which will depend on the particular case) to establish their right to the benefits. Personal medical information provided in that respect is not made available "for everyone to read".

116 KS testified that Smith offered no documents and obtained no consents before asking her questions about her circumstances. Whose consent was Smith to obtain first? Since the consent was KS' to give or not, the request for consent was implicit in the questions after Smith introduced herself and explained why she was calling. It was up to KS, who as an RN knows or ought to know something about medical information confidentiality, to answer the questions or not. If she felt unable to talk (notwithstanding that she answered the telephone) or to deal with the call she could have said so and suggested that Smith call back or communicate in writing. However, the issue was going to have to be dealt with at some point. In any event, it appears that KS freely gave up the information requested. Indeed, KS says she "consented", and although she says she did so she was told that she wouldn't be paid for any time off until the completed MCD was returned she also agreed that she had nothing

to complain about prior to July 6, 2005. Further, what Smith told her is true. An employee cannot refuse to provide sufficient appropriate information and expect to obtain benefits.

117 TT maintains that the MCD consent that she signed was for her family doctor, not for Dr. Hunter. Although I have determined in Award #1 that the consent in the Cowan MCD form is too broad, the fact is that TT signed that consent and that it was arguably broad enough to cover any physician involved in caring for her during the period for which she was claiming benefits. However, when TT objected to direct contact with Dr. Hunter, as even Cowan's records indicate she did, that broad consent was negated as far as such direct contact was concerned.

118 The evidence suggests that there were transition issues when Cowan took over the STD benefits function from the Hospital's EHS Department, and that this may have caused some of the frustrations experienced by some bargaining unit employees.

119 In addition, KS', TT's, KP's, AB's and KH's cases demonstrate that even as of the dates that they testified they had not been properly educated with respect to what is required of an employee who seeks collective agreement STD benefits. I consider it reasonable to infer that that is probably generally the case for bargaining unit employees.

120 KS appeared to take umbrage at the fact that she was required to have a MCD properly completed before she was entitled to receive LTD benefits, suggesting that notes like the April 6, 2005 (Tab 4 of Exhibit #51) and April 22, 2005 (Tab 5 Exhibit #51) notes from her family physician in support of her absences beginning April 1 and 16, 2005 respectively should be sufficient. I disagree. The April 1, 2005 note simply states that KS is "off work medical reasons April 1-April 10.05 (inclusive)". The April 22, 2005 note states only that KS is "off work from April 16.05 [,] RTW indefinite -> med. reasons." Neither of these is necessarily sufficient to excuse even an absence of less than five days, much less a claim for STD benefits. As far as AB's frustrations with Cowan are concerned, some of these arise from the way in which her doctor completed her MCD. For example, he indicated that she was not on medication (which AB says is incorrect) and estimated a return to work date which AB challenged.

121 TT's first MCD indicated only that she was pregnant and presented with cramping, weakness, pain and severe fatigue, and did not suggest that she required medication, therapy or any other treatment. I do not find it surprising that this caused Cowan to question her entitlement to STD benefits. It is her second MCD in which her physician mentioned the rather significant syncopy and that her symptoms were so severe that she required total rest, including bed rest at times, and the note from her obstetrician that TT was experiencing uterine contractions of sufficient intensity and frequency that he was concerned about premature labour and its ramifications, and that she should stay off work and rest in bed,

that call Cowan's conduct into question. KP's June 29,2005 doctor's note (which states only that she "requires another month off for medical reasons") were entirely inadequate for the purpose, although in neither case does this explain or excuse Cowan's subsequent conduct in their cases. Dr. Tsuchida's August 23, 2005 note stating that AB was to be "off work for medical reasons from 22/8/05 -> est. 26/9/05" is similarly unilluminating, although it must be read in context. And even within the context of Article 12.10 there was precious little objective information provided to support KH's STD claim until after the first denial letter.

122 These five employees' complaints about the process and Cowan's contacts with them, although not entirely without merit, betray a lack of understanding of what was required of them. Education in that respect is a shared responsibility. The Hospital and the Union both have a role to play, and a responsibility to ensure that bargaining unit employees are properly informed of their rights and obligations. Bargaining unit employees also have an obligation to inform themselves.

123 That said, and although Cowan is not necessarily at fault in every instance, the evidence in this case does reveal systemic problems.

124 The first thing that is apparent is that Cowan's records (at least as produced) are incomplete. On the face of those records not all telephone contacts are recorded, and not all relevant documents are in the files. For example, Cowan's "User-defined fields Report" dated October 11, 2005 which describes AB's diagnosis as "Adjustment Disorder reaction" may have been entered on the basis of subsequently acquired information or instructions that are not in evidence. It may have arisen out of discussions between Drs. Tessier and Tsuchida. In that respect, the evidence includes a record of a telephone conversation between the two doctors on September 9, 2005 (Exhibit #75). Although there is a reference to a telephone conversation between Drs. Tsuchida and Tessier in an e-mail from Dr. Tessier to Higginbotham in the Cowan file (page 18 of Exhibit #69) and in a January 30, 2006 e-mail from Dr. Tessier to Hastie (page 3 of Exhibit #69), the actual documentation of the conversation, which on its face was made by Dr. Tessier, is not in the Cowan file that was produced for this proceeding. There is no explanation for this. The evidence regarding TT's claim also raises record deficiency questions.

125 The fact that these deficiencies come out of a sample of only seven files is sufficient to raise concerns about the general state of Cowan's files.

126 Second, there is no doubt that Cowan misrepresented the status of its personnel to the Hospital and the Union. It represented that the Cowan employees who would be dealing with bargaining unit employees' STD benefits claims were all medical health professionals. On the evidence before me, at least Higginbotham and Geil were not medical health professionals. Cowan was wrong to misrepresent the situation, and doing so does not inspire confidence

and begs the question: what else has Cowan misrepresented? However, and notwithstanding that the consequences for mishandling confidential medical information may be different and more serious, and that it may be preferable for all claims assessors/adjudicators to be medical health professionals, there is nothing in law or otherwise that requires that everyone who has access to confidential medical information in a benefits claims process be a medical health professional. Of course whether or not Cowan employees are medical health professionals, they are obliged seek and disclose only necessary confidential medical information, and then only with the appropriate consent and according to law. They are also obliged not to use or distribute any personal information obtained from or with respect to an employee claimant for purposes unrelated to the particular claim for STD benefits or as appropriate for return to work purposes.

127 Third, one of the things that the Union and employees who testified take great issue with is the extent and nature of Cowan's contact with employees who are absent from work and seeking STD benefits. More specifically, the Union asserts that Cowan systemically harasses employees with unnecessary and inappropriate telephone calls to them at home.

128 There is nothing necessarily wrong with Cowan or any other benefits administrator telephoning a claimant at home as long as there is an objectively legitimate reason for doing so -whatever any particular claimant may "feel" in that respect. Some contact is necessary. There is nothing inherently or generally wrong with telephone contact with an employee who claims STD benefits. The fact that an employee might find such contact annoying does not mean she is being harassed. Subjective annoyance is not the same thing as objective harassment. The telephone is generally the most expeditious means of communication for the purposes of a claim, even from the perspective of the employee. Nor is there anything inherently or generally wrong with telephoning the employee at home. Where else is one to contact an employee who is absent from work and claiming disability benefits? However, what begins as acceptable if annoying contact can become harassment if the number or manner of the contacts, or the nature or scope of the information sought from the employee exceeds what is reasonably necessary in the circumstances. The stress of excessive or inappropriate contact will do nothing to help either the already vulnerable employee or the Hospital.

129 As a general matter, it is impossible to say how many such calls are acceptable within any given period of time. That will depend on the circumstances of the particular case. Every situation is different, and it is impossible to set out any specific "rules" in that respect. However, Cowan must take into account that it is dealing with people who assert that they are totally disabled in that they are "unable to perform the regular duties pertaining to [their] occupation due to injury or illness" (the words of the 1980 HOODIP), and must be sensitive to the asserted circumstances of the particular claimant and adjust the number and nature of the communications accordingly. Although, the onus is on a claimant to establish entitlement to benefits, it is appropriate that the benefit of any doubt about such an assertion be given to the

claimant until such time as either the claimant is either clearly failing to provide information that is reasonably required to support the claim, or there is objective information that casts real doubt on the legitimacy of the claim.

130 On the evidence before me in this proceeding, I am unable to conclude that it is more probable than not that Cowan's approach to communicating with bargaining unit employees seeking STD benefits amounts to *systemic* harassment (which does not necessarily mean that there has not been harassment in an individual case).

131 Fourth, the Union complains that Cowan's approach to assessing and adjudicating STD claims, and the manner in which it approaches return to work issues, is abusive and amounts to systemic, harassment, intimidation and coercion. There is merit to this allegation.

132 There is a difference between aggressive sick leave benefits management and harassment, and the line between them is a fine one. There is nothing wrong with advising an employee claiming benefits about the process and what is required of them. This is both necessary and appropriate. There is also nothing wrong with advising an employee that she will not receive the benefits claimed if she does not provide sufficient information to establish her entitlement to benefits. This is true. Nor is there anything wrong with advising an employee when STD benefits will run out. An employee might well complain if she were not properly advised in any of these respects. Indeed, one of the Union's complaints in this case is that Cowan insufficiently explained to some of the employees what more was required in order to establish their entitlement to STD benefits.

133 Just as there is a fine line between aggressive benefits management and harassment, there is a difference between providing information and attempting to coerce an employee to return to work before she is fit and able to do so under the guise of providing information. The evidence suggests Cowan failings on both sides of that line.

134 TT's case is an example of a case in which Cowan held too much back. Smith was insufficiently forthcoming about what Cowan's concerns were and what was lacking in the medical information provided. This was undoubtedly due at least in part to what the evidence suggests is Dr. Tessier's general approach; namely, to hold back "keeping more arguments if she comes back yet again." If there are deficiencies in an employee's claim for STD benefits it is appropriate for Cowan to clearly identify what they are. It is not for Cowan to "hold back arguments", or to argue at all. Its primary job is to assess and adjudicate STD benefits claims, not to take positions or "argue" with anyone. If it rejects (or advises that Hospital to reject) a claim, it should give something more than a generic reason for doing so.

135 It not appropriate for Cowan to take a "hard ball" approach to STD claims, whether so expressed or not. As a general matter, such an approach suggests coercion and is inconsistent

with the obligation to deal with STD benefits claims fairly and in good faith. Claims assessors/adjudicators must be sensitive to the circumstances and respectful of the rights of claimants.

136 It is not appropriate for Cowan to try to steer bargaining unit employees away from STD benefits to other possibly available sources of financial assistance. Cowan's job is to assess and adjudicate claims for STD benefits. Cowan should confine itself to the function contracted for. An employee who has a right to a benefit under the collective agreement is entitled to exercise that right and obtain that benefit even if other options are available. It is wrong for Cowan to deny a claim for STD benefits if any part of the basis for doing so is that there are other sources of assistance. A bargaining unit RN who qualifies for HOODIP STD benefits is entitled to them regardless of the availability of alternate sources of financial assistance. Cowan's propensity for emphasizing financial pressures, not out of any apparent genuine concern for the employee, but as a tool to coerce the employee to return to work is inappropriate. It is not appropriate for Cowan to subvert an employee's collective agreement rights by coercing the employee to seek benefits elsewhere.

137 AB's case presents a particularly disturbing example on an inappropriate approach to STD claims. Cowan's concern that "lack of income" was central to AB's claim is misguided. Why wouldn't (or shouldn't) lack of income be central to a claim for STD benefits? The purpose of such benefits is short term income replacement. Similarly, the suggestion that EI compassionate benefits and advance life insurance payment were available financial assistance alternatives indicates consideration of an irrelevant factor and demonstrates an inappropriate approach by Cowan. To repeat: Cowan's job is to adjudicate STD claims on their merits. It is not Cowan's job to steer employees away to other forms of possibly available assistance.

138 In summary, Cowan should restrict itself to what is supposed to be doing within the limits of its contract and (presumed) expertise. Its focus should be on the assessment and adjudication of STD benefits claims. It should leave arbitration considerations to human resources and legal professionals. Cowan should not suggest alternative sources of benefits or financial assistance, at least not unless the employee requests that sort of advice. That appears to be beyond Cowan's mandate under its contract with the Hospital, and even the best intentions in that respect can be misinterpreted. Similarly, Cowan is not only giving labour relations or other legal advice beyond Cowan's contractual mandate, it is in no position to do so, regardless of the newsletters or other sources it consults. Although it is not my place or purpose to give advice to Cowan, I observe that it may expose the Hospital or itself to criticism or even liability if any suggestions or advice that it gives in that respect turns out to be faulty.

139 Fifth, the evidence suggests that Cowan is be overly concerned with statistics and consistency. (See TT's case, for example.) A medical condition is unique to the individual

and must be evaluated on its own merits, not on the basis of the evaluations of others in broad categories which may not be accurately reflected in any one individual situation. For the reasons described in paragraph 112, above, consistency should emerge if the system is designed and administered properly, but consistency should not be a significant decision-making factor without regard to the circumstances of the individual case. The system should fit the needs and requirements of the benefits program and its beneficiaries, not vice versa.

140 Sixth, Cowan's failure to recognize and properly apply the collective agreement and the HOODIP definitions of "total disability" for STD benefits purposes is extremely troubling. Without the benefit of testimony from Cowan it is difficult to tell whether this is out of ignorance or otherwise, but in the context of the evidence as a whole the lack of any explanation suggests that it is not solely out of ignorance. KH's case demonstrates that Cowan either ignored or was negligently ignorant of the provisions of the collective agreement and the HOODIPs. At the very least Cowan's conduct demonstrates a misunderstanding of both the collective agreement (specifically Article 12.10 of the Central Agreement), and the definition of "total disability" for STD benefits purposes under the 1980 HOODIP. Lynas testified that the Hospital expected Cowan to be aware of Article 12.10 of the collective agreement (which provides that: "Absences due pregnancy related illness shall be considered as sick leave under the sick leave plan."), that pregnant employees are eligible for STD benefits, and that the Hospital's expectation was (and is) that the STD benefits adjudication process and parameters will be the same for pregnant employees as it is for other employees. Quite right, but the Hospital is responsible for ensuring that its agent Cowan is properly informed and instructed in that respect, and that it adjudicates claims properly. Cowan's response to the additional information provided after the initial rejection of KH's claim demonstrates a lack of proper attention by the Hospital and Cowan. The Hospital should have made sure that Cowan was aware that both under the collective agreement and otherwise (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (SCC)), pregnant bargaining unit RNs must be treated the same way as other employees. The fact that something may be a "normal" complication of pregnancy does not mean that it cannot result in total disability within the meaning of the HOODIP STD benefits provisions. But even in the absence of any instruction from the Hospital in that respect, Cowan failed to exercise due diligence or to properly apply the collective agreement or the clear Supreme Court of Canada guidelines from the *Brooks*, *supra*, and subsequent human rights cases that it is reasonable to expect every STD benefits administrator to be aware of.

141 Cowan's interpretation of the HOODIP STD benefits provisions is also wrongheaded. Higginbotham and Dr. Tessier were wrong to write in their September 13, 2005 letter to AB that fitness to work is not the issue. Fitness to work is *the* issue. The 1980 HOODIP states that for the purposes of STD benefits ""total disability" and "totally disabled" mean ... that [the employee is] unable to perform *the regular duties pertaining to [her] occupation* due to injury or illness and ... not engaged in any gainful occupation." (Emphasis added.) An employee

whose condition satisfies this definition is sufficiently unfit to work to be entitled to STD benefits. The wording is significant. It means that the employee must be unable to perform the *regular* duties of her occupation, not some of the duties, essential or otherwise. However, the words used are "pertaining to [her] occupation", not to her "classification", "position" or "job". "Occupation" is a broad term. In its plain and ordinary meaning it refers to one's vocation or line of work. "Job" tends to be a more colloquial term that can refer broadly to an occupation or profession, or narrowly to a particular position. In its plain and ordinary meaning "classification" means a category or type of position or job within an occupation. The point is that "occupation", which is the term used in the 1980 HOODIP tends to be a broader term than "classification" or "position". All of the bargaining unit employees covered by the collective agreement between the parties are RNs. That is the "occupation" of all of the bargaining unit employees. I am satisfied that the better view is that the term "occupation" does not refer to the employee's classification or particular job. That is, when determining whether a RN is totally disabled for 1980 HOODIP STD benefits purposes consideration is not limited to the RN's particular classification or position at the time she was injured or became ill. If the RN is qualified and can perform all of the regular (not modified) duties of any available RN position, with accommodation if required, she is not "totally disabled" for STD benefits purposes.

142 I am satisfied that the same analysis applies for the purposes of STD benefits under the 1992 HOODIP which provides that: "Total Disability and Totally Disabled means ... impairment ... which prevents [the employee] from performing *the regular duties of the occupation* in which she participated immediately preceding the start of the disability." (Emphasis added.)

143 Seventh, whether employees like it or not, as early a return to work as possible is a legitimate objective. Even KS rightly conceded that an employee claiming STD benefits, the Union and the Hospital all have a legitimate interest in and an obligation to facilitate as early a return to work as possible, with accommodation as appropriate where reasonably available. Having said that, this does not mean that a bargaining unit RN is obliged or can be required to return to work to less than regular duties in a RN position, with accommodation if available and appropriate. Nor does it mean that a return to work should be scheduled without regard to the objective evidence or employee's individual circumstances. In this case, Cowan's approach to return to work in the cases of KS, KP, KH, KM and PW was overly aggressive and ill-considered. Cowan's failure or apparent inability to properly consider the circumstances suggests an inappropriate and systemically arbitrary and coercive approach.

144 Eighth, Cowan's treatment of the STD claims in evidence also demonstrates a distressing lack of objectivity and inappropriate approach to medical information and guidelines. In assessing and adjudicating STD benefits claims and assessing return to work capability, Cowan is obliged to properly apply the actual collective agreement disability

guidelines with due regard to the objective medical information and the individual situation. The evidence reveals serious failings in that respect in the cases of KS, TT, AB, KH, PW and KM quite apart from failing to properly apply the collective agreement and the HOODIP provisions. In the absence of any explanation from Cowan, from which I can only infer that there is none, these cases demonstrate Cowan's, and in particular Dr. Tessier's, unfortunate tendency to ignore medical evidence and to second guess or disregard the conclusions and objective findings where these conflict with preconceived notions. PW's and KM's cases are particularly disturbing examples of Cowan's tendency to second guess or ignore the most responsible physicians assessments, including those of specialists and surgeons (and Dr. Tessier is neither), and even those of medical health professionals of whom Cowan requested an independent assessment.

145 On the evidence with respect to AB for example, it appears that a Cowan representative substituted a diagnosis for one made by the attending physician, without actually seeing much less conducting any examination of the employee, and with no documented basis for doing so. This is quite improper. It is inappropriate to substitute another diagnosis and effectively overrule one made by the treating or most responsible physician, particularly on the basis of the information that was available to Cowan in this case, without actually seeing the employee/patient. Cowan's job is to interpret and assess the medical evidence provided, and not to second guess an opinion expressed by a treating physician unless that opinion is clearly inconsistent with the medical evidence. On the evidence, there is no one at Cowan, including Dr. Tessier, who is in any position to second guess the opinion of a medical specialist. In that respect, in the absence of an explanation by the author (and again there is none), Exhibit #75 is so absurd as to be at least arbitrary and probably indicative of bad faith.

146 It is absurd to suggest that the fact that there is no medical cure for a condition means that the employee is disqualified from receiving STD benefits. It suggests the opposite. In AB's case, for example, a situational crisis may not be a medical condition as such, but it can result in disabling medical condition and an entitlement to benefits. Depression can be caused by situational issues, and a situational crisis should suggest a more rather than less medically significant situation.

147 In KM's case, Cowan (both Dr. Tessier and Higginbotham) displayed an inappropriate unwillingness to accept information that was inconsistent with their preconceived and misconceived notions, and failed to recognize the difference between being unfit and being unwilling to work. Although I can understand Dr. Tessier's desire to present Cowan's treatment of KM's case in the best possible light to the Hospital, I consider his implicit criticism of KM and her doctor to be inappropriate, particularly since KM did attempt to return to work in accordance with Cowan's wrong-headed CMR. KM's concerns were legitimate, and KM and her doctor were proven to be right. It was Dr. Tessier and Cowan who were wrong and acted badly, not KM or her doctor.

148 Ninth, there is the issue of Cowan to employee physician contact. There is nothing necessarily wrong with direct Cowan to physician contact. This may be the most efficient way to proceed from everyone's perspective. However, it should not be used as a routine part of the assessment/adjudication process, and it should never occur without the employee's full knowledge and express consent. In an STD benefits claim, the appropriate focus is on the employer-employee relationship. The quality of physicians' opinions regarding an employee's ability to work or return to work (which directly impacts upon the nature and extents of STD benefits available to the employee) will vary greatly depending upon, among other things, the individual physician's general attitude and approach to such issues, how well the particular physician knows the particular employee, and what the physician actually knows about the patient's job and the workplace. The physician's primary role in a STD benefits or return to work process should be to provide relevant objective medical information. The physician's primary responsibility is to the employee as patient, and s/he should not be placed into the middle of or play a policing role in what is essentially an employment issue between the employee/patient and the employer (or its agent - in this case, Cowan). In any case, the employee patient should not be left out of the loop. Where direct Cowan (i.e. employer) to physician contact is both necessary *and* appropriate, the appropriate consent must be obtained first. Unless there is a legitimate reason to keep the employee in the dark about a matter that fundamentally concerns her, the employee is entitled to know when and by what means such contacts are to take place beforehand, so that she can express any concerns or make any objections in a timely way. I appreciate that this may slow the process down. However, the process and all contacts regarding an employee's medical situation and ability to work must recognize that the issue concerns the employment relationship, and respect the limited privilege that attaches to confidential medical information is the patient's privilege, not that of the physician or the benefits administrator. The employee is also entitled to know what was the discussed and any conclusions that have been arrived at as a result in a timely way (again subject to legitimate reasons for limiting such reporting to the employee).

149 Exhibit #75 records, and AB does not dispute, that Dr. Tsuchida called Dr. Tessier at AB's request after she received notice of Cowan's determination of her claim. AB says she knew about the call but not what was discussed. On the evidence before me, I cannot find that this direct contact between Drs. Tessier and Tsuchida on September 9, 2005 was inappropriate, either because it was allegedly without consent or otherwise, when on AB's own evidence she instigated that contact, and apparently did not inquire about the discussion. However, the discussion should have been reported to her, and Cowan and Dr. Tsuchida had a shared responsibility in that respect.

150 In TT's case, the arguably broad consent could not be relied upon to permit Cowan to contact Dr. Hunter directly once TT registered her objection in that respect.

151 The evidence concerning KH suggests that Cowan communicated with her physician regarding antenatal records without first obtaining her informed consent in that respect.

152 In the result I have no evidentiary basis for the policy grievance dated December 1, 2004 (#04-56). That grievance must therefore be dismissed.

153 However, the July 27, 2005 (#05-41) policy grievance is allowed for the reasons given above. In argument, the union requested a variety of declarations and orders, and that I remain seized in the usual way.

154 I am not satisfied that the evidence discloses a need for a declaration relating to Cowan's requests for unnecessary medical information beyond the relief already given in Award #1. I am not satisfied that it is appropriate to issue a declaration regarding Cowan's systemic approach to communicating with bargaining unit employees. I am not satisfied that the evidence establishes a systemic violation of the Ontario *Human Rights Code*. I am also not satisfied that the Cowan has shared information with the Hospital in a manner that is systemically contrary to the collective agreement or legislation. My conclusions in these respects do not mean that there has been no violation of the collective agreement, or of the Code or other legislation in any individual case.

155 The Union requests an order requiring the Hospital to cease and desist using Dr. Tessier or unregulated health professionals to adjudicate or even access bargaining unit employees' confidential medical information. I am satisfied that such an order is not appropriate. There is nothing *prima facie* wrong with permitting individuals who are not regulated health professionals access to confidential medical information, so long as those individuals are properly trained in the interpretation, use and disclosure of such information. Although I am concerned about Dr. Tessier's approach and apparent attitude, I consider the order requested with respect to him to be premature. However, I note that the Hospital is responsible for Cowan's conduct and may be found liable for any misconduct in relation to STD benefit claims under the collective agreement.

156 The Union also seeks what it refers to as an "immunization order"; that is, an order "directing the Hospital to not use Cowan agents to participate in any functions of administration of sick benefits for ONA members." I am not prepared is issue such an order without giving the Hospital an opportunity to correct the situation. However, I or some other arbitrator may be prepared to do so in a future case if the problems identified in this proceeding persist, or other problems arise.

157 Having stated what I am not prepared to do, I consider it appropriate to issue the following declarations and orders:

I DECLARE THAT THE HOSPITAL HAS THROUGH ITS AGENT COWAN, VIOLATED THE COLLECTIVE AGREEMENT by

(a) applying the wrong test for entitlement to short term disability benefits under the collective agreement between the parties; and by

(b) considering irrelevant factors when determining entitlement to short term disability benefits under the collective agreement between the parties; and by,

(c) not properly applying the provisions of Article 12.10 of the collective agreement between the parties; and by

(d) acting in a manner that is arbitrary, harassing, coercive and in bad faith by seeking to deflect bargaining unit employees away from their right to sick leave benefits under the collective agreement by suggesting that they seek assistance other than short term disability benefits under the collective agreement, by ignoring or misapplying relevant medical information and generally accepted guidelines, by contacting employees' physician's directly without first obtaining an appropriate consent or keeping employees properly informed in that respect, and by pursuing the return to work of bargaining unit employees prematurely and without proper attention to the relevant circumstances.

I THEREFORE CONSIDER IT APPROPRIATE TO ORDER THE HOSPITAL to ensure that it and its agent Cowan cease and desist from all improper conduct as described in this award, and that bargaining unit employees' claims for short term disability benefits be assessed and adjudicated in accordance with all the Awards issued in this proceeding.

158 I shall remain seized for the purposes of rectification, and to deal with any issues concerning the implementation or administration of this Award.

End of Document

TAB 5

1982 CarswellOnt 593
Supreme Court of Canada

St. Peter's Evangelical Lutheran Church v. Ottawa (City)

1982 CarswellOnt 593, 1982 CarswellOnt 741, [1982] 2 S.C.R. 616, 140 D.L.R. (3d) 577, 14 O.M.B.R. 257, 17 A.C.W.S. (2d) 58, 20 M.P.L.R. 121, 45 N.R. 271, J.E. 82-1180

Trustees Of St. Peter's Evangelical Lutheran Church v. Corporation Of The City Of Ottawa

Dickson, Estey, McIntyre, Lamer and Wilson JJ.

Heard: April 1, 1982
Judgment: November 23, 1982

Counsel: *Gordon F. Henderson*, Q.C. and *Emilio Binavince*, for appellants.
D.V. Hambling, Q.C. and *J.L. O'Brien*, for respondents.

Subject: Public; Contracts; Municipal

Appeal from a decision of the Ontario Court of Appeal reported 14 M.P.L.R. 51, 30 O.R. (2d) 740, 118 D.L.R. (3d) 528, affirming 12 M.P.L.R. 241, 27 O.R. (2d) 264, 107 D.L.R. (3d) 229, holding that the City of Ottawa should not be deemed to have consented to the demolition of a building.

Canadian Abridgment (2nd) Classification:

Municipal Corporations, XX, 17.

McINTYRE J. (DICKSON, LAMER and WILSON JJ. concurring):

This appeal arises from an application for judicial review of a municipal by-law. The application was dismissed by the Supreme Court of Ontario reported (1980), 27 O.R. (2d) 264, 12 M.P.L.R. 241, 107 D.L.R. (3d) 229, and an appeal of that decision to the Ontario Court of Appeal reported (1980), 30 O.R. (2d) 740, 14 M.P.L.R. 51, 118 D.L.R. (3d) 526, was also dismissed. The case involves a consideration of the effect of s. 34(3) of the Ontario Heritage Act, S.O. 1974, c. 122, now R.S.O. 1980, c. 337 (the Act). That subsection provides that where the council of a municipality within 90 days of receiving the application neither consents to nor refuses an application to demolish a property, designated under the

Act as having historical or architectural value, it will be deemed to have consented to the application.

The appellants are the owners of the land and buildings known as 136 Bay Street in the City of Ottawa, hereinafter referred to as 'the property'. It was acquired by the appellants in 1974, in the words of one of the members of the church, "to enhance and protect" the church property which is located on an adjacent lot. There was a house situate on the property and in March of 1977 the appellants applied for a permit to demolish it. No reply or acknowledgment of this application was received. In January, 1979 a further request was made for a demolition permit and again no formal reply or acknowledgment was received. On June 6, 1979 the council of the City of Ottawa passed By-law 157-79, pursuant to s. 29 of the Act, which had the effect of designating the property as one of historical or architectural value. It was conceded by the appellants that the statutory provisions relating to the designation by-law were properly complied with and that the by-law was accordingly effective to designate the property under the Act. As a result of the designation, the appellants, as owners of the property, were prohibited by the provisions of s. 34(1) of the Act from demolishing the building without the consent in writing of the council and it is clear that the appellants were aware of this fact.

The appellants on June 27, 1979 applied to the council for consent in writing to demolish the building on the property. The letter setting forth this application was, according to the respondents' evidence, received on June 29, 1979. The letter also informed the council that a formal application for a permit to demolish the building, which was required under the Building Code Act, S.O. 1974, c. 74 now R.S.O. 1980, c. 51, and the city by-laws, would be made the following week to the city's building inspector. This later application was received by the city on July 4, 1979.

The council held a meeting on September 19, 1979 and adopted as By-law 261-79 a report of the Ottawa Planning Board, numbered 18a, recommending that the application for permission to demolish the building be denied, and a report of the Board of Control, numbered 19, recommending that "expropriation proceedings be initiated to acquire the Heritage building at 136 Bay Street". The second report included as recommendation No. 4 the statement that "the Department [of Community Development] be instructed to meet representatives of the church to discuss purchase and/or other solutions". It was conceded that no written notice regarding the refusal to permit demolition was sent to the applicants prior to October 26, 1979.

On October 27, 1979 the appellants commenced demolition of the building and it was substantially demolished. On the same day, the city obtained an ex parte injunction preventing further demolition which was served on the appellants on October 29, 1979. As well the appellants received on October 29 a letter from the city, dated October 26, 1979,

refusing to consent to demolition, and a notice of intention to expropriate. This was the only formal notice received from the city after the council meeting of September 19.

The city commenced an action for an injunction and damages against the appellants and for a continuation of the injunction until trial. The appellants commenced proceedings for judicial review of By-law 157-79 (the designation by-law). The two proceedings were argued together on common evidence before Craig J. He continued the injunction against further demolition until trial and dismissed the application for judicial review on January 9, 1980. An appeal from this dismissal was dismissed in the Court of Appeal on November 20, 1980.

It is clear from the evidence, and in fact it was conceded, that no publication in a newspaper and no written notice, such as is contemplated in s. 67 of the Act, regarding the intention of the council to refuse permission to demolish the building was given to the appellants. Section 67 provides:

> 67. — (1) Any notice or order required to be given, delivered or served under this Act or the regulations is sufficiently given, delivered or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made at his last known address.
>
> (2) Where service is made by mail, the service shall be deemed to be made on the seventh day after the day of mailing unless the person on whom service is being made establishes that he did not, acting in good faith, through absence, accident, illness or other cause beyond his control, receive the notice or order until a later date.
>
> (3) Any notice required to be published in a newspaper having general circulation in the municipality in which a property is situate shall be published in that newspaper once for each of three consecutive weeks.

No formal notice of the city's position was given until after the 90-day period in s. 34(2) of the Act had elapsed on September 27 (90 days from June 29) or, if the formal application received by the city on July 4 is considered to be the effective date, then not later than October 4 (90 days from July 4). It is also clear from the evidence, however, that over a period of some two years discussions had taken place between representatives of the appellants and the city regarding these matters. There had been correspondence between them and in later months there had been newspaper publicity which gave a clear indication that the city did not intend to permit the demolition of the building. It is also true that at least two members of the appellant's church were present at the meeting of the council on September 19, 1979 and, while it is not clear what they could have inferred from what they heard, they were aware at least that up to that point the city had not consented to their application.

In the trial Court, Craig J. did not consider that the admitted failure of the council to give notice of its decision to the owners was fatal to the council's position. He concluded on the evidence that the appellants were well aware of the "true purpose and intention of the city" and considered that the word 'deemed' in subs. (3) of s. 34 should be "interpreted in this context to mean 'deemed until the contrary is proved' [p. 245 M.P.L.R.]." Concluding then that the appellants knew that the city opposed and would not consent to the application, he declined to apply the deeming provision and dis missed the application for judicial review. In the Court of Appeal, MacKinnon A.C.J.O., with whom the other members of the Court agreed, considered that the city had given notice of its decision to the appellants and dismissed the appeal. Jessup J.A. added that all Acts were deemed remedial by s. 10 of the Interpretation Act, R.S.O. 1970, c. 225, and that he would dismiss the appeal for the reasons given by Craig J. In this he was agreeing with Craig J.'s view that the deeming provision should have a liberal construction in these circumstances and not be applied strictly so as to deem the council's consent conclusively.

In this Court, the appellants argued that under the provisions of s. 34(2) of the Act the city was required, within 90 days from the receipt of the appellants' application for a demolition permit, to reach a decision. It was required either to consent to the application or to refuse it and prohibit any demolition for a further period of 180 days from the date of such decision. The city was required to give notice. Since the council did neither, within 90 days, the deeming provision in subs. (3) of s. 34 resulted in a conclusive deeming that the respondent city had consented to the application. It was further contended that the common law right of the property owner could not be taken away without the use of clear statutory language and there was no such language in the Act. In fact, it was contended that the language was clear to the effect that notice was required in the manner provided in s. 67 of the Act, and that the failure in this respect by the respondents was fatal to their position.

The respondents contended that the issue between the parties was limited to the simple question of notice. It was argued that under s. 34(2) of the Act notice had been given to the appellants by the course of dealings between the parties and by the information the representatives of the appellants would have acquired as a result of attendance at the meeting of the council on September 19, 1979. There was no requirement for written notice. In any event, any notice required was replaced by notice in fact. It was also argued that the deeming provision in subs. (3) could not come into effect because, by a true construction of the Act, the deeming provision meant 'deemed until the contrary has been shown', not 'conclusively deemed'. Accordingly it followed, since it was clearly known by the appellants that the respondents had not, in fact, consented and had refused to consent, that the contrary had been shown. The deeming provision was not effective then to assist the appellants and the appeal should fail.

Section 34 of the Ontario Heritage Act is set out hereunder:

> 34. — (1) No owner of property designated under this Part shall demolish or remove any building or structure on such property or permit the demolition or removal of any building or structure on such property unless he applies to the council for the municipality in which the property is situate and receives consent in writing to such demolition or removal.
>
> (2) The council, after consultation with its local advisory committee, where one is established, shall consider an application under subsection 1 and within ninety days of receipt thereof shall,
>
> (*a*) consent to the application; or
>
> (*b*) refuse the application and prohibit any work to demolish or remove any building or structure on the property for a period of 180 days from the date of its decision, and shall cause notice of its decision,
>
> (*c*) to be given to the owner and to the Foundation; and
>
> (*d*) to be published in a newspaper having general circulation in the municipality, and its decision is final.
>
> (3) The applicant and the council may agree to extend the time under subsection 2 and, where the council fails to notify the applicant of its decision within ninety days after the notice of receipt is served on the applicant or within such extended time as may be agreed upon, the council shall be deemed to have consented to the application.
>
> (4) Notwithstanding subsection 1, where the period of 180 days prohibiting any work to demolish or remove any building or structure on a property under clause *b* of subsection 2 has expired and the owner has not agreed to an extension of such period, or where the extension of time agreed upon by the owner and the council under subsection 3 has expired, the owner may proceed to demolish or remove the building or structure on the property subject to the provisions of any other Act or regulation thereunder.
>
> (5) Where,
>
> (*a*) the council consents to an application under clause *a* of subsection 2, or is deemed to have consented to an application under subsection 3; or
>
> (*b*) the period of 180 days under clause *b* of subsection 2 has expired or where the extension of time agreed upon by the owner and the council under subsection 3 has

> expired and the demolition or removal of the building or structure on the property has been completed, the council shall pass a by-law repealing the by-law or part thereof designating the property and shall cause,
>
> (*c*) a copy of the repealing by-law to be served on the owner and on the Foundation;
>
> (*d*) notice of the repealing by-law to be published in a newspaper having general circulation in the municipality;
>
> (*e*) reference to the property to be deleted from the Register referred to in subsection 1 of section 27; and
>
> (*f*) a copy of the repealing by-law to be registered against the property affected in the proper land registry office.

The Ontario Heritage Act was enacted to provide for the conservation, protection and preservation of the heritage of Ontario. There is no doubt that the Act provides for and the Legislature intended that municipalities, acting under the provisions of the Act, should have wide powers to interfere with individual property rights. It is equally evident, however, that the Legislature recognized that the preservation of Ontario's heritage should be accomplished at the cost of the community at large, not at the cost of the individual property owner, and certainly not in total disregard of the property owner's rights. It provided a procedure to govern the exercise of the municipal powers, but at the same time to protect the property owner within the scope of the Act and in accordance with its terms. Virtually all argument in this Court centred upon the construction and effect of this section and, particularly, subs. (3), the 'deeming' provision. The respondents have contended for a liberal construction of the Act and the appellants for a strict construction. The distinction between the two approaches is conveniently set out in The Construction of Statutes, E.A. Dreidger, pp. 148-9, in this manner:

> The early doctrine of equitable construction was followed by the theory of 'strict' and 'liberal' construction. Statutes were regarded as falling into one or two broad classes — penal and remedial. Penal statutes (which included not only statutes imposing a penalty for violation, but also revenue statutes and statutes interfering with the liberty or property of the subject) were to be construed strictly, and remedial statutes were to be construed liberally.
>
> What the boundaries of these two classifications were has never been clearly defined; what is a remedial statute to one may be penal to another; and a statute could in some aspects be regarded as penal and in others as remedial. The two methods of construction also are not clearly defined, and in their application probably meant no more than this: in the case of a remedial statute the judges may bring in everything they can within the

> maximum scope of the language used; in the case of a penal statute they must not bring in anything unless they are compelled to do so by clear language. The difference is one of elasticity.

The learned author went on, however, to point out that the importance of this categorization of approaches to a statutory construction may have been diminished by reason of the Interpretation Act provision relating to the construction of all statutes, where he said:

> Whatever distinction there was between these two classifications or these two methods of construction has been abolished by statute. The Interpretation Act provides that 'every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects'. All statutes, therefore, are now 'remedial' and must be 'liberally' construed.
>
> Nevertheless the concepts of 'strict' and 'liberal' construction constantly appear in the decisions and it is frequently said that taxing statutes must be strictly construed.

This point was taken in the Court of Appeal by Jessup J.A. Section 10 of the Ontario Interpretation Act, R.S.O. 1970, c. 225, provides:

> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In the Ontario Court of Appeal, as well as in the High Court, the purpose of the Act, that is the preservation and protection of Ontario's heritage, was recognized and the statute was characterized as remedial. MacKinnon A.C.J.O. said [p. 52 M.P.L.R.]:

> We are of the view that the matter really comes to a narrow compass on the particular and peculiar facts of this case. It should be said at the opening that the object and purpose of the Ontario Heritage Act S.O. 1974, c. 122, is clear. It is to preserve and conserve for the citizens of this country inter alia, properties of historical and architectural importance. The Act is a remedial one and should be given a fair and liberal interpretation to achieve those public purposes which I have recited.

The Ontario Courts have adopted the approach dictated by s. 10 of the Interpretation Act and they have construed the statute in the purposive manner. In this they have given effect fully to the avowed purpose of the Ontario Heritage Act. Accepting the approach so taken, I am not of the view, however, that in an effort to give effect to what is taken to be the purpose

of the statute it is open to the Court of construction to disregard certain provisions of the Act. The whole Act must be construed. It must be construed to give effect to the purpose above described but also to have regard for many provisions of the Act, particularly ss. 34 and 67, the purpose of which is to protect the interests of the landowner concerned. To ignore these provisions, or to read them down to where they are deprived of any real significance, is not to construe the statute but to decline to assign any meaning to certain of the words that were used by the Legislature.

In pursuance of the expressed purpose of the Act, the Legislature set up a detailed scheme of procedure which, if followed, would achieve the objects of the enactment and at the same time protect the landowners to the extent prescribed by the Legislature. To protect the heritage of Ontario the municipalities were given power to designate property of their choice and to suspend thereby many of the rights of private ownership. These provisions of the Act should be given force and effect to secure the goals of the Legislature. To protect landowners, the Legislature provided certain procedures including those set out in s. 34, together with the provisions of s. 67, which are the ones with which we are concerned. These provisions, too, must have their effect.

It should be observed that the protective provisions of s. 34 do not enable the landowner to interfere with the city's right to designate, protect, and to acquire the property. The city's right in this respect is indefeasible as long as it complies with the legislative directions as to its procedure but it should be noted that, in the face of this indefeasible right on the part of the city, the only protection left for the landowner is procedural. The statute has said in the clearest possible terms that the landowner may not demolish without consent. It has then said that when the landowner applies for consent all is held in suspension for 90 days during which time the city council must make a decision. It may consent or it may refuse and prohibit demolition for a period of 180 days from the date of its decision. It clearly then has the power, with which the landowner may not interfere, to hold all in suspension for a period of 270 days while reaching its ultimate decision regarding the property. To comply with the procedure set forth in the statute, all that is required in protection of the landowner's interest is the taking of a decision and the giving of notice. The manner in which that notice may be given is prescribed in s. 67 of the Act, which is reproduced above. While I would not consider that s. 67 provides the only manner of giving notice, it is my opinion that some positive step in that regard must be taken. Section 34 of the Act was enacted for the protection of the landowner. The notice provision of subs. (2) is not merely a formal requirement but one of substance. It is there to insure that the landowner will know what decision has been made and the date of that decision. He will thus be aware of the date of commencement of any additional time period set running by the decision so that he will be able, with some degree of certainty, to make such lawful disposition or use of his property as may be permitted under the Act. To read down the notice provision as was done by the Courts below is not to construe s. 34(2),

but simply to ignore it and by so doing to remove the protection given to the landowners by the Legislature.

I observe at this point that the importance of the notice provision is given weight by the fact that subs. (3) of s. 34 provides a sanction for failure to notify in the form of the deeming provision. Furthermore, subs. (4) of s. 34 provides that, even where notice is given under s. 34(2) and the additional period of 180 days referred to in s. 34(2)(*b*) becomes available to the council, the landowner may, upon the expiration of that period or any extension which may be agreed upon, proceed to demolish the building or structure on the land unless, of course, the city has acted to acquire the property under s. 36. The observance of the notice provisions and the specified time limits is therefore of fundamental importance. They fix and determine the commencement and duration of the period or periods during which the landowner's rights are suspended and thereby fix the date upon which they may be reasserted.

It is therefore my opinion that, even accepting the argument of the respondents regarding statutory construction and giving the Act that broad, liberal construction mandated by s. 10 of the Interpretation Act, the setting aside of the notice provisions which reflect a significant part of the legislative intent cannot be justified. The notice provisions must, in my view, be observed and carried out as provided in the statute.

Considering as I do that the notice provisions in s. 34(2) should be complied with and noting that they were not, consideration must now be given to the consequences of non-compliance. Notice was required to be given within the 90-day period. This period was up on September 27, 1979 or at least on October 4, 1979. Nothing in the nature of a written or formal notice was given or received until late October. We are squarely confronted with the deeming provision in subs. (3) of s. 34 which provides that if the council fails, within 90 days after receipt of the application for demolition, to make known its decision and give notice as required under the Act, the council shall be deemed to have consented to the application.

The Court of Appeal was of the view that there was no occasion to invoke the deeming provision. It considered that the appellants were notified by the presence of two representatives at the council meeting of September 29, 1979. Craig J. in the High Court, however, dealt with the deeming provision by considering it to be rebuttable. He said [p. 245 M.P.L.R.]:

> In my opinion, as I have indicated, the applicant did have notice, although not a formal notice required by The Ontario Heritage Act, which provides:
>
> > 67.(1) Any notice or order required to be given, delivered or served under this Act or the regulations is sufficiently given, delivered or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made at his last known address.

> I am satisfied that the applicant was well aware of the true purpose and intention of the city. Accordingly, for these rea sons the word 'deemed' should be interpreted in this context to mean 'deemed until the contrary is proved', because in my opinion the contrary has been proved.

In my opinion, neither approach is sustainable in the present case. The first depends upon equating knowledge on the part of the appellants with notice given by the respondent city and the second depends upon treating the deeming provision as creating a rebuttable deeming, neither of which concepts can, in my view, fit the statutory framework created by the Act. It is true, of course, that the words "deemed" or "deeming" do not always import a conclusive deeming into a statutory scheme. The word must be construed in the entire context of the statute concerned. Where a statute sets up a scheme for the employment of special powers by a municipal body and clearly provides a detailed procedure which will protect the municipal authority and make lawful the exercise of those powers, and then provides a specific sanction for failure to follow the statutory procedure in the form of a deeming provision, it is difficult, indeed, to conclude that a conclusive deeming was not intended. Any other conclusion would frustrate and break down the whole scheme of the Act designed specifically to accomplish both the preservation of the heritage of Ontario and the protection of landowners. The construction contended for by the respondents and accepted in the other Courts would enable the city, on receipt of an application to demolish, to hold the landowner in suspense for longer periods than are contemplated in the Act, making it impossible for the landowner to exercise the rights given to him under s. 34 to compel or seek to compel the performance by the city of its obligation under subs. (5) of s. 34. The purpose of s. 34 is to give the city time to consider its position. The combined effect of the specific time limits imposed, the specific direction to decide and notify, the provisions of s. 67 giving a method by which notice may be given, and the deeming provision is to give an element of finality to the proceeding. In other words, by failing to act within the 90-day period the city has been deemed to have consented to the appellants' application to demolish, not because it has in fact consented but because it has failed to observe specific statutory provisions, the compliance with which is a condition precedent to its right to retain control of the property.

I would allow the appeal with costs to the appellants throughout and direct the passage by the council of a by-law repealing that part of the designating by-law affecting the property as directed in s. 34(5) of the Act.

ESTEY J. (dissenting):

By an application for judicial review of a by-law enacted by the City of Ottawa the appellants bring into issue their right to demolish a building owned by the church after it had been declared by the by-law in question to be a heritage building under the Ontario Heritage Act,

S.O. 1974, c. 122. There is no dispute that the by-law in question, No. 157-79, was validly enacted by the City of Ottawa pursuant to the Ontario Heritage Act. What is at issue is whether the appellants thereafter and pursuant to the terms of the statute attained the right to demolish their building which they partially did under circumstances which I shall describe later.

The rationale for the conservation of the building as a heritage site is explained in a report to Ottawa city council entitled: "Conservation of the Sole Surviving Example of Settlement Era Upper Town, Conservation of 136 Bay Street":

> **RATIONALE**
>
> The property at 136 Bay Street is an outstanding heritage building, having been erected prior to 1854 by Captain William T. Clegg of the Royal Engineers, Ordinance Paymaster, artist, and assistant in route selection for the Rideau Canal. It was subsequently lived in by other notable individuals and is the sole surviving settlement era residence in what was Upper Town, the upperclass residential section of Bytown....
>
> Further, the property is a significant element in the Queen Street Heritage Area, the last area of late nineteenth century residential architecture to the west of downtown and the setting for Christ Church Cathedral and the cliff marking the city centre's western edge.

The property was acquired by the appellants in May of 1974 and was operated as a rooming house until 1 May 1979. It is adjacent to the main church property and it was the desire of the trustees to demolish the building with a view to expansion of the church grounds and parking facilities. On 21 March 1977 the appellants filed an application with the building inspection division of the City of Ottawa for a permit to demolish the building. There followed a series of intermittent discussions between city officials and representatives of the appellants which were inconclusive; the following notations appear on the application: "Pastor has been speaking to Mr. Ham [a planner employed by the City]", and "Heritage File No. — 136-H-12-146. Do not issue". On June 30, 1977 the Pastor wrote to the Inspector of the Property Standards Division of the City, which letter included the following:

> We are anxious to pursue demolition of 136 Bay Street for much needed parking and to clean up the area. However, it looks as if we will have to see what the 'Heritage Committees' have to say about this property. We have met with the Chairman, Heritage Committee, Ottawa, and explained fully our situation to him.
>
> If it is felt that 136 Bay Street falls into the category of a 'Heritage Home' we will want to hear from the Heritage authorities immediately what monies they are willing to make available for the renovation of this building. We have made the Chairman of the Heritage Committee, Ottawa, aware of your Work Order and actions required.

The City of Ottawa, at a council meeting of June 15, 1977, received a preliminary central area heritage report identifying the property as "heritage". On 21 February 1979, the council approved in principle a report recommending the protection and conservation of the area, specific mention being made of 136 Bay Street. On April 4, 1979 the city established its intention to designate the building as a heritage property. By registered letter dated April 19, the intention to designate was communicated to the appellants and they were given 30 days in which to object.

> **NOTICE OF INTENTION TO DESIGNATE**
>
> TAKE NOTICE that the Council of The Corporation of the City of Ottawa on the 4th day of April 1979, established its intention to designate the lands and buildings known municipally as 136 Bay Street as a property of architectural and historical value or interest under The Ontario Heritage Act, 1974, Statutes of Ontario, 1974.
>
> **STATEMENT OF REASONS FOR THE PROPOSED DESIGNATION:**
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> > The two and one-half storey stone residence at 136 Bay Street is recommended for designation as being of architectural and historical value. Erected prior to 1866, the T-shaped structure has a rear stone portion of post-Georgian character. The front section has segmental and semi-circular arched windows and an offset entranceway more characteristic of the 1870's. Descendants state that the building was the residence of Captain T. Clegg, prior to his retirement. Mr. Gustavius Wickstead, Chief Law Clerk, House of Commons, resided there from 1886 through the turn of the century.
>
> NOTICE OF OBJECTION to the designation may be served on the Clerk, within thirty (30) days of the 20th day of April, 1979.

No objection was received in response to the above notice and the city adopted By-law 157-79 on June 6, 1979 designating the property pursuant to s. 29 of the Heritage Act, supra, as a property of architectural and historical value. Notice of the designation by-law was communicated to the appellants by registered letter dated July 12, 1979. The appellants made application for a permit to demolish the building which application was made either on June 29, 1979 or on July 4, 1979 and it matters not which for the purposes of these proceedings. The statute requires that the city respond to such application within 90 days, otherwise it shall be deemed to have consented to the application. The 90-day period expired on October 2, 1979 (based on my assumption that the application for the permit was made on July 4, 1979). Crucial to the disposition of this appeal is s. 34 of the Act, the operative parts of which are as follows:

34. — (1) No owner of property designated under this Part shall demolish or remove any building or structure on such property or permit the demolition or removal of any building or structure on such property unless he applies to the council of the municipality in which the property is situate and receives consent in writing to such demolition or removal.

(2) The council, after consultation with its local advisory committee, where one is established, shall consider an application under subsection 1 and within ninety days of receipt thereof shall,

(*a*) consent to the application; or

(*b*) refuse the application and prohibit any work to demolish or remove any building or structure on the property for a period of 180 days from the date of its decision,

and shall cause notice of its decision,

(*c*) to be given to the owner and to the Foundation; and

(*d*) to be published in a newspaper having general circulation in the municipality,

and its decision is final.

(3) The applicant and the council may agree to extend the time under subsection 2 and, where the council fails to notify the applicant of its decision within ninety days after the notice of receipt is served on the applicant or within such extended time as may be agreed upon, the council shall be deemed to have consented to the application.

(4) Notwithstanding subsection 1, where the period of 180 days prohibiting any work to demolish or remove any building or structure on a property under clause *b* of subsection 2 has expired, and the owner has not agreed to an extension of such period, or where the extension of time agreed upon by the owner and the council under subsection 3 has expired, the owner may proceed to demolish or remove the building or structure on the property subject to the provisions of any other Act or regulation thereunder.

(5) Where,

(*a*) the council consents to an application under clause *a* of subsection 2, or is deemed to have consented to an application under subsection 3; or

(*b*) the period of 180 days under clause *b* of subsection 2 has expired or where the extension of time agreed upon by the owner and the council under subsection 3 has

> expired and the demolition or removal of the building or structure on the property has been completed,
>
> the council shall pass a by-law repealing the by-law or part thereof designating the property ....

At a meeting of September 19, 1979, Ottawa City Council considered a report from the Ottawa Planning Board entitled "Application for permission to demolish the Clegg House" which recommended:

> That the application of St. Peter's Lutheran Church for permission to demolish the Clegg House, 136 Bay Street, be denied.

As well a report from the Board of Control entitled "Conservation of the sole surviving example of settlement era Upper Town, Conservation of 136 Bay Street" which recommended:

> That expropriation proceedings be initiated to acquire the heritage building at 136 Bay Street.

The two recommendations were adopted by council in By-law 261-79. It may be noted that the following commentary on the "Background" forms part of the latter report.

> Discussions with the Church have indicated that no compromise, alteration in their plans, or voluntary financial solution is anticipated. The Church remains adamant in its intention to demolish the building.

The report was amended before adoption by by-law to include the further recommendation:

> The Department be instructed to meet representatives of the church to discuss purchase and/or other solutions.

The action taken with respect to denial of permission to demolish included a comment by the Commissioner of Finance which presumably formed a part of the report confirmed by By-law 261-79 which stated:

> Denial of permission to demolish will allow six additional months for the City to develop an effective, permanent method for preservation. Consideration of such methods is under way.

I do not conclude that these related considerations in any way detract from the two decisions embodied in By-law 261-79.

There are findings of fact in each Court below that the appellants knew of the action taken by the council of the City of Ottawa in its meeting of September 19 and there is ample evidence on the record to support the concurrent findings of knowledge in the appellants of the refusal of the application for demolition by the council of the respondent. It may be briefly summarized:

(a) At the council meeting on September 19 two of the Trustees of the appellants were present;

(b) The secretary of the appellants, prior to the meeting, reviewed the draft recommendations which council confirmed in By-law 261;

(c) The secretary of the appellants submitted a letter, on the instructions of the board, to the respondent council relating to the proposed expropriation of the property which letter was received and dealt with by the respondent council at the meeting on September 19; the letter contains the following: "The Trustees of the Church oppose the recommendation of the Board of Control and the Ottawa Planning Board for expropriation ...";

(d) The secretary of the appellants had read the newspaper accounts, dated September 20, 1979, of the meeting of the respondent council on September 19.

Before returning to the interpretation problems raised by s. 34, the history of the events can be shortly completed. The respondents attempted to deliver a notice, including a copy of the minutes of the council meeting of September 19, to the appellants on October 26 but service of these documents was refused by a person on the premises of the church. On the following day (Saturday, October 27), somewhere between 7 and 8:45 in the morning, the appellants partially demolished the building. Injunction proceedings were then taken restraining the appellants from completing the demolition and this order continues to this date.

I return to the question of the proper application of the provisions of s. 34, supra, in these proceedings. The Ontario Heritage Act, supra, sets forth a procedure whereby municipalities may designate properties within their boundaries as being of historic or architectural value or interest and thereafter may take proceedings to acquire such properties for permanent preservation. Section 29 of the Act was invoked by the respondent upon the passage of By-law 157-79 in connection with the property in question. The succeeding sections of the Act then provide for the care, custody and ownership of the designated property. Section 34, for example, prohibits demolition except on authorization issued pursuant to that section and thereafter the council shall either permit or refuse demolition and if the former, shall repeal the by-law designating the property under s. 29. Under s. 36 the council may acquire by purchase, expropriation or otherwise any property designated under the statute.

The appellants here made application under s. 34(1) for approval of demolition. The application was denied. No notice in the sense of a written notice was given to the appellants by the respondent within the 90-day period nor did the respondent cause any notice of its decision to be published in a newspaper in the City of Ottawa. In the facts of this case we have only the knowledge of the appellants of refusal of the application as so found by the Courts below, within the 90-day period. Problems immediately arise relative to the effect:

> (1) in law of the failure to deliver written notice to the owner under s. 34(2)(*c*); and,
>
> (2) of the deeming provision in subs. (3) of s. 34 which says in essence:
>
> where the council fails to notify the applicant of its decision within 90 days after the notice of receipt is served on the applicant ... council shall be deemed to have consented to the application.

It is to be noted at once that the terminology with respect to notice under subs. (2) is different from that of subs. (3). In subs. (2) the council "shall cause notice ... to be given" to the owner and in subs. (3) the provision is: "Where the council falls to notify the applicant" within 90 days after "notice of receipt is *served* on the applicant". There would appear to be a distinction between notice being given to the owner in subs. (2) and the requirement of notification to the applicant under subs. (3). Furthermore, the notice of receipt issued by the council must be "served" on the applicant under subs. (3). The verb 'to serve' is not employed in subs. (2). A similar contrast can be found with s. 29(3) which requires the council to "serve" the notice of intention to designate the property in the first place.

Another problem arises from the phraseology employed by the Legislature in subs. (2)(*b*). This provision requires the council to act within 90 days of receipt of the application by either consenting or refusing the application. Clause (*b*) may go further and require a decision to prohibit demolition apart from the refusal of the application for demolition. The subsection reads: "The council ... shall ... refuse the application and prohibit any work to demolish ... the building ... for a period of 180 days...." Counsel for the appellants urged an interpretation whereby the conjunctive 'and' would be read as splitting the decision into two parts and requiring the council not only to announce a refusal of the application but to announce a prohibition of demolition for 180 days. Here the by-law simply refuses the application for demolition. It would, in my view, put an undue strain on the language adopted by the Legislature to require the municipality when denying the application to go further and repeat the entire subs. (2)(*b*). It is to be noted that in subs. (5)(*b*), when the 180-day period has expired, council shall repeal the designating by-law. This clearly lays out a statutory scheme whereby the effect of a refusal of an application to demolish is to sterilize the property for a period of 180 days at the end of which, failing other authorized action by the council, the council must repeal the designating by-law. In my view, a proper construction of subs. (2)

(*b*) does not require council to decide on a refusal of a demolition application to prohibit demolition for 180 days; that result flows from the decision of denial of the application.

Subsection (2) goes on to require the council, upon reaching a decision under clauses (*a*) or (*b*), to cause "notice" of this decision (and I note the word decision is in the singular) "to be given to the owner" and "to be published in a newspaper". There is no requirement that the notice be in writing or that it be "served" on the owner. Nor indeed is there any requirement that the council actually insert notice in a newspaper by way of advertisement or otherwise, but simply to cause notice to be published in a newspaper. Here the decision was indeed published in the newspaper and the evidence indicates one or more officers or trustees of the appellants saw the newspaper. I do not believe that the intention of the Legislature was to allow casual newspaper reports not "caused" by the council to suffice as notice under subs. (2)(*d*). What therefore is the effect of the failure by council to insert a notice of its decision in a local newspaper? I share the view, with respect, of the Courts below that subs. (2)(*d*) is directory only and that its failure to publish in a local newspaper does not operate to invalidate the decision to deny the application for demolition authority.

As to the effect of subs. (2)(*c*) some help can be obtained by reading that provision in conjunction with subs. (3). Both subsections require council to cause a notice to be given to the owner or to notify the owner of the decision of the council within the 90-day period. Subsection (3) goes on to provide that upon failure to notify the applicant within the prescribed period "the council shall be deemed to have consented". The deeming, be it noted, runs only to the requirement of notice under subs. (2)(*c*) and not publication under (2)(*d*). What then is the proper meaning in these circumstances of the deeming provision in subs. (3)? In *Hickey v. Stalker*, 53 O.L.R. 414, [1924] 1 D.L.R. 440 (C.A.), Middleton J. was called upon to construe the meaning of the word "deemed". His Lordship pointed out that the word imported one of two meanings, that is to say it meant either "deemed conclusively" or "deemed until the contrary is proved", and then continued:

> I think this modified meaning should be given to the word as found in our statute, for it will not only save the legislation from being unjust but also from being absurd. That it is the duty of the Court, in seeking the true legislative intention of an Act, which undoubtedly is the sole duty of the Court, to regard the possible consequences of alternative constructions of ambiguous expressions, has been determined in many cases. (p. 419)

In this Court, Cartwright J., as he then was, on behalf of himself and Chief Justice Kerwin, adopted the interpretation of Middleton J. in the case of *Gray v. Kerslake*, [1958] S.C.R. 3, [1957] I.L.R. 1-279, 11 D.L.R. (2d) 225. His Lordship stated at p. 9 [S.C.R.]:

> In the case at bar, and in many cases which can easily be imagined, to construe the word 'deemed' in s. 134(1) as 'held conclusively' would be to impute to the Legislature the intention (i) of requiring the Court to hold to be the fact something directly contrary to the true fact, ...

In that case the Court was concerned with the interpretation of a section of The Insurance Act, R.S.O. 1950, c. 183, s. 134(1), which said:

> A contract is deemed to be made in the province:
>
> (*a*) if the place of residence of the insured is stated in the application or the policy to be in the province....

On the facts of that case the contract of insurance was made and was to be performed wholly outside the province. The contrary to the presumptive conclusion was proved and in fact admitted in the proceedings. The Court declined to apply the conclusive interpretation to the word 'deemed'. The other members of the Court did not express an opinion on this aspect of the case.

The only reference in the statute to the mechanics of notice is to be found in s. 67, subs. (1) of which provides:

> (1) Any notice or order required to be given, delivered or served under this Act or the regulations is sufficiently given, delivered or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made at his last known address.

This provision I find to be of no help because it again does not specify whether the notice is required to be in writing and uses all three verbs — given, delivered or served — when providing that the notice is sufficiently given, delivered or served "if delivered person ally". The stipulation that notice "is sufficiently given ... if delivered personally" does not modify the requirement beyond that stated in s. 34(2)(*c*) that "notice ... be given". The question therefore reduces itself to whether or not knowledge can be equated with notice, for we have here a finding in the Courts below of knowledge. Section 10 of the Interpretation Act, R.S.O. 1970, c. 225, requires that all statutes be given "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". In this appeal we are concerned with a statute of general effect clearly enacted for the benefit of the public at large and which establishes a simple procedure whereby both the public interest and the interest of the owner of the property in question can be served. Here, on the facts as found by the Courts below, the owners of the property fully participated in the process inaugurated and carried forward

under the provisions of the Ontario Heritage Act. There is no question of lack of knowledge, consultation or participation by the appellants at any stage of the process, either from its beginnings when designation occurred or where expropriation was undertaken in opposition to the written pleas of the appellants. In these circumstances, in my view, the statute is fairly and properly interpreted when knowledge is indeed equated with notice. The deeming provision in subs. (3) should, in my view, be interpreted as "deemed to be so until the contrary is proved". Here the appellant owners were given notice by their presence at the council meeting in question and thus both literally and substantially the council did "cause notice of its decision to be given to the owner". The owner was fully apprised of the decision and hence has received "notice" thereof, albeit informally and not in writing.

The council, having taken the necessary step in denying the application for authority to demolish, proceeded in accordance with the statutory directives by undertaking expropriation by by-law pursuant to s. 36 of the Act. The council therefore is not required by subs. (5) of s. 34 to repeal the designating by-law, the appropriate action having been taken within the prescribed 90-day period.

Finally, it was submitted by council for the appellants that in order for the action of council to be decisive, it must be announced in the manner prescribed by subs. (2) in order to "bind" the city and in order to fix the time for the commencement of the running of the 180-day period within subs. (2)(*b*). We are not here concerned with the situation which would result in the event a council of a munici pality were to repeal the rejection by-law. Until By-law 261-79 has been repealed, the city is, in the sense of the argument, "bound" by its decision. It follows that under subs. (2)(*b*) the 180-day period automatically commenced to run with the refusal of the application for the demolition permit.

For these reasons I would dismiss the appeal with costs.

Appeal allowed.

TAB 6

2011 SCC 23
Supreme Court of Canada

Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.

2011 CarswellBC 1102, 2011 CarswellBC 1103, 2011 SCC 23, [2011] 2 S.C.R. 175, [2011] 7 W.W.R. 1, [2011] B.C.W.L.D. 3901, [2011] B.C.W.L.D. 3902, [2011] B.C.W.L.D. 3903, [2011] B.C.W.L.D. 4112, [2011] B.C.W.L.D. 4122, [2011] B.C.W.L.D. 4123, 18 B.C.L.R. (5th) 1, 201 A.C.W.S. (3d) 585, 306 B.C.A.C. 1, 316 W.A.C. 1, 331 D.L.R. (4th) 1, 416 N.R. 1, 5 R.P.R. (5th) 1, 81 B.L.R. (4th) 1, 82 C.C.L.T. (3d) 1, J.E. 2011-871

Sharbern Holding Inc. (Appellant) and Vancouver Airport Centre Ltd., Larco Hospitality Management Inc., MM&R Valuation Services Inc. doing business as HVS International — Canada and HVS International — Canada (Respondents)

McLachlin C.J.C., Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: October 6, 2010
Judgment: May 11, 2011 *
Docket: 33280

Proceedings: affirming *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* (2009), 93 B.C.L.R. (4th) 256, 57 B.L.R. (4th) 1, 2009 CarswellBC 1337, 2009 BCCA 224, 458 W.A.C. 116, 271 B.C.A.C. 116 (B.C. C.A.); reversing *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* (2007), 38 B.L.R. (4th) 171, 2007 CarswellBC 1948, 2007 BCSC 1262 (B.C. S.C.)

Counsel: Stephen R. Schachter, Q.C., Geoffrey B. Gomery for Appellant
Peter A. Gall, Q.C., Donald R. Munroe, Q.C., M. Ali Lakhani, Edward Iacobucci for Respondents

Subject: Torts; Contracts; Corporate and Commercial; Property; Securities; Civil Practice and Procedure

APPEAL by investors from judgment reported at *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* (2009), 93 B.C.L.R. (4th) 256, 57 B.L.R. (4th) 1, 2009 CarswellBC 1337, 2009 BCCA 224, 458 W.A.C. 116, 271 B.C.A.C. 116 (B.C. C.A.), allowing developer's appeal from judgment finding developer guilty of misrepresentations regarding prospectus for interest in hotel.

POURVOI formé par les investisseurs à l'encontre d'un jugement publié à *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* (2009), 93 B.C.L.R. (4th) 256, 57 B.L.R. (4th) 1, 2009 CarswellBC 1337, 2009 BCCA 224, 458 W.A.C. 116, 271 B.C.A.C. 116 (B.C. C.A.), ayant accueilli l'appel interjeté par le promoteur à l'encontre d'un jugement ayant déclaré le promoteur coupable de fausse représentation au sujet d'un prospectus d'investissement dans un hôtel.

***Rothstein J.*:**

I. Introduction

1 When securities are offered to the general public, the rule of *caveat emptor* no longer applies. Securities legislation imposes on issuers a statutory duty of disclosure. That duty may vary in detail from one Act to another or from one jurisdiction to another. However, the common theme is that issuers must disclose to potential investors information affecting their investment decision. Even so, issuers are not subject to an indeterminate obligation, such that an unhappy investor may seize on any trivial or unimportant fact that was not disclosed to render an issuer liable for the investor's losses. Rather than issuers being required to provide unlimited disclosure, disclosure obligations have been enacted to provide a balance between too much and too little disclosure.

2 The appeal arises from a class action lawsuit in which the appellant, Sharbern Holding Inc. ("Sharbern"), represents a class of investors who purchased strata lots in a Hilton hotel ("Hilton Owners") from the respondent developer, Vancouver Airport Centre Ltd. ("VAC"). Sharbern claimed that VAC was liable for failing to disclose details about differences in the financial arrangements given to the Hilton Owners, and those given to purchasers of strata lots in the adjacent Marriott hotel ("Marriott Owners") that VAC was developing on the same property. Sharbern alleged that the differences resulted in an undisclosed conflict of interest in that they created an incentive for VAC to favour the Marriott over the Hilton in its operation and management of the two hotels.

3 Two main questions are raised on appeal. The first is whether VAC is liable for alleged misrepresentations contained in the offering memorandum and disclosure statement (the "Hilton Disclosure Statement") that VAC used to sell the Hilton strata lots. The second is whether VAC is liable for breach of fiduciary duty when it acted as manager of the Hilton under an agreement (the "Hotel Asset Management Agreement") entered into between VAC and the Hilton Owners, including Sharbern. In the reasons that follow, I conclude that Sharbern's claims fail on both grounds, and I would dismiss the appeal.

4 As to the first question, I am of the opinion that the trial judge erred in law in concluding that VAC is liable for misrepresentation, either under the statutory cause of

action found in the *Real Estate Act*, R.S.B.C. 1996, c. 397, or under the common law of negligent misrepresentation.

5 Under s. 75 of the *Real Estate Act*, VAC could only be liable if it is found to have made material false statements to Sharbern, and cannot rely on the defence contained in the section. I am of the respectful view that the trial judge erred in law with respect to the materiality of the alleged false statements. The legal errors were: treating the conflict of interest as inherently material; reversing the burden of proof of materiality from the plaintiff to the defendant; and failing to consider all of the evidence relevant to the determination of materiality. She further erred in not considering the statutory defence which would avail to the benefit of VAC.

6 Although this Court has previously dealt with the issues of materiality and disclosure obligations in the context of securities law, this case represents the first time that the Court has considered the common law test for materiality. Even though the test is not new in Canadian law, this case represents an opportunity to clarify important aspects of the test.

7 Under the common law of negligent misrepresentation, the trial judge erred by not considering whether VAC breached the standard of care. As there is no evidence capable of supporting a finding of breach of standard of care, her finding under the common law of negligent misrepresentation cannot stand.

8 As to the second question, although VAC, as manager of the Hilton, had fiduciary obligations to Sharbern, Sharbern did not discharge its onus of proving a breach of fiduciary duty. A fiduciary is required to disclose material facts and information, and conflicts of interest. VAC's position of conflict in managing both the Hilton and the Marriott hotels had already been disclosed to Sharbern. The trial judge again failed to consider all the relevant evidence on the issue of materiality that was before her, and Sharbern did not adduce evidence to support a finding that the different financial arrangements constituted material facts or information beyond what had already been disclosed by VAC.

II. Facts

A. The Hilton and Marriott Hotels

9 VAC is owned by Larco Investments Ltd. ("Larco Investments"), a company involved in real estate and hotel development. By the mid 1990s, there was an extraordinary boom in the Richmond hotel market. Larco Investments already owned the Best Western Richmond Inn in that market, and decided to develop and market two additional hotels on the same property. It incorporated VAC for that purpose. The Marriott hotel, a strata-titled hotel tower marketed through an offering memorandum and disclosure statement issued September 11, 1996, opened for business in June 1998. A second, identical strata-titled hotel tower was built and marketed through the Hilton Disclosure Statement issued February 3,

1998. It opened as a Hilton hotel in June 1999. The two hotels were essentially identical and were joined by a concourse of shops and other amenities.

10 Purchasers of strata lots in each hotel entered into separate Hotel Asset Management Agreements with VAC, whereby VAC was given exclusive management of the hotel for 20 years, with an option to renew. In return, VAC contracted to, among other things, use commercially reasonable efforts to rent out the strata units, maximize each owner's proportionate share of monies available for distribution, and faithfully perform its duties and responsibilities and supervise and direct hotel operations.

11 The two strata unit hotels were marketed and developed at different times, resulting in differences in the financial arrangements offered to the purchasers of each hotel. Since the popularity of marketing a strata unit hotel in an urban area solely for the income stream was unknown, VAC offered purchasers in the Marriott hotel a gross operating guarantee. For the first five years of the hotel's operation, VAC guaranteed a gross return of 12% of the purchase price of the owner's unit, so that each strata lot owner's annual proportionate share of funds available for distribution after projected operating expenses and other deductions was a projected net return of 8.29%.

12 Under the Hotel Asset Management Agreement entered into between the Marriott Owners and VAC, VAC was entitled to a monthly management fee of 5% of the gross rental revenue, and an incentive management fee equal to 25% of the amount by which the owners' net annual return on investment exceeded 8%.

13 VAC's evidence was that it intended to market the Hilton with a guaranteed rate of return, but was advised by Larco Investments' securities solicitor that changes to securities regulations precluded making reference to a guarantee in the Hilton Disclosure Statement. Instead, VAC marketed the Hilton on the basis of projections. In an effort to increase the projected return for potential investors of the Hilton strata units, VAC increased the revenue available to them by: including food and beverage revenues (which were retained by VAC for the Marriott hotel); decreasing the management fee charged by VAC under the Hotel Asset Management Agreement to 3%; and removing the hotel lobby lease expense.

14 The guaranteed gross return offered to Marriott Owners, and the 5% gross rental revenue and added incentive provided to VAC as its fee for managing the Marriott versus the 3% management fee provided to VAC for managing the Hilton (collectively the "Compensation Differences") are the differences in the financial arrangements made with purchasers of the two hotels that are the essential focus of Sharbern's claims on appeal.

15 While the Hilton Disclosure Statement disclosed that VAC owned the Best Western Richmond Inn and that VAC was currently developing the adjacent Marriott hotel, it did not disclose the Compensation Differences as between the Hilton and Marriott Owners.

16 The marketing of the Hilton strata units was not as successful as that of the Marriott, in which all of the units were sold within a few hours. At some point, VAC decided to retain the last 24 Hilton units rather than continue to incur significant marketing costs. Ultimately, neither hotel achieved their anticipated financial performances. By 2001, the Richmond hotel market was one of the weakest hotel markets in Canada. The hotel market was further weakened by the events of September 11, 2001. The Marriott did not achieve a 12% gross return on investment for any of the years covered by the 5-year guarantee. As a result, VAC sustained liability of over $13 million under the guarantee, which was ultimately paid by Larco Investments. The Hilton Owners incurred losses instead of obtaining the projected 16.6% returns. The Hilton did not perform as well as the Marriott.

B. Procedural Background

17 On June 16, 2003, Sharbern brought an action against VAC, HVS International — Canada ("HVS") and Larco Hospitality Management Inc. (formerly known as HMS Hospitality Management Services Ltd. ("HMS")). HVS was the company that prepared the financial projections for the Hilton hotel that were included in the Hilton Disclosure Statement. HMS was an affiliate of VAC that carried out the day-to-day management of the Hilton hotel, the Marriott hotel and the Best Western Richmond Inn.

18 Sharbern obtained certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, on behalf of approximately 200 unit owners (*Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2005 BCSC 232 (B.C. S.C.) ("*Certification Trial*"), aff'd 2006 BCCA 96, 223 B.C.A.C. 80 (B.C. C.A.) ("*Certification Appeal*")). Twenty-four common issues on liability were certified. The trial judge summarized what she called the "central contentious" common liability issues (at para. 10 and Appendix), which I paraphrase as:

> 1. Whether the financial projections made by HVS were negligent misrepresentations, and whether the investment returns projected by VAC in the Hilton Disclosure Statement constituted fraudulent or negligent misrepresentations.
>
> 2. Whether VAC's representations about conflicts of interest and the nature of the financial arrangements as between the Hilton and Marriott hotels were fraudulent or negligent.
>
> 3. Whether the members of the Hilton Class could be deemed to have relied on any of the impugned representations pursuant to s. 75(2) of the *Real Estate Act* and the effect of the repeal of the *Real Estate Act*.

4. Whether VAC and HMS owed fiduciary and/or trust duties to the members of the Hilton Class, and if so, whether they breached those duties.

III. Lower Court Decisions

A. British Columbia Supreme Court, 2007 BCSC 1262, 38 B.L.R. (4th) 171 (B.C. S.C.)

19 Madam Justice Wedge made a number of findings that are not at issue in this appeal. She determined that neither VAC nor HVS were liable for negligent misrepresentation concerning the financial projections. She observed that the allegation of fraud against VAC with respect to the projected investment returns had been withdrawn by Sharbern. She found that HMS did not owe fiduciary duties to Sharbern. In supplemental reasons, she also clarified that VAC was not liable for fraudulent misrepresentation with respect to its conflict of interest representations because Sharbern did not "prove that VAC did not have an honest belief in the representation and either intended to deceive investors or was reckless as to whether it did so" (2008 BCSC 245 (B.C. S.C.), at para. 12).

20 With respect to her findings that are at issue in this appeal, Wedge J. concluded that the undisclosed Compensation Differences gave rise to at least a potential conflict of interest, particularly in view of the potential for common management of the two hotels. She then concluded that VAC negligently misrepresented both the absence of an actual or potential conflict of interest and the nature of the agreements between VAC and the Marriott Owners. She found both misrepresentations material. It is not entirely clear from Wedge J.'s reasons whether she found VAC liable under the common law or under the *Real Estate Act*, although I proceed on the basis that she found VAC liable under both.

21 Wedge J. concluded that under the *Real Estate Act*, the investors were deemed to rely on material misrepresentations by VAC. She determined that such deemed reliance was not a rebuttable presumption, irrespective of the actual knowledge of the investors.

22 She also found that in its capacity as manager, VAC was a fiduciary of the Hilton Owners, that a conflict existed with respect to VAC's interests as between the Hilton and the Marriott, and that VAC was liable for breach of fiduciary duty because it did not disclose that conflict. Finally, she found that VAC was also liable for breach of fiduciary duty as manager, because of a non-competition arrangement that it put in place between the Marriott and the Hilton, preventing each hotel from competing for certain customers with the other or with the Richmond Inn.

B. British Columbia Court of Appeal, 2009 BCCA 224, 57 B.L.R. (4th) 1 (B.C. C.A.)

23 VAC appealed and Sharbern cross-appealed aspects of the trial decision. The Court of Appeal allowed VAC's appeal, overturning Wedge J.'s findings with respect to misrepresentation, deemed reliance and breach of fiduciary duty. Sharbern's cross-appeal was dismissed.

24 On the issue of misrepresentation, Chiasson J.A. found that the details of the financial arrangements between the two hotels were not material. He observed that at trial "VAC relied on the extensive factual and expert evidence it adduced concerning actual and industry practice in the management of multiple hotels by a single entity" and that "[t]here was no evidence to the contrary and no evidence objectively to support the conclusion a reasonable investor would be concerned about the details of the financial arrangements" (para. 76). He found that

> [h]aving made the disclosure [VAC] did, recognizing industry and actual practice and considering the subjective belie[f] of [VAC's officers and employees], VAC did not misrepresent that it was unaware of any conflict that reasonably could affect materially the investment decisions of the Hilton Hotel investors. [para. 84]

He therefore ruled that the trial judge had erred in concluding VAC materially misrepresented its conflict of interest and its agreements with the Marriott Owners.

25 As to breach of fiduciary duty, Chiasson J.A. determined that there was no breach by VAC. He observed that the answer to whether VAC was "obliged to tell the Hilton Hotel unit owners the details of its financial arrangements with the Marriott Hotel unit owners ... depends on whether that information was material" (para. 98). He went on to conclude that "in the circumstances of this case, the information objectively was not material" (para. 99). In his view, "the consent given to VAC to act for competing hotels is an answer to any contention the implementation of the price competition policy was *per se* a breach of fiduciary duty" (para. 104). The issue was again reduced to the question of whether VAC was required to disclose the details of its financial arrangements with the Marriott. Chiasson J.A. concluded it was not.

IV. Issues

26 This appeal raises five issues, which I will address in turn:

> 1. Did the trial judge err in finding that VAC was liable under s. 75 of the *Real Estate Act* for material false statements?

2. Did the trial judge err in not considering the statutory defence available to a developer under s. 75(2)(b)(viii) of the *Real Estate Act*, and whether VAC could avail itself of that defence?

3. Did the trial judge err in finding that the deemed reliance under s. 75(2)(a) of the *Real Estate Act* was irrebuttable?

4. Did the trial judge err in finding that VAC was liable for negligent misrepresentation under the common law?

5. Did the trial judge err in finding VAC liable for breach of fiduciary duty?

V. Analysis

A. Misrepresentation Under the Real Estate Act

(1) VAC's Statutory Disclosure Obligations

27 I commence with a summary of the statutory disclosure requirements that were applicable in the context of this case.

28 The Hilton hotel strata lots were a combination of an interest in real estate and an interest in a rental pool, governed by the *Securities Act*, R.S.B.C. 1996, c. 418, and the *Real Estate Act*. Both statutes governed VAC's disclosure obligations. Pursuant to those obligations, VAC marketed the strata lots using a document that was a combination of both a *Securities Act* "offering memorandum" and a *Real Estate Act* "disclosure statement".

29 As to VAC's disclosure obligations under the *Securities Act*, the strata lots were marketed on the basis of exemptions then found in ss. 45(2)(5) and 74(2)(4) of that Act. Section 45(2)(5) provided that VAC did not have to register with the British Columbia Securities Commission to trade in the strata lots. Section 74(2)(4) provided that VAC did not have to provide a *Securities Act* prospectus for the strata lots. Both exemptions applied to trades — such as those involving the strata lots — in which a person purchased the security as a principal and the security had an aggregate acquisition cost of not less than a prescribed amount, in this case $97,000.

30 The minimum acquisition cost and the requirement that the purchaser be acting as principal imply that these conditions serve as a proxy for a degree of sophistication on the part of the investor, justifying a more defined disclosure obligation than that found under the prospectus requirements. Because the strata lots fell under these *Securities Act* exemptions, VAC was only required to submit an offering memorandum (British Columbia Securities Commission, Notice and Interpretation Note No. 96/36, "Real Estate Securities"). VAC's

disclosure obligations under an offering memorandum were limited to disclosing specific matters that were prescribed by the B.C. Securities Commission in a document referred to as Form 43B.

31 As to VAC's disclosure obligations under the *Real Estate Act*, s. 66(1) of that Act provided that the Superintendent of Real Estate could permit VAC to issue a disclosure statement as opposed to a prospectus. The Superintendent of Real Estate appears to have exercised that discretion in this case. VAC's disclosure obligations in a disclosure statement were limited to specific matters that were prescribed by the Superintendent of Real Estate (pursuant to *Real Estate Act*, ss. 66(3)(a) and (c)).

32 Rather than issuing a separate offering memorandum and a separate disclosure statement, the Superintendent of Real Estate and the Securities Commission appear to have allowed developers to issue one document that combined the two. The Hilton Disclosure Statement was such a document. In that document, as I have just explained, VAC was only required to disclose certain prescribed matters. Of those prescribed matters, the only two of relevance to this appeal are Items 9 and 13 of Form 43B.

33 Item 9 of Form 43B required VAC to include a statement drawing attention to the speculative nature and inherent risks of a real estate investment and to disclose specific factors that "make the offering a risk or speculation":

> **ITEM 9 Risk Factors**
>
> (1) State:
>
> > **A real estate investment is, by its nature, speculative. If a purchaser is purchasing the real estate as an investment, the purchaser should be aware that this investment has not only the usual risks when purchasing real estate, but also those risks that are inherent to the nature of real estate securities.**
>
> (2) Disclose the risk factors that make the offering a risk or speculation.
>
> ***Instructions:*** Risk factors may include but are not limited to such matters as risks associated with real estate investments generally, reliance on the developer/ managers efforts, ability and experience, inexperience of management, lack of financial expertise, reliance on the financial strength of the person offering the guarantee or financial commitment, cash flow and liquidity risks, financing risk, potential liability to make additional contributions beyond initial investments, restricted rights of a holder in the management and control of the strata corporation or business, inability to change the manager, restrictions on resale of the real estate securities, developer/manager conflicts of interests, and where the offering provides

holders with a means to participate financially in a business such as a hotel, motel, resort or apartment hotel or other commercial enterprise, the general risks of the business, absence of an operating history of the business, and competition.

(3) If the real estate securities include a rental pool, state:

The success or failure of the rental pool will depend in part on the abilities of the manager of the rental pool.

(4) If the owner will be responsible for paying a portion of the costs of the operation of the rental pool, state:

If the revenue generated from the rental pool is less than the costs of operating the rental pool, then the purchaser must make additional contributions over and above the purchasers initial investment and financing costs.

(5) If the real estate securities include a guarantee or other financial commitment, state:

The ability of [the person providing the guarantee] to perform under the [guarantee or other financial commitment] will depend on the financial strength of [the person]. See [the persons] financial statements on page [*]. There is no assurance that [the person] will have the financial ability to be able to satisfy its obligations under the [guarantee or other financial commitment] and therefore you may not receive any return from your investment.

34 Item 13 of Form 43B required VAC to include a statement describing conflicts of interest and provided:

ITEM 13 Conflicts of Interest

Describe any existing or potential conflicts of interest among the developer, manager, promoter ... in connection with the real estate securities which could reasonably be expected to affect the purchaser's investment decision.

35 Article 4.9(i) of the Hilton Disclosure Statement is related to the Item 9 obligation to disclose risk factors:

4.9 Risk Factors

. . . . .

(i) **Liabilities and Obligations of the Developer.** The Developer is currently developing the Vancouver Airport Marriott, a 237 room full service hotel, on the Parent Property.

> The Vancouver Airport Marriott is scheduled for completion in or about June of 1998. In this regard, the Developer has entered into purchase agreements, ancillary documents similar in form and substance to the Agreements, and certain additional agreements with purchasers of strata lots comprising the Vancouver Airport Marriott, all of which give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements.
>
> (A.R., vol. II, at p. 164)

Article 4.1 of the Hilton Disclosure Statement provided that "Agreements" meant "the Bylaws, the Hotel Asset Management Agreement, the Hotel Use Covenant, the Joinder in Covenant Agreement and the Purchase Agreement".

36 Article 4.11 is related to the Item 13 obligation to disclose conflicts of interest:

> **4.11 Conflicts of Interest**
>
> The Developer is not aware of any existing or potential conflicts of interest ... that could reasonably be expected to materially affect the purchaser's investment decision. ...

(2) Liability Under the Real Estate Act

37 Sharbern claims that VAC is liable for misrepresentations contained in arts. 4.9(i) and 4.11 of the Hilton Disclosure Statement in that they resulted in the "non-disclosure of a material conflict of interest" (A.F., at para. 1). There are two potential causes of action here: one under s. 75 of the *Real Estate Act*, and the other at common law under the tort of negligent misrepresentation. I will first deal with the cause of action under the *Real Estate Act*.

38 Section 75 of the *Real Estate Act* provides the statutory mechanism pursuant to which an investor can hold a developer liable with respect to the representations found in a disclosure statement. Under the *Real Estate Act*, if a "material false statement" is contained in a disclosure statement, the developer will be liable to investors for any resulting loss they may have sustained, and investors are deemed to have relied upon the representations made in the disclosure statement. However, s. 75 also contains a defence which provides that if the developer had reasonable grounds to believe and did believe that the material false statement was true, it would not be liable. (Although s. 75 uses the term "prospectus", a disclosure statement is deemed under s. 66(2) of the *Real Estate Act* to be a prospectus for the purposes of the section.) The relevant parts of s. 75 of the *Real Estate Act* provide:

> 75 (1) In this section, **"prospectus"** includes every statement and report and summary of report required to be filed with the prospectus under this Part.

> (2) If a prospectus has been accepted for filing by the superintendent under this Part,
>
> > (a) every purchaser of any part of the subdivided land, shared interests in land or time share 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, and
> >
> > (b) if any material false statement is contained in the prospectus,
> >
> > > (i) every person who is a director of the developer at the time of the issue of the prospectus,
> > >
> > > (ii) every person who, having authorized the naming, is named in the prospectus as a director of the developer,
> > >
> > > (iii) every person who is a developer, and
> > >
> > > (iv) every person who has authorized the issue of the prospectus
> >
> > is liable to compensate all persons who have purchased the subdivided land, shared interests in land or time share interests for any loss or damage those persons may have sustained, unless it is proved
> >
> > . . . . .
> >
> > > (viii) that, with respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, the person had reasonable grounds to believe and did, up to the time of the sale of the subdivided land, shared interests in land or time share interests believe that the statement was true....

39 Under s. 75(2)(b) of the *Real Estate Act*, Sharbern has the onus to demonstrate that either or both of arts. 4.9(i) and 4.11 contained a "material false statement". As the plaintiff, Sharbern bears this onus under the principle that the party who alleges a fact has the burden of proving it. Nothing in the language of s. 75 suggests that a plaintiff advancing a statutory cause of action under the *Real Estate Act* does not bear this onus. In order for art. 4.9(i) to contain a material false statement, the representation that VAC made indicating that it had entered into agreements with the Marriott that were "similar in form and substance" to those governing the Hilton must be shown to be a material false statement. For art. 4.11 to contain a material false statement, VAC's representation that it was "not aware of any existing or potential conflicts of interest ... that could reasonably be expected to materially affect the purchaser's investment decision" must be found to be a material false statement. If Sharbern

satisfies that onus, VAC must then demonstrate that it had reasonable grounds to believe and did believe that the material false statements were true, in order to rely on the defence.

(3) Materiality

40 In *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 2 S.C.R. 331 (S.C.C.), Binnie J. wrote that "disclosure lies at the heart of an effective securities regime" and that the extent of disclosure is a matter of legislative policy that involves "[b]alancing the needs of the investor community against the burden imposed on issuers" (para. 5). The materiality standard for disclosure "supplants the 'buyer beware' mind set of the common law with compelled disclosure of relevant information" while "recogniz[ing] the burden" that is placed on issuers to provide such disclosure (*Kerr*, at para. 32).

41 A materiality standard is a legislated and regulatory balancing between too much and too little disclosure. As the Supreme Court of the United States cautioned in *TSC Industries Inc. v. Northway Inc.* (1976), 426 U.S. 438 (U.S. Ill.) (U.S. Ill. 1976), at pp. 448-49:

> ... if the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information — a result that is hardly conducive to informed decisionmaking.

42 Sharbern argues that in a prospectus context under the *Real Estate Act*, "asymmetries in knowledge and vulnerability" exist which would suggest that the materiality standard of disclosure should be high (A.F., at para. 32). I infer that it is Sharbern's position that when balancing the requirement to disclose in a prospectus context, the emphasis should be on more disclosure. Although Sharbern does not suggest that VAC, in its capacity as developer, was acting as a fiduciary, Sharbern does say that VAC's disclosure obligations should be the same as that of a fiduciary.

43 Potential investors are indeed vulnerable to the superior knowledge of an issuer as to what need and need not be disclosed. That is the reason for legislated disclosure obligations in a securities context. However, the jurisprudence has recognized that it is not in the interests of investors to be buried "in an avalanche of trivial information" that will impair decision making (*TSC Industries*, at p. 448). As I will explain, the materiality standard calls for the disclosure of information that a reasonable investor would consider important in making an investment decision.

(4) The Test for Materiality

44 The *Real Estate Act* does not define what is meant by the term "material" when it is used in the context of the "material false statement" required for liability under s. 75. The parties submit that in interpreting materiality under s. 75, the Court should adopt the approach set out by the Supreme Court of the United States in *TSC Industries*. In that case, the materiality of an omitted fact in a proxy solicitation context was determined based on whether there was a substantial likelihood that the disclosure of the omitted fact would have assumed actual significance in the deliberations of a reasonable investor.

45 The materiality test was described by the U.S. Supreme Court in *TSC Industries*:

> ... An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with *Mills*' general description of materiality as a requirement that "the defect have a significant propensity to affect the voting process." It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.
>
> [Emphasis in original; p. 449]

The U.S. Supreme Court characterized materiality "as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts" (p. 450).

46 The *TSC Industries* test is not a new concept in Canadian securities law. The test has been adopted by a number of Canadian appellate courts: see *Canada (Director appointed under s. 253 of Canada Business Corporations Act) v. Royal Trustco Ltd.* (1984), 6 D.L.R. (4th) 682 (Ont. C.A.), aff'd [1986] 2 S.C.R. 537 (S.C.C.); *Harris v. Universal Explorations Ltd.* (1982), 17 B.L.R. 135 (Alta. C.A.); and *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, 189 B.C.A.C. 251 (B.C. C.A.).

47 A disclosure statement under the *Real Estate Act* is analogous to the proxy solicitation in *TSC Industries*. The analogy exists because the two documents share similar characteristics. That is, both are (i) prepared unilaterally by management or a developer, (ii) prepared pursuant to statutory and/or regulatory obligations, (iii) used to provide information to investors (current or potential) to allow them to make informed choices, and (iv) used by investors in making decisions (either deciding how to vote or whether to invest). Both are used by investors to make informed investment decisions based on information provided to

them by a party that unilaterally controls what specific information to disclose, pursuant to statutory obligations. Therefore, it is appropriate to consider the *TSC Industries* test to determine the materiality of the representations under the *Real Estate Act*.

48 The U.S. Supreme Court indicated that it was "universally agreed" that the question of materiality is objective (*TSC Industries*, at p. 445). Materiality is based on an examination of how the information would have been viewed by a "reasonable investor". The U.S. Supreme Court concluded that the objective standard formulated in *TSC Industries* "best comports with the policies" (p. 449) of the proxy disclosure rules - the purposes of which were "not merely to ensure by judicial means that the transaction, when judged by its real terms, is fair and otherwise adequate, but to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice" (p. 448).

49 In order to define the appropriate threshold as to "just how significant a fact must be" (*TSC Industries*, at p. 445) to a reasonable investor before it becomes material, the court imposed a standard that requires that there must be a "substantial likelihood" that an omitted fact "would" be considered important. This standard was imposed rather than the lesser standard which would require disclosure if an omitted fact "might" have been considered important. In adopting the "would" standard, the U.S. Supreme Court approved of the words of Chief Judge Friendly of the U.S. Second Circuit Court of Appeals in *Gerstle v. Gamble-Skogmo Inc.* (1973), 478 F.2d 1281 (U.S. 2nd Cir. Ct. App. 1973), where he wrote:

> We think that, in a context such as this, the 'might have been' standard ... sets somewhat too low a threshold; the very fact that negligence suffices to invoke liability argues for a realistic standard of materiality. ... While the difference between 'might' and 'would' may seem gossamer, the former is too suggestive of mere possibility, however unlikely. When account is taken of the heavy damages that may be imposed, a standard tending toward probability rather than toward mere possibility is more appropriate. ... [p. 1302]

50 At the same time, the U.S. Supreme Court clarified that a shareholder is not required to prove that the omitted fact would have caused a reasonable investor to change his or her vote. What is required is proof of a substantial likelihood that the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder. The standard was seen as consistent with the court's description of materiality in its earlier decision in *Mills v. Electric Auto-Lite Co.* (1970), 396 U.S. 375 (U.S. Sup. Ct.) (U.S. Sup. Ct. 1970) that the defect or omission "have a significant propensity to affect the voting process" (Emphasis in original; p. 384).

51 Given that materiality is determined objectively, from the perspective of a reasonable investor, I would add that the subjective views of the issuer do not come into play when assessing materiality. As I will discuss later, with respect to VAC's liability under the *Real*

Estate Act, VAC's subjective views only are taken into account when considering the defence under s. 75(2)(b)(viii), not when considering whether a false statement was material. I make this observation because in art. 4.11 of the Hilton Disclosure Statement VAC represented that it was "not aware of any existing or potential conflicts of interest". The Court of Appeal appears to have treated this language as importing a subjective element into the analysis of VAC's conflict representation, rather than treating it as an element of the statutory defence.

52 Finally, the U.S. Supreme Court indicated that the importance of an omitted fact must be considered in the light of whether it would be viewed by a reasonable investor as having "significantly altered the 'total mix' of information made available". In certain situations, evidence of the information made available may be such that common sense inferences will be sufficient to establish materiality. In other cases, where there is evidence that supports competing inferences, a court may be required to carry out a more complex analysis to determine what the reasonable investor would have considered important. For the majority of cases, materiality is a contextual matter, involving the application of a legal standard to specific facts, that must be determined in light of all of the information that was made available to an investor. Canadian and American authorities and commentary on materiality indicate that assessing materiality is a "fact-specific inquiry" (*Basic Inc. v. Levinson* (1988), 485 U.S. 224 (U.S. Ohio) (U.S. Ohio 1988), at p. 240). Materiality is "to be determined on a case-by-case basis" (*Basic*, at p. 250) in light of all of the relevant circumstances.

53 The United States Securities and Exchange Commission ("SEC"), in SEC Staff Accounting Bulletin: No. 99 — "Materiality" (August 12, 1999) says that quantitative and qualitative factors should be considered in assessing materiality and that this requires "a full analysis of all relevant considerations" (pp. 2-3). The SEC wrote that "an assessment of materiality requires that one views the facts in the context of the "surrounding circumstances", as the accounting literature puts it, or the "total mix" of information, in the words of the [U.S.] Supreme Court" (p. 1-3). A fact-driven, contextual approach to determine materiality is also recommended in the Canadian Securities Administrators *National Policy 51-201 Disclosure Standards* (July 12, 2002).

54 Despite materiality being a question of mixed law and fact, Sharbern asserts that "there is no need for a plaintiff to tender industry or expert evidence as to what would influence a reasonable investor because the question of materiality of conflicts of interest in a prospectus is uniquely for the court, involving a question of construction" (A.F., at para. 40). To support this assertion, Sharbern refers to the words of Binnie J. in *Kerr* where he wrote that "disclosure is a matter of legal obligation" (para. 54). In *Kerr*, Binnie J. was writing in the context of explaining that the business judgment rule "should not be used to qualify or undermine the duty of disclosure" (para. 54).

55 The business judgment rule is applied by courts when they are asked to resolve disputes involving business decisions made by managers (*Kerr*, at para. 54). In *Kerr*, Binnie J. adopted Weiler J.A.'s description of the business judgment rule at p. 192 in *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.) as follows:

> The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. ...
>
> [Emphasis deleted ...] [para. 54]

56 Binnie J. explained that the business judgment rule has been traditionally justified with respect to business decisions because: (i) "judges are less expert than managers in making business decisions", and (ii) "[i]n order to maximize returns for shareholders, managers should be free to take reasonable risks without having to worry that their business choices will later be second-guessed by judges" (*Kerr*, at para. 58). These traditional justifications for the rule "do not apply to disclosure decisions" (*ibid*).

57 As I have explained, the question of materiality involves the application of a legal standard to a given set of facts. Judges are not less expert than business managers when it comes to the application of a legal standard to a given set of facts; neither do managers' assessments of risk have anything to do with meeting their disclosure obligations. As Binnie J. observed, "[i]t is for the legislature and the courts, not business management, to set the legal disclosure requirements" (*Kerr*, at para. 55).

58 Nothing in these reasons departs from the law as set out in *Kerr*. VAC's statutory obligation in this case was to disclose certain prescribed matters and, in doing so, to not make material false statements. While VAC made its own assessment of what information it was required to include in the Hilton Disclosure Statement, it is the court that determines whether the disclosure made meets VAC's legal obligations. The court must therefore inquire into what the reasonable investor would consider as significantly altering the total mix of information made available. This is a fact-specific inquiry, and except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention.

59 In carrying out a materiality assessment, a court must first look at the information disclosed to investors at the time they made their investment decision. In the present case, what I will refer to as "disclosed information" was the information contained in the Hilton Disclosure Statement. The next step in determining whether an omitted fact or information

(the "omitted information") would be considered as significantly altering the total mix of information made available is to consider the omitted information against the backdrop of what was disclosed. In the present case, the significance of the Compensation Differences must be ascertained by comparing the omitted information (the guaranteed rate of return to Marriott Owners and the 5% management fee and added incentive payable to VAC by the Marriott Owners) to the disclosed information. As part of this second step, a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. In this case, for example, evidence about the strong economic environment at the time investors made their investment decisions would help to evaluate whether the guaranteed rate of return given to Marriott Owners would have been significant in the context of the projections for high occupancy rates for the Hilton hotel that were disclosed in the Hilton Disclosure Statement.

60 Another type of evidence relevant to the materiality assessment is evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations ("behaviour evidence"). For example, a plaintiff would not be precluded from introducing evidence, if available, that the defendant acted on a conflict of interest even though that evidence pertained to events arising subsequent to the investors making their investment decisions. Similarly, a defendant would not be precluded from bringing evidence that investors had information not included in the disclosure documents at the time they were making their investment decisions, or that investors who had the information acted in a certain way. Beyond this behaviour evidence, evidence of common knowledge or, depending upon the circumstances, knowledge specific to particular investors would also be admissible. Nonetheless, in considering the question of materiality, the predominant focus is on the disclosed and omitted information.

61 In sum, the important aspects of the test for materiality are:

i. Materiality is a question of mixed law and fact, determined objectively, from the perspective of a reasonable investor;

ii. An omitted fact is material if there is a substantial likelihood that it *would* have been considered important by a reasonable investor in making his or her decision, rather than if the fact merely *might* have been considered important. In other words, an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available;

iii. The proof required is not that the material fact would have changed the decision, but that there was a substantial likelihood it would have assumed actual significance in a reasonable investor's deliberations;

iv. Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors; and

v. The materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient. A court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well, evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer.

(5) Analysis of the Trial Judge's Materiality Assessment

62 I now turn to the trial judge's materiality assessment. In my respectful view, the trial judge made three interrelated errors of law in her treatment of the materiality of VAC's alleged conflict of interest stemming from the Compensation Differences, which impact upon her assessment of whether the Hilton Disclosure Statement contained a material false statement. First, she equated the existence of a potential or actual conflict of interest with materiality, essentially treating a conflict of interest as inherently material. Second, she reversed the onus on Sharbern as plaintiff to prove materiality and placed an onus on VAC to disprove materiality. Third, she failed to consider all of the evidence available to her on the issue of materiality. I will deal with these errors in turn.

63 Although much time was dedicated to the question in her analysis, the key issue before the trial judge was not whether a potential or actual conflict of interest existed. The existence of non-material conflicts of interest had been acknowledged by VAC in arts. 4.9(i) and 4.11 of the Hilton Disclosure Statement. Rather, the key issue was whether the Compensation Differences and the potential or actual conflict of interest they created were *material*, thereby rendering VAC's failure to disclose them "material false statements" attracting liability under the statute.

64 A careful review of Wedge J.'s reasons shows that once she had determined that there was a potential or actual conflict of interest, she found that there was an obligation to disclose the conflict as if the existence of the conflict itself was inherently material. For example, before she had even considered the issue of materiality, Wedge J., states at para. 310 that "[g]iven the existence of the conflict described above, VAC was required to disclose the nature of those agreements" evidencing the Compensation Differences. Similarly, when speaking about the evidence led by VAC concerning the benefits to the hotels of sharing resources and expenses, she determined that "[i]t is for the investor to decide whether the benefits of cost and resource sharing outweigh the detriment of the conflict. An investor cannot engage in that weighing process unless the conflict is disclosed" (para. 304). Again, this is before the trial judge had made any determinations with respect to the materiality of the conflict of interest.

65 Treating a conflict of interest as inherently material led the trial judge to other manifestations of the same error of law. One is that she misinterpreted the statutory disclosure requirement. She said that the conflict of interest must be disclosed so that investors can weigh its costs and benefits against those of other factors. However, the statutory requirement does not impose on issuers an obligation to disclose all facts that would permit an investor to sort out what was material and what was not. This approach would not only result in excessive disclosure, regardless of materiality, it would overwhelm investors with information and impair, rather than enhance, their ability to make decisions.

66 Further, by holding that the failure to disclose the existence of conflict of interest is sufficient to attract liability for a material false statement, the trial judge misinterpreted the test for materiality. If the mere existence of a potential or actual conflict of interest creates an obligation to disclose it, without a proper inquiry into the materiality of the conflict, this approaches the standard of material fact used by the Court of Appeals in *TSC Industries* of "all facts which a reasonable stockholder might consider important" (*Northway Inc. v. TSC Industries Inc.* (1975), 512 F.2d 324, Fed. Sec. L. Rep. P 95,007 (U.S. C.A. 7th Cir. 1975), at para. 3). That standard has been rejected by the U.S. Supreme Court and now by this Court in these reasons.

67 In assessing materiality, the trial judge pointed to the test set out in *TSC Industries* and concluded:

> I am satisfied that VAC's ability to make more money under the Marriott guarantee when a potential customer chose the Marriott over the Hilton would have assumed actual significance in the deliberations of a reasonable investor, as would the fact that VAC made more money in management fees if the Marriott revenue was relatively higher than the Hilton revenue. [para. 321]

However, she does not address how or why there is a substantial likelihood that the Compensation Differences would be viewed by reasonable investors in the Hilton strata lots as significantly altering the total mix of the information made available. She appears to make a common sense inference that the Compensation Differences would have been material, without offering any analysis of how the conflict created by the Compensation Differences would fit into the mix of all other relevant information, nor does she take notice of what the total mix of information would be.

68 There was evidence, which I will discuss more fully below, which could have supported the opposite inference, that the Compensation Differences or the omitted information were not material in the context of what had already been disclosed to investors. For example, the disclosed information included information about: the economic environment at the time of the sale of the strata lots; the financial benefits offered to the Hilton Owners, such as the management fee payable to VAC; information about common management by VAC and resulting risk factors; and information relevant to VAC's limited ability to prefer its own interests. The trial judge also had behaviour evidence led by VAC about what the conduct of fully informed investors had been. In my view, this evidence demonstrated that competing inferences could be drawn in this case and added a layer of complexity to the materiality analysis that took it outside the realm of drawing a simple, common sense inference. A more detailed analysis of the evidence constituting the "total mix" of information was required in order to make a determination about what a reasonable investor would have considered significant.

69 Wedge J.'s error in treating a conflict of interest as inherently material is interrelated with her second error, which was to reverse the onus of proof. Once she was satisfied that Sharbern had proven the existence of a conflict of interest, she turned to VAC to show why it was not material. The result was that she made the determination that the conflict of interest was material without requiring Sharbern to satisfy its burden, as plaintiff, of proving materiality.

70 Having found a conflict of interest to be inherently material, the trial judge looked to VAC to show proof that it was not. She considered VAC's submissions that the Compensation Differences would not have been material in light of all the disclosed information about common management in the Hilton Disclosure Statement. She then stated "I cannot agree with VAC's submission concerning materiality" (para. 320) and concluded that "the presence of an actual or potential conflict of interest on the part of [VAC] would concern any reasonable person contemplating investing more than $100,000 in a strata unit" (para. 321). While observing that "no expert evidence was advanced with respect to the knowledge of the reasonable investor" (para. 317), she neither proceeded with an analysis of other evidence of materiality adduced by Sharbern, nor commented upon the absence of any such evidence. As stated above, the onus of proving the materiality of a fact,

statement or omission rests with the person alleging materiality. Sharbern did not adduce any evidence supporting the materiality of the Compensation Differences (other than the Hilton Disclosure Statement and the omitted information). It did not provide evidence to explain or place the omitted information into the context of the disclosed information in a way that would show its materiality. There is nothing in the trial judge's analysis to indicate that Sharbern satisfied its burden.

71 The third error evident from the decision of Wedge J. is that she failed to consider all the evidence available to her on the issue of materiality. I am not unmindful that "[i]n reviewing the decisions of trial judges in all cases ... it is important that the appellate court remind itself of the narrow scope of appellate review" with respect to factual matters (*Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014 (S.C.C.), at para. 11; see also *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 46). When a question of mixed fact and law is at issue, the findings of a trial judge should be deferred to unless it is possible to extricate a legal error (*Housen*, at para. 37). Within this narrow scope of review, an appellate court may "reconsider the evidence" proffered at trial when there is a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his [or her] conclusion" and thereby erred in law (*Van de Perre*, at para. 15). As I will now explain, Wedge J. ignored and misconceived evidence relevant to the question of materiality in a way that affected her conclusions.

72 The statutory disclosure requirements only oblige issuers to disclose certain prescribed information. Where the issuer's disclosure is challenged, the court must determine whether the omitted information was material in the context of the "total mix" of information made available to the investor. While Wedge J. considered some evidence in relation to materiality (i.e. the language and general circumstances surrounding the Hilton Disclosure Statement), she failed to consider other relevant evidence. For example, she rejected much of the evidence adduced by VAC as being irrelevant to the issue of the existence of a conflict of interest. There is no indication that she considered that evidence, as she was required to do, in assessing the materiality of the Compensation Differences.

73 As I will detail below, evidence of factors such as the general economic climate at the time the strata lots were sold, the financial arrangements offered to Hilton Owners, the disclosure made by VAC of common management and risk factors, and the limited extent of VAC's ability to act upon the Compensation Differences in its own interests, may be of little weight in determining whether a potential or actual conflict of interest existed as a result of the Compensation Differences. However, as mentioned above, those factors constituted disclosed information that would come into play as relevant to the issue of whether reasonable investors would have considered the omitted information important to their investment decision.

(a) The Economic Environment

74 The Hilton Disclosure Statement warned that "[t]o the extent that there are more hotel rooms available in a particular market than there is demand for those rooms, then both occupancy and room rental rates may be adversely effected (*sic*). There are other hotels which are planned for the Richmond and Vancouver markets" (art. 4.9(b)). However, it also stated that "Richmond is ranked as having the highest hotel occupancy of any market in Canada and the United States for the full year 1996" and was showing similar promise for 1997 (point 5 of the executive summary). The information about the high hotel occupancy rates in Richmond, coupled with the optimistic projections made in the Hilton Disclosure Statement, are relevant considerations the trial judge should have taken into account and suggested that the Hilton would not have a problem with occupancy rates, or need to worry about competition from the Marriott. This information about the economic environment was disclosed information forming part of the total mix of information made available to investors, against which they would have weighed the importance of the omitted information.

(b) Financial Benefits to Hilton Owners

75 The omitted information about VAC's agreements with the Marriott Owners would have been assessed by a reasonable investor in comparison to the disclosed information about the financial arrangements given to Hilton Owners. Although they did not receive a guarantee, the lower management fee of 3% instead of 5% and an added incentive had been given to Hilton Owners to increase their projected rate of return. The advantage of paying a low percentage management fee could have supported an inference that there were financial arrangements to counterbalance the omitted information about financial arrangements for the Marriott Owners even if they left the alleged incentive for favouritism unchanged.

(c) Disclosure of Common Ownership and/or Management and Risk Factors

76 The Hilton Disclosure Statement disclosed that the developer of the Hilton was also developing the Marriott, and was the owner of the Richmond Inn. In the risk factors, VAC disclosed that its agreements with the Marriott "give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements" with the Hilton strata lot owners (art. 4.9(i)). VAC also disclosed that the Asset Manager would be the same for the Hilton and the Marriott, and that the day-to-day management of the Hilton would be subcontracted to the manager of the Richmond Inn. The Hilton Disclosure Statement states that "[t]he success of the Hotel will depend in large measure on the ability of the Developer as Asset Manager" and that "the success or failure of the Rental Pool will depend in part on the managerial abilities of the Asset Manager" (art. 4.9(e) (emphasis in original deleted)).

77 Although the trial judge rejected VAC's submission that its disclosure of potential conflicts had been sufficient, she noted in her reasons that because the two hotels were in direct competition for clientele, "the interests of their owners were not congruent" (para. 299). Nonetheless, she acknowledged that "Hilton Owners consented to VAC acting for other principals competing in the same market" (para. 425). While all of this evidence was reviewed by the trial judge in other contexts, in my respectful opinion, she failed to assess whether there was a substantial likelihood that a reasonable investor in a Hilton strata lot would have viewed the Compensation Differences and their potential for creating a conflict of interest as significantly altering the information already possessed about the potential risk factors.

(d) VAC Had No Practical Means or Incentive to Favour the Marriott

78 VAC led evidence at trial in an attempt to show why it would not have preferred the Marriott and that it did not do so. VAC submits that this evidence shows that the conflict of interest did not manifest itself in practice, and that VAC had no practical means or the incentive to favour the Marriott over the Hilton. VAC argues that this evidence "support[s] VAC's conclusion that the potential conflict of interest was not material at the time of disclosure" (R.F., at para. 91). The trial judge considered this evidence in the conflict of interest stage of her analysis. There, she found that it did "not go to the issue of the existence of conflict" but rather "only goes to whether VAC would have acted on the opportunities raised by the conflict" (para. 306). She does not appear to have considered it with respect to whether it would be relevant to the question of materiality.

79 The evidence adduced by VAC that would show it had limited practical means and limited incentives to favour the Marriott over the Hilton includes evidence that VAC had a limited ability to market the hotels in a manner that favoured one hotel over the other. Evidence led at trial and discussed by the trial judge in her fiduciary duty analysis suggested about half of the hotels' traffic was generated by marketing at the international/national level by the Hilton and Marriott chains. While we should avoid considering this percentage, which did not constitute disclosed information, the Hilton Disclosure Statement did disclose that investors could expect to "benefit from [the] strength of Hilton's worldwide reservations system and the worldwide recognition provided by [the Hilton chains]" (point 3 of the executive summary).

80 The Hotel Asset Management Agreement under which VAC managed the Hilton hotel was disclosed information. That agreement required VAC to manage the Hilton hotel in a commercially reasonable manner and contained a number of obligations to use reasonable efforts. Even if the Hilton Owners had been aware of the omitted information, their concerns about any potential favouritism of the Marriott hotel would have been displaced by this contractual obligation imposed on VAC. The requirement to operate the

hotel in a commercially reasonable manner would be inconsistent with VAC favouring one hotel to the detriment of the other, and served as a means to contractually preclude VAC from doing so.

(e) Evidence of Conduct of Fully Informed Investor

81 Another piece of evidence that should have been included in the trial judge's materiality assessment was that Tevan Trading Ltd. ("Tevan") (the largest investor in the Hilton strata lots other than VAC's parent company), owned units in both the Hilton and the Marriott. Tevan purchased 6 Hilton units on March 17, 1998, and then additional Hilton units on March 23, 1998, along with four Marriott units on the same day. The Marriott units became available to Tevan because certain buyers in the Marriott had cancelled their purchases. While the details of the Compensation Differences would have been known to Tevan when it invested in the Hilton on March 23, 1998, they did not appear to affect Tevan's decision to invest in the Hilton as well as the Marriott. It is true that Tevan is only one investor, and there is no evidence about Tevan's intentions in buying strata units in the Hilton and Marriott. Thus, one cannot jump to the conclusion that Tevan alone represents the "reasonable investor". Nonetheless, the trial judge was required to consider this behaviour evidence as part of her determination of the substantial likelihood that a reasonable investor would have seen any conflict created by the Compensation Differences as significantly altering the total mix of information he or she had available.

(f) Evidence of the Investor Committee Meetings

82 Finally, there was also relevant behaviour evidence concerning the Hilton Owners' investor committee meetings. Minutes of those meetings record questions raised by the Hilton Owners over concerns they had with the hotel. There is no indication in these Minutes that the Hilton Owners were concerned about the Compensation Differences prior to the filing of their Statement of Claim in June 2003. This lack of concern would suggest that the Compensation Differences were not material.

83 In particular, VAC disclosed the existence of the guarantee in favour of the Marriott Owners at an investors committee meeting with the Hilton Owners on June 14, 2000. The timing of the disclosure of the differential management fee is not clear. While numerous concerns were raised by the investors during these meetings — ranging from concerns over pastry contracts, to concerns over strata fees, advertising and the franchise agreement — none of the Minutes of any of the investor committee meetings subsequent to the June 14, 2000 disclosure, record any questions that would evidence a concern over the guarantee.

84 Under the guarantee VAC sustained a liability of over $13 million. The financial impact or incentive for VAC from the management fee differentials would have been considerably less. While the differential in management fees might be thought to support Sharbern's

argument that it created an incentive for VAC to favour the Marriott, from the perspective of the Hilton Owners, the lower management fee payable would also have appeared favourable to them. Further, VAC manager Timothy Mashford, who was present during many of the investor committee meetings, testified that at no time did any of the investors express any concern that the Hilton, Marriott and Richmond Inn were being commonly managed by VAC.

85 In sum, the evidence summarized in the preceding paragraphs should have been considered by the trial judge in applying the materiality standard to the facts of this case. Some of the evidence referred to above helps to place the omitted information in the factual context of the total mix of disclosed information, in order to evaluate whether the omitted information would have been considered important by reasonable investors in making their investment decisions. While not part of the total mix, the behaviour evidence of fully informed investors, either prior to making their investment decisions (e.g., the Tevan evidence) or subsequent to their investment (e.g., the investor committee meetings evidence), when they learned of the guarantee, was also relevant to the trial judge's determination of whether the reasonable investor would have considered the Compensation Differences material.

(6) Sharbern's Burden of Proof

86 For its part, Sharbern was not required to prove that investors would not have purchased the Hilton strata lots had they known about the Compensation Differences. However, Sharbern did have the burden of proving, on a balance of probabilities, the substantial likelihood that disclosure of the omitted information would have significantly altered the total mix of information made available to reasonable investors in the Hilton strata lots.

87 To the extent it existed, in cases where common sense inferences are not sufficient, a plaintiff could lead the following types of evidence in the discharge of that burden:

(i) that potential investors who knew of the Compensation Differences declined to invest in Hilton strata lots or exhibited concern and doubts about the investment because of them;

(ii) that potential investors declined to invest in the Hilton strata lots because they found there was insufficient disclosure about the common management of the Hilton and Marriott hotels and the conflict of interest;

(iii) that once the Hilton Owners became aware of the Compensation Differences, they expressed significant concerns about them and challenged VAC's ability to properly manage the Hilton hotel in accordance with its contractual obligations;

(iv) that VAC's marketing efforts and management of the hotel were not carried out diligently in good faith; and

(v) that VAC acted on the conflict of interest to the detriment of Hilton Owners.

Some of this evidence might have required expert evidence. However, if it existed, evidence could have been obtained through the pre-trial discovery process, including production of documents, or demonstrated at trial through the cross-examination of VAC's employees. The above list is not exhaustive, nor is a plaintiff required to lead all of the evidence on that list in order to prove materiality. Because the materiality determination is case specific, the evidence that is required in any given case will vary with the circumstances.

88 The only evidence adduced by Sharbern in relation to these types of considerations was evidence of a non-competition policy implemented by VAC in 2002 that provided that the Hilton, the Marriott and the Richmond Inn would not engage in price competition with respect to each other's top ten clients by undercutting room rates. Without deciding upon the merits or actual effect of the policy, the trial judge commented that because the Marriott had been in operation one year longer than the Hilton, it had a competitive advantage over the Hilton such that any agreement favouring the *status quo* was to the benefit of the Marriott. Sharbern alleged that the policy was detrimental to the Hilton hotel and therefore proved that VAC had used its position as a common manager to favour the Marriott hotel and, consequently, its own interests.

89 As the non-competition policy was developed long after the time period of VAC's statutory disclosure obligations, I will concentrate my analysis of it on the alleged breaches of fiduciary duty. As discussed more fully below, in my view the materiality of the noncompetition agreement was not established on the evidence. The evidence was that the Marriott would match the Hilton's pricing in order to retain customers. It is indeed dubious that any hotel would sit idly by and watch its competitor take its customers through lower pricing in a poor market environment without taking steps to retain those customers. It is apparent that VAC saw price competition as merely resulting in an attrition of revenue for all three hotels and sought to prevent such a result. That could hardly be seen as prejudicial to the Hilton. Moreover, whether or not it could be viewed as material or as having an effect on the Hilton occupancy rates would have depended upon an assessment of how it compared with the other arrangements that existed between the hotels, such as evidence about the sharing or referral of Marriott customers to the Hilton and Richmond Inn. We do not have the benefit of such an assessment.

90 Sharbern failed to adduce any other evidence to prove there was a substantial likelihood that disclosure of the Compensation Differences would have significantly altered the total mix of information that was made available to reasonable investors in the Hilton strata lots.

(7) Conclusion on Materiality

91 In sum, the trial judge erred in law by treating this conflict of interest as inherently material; reversing the onus of proof of materiality; and failing to consider all of the evidence relevant to the determination of materiality. It also appears from the record before the trial court that no evidence was adduced by Sharbern which could reasonably have supported a finding that the Compensation Differences and any conflict of interest they created were material. Separating materiality from the conflict of interest analysis, applying the burden of proof appropriately and taking account of all relevant evidence, I am of the opinion that it has not been demonstrated that there was a substantial likelihood that disclosure of the Compensation Differences would have assumed actual significance in a reasonable investor's investment decision.

B. The Statutory Defence

(1) The Legal Test

92 Even if VAC were found to have made a "material false statement", s. 75(2)(b)(viii) of the *Real Estate Act* provides VAC with a defence if it can prove that it "had reasonable grounds to believe and did, up to the time of the sale ... believe that the statement was true". To rely on the defence, VAC had to show: (1) that it subjectively believed the representations it made were true; and (2) that it objectively had "reasonable grounds" for such a belief. In considering the defence, the question is not whether VAC's conclusion itself was reasonable. Rather it is whether VAC subjectively believed its representations, and whether that belief had an objective basis in the sense that there were reasonable grounds for the belief.

93 The statutory defence found in s. 75(2)(b)(viii) of the *Real Estate Act* does not appear to have been considered by the trial judge. It is not mentioned by her at any point. At para. 323, Wedge J. reproduced portions of s. 75 of the *Real Estate Act*; however, she did not go so far as to reproduce the portion of s. 75 that contained the statutory defence. In addition, the common liability questions made no mention of the statutory defence.

94 When a trial judge does not consider a statutory defence, an appellate court may do so or remit the defence to the trial court for its consideration (*Hollis v. Birch*, [1995] 4 S.C.R. 634 (S.C.C.), at para. 33). In this case, it is both feasible on a practical level and in the interests of justice for this Court to make a fresh assessment of the evidence on the record with respect to the defence.

95 In my opinion, even if VAC were shown to have made a material false statement, the statutory defence contained in s. 75(2)(b)(viii) of the *Real Estate Act* would preclude VAC from being found liable under s. 75(2). As I will shortly explain, the evidence indicates

that VAC subjectively believed, and objectively had reasonable grounds to believe, that it was making true statements when it did not disclose the details of the Compensation Differences and represented in the Hilton Disclosure Statement: (i) that it had entered into agreements with the Marriott that were "similar in form and substance" to those governing the Hilton (art. 4.9(i)); and (ii) that it was "not aware of any existing or potential conflicts of interest ... that could be reasonably be expected to materially affect the purchaser's investment decision" (art. 4.11).

96 The evidence establishing the subjective and objective components of the defence is evidence of: (i) common industry practices; and (ii) VAC's limited practical means and incentives to prefer the Marriott. Significantly, Sharbern did not draw this Court's attention to any evidence that would negate the defence.

(2) Common Industry Practice Evidence

97 The Hilton Disclosure Statement disclosed that VAC's parent company, Larco Investments, itself or through its subsidiaries, concurrently owned or managed a Delta and a Ramada hotel in Vancouver, a Holiday Inn at Whistler, a Delta and a Radisson hotel in Toronto and other hotels across Canada. As noted by the Court of Appeal, "VAC relied on the extensive factual and expert evidence it adduced concerning actual and industry practice in the management of multiple hotels by a single entity. There was no evidence to the contrary and no evidence objectively to support the conclusion a reasonable investor would be concerned about the details of the financial arrangements" (para. 76).

98 Wedge J. rejected VAC's industry practice evidence finding it of "little probative value" in relation to whether it proved that a conflict of interest existed in the common management of the Hilton and the Marriott (para. 296). This finding was based on her view that:

> there was no evidence offered by VAC (or its experts) as to whether those properties were in the same competitive set, whether the management fee or other financial arrangements governing the properties were the same, whether those details were disclosed to the owners, or, most importantly, whether there were representations to investors concerning potential or actual conflicts of interest as a result of common management. [para. 296]

However, as I will now explain, I am of the opinion that Wedge J. erred in law when she said that there was "no evidence", as there was evidence. Further, while proving the lack of a material conflict of interest in one common management scenario may be of little help in proving or disproving the existence of a material conflict of interest in another, evidence that hotel managers routinely act for competing hotels would be relevant to the question of whether resulting conflicts of interest are generally seen as material.

99 VAC adduced evidence that it was a common industry practice for different hotels to be commonly managed in the same market, with different management contracts and financial arrangements for each hotel, and with different owners who were not aware of the terms of the contract with the other hotels. VAC's witnesses, including Joann Pfeifer, testified that they believed that common management would be an advantage allowing the participating hotels to maximize profits. Joel Rosen, who was qualified as an expert in the hotel consulting field, testified that it was a common practice in the hotel industry for the same manager to commonly manage competing hotels in the same market and that this practice had "been the case for many years" (R.R., vol. 6, at p. 1159). In his expert report, Mr. Rosen opined that "a hotel management company operating multiple competing properties in a market is not uncommon" (R.R., vol. 30, at p. 6006). By way of example he discussed certain luxury hotels in various cities in the United States, remarking that:

> ... the management contracts may be the same or different in each city, depending on the negotiations at the time the contracts were determined. The fees may differ, the calculation of the incentive fee may differ, the termination clauses may differ, etc. The contracts do not mirror each other at all in each city and in fact the owner of one hotel would not know the terms of the contract at the other hotel in their city.
>
> (R.R., vol. 30, at p. 6006 (emphasis added)).

100 VAC also adduced evidence of the perspective and experience of its principals and senior managers. VAC's sole director and officer, Amin Lalji, when asked about separately owned, commonly managed hotels, testified that "there were plenty of examples prevailing in the market where this is a common practice of most hotel companies, where they would be managing hotels for different ownership structures" (R.R., vol. 8, at p. 1478). Lalji then cited examples in the B.C. market in which there was common management of competing hotels. Similarly, a senior manager hired by Lalji, Joann Pfeifer, testified that some of the Delta hotels in Vancouver were managed by the same company, with different owners, and with different compensation structures in place for the manager.

101 The evidence is that it was a common industry practice for different competing hotels to be commonly managed with the different owners not being aware of the terms of the contracts at each hotel. From this evidence, it can be inferred that VAC had both a subjective and objective basis for concluding that a reference to the Compensation Differences in the Hilton Disclosure Statement was neither expected nor required.

(3) Evidence of Limited Practical Means and Incentives to Prefer

102 The evidence of VAC's limited practical means and incentives to prefer the Marriott over the Hilton (which I summarized above) is also relevant to determining whether the

subjective and objective components of the statutory defence have been established. For example, evidence provided on the details of industry and client practices that would have affected comparative occupancy rates and limited VAC's ability to induce Hilton clients to switch to the Marriott, is relevant to whether there was an objective basis for VAC's belief that the Compensation Differences were not material. Evidence was adduced that relative hotel occupancy was affected to a large degree by independent factors such as international or national marketing.

103 With respect to the hotel business that was generated locally, the trial judge observed that much was won through a formal request for proposal process from corporate clients. The manner in which VAC participated in this formal request for proposal process would have been subject to VAC's contractual obligations under the Hotel Asset Management Agreement to manage the Hilton in a commercially reasonable manner. To avoid liability for breach of contract, VAC would have no room under the formal request for proposal process to market the hotels in a manner that favoured the Marriott over the Hilton. Thus, there was an objective basis for VAC believing that, even if the Compensation Differences created an incentive to favour the Marriott, it could not have materially affected the relative occupancy rates of the Hilton or the Marriott had it tried to do so.

104 Evidence of VAC's knowledge and motivations would also be relevant to the inquiry. Such evidence included testimony provided by VAC's senior manager that she could not have retained managers for the Hilton and the Marriott if these managers had been directed to favour one hotel over the other. One of VAC's principals also testified that neither Larco Investments nor VAC would have risked their reputations by engaging in preferential conduct.

105 Further, evidence about the sharing of common resources and expenses between the Marriott, the Richmond Inn and the Hilton, such as joint contracts for airport shuttle bus service, airline crew transportation, dry cleaning, hotel laundry and armoured car pick-up, and shared personnel such as a chief engineer, executive housekeeper and payroll assistant, substantiates VAC's belief that the Hilton would derive benefits from the common management arrangement. In my opinion, the efficiencies of shared services and the potential for business referrals could reasonably have factored into VAC's assessment of whether the Compensation Differences were material.

106 According to s. 75(2)(b)(viii) of the *Real Estate Act*, the relevant time period to assess VAC's beliefs is "up to the time of the sale". When the lots were being marketed, occupancy rates were expected to remain high. The evidence was that VAC would not have been concerned at that stage about liability from the guarantee of gross revenues given to Marriott Owners, especially given that, on the evidence, it had intended to make the same offer to Hilton Owners until dissuaded by legal advisors. Similarly, it had reduced the

management fee payable by Hilton Owners, not to provide a benefit to itself or an advantage to Marriott Owners, but in order to give increased revenues to Hilton Owners.

107 In my view, the evidence supports the claim that VAC subjectively believed and had a reasonable basis for believing that the financial arrangements for the two developments were similar, despite the differences in detail. It is no coincidence that Sharbern's action against VAC focussed mainly on the claims of negligent misrepresentation and fraud in relation to the financial projections. Occupancy rates and how they might be influenced by the Compensation Differences only seemed important in hindsight, with the change in economic conditions, 9/11, the SARS crisis, and the increased supply of hotel rooms in Richmond.

108 The evidence adduced by VAC proves, on a balance of probabilities, that VAC subjectively believed and had reasonable grounds for believing that the Compensation Differences would not materially affect a purchaser's investment decision, that its agreements with the Marriott Owners were similar to its agreements with Hilton Owners, and that the representations it made in the Hilton Disclosure Statement were true.

(4) No Evidence to Negate the Defence

109 Sharbern did not direct this Court to any evidence to the contrary or to specific passages in the reasons of the trial judge that would have negated the defence established by VAC's evidence. During oral argument, when asked if there was a specific passage in the trial judge's reasoning that negated the defence, Sharbern's counsel observed that there was "not a specific passage" but rather that "the burden of [the trial judge's] reasoning as a whole" was responsive to the question of the defence (Transcript, at pp. 8-9). Counsel also asserted that "it would be obvious in the circumstances" (p. 8). With respect, it is not obvious, particularly in light of the evidence led by VAC showing that the subjective and objective components of the defence had been established.

110 A finding of fraud at trial would have contradicted the conclusion drawn from the evidence that VAC subjectively believed the truth of its representations. There was no such finding. Similarly, a finding that VAC negligently misrepresented the absence of a potential or actual conflict of interest in the Hilton Disclosure Statement could preclude VAC from proving that there were reasonable grounds for its belief in the truth of its representations, and prevent it from establishing the objective basis of its statutory defence. However, as I will set out more fully below, in my view the trial judge did not consider all of the elements necessary to establish negligent misrepresentation.

111 As a result, even if VAC were found to have made material false statements, VAC cannot be held liable under s. 75 of the *Real Estate Act* because the evidence establishes that the statutory defence found in s. 75(2)(b)(viii) applies.

C. Deemed Reliance

112 A final issue with respect to VAC's potential liability under the *Real Estate Act* is whether the deemed reliance provided for under the statute is rebuttable when the contrary is proved, with evidence, on a balance of probabilities. Section 75(2)(a) of the *Real Estate Act* provides that every purchaser of any part of land to which a prospectus relates "is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not". Given my conclusion that VAC cannot be held liable for making material false statements under the *Real Estate Act*, it is not strictly necessary to consider whether the deemed reliance provided under that Act is rebuttable. The issue is even less germane given the subsequent repeal of the *Real Estate Act*. Nevertheless, as both parties argued the issue on appeal, I will briefly comment on the matter.

113 The trial judge found that deemed reliance is not rebuttable. She concluded that the purpose of the *Real Estate Act* was to "protect the investing public" (para. 333). She wrote that it would "undermine the purpose of the legislation" to allow a developer to attempt to rebut the presumption and "direct the focus of the inquiry to what the investor knew rather than what the developer failed to disclose" (para. 333). The Court of Appeal came to the opposite conclusion. It found that deemed reliance is rebuttable because the language used in s. 75 did not expressly create a non-rebuttable presumption.

114 The *Real Estate Act* used the words "*deemed* to have relied. In *St. Peter's Evangelical Lutheran Church v. Ottawa (City)*, [1982] 2 S.C.R. 616 (S.C.C.), at p. 629, the majority of this Court wrote that "the words 'deemed' or 'deeming' do not always import a conclusive deeming into a statutory scheme" and that "[t]he word must be construed in the entire context of the statute concerned".

115 Sharbern submits that the broad purpose of the *Real Estate Act* is to protect investors, and that investors are best protected when they do not have to prove reliance. It argues that conclusive deeming strengthens an investor's civil right of action, particularly when a class action is involved, and makes it more likely that a wronged investor will prosecute his or her claim without having to focus on what was read or understood by the investor or what motivated the investor to invest. Sharbern also contends that textual considerations, like the structure of s. 75, suggest the deemed reliance is not rebuttable.

116 I do not accept Sharbern's argument that the purpose of the *Real Estate Act* would be undermined by allowing deemed reliance to be rebutted. The successor legislation to the *Real Estate Act*, the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, allows for the deemed reliance provided in s. 22(3) of that Act to be rebutted under s. 22(5) when it can be proven that "the purchaser had knowledge of the misrepresentation at the time at which the purchaser received the disclosure statement". The related *Securities Act* also provides at

s. 131 for rebuttable deemed reliance on misrepresentations in a prospectus. The existence of rebuttable presumptions under this successor and related legislation suggests that such presumptions accord with the investor protection purposes of those acts.

117 I acknowledge that the *Real Estate Act*, unlike the successor and related legislation, did not expressly provide for a rebuttable presumption. Nonetheless, as *St. Peter's* indicates, the use of the word "deemed" does not always result in a conclusive, non-rebuttable presumption. It is the purpose of the statute that must be examined in order to determine if the presumption is rebuttable. The successor and related legislation in this case can assist with interpreting the purpose of deemed reliance in the *Real Estate Act*. Lord Mansfield explained this principle in *R. v. Loxdale* (1758), 1 Burr. 445, 97 E.R. 394 (Eng. K.B.), observing that "[w]here there are different statutes in pari materia though made at different times, or even expired ... they shall be taken and construed together ... and as explanatory of each other" (p. 395). Estey J. provided a more modern explanation of this principle, and explained how "sometimes assistance in determining the meaning of [a] statute can be drawn from similar or comparable legislation within the jurisdiction or elsewhere" (*Nova v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437 (S.C.C.), at p. 448).

118 As I have discussed above, disclosure is a matter of legislative policy that involves "[b]alancing the needs of the investor community against the burden imposed on issuers" (*Kerr*, at para. 5). A non-rebuttable presumption could interfere with this balancing and would not serve the statutory purpose behind legislated disclosure obligations. For example, 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. The purpose of the disclosure obligation is to balance the amount of disclosure made, not to place VAC into the role of insurer for Sharbern and the other Hilton Owners.

119 Given that similar statutes expressly allow deemed reliance to be rebutted, the legislature does not view rebuttable presumptions to be contrary to investor protection. Further, a non rebuttable presumption could be contrary to the legislative balancing that underlies the disclosure requirements in the *Real Estate Act* and would result in absurd and unjust results. I would therefore conclude that the presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase.

D. Common Law Negligent Misrepresentation

120 In addition to its claim under s. 75 of the *Real Estate Act*, Sharbern alleges that VAC is liable for the tort of negligent misrepresentation. The trial judge did not distinguish between the common law and statutory causes of action in her reasons, and they were not distinguished in the list of common issues on liability. Nonetheless, I proceed on the basis that when the trial judge found that "VAC negligently misrepresented" (paras. 322 and 473) the Compensation Differences, this finding applied to both the statutory and common law causes of action.

121 I am of the opinion that the trial judge's findings pertaining to the common law of negligent misrepresentation cannot stand because she did not consider all of the elements necessary to establish the tort. As set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.):

> The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. [p. 110]

122 The requirements set out in *Cognos* were not included in the list of common liability issues. Nor was the framework discussed or utilized by the trial judge in her reasons. While she clearly dealt with the duty of care, and it might be inferred that her misrepresentation analysis dealt with whether the Compensation Differences were untrue, inaccurate or misleading (though this was not done so expressly), the trial judge did not consider the third *Cognos* requirement. She also did not consider the fourth requirement of reasonable reliance and fifth requirement of resulting damages. However, reasonable reliance and damages would likely be dealt with in the class action proceeding through future common or individual trials.

123 The third *Cognos* requirement obligated Sharbern to prove that VAC had "acted negligently in making [the] misrepresentation". This requirement is concerned with the standard of care, and was described by Iacobucci J. in *Cognos*:

> The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, "reasonable person". The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading. ...
>
> [Emphasis added; p. 121]

124 In considering the standard of care, the trial judge would have had to address whether, on an objective basis, VAC had taken such reasonable care as the circumstances required to ensure that the representations made in the Hilton Disclosure Statement were accurate and not misleading. She made no such finding. Instead, she summarily concluded that VAC "negligently misrepresented" the Compensation Differences, without having addressed the standard of care.

125 Sharbern submits that the trial judge's conclusion that VAC's representations were negligent is "sound" (A.F., at para. 47). In oral argument, counsel for Sharbern conceded that the trial judge's "reasoning is sparse on her conclusion as to negligence" but insisted that her conclusion was "obvious in the circumstances" (Transcript, at pp. 8-9).

126 I am unable to agree. I do not think it appropriate to collapse the *Cognos* requirement into a bare assertion of obviousness. Failure to demonstrate how VAC breached the standard of care is fatal to Sharbern's common law claim. Sharbern, as plaintiff, bears the burden of proving its allegations. Sharbern does not point to evidence that could support a finding that the standard of care was breached. Nor does it explain how such a conclusion could have been reached based on the trial judge's "sparse" reasoning.

127 Rather, Sharbern asserts that it was not required to adduce expert evidence as to what a developer ought to disclose. It argues that the case is about an experienced businessman (Mr. Lalji) who, while aware of the undisclosed incentive, defends his failure to disclose it by assuring us he would not put his own interests first. Sharbern contends that VAC's evidence of its reliance upon industry and expert evidence and upon the advice of its solicitors in respect of its disclosure obligations did not establish that VAC did not breach the standard of care.

128 Nonetheless, in the circumstances of this case, a bare assertion that something is obvious, without more, cannot establish the applicable standard of care. In the face of considerable evidence before the trial court as to why the Compensation Differences or the potential conflict of interest they created would not have been material to the decision of investors, Sharbern did not provide the court with any evidence to counter VAC's position. For this reason, Sharbern's common law claim of negligent misrepresentation must fail.

129 I would add one observation on the fourth *Cognos* requirement — reasonable reliance. In this case, Sharbern did not adduce evidence of actual reliance. Instead it relied upon the statutory deeming provision in the *Real Estate Act*. While the trial judge appears to have contemplated the necessity of individual trials on the issue of reliance at the outset of this litigation, her failure to differentiate between the common law and statutory claims in her reasons conveys the impression that the statutory deeming provision can establish common law reliance, removing the need for further trials. This approach would be problematic. I do not think a plaintiff may dip into a statutory cause of action for a helpful element in order

to establish the "actual reliance" required to maintain a common law claim for negligent misrepresentation.

130 For these reasons I conclude that VAC cannot be held liable for negligent misrepresentation at common law.

E. Breach of Fiduciary Duty

131 The final issues to be determined in this appeal are whether a fiduciary duty existed between VAC and Sharbern and, if so, whether VAC breached that fiduciary duty. The breach issue can be broken down into two aspects: (i) whether VAC breached its fiduciary duty to Sharbern by failing to disclose the alleged conflict of interest created by the Compensation Differences; and (ii) whether VAC breached its fiduciary duty to Sharbern when it implemented the non-competition policy between the Hilton, the Richmond Inn and the Marriott. I will deal with these issues and sub-issues in turn.

(1) Lower Court Treatment of the Fiduciary Duty Issues

132 Wedge J. described the content of VAC's fiduciary duties to Sharbern and other Hilton Owners in the following terms:

> ... I find that VAC did not owe a fiduciary duty to not work for other principals competing in the same hotel market as the Hilton. I also find that VAC did not owe a duty to the Hilton Owners to disclose information that it had received from its other principals. Rather, the Hilton Owners consented to VAC acting for other principals competing in the same market, and could expect VAC to keep all information it received from each of its principals confidential.
>
> . . . . .
>
> I find that VAC owes the following fiduciary duties to the Hilton Owners:
>
> 1. A fiduciary duty to not act for other principals competing in the same market and with respect to whom VAC has a personal interest in favouring.
>
> 2. A fiduciary duty to not act as agent for the Hilton Owners and any third party contracting with them without first making complete disclosure to them and obtaining their consent. [paras. 425 and 429]

133 The trial judge went on to find that, as a result of the Compensation Differences, VAC had a personal interest in favouring the Marriott over the Hilton. She concluded that

> VAC's personal interest in favouring the Marriott over the Hilton conflicts with its fiduciary duty to the Hilton Owners. Unless VAC disclosed this conflict of interest, and

> obtained fully informed consent from the Hilton Owners to act in those circumstances, it would be in breach of its fiduciary duty by continuing to act. [para. 439]

134 Wedge J. then confirmed that whether the common management of the Hilton and the Marriott had affected the operation of the Hilton to its detriment had not been quantified on the evidence, and did not need to be quantified at that stage in the proceedings. However, she found that there was some evidence "that the Hilton has been disadvantaged by the common management" (para. 447). By this she was referring to a non-competition policy VAC implemented between the Hilton, the Richmond Inn and the Marriott. Since the Hilton brand was proving weaker than the Marriott, senior management at the Hilton tried to lure away corporate clients from the Marriott by undercutting the Marriott's room rates. When the Marriott complained that this was eroding business and causing both hotels to lose money, sales staff proposed that the Hilton, Marriott and Richmond Inn agree not to pursue the top ten corporate preferred accounts of each by offering lower rates. However, other forms of inducement were permitted. The non-competition policy was implemented in 2002.

135 Wedge J. considered this arrangement to be an agreement between the Hilton and the Marriott with VAC acting as agent for both. Irrespective of the merits of the contract, she found it to be a breach of VAC's equitable obligation to the Hilton Owners to commit them to a contract with another party for whom VAC was also acting as agent, without obtaining the Hilton Owners' informed consent.

136 The Court of Appeal found that there was no breach of fiduciary duty. Chiasson J.A. interpreted the trial judge's reasoning to mean that VAC was in breach of its fiduciary duty as soon as it contracted with the Hilton Owners because of its agreement with the Marriott Owners. However, having previously concluded that VAC did not misrepresent its arrangements with the Marriott Owners, he found that VAC was not in breach of fiduciary duty on entering into the contract with the Hilton Owners. In his view, the issues were interrelated. He reconfirmed that "in this case, the relationship between VAC and the Marriott Hotel unit owners was disclosed" and that the question of whether VAC was in breach of its fiduciary duty because of its failure to disclose the Compensation Differences "depends on whether that information was material" (para. 98). Chiasson J.A. concluded that "in the circumstances of this case, the information objectively was not material" (para. 99).

137 Chiasson J.A. also held that "the consent given to VAC to act for competing hotels is an answer to any contention the implementation of the price competition policy was *per se* a breach of fiduciary duty" (para. 104). The issue again turned on whether VAC had been required to disclose the Compensation Differences, and in his view, it was not.

(2) A Fiduciary Relationship Existed

138 VAC argues that the trial judge erred in finding that VAC's relationship with Sharbern was fiduciary in nature. VAC says that the trial judge's "decision to characterize VAC as a fiduciary was not based on a careful consideration of the individual relationship between the parties" but was instead based on a "simplistic categorical analysis" in which "[s]he held that VAC was in some respects [Sharbern's] agent, and that the principal-agent relationship was a classic fiduciary relationship" (R.F., at para. 112). VAC submits that the parties were simply dealing in an in an arm's length commercial relationship characterized by self interest.

139 I cannot agree with VAC's position. In my opinion, the trial judge did not conduct a "simplistic categorical analysis". She made a comprehensive review of the jurisprudence and observed that "[f]iduciary duties will not necessarily exist in all agency relationships" (para. 398). She then carefully considered the relationship that existed under the Hotel Asset Management Agreement before concluding that the relationship was fiduciary. She noted that VAC was given discretion as a manger, that it had the ability to unilaterally affect the hotel owners' legal or practical interests, and that the hotel owners were especially vulnerable in that regard. It is clear that she evaluated the relationship created under the Hotel Asset Management Agreement in light of the typical characteristics of fiduciary relationships set out by Wilson J. in her well-known dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), at p. 136.

140 In my opinion, there is no basis upon which to differ with the conclusion of the trial judge that while acting as manager of the Hilton, VAC owed fiduciary obligations to the Hilton Owners, including Sharbern.

141 That said, the nature and scope of the fiduciary duty owed by VAC must be assessed in the context of the contract giving rise to those duties. As noted by Cromwell J., for a unanimous Court, in *Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at para. 75: "... what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her". He also stated that "[i]n cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue" and that "[t]he fiduciary's undertaking may be the result of ... the express or implied terms of an agreement" (para. 77). While an express undertaking can be found in the terms of a contract for an agency relationship, an implied undertaking can be found with regard to "the particular circumstances of the parties' relationship" which could include "professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty" (para. 79).

142 In this case, purchasers in the Hilton strata lots knew that they would be entering into the Hotel Asset Management Agreement giving VAC exclusive management of the hotel for at least 20 years. In exchange, VAC contracted to, among other things, use commercially

reasonable efforts to rent out the strata units, maximize each owner's proportionate share of monies available for distribution, and faithfully perform its duties and responsibilities and supervise and direct hotel operations. The Hilton Disclosure Statement explained to investors that the success or failure of the rental pool would depend in part on the managerial abilities of the manager. It also contained the reassurance that VAC's related companies had experience in concurrently owning or managing competing hotels. Investors undoubtedly counted on VAC to provide managerial experience and expertise. However, they did so understanding and consenting to VAC receiving a management fee, and acting as the manager of the competing Marriott hotel. Disclosure of that conflict position was coupled with the warning that this "could impact upon its ability to perform its obligations under the [Hotel Asset Management Agreement]" (art. 4.9).

143 While Sharbern was in a fiduciary relationship with VAC, and VAC owed a duty to use its discretionary powers as manager to act in the interests of Sharbern, this relationship was entered into with the knowledge that there would be common management of the Hilton and Marriott, and that VAC's related companies had a history of concurrent ownership or management of competing hotels. The fiduciary relationship in this case must therefore be circumscribed by the contractual bargain and the knowledge that VAC would be simultaneously balancing fiduciary obligations owed to the Hilton Owners and owners of a competitor: *Perez*, at para. 79.

(3) Distinguishing the Misrepresentation and Fiduciary Duty Claims

144 When VAC issued the Hilton Disclosure Statement, it was acting in its role as a developer/issuer, and was not an agent of Sharbern. As issuer, its relationship with Sharbern was not fiduciary in nature. An issuer and investor in these circumstances deal with each other in an arm's length commercial relationship characterized by self interest.

145 However, when VAC began acting as Sharbern's agent under the Hotel Asset Management Agreement, a fiduciary relationship arose.

146 It is important to recognize that these are two distinct relationships that happen to be between the same parties: a non-fiduciary issuer-investor relationship, and a fiduciary principalagent relationship. Therefore, although the underlying factual basis of the issuer-investor misrepresentation issue and the principal-agent fiduciary duty issue are largely the same, the two issues constitute distinct causes of action arising at different *times*. The misrepresentation claim is related to VAC's disclosures made when it was the developer of the Hilton hotel and issuer of the Hilton Disclosure Statement. The breach of fiduciary duty claim is related to VAC's activities when it began acting as an agent and managed the Hilton hotel.

(4) Disclosing the Compensation Differences

147 The question to be answered here is whether VAC breached its fiduciary duty to Sharbern and the other Hilton Owners while acting as their hotel asset manager, by failing to disclose the Compensation Differences and obtaining the informed consent of the Hilton Owners.

148 A breach of fiduciary duty would occur if the undisclosed Compensation Differences were material or placed VAC into a conflict of interest to which Sharbern had not consented. This is because equity "forbids trustees and other fiduciaries from allowing themselves to be placed in ambiguous situations ... that is, in a situation where a conflict of interest and duty might occur" (D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 914). As M. Ng writes, in *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (loose-leaf), at p. 2-10:

> Where fiduciaries put themselves in a position where their own interests or those of others may conflict with their duty to their principal, they will be required to disclose all material information regarding the transaction in order to obtain their principal's informed consent as to their acting despite the conflict.

149 Sharbern submits that the question of whether VAC breached its fiduciary duty to avoid undisclosed conflicts of interest was "one of consent" (A.F., at para. 54). That is, Sharbern argues that the Court must ask whether VAC "made sufficient disclosure, in the [Hilton Disclosure Statement], of the facts pertaining to its conflict of interest that investors purchasing under the [Hilton Disclosure Statement] must be taken to have consented to the conflict" (*ibid.*). Sharbern's position is premised upon the assumption that the Compensation Differences constituted a material fact or information beyond what had already been disclosed. If that were true, then the onus would fall on VAC, as fiduciary, to prove that it had received the informed consent of the Hilton Owners with respect to the Compensation Differences: *McGuire v. Graham* (1908), 11 O.W.R. 999 (Ont. C.A.), at pp. 999-1000.

150 However, the materiality of the Compensation Differences must first be established. This is because "[n]ot every self-interested act by a fiduciary conflicts with his fiduciary duties; otherwise, he could never do anything for his own benefit" (*Waters'*, at p. 914). As stated by F.M.B. Reynolds in *Bowstead and Reynolds on Agency* (17th ed. 2001), at para. 6-057, "[t]he duty does not completely prohibit the adoption of a position or the entering into of transactions in which such a conflict might occur; it rather prohibits doing so without disclosure of all material facts to the principal so as to obtain his consent" (emphasis added). Here, the principal had consented to the agent's conflict of interest — to act for other principals competing in the same market — and knew that the agent would be simultaneously acting in the interests of the principal and competitors. The first question that Wedge J. ought to have asked, therefore, was whether the Compensation Differences constituted a material

fact or information beyond what had already been disclosed, such as to impose a fiduciary duty upon VAC to disclose their particulars.

151 The standard for identifying when a conflict of interest exists in a fiduciary context was discussed by this Court in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (S.C.C.). There, Binnie J. dealt with conflicts of interest arising out of the solicitor-client fiduciary relationship. He set out the following standard for identifying when a lawyer is in a position of conflict of interest:

> I adopt, in this respect, the notion of a "conflict" in § 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person".
>
> [Emphasis added; para. 31]

152 The essential first step was for the court to determine if the Compensation Differences constituted material facts or information beyond what had already been disclosed, thereby giving rise to a fiduciary duty for VAC to disclose them and obtain consent. In this regard, VAC submits that "[a]ll of the evidence on the issue of materiality that [it] adduced, and that the trial judge disregarded, was therefore as relevant to determining the existence of a conflict of interest as it was to determining whether [it] had made a misrepresentation in the [Hilton Disclosure Statement]" (R.F., at para. 106).

153 This is essentially correct, except for one qualification. It must be remembered that the fiduciary duty issue is distinct from the misrepresentation issue. The materiality evidence and analysis carried out with respect to Sharbern's claim that VAC made material false statement attracting statutory liability under the *Real Estate Act* related to the time period during which the Hilton strata units were marketed and sold. VAC's disclosure obligations under its fiduciary duty related to matters existing or arising during its role as manager of the Hilton hotel. This requires a consideration of the time period following the Hilton Disclosure Statement and also the time period covering the later stages of the fiduciary relationship.

154 The Hilton Disclosure Statement was issued in February 1998, and the hotel opened for business in June 1999. VAC had disclosed in the Hilton Disclosure Statement its management of the Marriott hotel and the similar and additional agreements it had with that hotel, "all of which give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements" (art. 4.9(i)). I place no significance on VAC's description of itself as "Developer" instead of "manager" in this context, as the former would have been the term by which it was defined in the Hilton Disclosure Statement. As found by the trial judge, "the Hilton Owners consented to VAC acting for other principals

competing in the same market" (para. 425). I agree with Chiasson J.A.'s observation that the question is invariably reduced to whether the Compensation Differences were material, thereby obliging VAC to disclose them and obtain the Hilton Owners' consent to those details. It is also necessary to inquire whether circumstances changed during the course of the fiduciary relationship such as to require VAC to make additional disclosures and obtain renewed consent.

155 The materiality of the Compensation Differences when the investors were making their decision to invest has been dealt with in detail in the discussion of VAC's alleged statutory liability under the *Real Estate Act*. However, I would add that the disclosure obligations with respect to VAC's fiduciary duty are different from the disclosure obligations under the *Real Estate Act*. As a fiduciary, VAC was obligated to disclose any material facts or information, such as if there was a substantial risk that VAC's fiduciary relationship with the Hilton Owners would be materially and adversely affected by VAC's own interests or by VAC's duties to another (as per *Neil*, at para. 31). VAC's statutory duty was simply to disclose to investors certain prescribed information, without making material false statements. Nonetheless, in that regard, much of the evidence about the materiality of the Compensation Differences as it related to VAC's alleged statutory liability under the *Real Estate Act* would also have been relevant to the question of materiality under the fiduciary duty analysis.

156 VAC submitted extensive evidence in support of its position that its lack of disclosure of the Compensation Differences in the Hilton Disclosure Statement did not constitute a material false statement under the legislation. There is no need to repeat that evidence here, which has been discussed in detail above. However, I would add that, in the context of proving or disproving the alleged breach of fiduciary duty, the parties are not precluded from bringing evidence that did not form part of the total mix of information available to investors at the time of their investment decisions, or evidence that would not have been available through the Hilton Disclosure Statement.

157 For example, the evidence with respect to an industry practice of common management of competing hotels that was considered in relation to VAC's statutory defence is, in my view, also relevant to the question of whether the Compensation Differences were material in the context of the claim of breach of fiduciary duty. After all, the fiduciary relationship arose in the context of a disclosed conflict of interest of common management, and a reported practice of common management of competing hotels by VAC's related companies. Beyond the testimony of VAC's witnesses that common management of competing hotels took place without disclosure of the contractual terms to the different owners, it seems highly unlikely that management agreements negotiated between different parties at different times would have identical terms. This case yields one example, where the guaranteed rate of return offered to Marriott Owners apparently could not be offered in the Hilton Disclosure Statement a year later because of changes in securities laws. The fact that common

management was nonetheless an accepted industry practice for different hotel chains in the same market suggests that industry players did not treat differing management compensation arrangements as material to the efficient operation or profitability of the hotels. Such evidence would have been relevant to the trial judge's consideration of the materiality of the Compensation Differences.

158 In contrast to the evidence adduced by VAC, Sharbern did not provide any evidence as to the materiality of the Compensation Differences in this context. Nor did the trial judge consider all the evidence submitted by VAC in her assessment of the materiality of the financial incentives. Although the misrepresentation issue is distinct, the error seen in relation to that analysis applies equally to the analysis of the issue of whether VAC was liable for breach of fiduciary duty. The party seeking to establish the materiality of the undisclosed facts or information did not provide evidence upon which a finding of materiality could reasonably have been made.

159 The fiduciary relationship also existed during the later period of time, during which VAC was managing the Hilton hotel. The Hilton hotel opened in June 1999. VAC disclosed the existence of the guarantee in favour of Marriott Owners in a meeting with Hilton Owners on June 14, 2000. The timing of the disclosure of the differential in management fee is not clear. At some point, when the economy deteriorated and occupancy rates plummeted, the Compensation Differences potentially became more germane. So too would VAC's retention of the 24 strata lots in the Hilton hotel, at least in the eyes of Marriott Owners. VAC could then have had a renewed obligation to disclose what had arguably developed into a material conflict of interest, assuming a rejection of VAC's arguments that it lacked the practical means and incentive to act upon the Compensation Differences. How did the timing of these events compare to the timing of the June 2000 disclosure of the guaranteed rate of return to Marriott Owners? Did the conduct of the Hilton Owners subsequent to disclosure constitute consent, at least until the filing of the plaintiff's Statement of Claim in June 2003 or perhaps when they sought legal advice in the fall of 2002? Evidence on these considerations is not before us, and did not form part of the record before the trial judge.

160 In sum, not only did the trial judge not consider all the evidence relevant to the issue of materiality, there was a failure on the part of the plaintiff to adduce evidence on the issue of the materiality of the Compensation Differences, either at the time of the Hilton Disclosure Statement or during the later stages of the fiduciary relationship. I am of the opinion that Sharbern failed to demonstrate that the Compensation Differences constituted a material fact or information beyond what had already been disclosed by VAC. Also, as found in the analysis of the misrepresentation issue, the trial judge's conclusions on the issue of breach of fiduciary duty were tainted by an expectation that VAC must disprove, rather than Sharbern satisfy its onus of proving, the materiality of the Compensation Differences. These problems loom large over the consideration of whether to remit the matter to the trial

judge for a determination on the issue of the materiality of the Compensation Differences for the purpose of assessing VAC's liability for breach of fiduciary duty.

(5) The Non-Competition Agreement

161 Apart from the non-disclosure of the Compensation Differences, Sharbern submits that it was a breach of VAC's fiduciary duty for VAC to direct its staff at the Hilton not to engage in price competition with the Marriott.

162 The trial judge observed that VAC implemented a "non-competitive pricing policy which prevented the [Hilton, Marriott and Richmond Inn] from undercutting each other's room rates" with respect to the top ten corporate preferred accounts of each hotel (para. 161). The policy was implemented shortly after the Hilton's 2002 budget was put in place. She found that "[u]nder the policy, both the Hilton and the Marriott were constrained, but the *status quo* favoured the Marriott" as the Hilton was "trying to close the gap" (para. 454) that the Marriott had obtained because of a "year's head start by the time the Hilton opened" (para. 448).

163 Irrespective of the merits of the contract, the trial judge held that it was a breach of fiduciary duty for VAC to commit the Hilton Owners to a price competition agreement with the Marriott Owners in the absence of the former's consent.

164 VAC argues that the evidence at trial established that the price competition policy was not a manifestation of a conflict of interest as a matter of fiduciary law. It says that the policy was in the best interests of both the Hilton and the Marriott Owners. For example, the general manager of the Marriott hotel, James Nesbitt testified that the Marriott would have matched prices with the Hilton if necessary to retain any business that the Hilton hotel might have attempted to poach by underbidding. He observed that undercutting on price was "not a strategy that works at all" (R.R., vol. 11, at p. 2102). When asked about his experience with customers threatening to move hotels because of lower rates, Nesbitt testified that "in all cases because it's much easier to retain an existing customer, than spend a lot to go out and find a new customer, in every case you would match that rate to make sure you kept the business" (p. 2104).

165 First, I cannot agree with the trial judge's conclusion that it was a breach of fiduciary duty for VAC to enter into agreements with the Marriott Owners on behalf of the Hilton Owners without prior consent. With three hotels located on the same property, connected by a shopping concourse, and managed through common management, agreements entered into by VAC on behalf of and between Hilton Owners and Marriott Owners would have been part of the ordinary course of business, as day to day matters that could not feasibly require prior consent of all Hilton Owners. Agreements to effect the sharing of common resources and expenses mentioned earlier would be one example. Significantly, the Hilton Disclosure

Statement provided that VAC had the right to enter into such agreements. As stated at art. 4.4(b):

> ... the Asset Manager shall have the right to enter into such agreements and contracts, and to do such acts and things, as the Asset Manager, in its discretion, considers necessary or desirable, including without limitation entering into affiliation, management, reservation, marketing agreements or licensing or franchise agreements with a hotel chain.

166 Second, the trial judge erred by failing to consider evidence which was relevant to the materiality of the non-competition agreement, such as evidence of other effects of common management and their impact on the Hilton Owners. Wedge J. simply saw the non-competition agreement as proof of the potential conflict of interest created by common management, commenting that "[t]he highly competitive hotel industry does not embrace the notion of evenhandedness" (para. 303). She ignored other evidence to the effect that the three hotels also shared business with each other. VAC's evidence indicated that the Marriott referred business to the Hilton or the Richmond Inn when it did not have the capacity or did not wish to accommodate the lower room rate requested by the client. When the Marriott did not have the capacity to accommodate all the Cathay Pacific air crews, it negotiated a contract which gave a portion of the Cathay Pacific business to the Hilton. In my view, the trial judge erred in assessing the materiality of the non-competition agreement to Hilton Owners without determining, on the totality of evidence, whether it was part of an overall practise of cooperation that was to the ultimate benefit of the three hotels.

167 In sum, without proof that the non-competition agreement constituted a material fact or information beyond what had already been disclosed by VAC, I cannot accept that the non-competition agreement constituted a breach of fiduciary duty.

VI. Summary and Conclusions

168 In view of the length of these reasons, it will be useful to summarize my conclusions at this point.

169 As to VAC's liability for material false statements under the *Real Estate Act*:

> 1. The key question for liability under s. 75(2) of the *Real Estate Act* was to determine if the Compensation Differences were material. Except in cases where materiality can reasonably be established through common sense inferences, materiality must be proven through evidence, and is a fact-specific inquiry, determined on a case-by-case basis. Investors do not have to prove that the undisclosed information would have changed their decision to invest. However, they must prove a substantial likelihood that it would be considered important by a reasonable investor in making an investment decision.

That is, there must be a substantial likelihood that a reasonable investor would consider the fact as having significantly altered the total mix of available information.

2. The trial judge made three errors in her materiality assessment. First, she treated the conflict of interest as inherently material; second she reversed the onus of proof of materiality; and, third, she did not consider all of the evidence available to her on the issue of materiality.

3. The onus was on Sharbern to prove that the Compensation Differences were material. It did not adduce any evidence which could reasonably do so.

4. Even if VAC were found to have made a "material false statement", the statutory defence found in s. 75(2)(b)(viii) of the *Real Estate Act* would have availed to its benefit. The trial judge erred by not considering this defence. The statutory defence was established. VAC led evidence to show that it subjectively believed and had reasonable grounds for believing that the Compensation Differences were not material. Sharbern did not direct this Court to any evidence to the contrary.

5. The presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase.

170 As to VAC's liability for negligent misrepresentation, the trial judge erred by not considering whether VAC breached the standard of care. As there was no evidence capable of supporting a finding of breach of standard of care, VAC cannot be held liable for negligent misrepresentation.

171 As to VAC's liability for breach of fiduciary duties:

1. When VAC began acting as manager under the Hotel Asset Management Agreement, a fiduciary relationship arose between VAC and Sharbern (and the other Hilton Owners).

2. VAC had already disclosed, and the Hilton Owners had consented to, VAC's common management of the Hilton and the Marriott hotels. Therefore, that conflict of interest was not a breach of VAC's fiduciary duty. VAC was only obliged to disclose the Compensation Differences if they constituted material facts or information beyond what had already been disclosed. Sharbern did not adduce evidence to establish the materiality of the Compensation Differences. Additionally, the trial judge erred by reversing the onus of proof of materiality and by not considering all the evidence adduced by VAC relevant to the issue of materiality.

3. The trial judge erred by not assessing the materiality of the non-competition agreement, and Sharbern did not adduce evidence to establish its materiality.

172 I am mindful of the time and resources expended by the parties in the eight years since this litigation commenced. It cannot be in the interests of justice or the parties to prolong the matter further than necessary.

173 Had I not found that Sharbern had failed to adduce any evidence to establish the materiality of the Compensation Differences or that VAC could claim the benefit of the statutory defence under s. 75(2)(b)(viii) of the *Real Estate Act*, I would have considered remitting the matter to Wedge J. for a determination of the issues in consideration of all the relevant evidence and in accordance with these reasons. However, she would be placed in the position of reassessing the issues upon a consideration of a wider swath of evidence, all in support of only VAC, without any evidence to support the position of Sharbern. The same dilemma arises if she is directed to reconsider whether VAC breached its fiduciary duty to the Hilton Owners by failing to disclose the Compensation Differences during the course of its management of the Hilton hotel.

174 Cases such as *Hollis v. Birch* have discussed the circumstances under which it is appropriate for an appellate court to make a fresh assessment of the evidence on the record. Whether the appellate court should do so will depend upon what is in the interests of justice, and whether a fresh assessment is feasible on a practical level. Feasibility often depends upon the extent to which the credibility of witnesses is at issue as opposed to a consideration of documentary evidence. I am mindful that this case involved a two-month trial, which included much *viva voce* evidence. However, none of the findings of fact by the trial judge appear to be predicated upon her assessment of the credibility of witnesses.

175 It has been a recurring finding throughout my consideration of the issues in this case that Sharbern failed to adduce evidence to support key aspects of its claims. As plaintiff, Sharbern had the burden of proving all the necessary elements of its claims, on a balance of probabilities. Sharbern was given the opportunity of a two-month trial to produce such evidence. Nonetheless, it failed to lead sufficient evidence to discharge its onus with respect to establishing the requisite breach of the standard of care necessary to its claim of negligent misrepresentation.

176 It also failed to produce evidence in support of the materiality of the Compensation Differences, both with respect to whether a failure to disclose them resulted in (i) a material false statement attracting liability under the *Real Estate Act*, or (ii) a breach of its fiduciary duty to the Hilton Owners as the manager of the Hilton hotel. The first may have been due to its position argued in this Court that "there is no need for a plaintiff to tender industry or expert evidence as to what would influence a reasonable investor because the question of

materiality of conflicts of interest in a prospectus is uniquely for the court" (A.F., at para. 40). As I said previously, this position misapprehended the fact based inquiry that is required in order to establish materiality, as well as the onus on a plaintiff to adduce evidence in support of materiality. Sharbern's failure to adduce evidence of materiality in the context of the claim of breach of fiduciary duty may similarly stem from a misapprehension of the principle that there is only a duty to disclose material facts or information.

177 This Court is in the same position as was the Court of Appeal, which signalled throughout its reasons for judgment that the plaintiff had failed to adduce objective evidence to support its claims. In my opinion the evidence before the trial court could not support a finding that VAC was liable under the *Real Estate Act*, for negligent misrepresentation or for a breach of fiduciary duty either for failing to disclose the Compensation Differences or in implementing the non-competition policy.

178 I would dismiss the appeal. Leave to appeal in this matter was granted with costs in the cause. Section 37 of the British Columbia *Class Proceedings Act* establishes a no costs regime in the Trial Court and the Court of Appeal. However, that statute does not apply to this Court. The respondents are entitled to their costs in this Court.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* A corrigendum issued by the Court on May 13, 2011 has been incorporated herein.

TAB 7

29 of 29 DOCUMENTS

Case Name:

Summitt Energy Management Inc. (Re)

**IN THE MATTER OF the Ontario Energy Board Act, 1998,
S.O. 1998, c. 15, Schedule B;
AND IN THE MATTER OF a Notice of Intention
to Make an Order for Compliance,
Suspension and an Administrative Penalty
against Summitt Energy Management
Inc.**

2010 LNONOEB 304

No. EB-2010-0221

Ontario Energy Board

Panel: Paul Sommerville, Presiding Member; Marika Hare, Member

Decision: November 18, 2010.

(217 paras.)

Tribunal Summary:

The Board issued a Notice of Intention to Make an Order for an Administrative Penalty, Compliance and Suspension against Summitt, under section 112.3, 112.4 and 112.5 of the Act (the "Notice"). The allegations against Summitt were set out as:

1. Summitt contravened section 88.4(2)(C) and 88.4 (3)(C) of the Act in 19 instances through the actions of five of its sales agents, by engaging in unfair practices as defined in Section 2 of Ontario Regulation 200/02;

Summitt contravened section 2.1 of the Code of Conduct for Gas Marketers and the Electricity Retailers Code of Conduct through the actions of five of its sales agents who engaged in unfair marketing practices as defined in section 2.1 of the Codes; and Summitt contravened section 88.9(1) of the Act in 10 instances by failing to deliver a written copy of the contract to the consumer within the time prescribed by regulation.

An oral hearing was commenced and the Board heard the evidence of 23 members of the public with respect to the alleged 19 incidents of Summitt's door-to-door sales agents making false and misleading statements. Summitt, in its defence, introduced evidence through the five sales agents named in the Notice, a sales manager, Summitt's Vice President of Regulatory Affairs and an expert. Details of the evidence are set out in the Decision.

The Panel considered arguments made by the parties and found that Summitt did not exercise the due diligence required to ensure that its door-to-door sales agents acted in a manner that was compliant with their legal and regulatory obligations. The Panel also went on to find several deficiencies with respect to the organization of Summitt's door-to-door sales activity.

The Board ordered Summitt to procure a review and audit of the sales practices of its retail salespeople in accordance with certain terms set out in the Decision (at p. 50), including that the audit be conducted by an independent third party auditor and the product of the audit be a report which will be filed with the Board and compliance staff. If the conclusion of the audit is that Summitt was not in substantial compliance with its 14 point compliance program (as set out in the Decision at p. 20-23), the Board will reconvene to receive submissions re: next steps.

The Board also found that it has significant flexibility in crafting an appropriate order to remedy a contravention. The Board found that "the evidence in this case shows that customer after customer was misled into signing contracts that provided an economic benefit to Summitt at the expense of the customer. To permit Summitt to retain that money is inappropriate by any measure." Accordingly, the Board directed Summitt, where a contravention was found, to cancel contracts and compensate customers so they would be in the same position they would have been in, had they not entered into a contract with Summitt.

The Panel also ordered Summitt to pay an administrative penalty and costs, in the amount of $299,000.

DECISION AND ORDER

Introduction

1 The Ontario Energy Board (the "Board"), issued a Notice of Intention to Make an Order for Compliance against Summitt Energy Management Inc. ("Summitt") under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act") on June 17, 2010. On July 8, 2010, Summitt gave notice to the Board requiring the Board to hold a hearing on this matter. The Board assigned the proceeding file No. EB-2010-0221.

2 On July 9, 2010, the Board issued a Notice of Hearing and Procedural Order No. 2 which set the date for an oral hearing.

3 On August 23, 2010, the Board heard oral submissions on a request by the University of Western Ontario's Community Legal Services ("CLS") for intervenor status in this proceeding and a Motion by Summitt for an order of the Board requiring Compliance Staff to provide further disclosure, and seeking the scheduling of a number of pre- hearing procedures. The Motion also sought an adjournment of the hearing to a later date. After hearing submissions, the Board made a decision on the Motion and denied CLS's application for intervenor status.

4 The Oral hearing commenced on August 30, 2010 and concluded on September 8, 2010. The parties filed final submissions in accordance with Procedural Order No. 4 which was issued on September 9, 2010.

5 In this proceeding Compliance Counsel is seeking to establish that during the relevant period (August 2008 to January 2010), Summitt contravened:

1. Subsections 88.4(2)(c) and 88.4(3)(c) of the Act in nineteen instances through the actions of five of its sales agents by engaging in unfair practices as defined in Section 2 of Ontario Regulation 200/02;

2. Sections 2.1 of the Code of Conduct for Gas Marketers and the Electricity Retailers Code of Conduct respectively (the "Codes") through the actions of five of its sales agents who engaged in unfair marketing practices as defined in section 2.1 of the Codes; and

3. Subsection 88.9 (1) of the Act in ten instances by failing to deliver a written copy of the contract to the consumer within the time prescribed by regulation.

6 Compliance Counsel also seeks to establish that Summitt "is likely" to contravene these provisions again in respect of its ongoing door-to-door sales activities.

7 Compliance Counsel seeks the following Board Orders against Summitt:

1. an Order under section 112.3 of the Act, requiring Summitt to comply with all enforceable provisions, and to take such further actions as the Board may specify to remedy the contraventions and prevent further contraventions;

2. an Order under section 112.4 of the Act, suspending Summitt's door-to-door sales activities pending completion of an audit of its door-to-door sales process, and the implementation by Summitt of any recommendations resulting from the audit; and

3. an Order under section 112.5 of the Act, requiring Summitt to pay an administrative penalty in respect of each contravention found, in the amount set by the Board.

Background

8 This proceeding presents the Board with its first opportunity to hear, under oath, the testimony of customers of an energy retailer.

9 The advent of energy retailing in Ontario has had a troubled history. From its inception there have been waves of complaints respecting the practices of door-to-door retail salespersons in the industry. This has resulted in a series of legislative and regulatory changes, all designed to minimize the potential for misunderstanding, misrepresentation, and harm to consumers.

10 During this proceeding, the Board heard evidence that an in-depth investigation of consumer complaints relating to the conduct of Summitt and its retail salespersons began in the fall of 2009. The investigation examined and re-examined these complaints with a view to determining whether specific noncompliance situations could be identified. The investigation consisted of direct contact with complainants who had on their own motion contacted the Board to complain about one aspect or another of their contact with Summitt.

11 This investigation was undertaken in such a fashion so as to ensure that no person at the Board who might be engaged in the adjudication of any compliance action would be exposed in any manner whatsoever to the conduct or the fruits of the investigation. Board staff and legal counsel that were engaged in the investigation, referred to in this decision as "Compliance Staff" and "Compliance Counsel", were effectively isolated from all other elements of the Board in this regard. Board staff as a whole had no knowledge of any of the aspects of the investigation leading up to the filing of the Notice, and the Board panel had no knowledge of any aspect of the investigation prior to the publication of the Notice. From that time forward, all of the information that has been made available to or considered by the panel has been on the public record.

Organization of Summitt's Door-to-Door Sales Activity

12 Before dealing with the specific allegations outlined in the Notice of Intention to Make an Order for Compliance against Summitt (the "Notice"), the Board will provide some general background respecting the organization of the sales activity undertaken by Summitt during the period covered by the specific complaints.

13 It is necessary to appreciate various aspects of Summitt's door-to-door energy sales in order to understand the extent to which the individual retail salespersons met the statutory and regulatory obligations. There are several key components which have important implications for the Board's consideration of the allegations in this proceeding:

* the nature of Summitt's sales force;

* Summitt's two-part contract;

* the representation of comparative pricing;

* the representation of the "Provincial Benefit"; and

* the nature of and the role of the "reaffirmation" call.

Summitt's Sales Force

14 The retail salespersons whose actions are at the centre of this proceeding were employees or independent contractors of subcontractors to Summitt. These subcontractors provide sales forces to the various energy retailers and other sales companies from time to time.

15 The Board notes that a number of the salespersons involved in this case have at some time in their career sold contracts for an energy retailer other than Summitt. The transition of employees from one energy retailer to another seems to have been common and was often driven by a change in the subcontracting relationship between their employer and the energy retailer. A subcontractor who had been providing retail salespersons to one energy retailer this month, could well be providing retail salespersons to another energy retailer next month. Notably, while the salespersons whose conduct is at issue are no longer selling for Summitt, a number of them continue to work for the same subcontractor and are now selling other products door-to-door, such as rental contracts for waterheaters. This demonstrates that the move from one energy retailer to another (or to other door-to-door sales) is considered by the participants to be an easy transition.

16 When a retail salesperson begins selling Summitt's contract, they are required to take part in a training program. Summitt provides its subcontractors with training materials, but leaves the actual training of salespersons to the subcontractor. As a result, there did not appear to be a predictable, standard practice for retail salesperson training.

17 In most cases, the retail salespersons were given scarcely a few hours of training and mentoring before they were on their own with customers. It seems that no two of the retail

salespersons experienced the same training regime. The energy market in Ontario is notoriously complex, containing many somewhat obscure elements that have implications for the price of the respective commodities. There have been important developments in the market over the last few years that have direct relevance for customers being asked to decide on whether to enter into long-term fixed price energy retail contracts. For electricity, the Provincial Benefit is one such development, Smart Meters and time of use rates are another. It was clear from the testimony of Summitt's salespersons that a few hours of training was not an adequate foundation for someone who is expected to go into homes to sell these very significant contracts to relatively uninformed consumers on the basis of price comparisons or promises of lower prices.

Summitt's Two-part Contract

18 The contractual relationship relied upon by Summitt consisted of a two-part contract.

19 The initial contractual document was curiously entitled "Registration Form". This is the document that was signed by the prospective customer at the doorstep. In Summitt's view, the execution of this "Registration Form" creates a complete contractual nexus with the customer once the separate Customer Agreement with Terms and Conditions document was delivered. It is noteworthy that this initial document is ambiguous as to its status as a binding contractual document. Certainly the title of the document seems to create an impression that the prospective customer is merely registering for a program, or signing up to receive further information, rather than entering into a long-term fixed-price contract for the provision of electricity, natural gas, or both.

20 The Registration Form references the "Customer Agreement with Terms and Conditions" and directs the customer to this additional document. At other points, the Registration Form refers to itself as the "Agreement" as a defined term and then again as an "agreement" apparently not as a defined term. The Registration Form also refers to itself as the "Comprehensive Energy Price Protection Program" It would appear that the "comprehensive" energy protection program is "comprehensive" even where it only applies to supply of one of the commodities, that is one of electricity or natural gas.

21 The "Customer Agreement with Terms and Conditions" that the Registration Form refers to is also presented in a very ambiguous manner. The document looks like a promotional brochure intended to encourage parties to enter into a contractual relationship, and not as an integral, indeed critical, element of an existing contractual relationship. There are numerous examples of "brochures" used over the relevant period in the record, but in every case the document appears to be more sales tool than contractual document. The exterior panels of the brochure contain the price comparison information relied upon by the retail salesperson to sell the customer on the attractiveness of Summitt's product. Only when the customer unfolds the panels of the brochure will they find the terms and conditions written on an inside panel. It is the type of document that a customer could easily have discarded without realizing that it contained the terms and conditions.

22 This ambiguity was made even more pronounced when one considers the conduct of Summitt's retail salespersons. From the evidence before the Board, it appears that the retail salespersons did not refer to the Registration Form as a binding contractual document when selling to customers and instead referred to it as an "application" or "registration". The Board heard repeatedly that the retail salesperson would fill in all of the information on the form, often in advance of the door-to-door visit. In many cases, customers clearly had no appreciation of the impact of signing the Registration Form until well after their interaction with the retail salesperson was over. Moreover, the retail salespersons repeatedly described the document containing the terms and conditions as a "brochure" during their evidence and appear to have used that term when speaking with the customers. Most tellingly, none of the retail salespersons specifically referred the prospective customers to any of the specific terms or conditions contained in the "Customer Agreement with Terms and Conditions" even though it contained important details of the contractual arrangement, including terms relating to liquidated damages and termination of the contract that strongly favoured Summitt.

23 Standard form contracts, offered on a "take it or leave it" basis, are a pervasive and indispensible feature of modern commercial life but the basic principle concerning the incorporation of unsigned documents (such as the "brochure" proffered by Summitt agents) was established long ago in the 19th century "ticket" cases.[1] The use of standard forms does give rise to a number of potential concerns as the forms are unlikely to be read, or if read, understood by the parties signing them and the classic model of *consensus ad idem* is lacking. Furthermore, there is the risk that such standard form contracts or "contracts of adhesion" may contain terms that are harsh or unfairly oppressive to the person who wishes to obtain a particular commodity or service. The common law has, to an extent, responded to the phenomenon of unfair terms in standard forms by refusing to incorporate written terms that may operate unfairly and to the surprise of one of the parties.[2]

24 In a case where the person receiving the document actually knows that the paper contains a set of conditions that the offering party intends to be the terms of their agreement, assent is easily established, whether or not the recipient actually reads the document and becomes familiar with the terms.[3] In other cases, where the recipient does not have actual knowledge of the nature of the document, the question is whether the person issuing the document can reasonably assume that the other party is aware that the document contains conditions either because of the nature of the transaction or because reasonable steps have been taken to give the other party notice of this fact.[4]

25 In cases where it is not obvious that the document is contractual in nature the test to be met is whether the party relying on the document has given sufficient notice to the other party that the document contains conditions. If the proffering party "did what was reasonably sufficient to give the plaintiff notice of the condition"[5] the parties would be bound by the conditions whether or not they took the trouble to read the document. However, if, in the circumstances of a particular case, the person receiving the document might reasonably assume that the document has some purpose other than communicating contractual terms, courts incline to the view that reasonable notice has not been given[6]

26 In the present case, the organization of the sale by Summitt and the presentation of the contracts by the retail salespersons could be seen as falling short of reasonable notice of the contents and significance of the documents that were presented to them as a Registration Form and "brochure".

27 It is beyond the scope of this proceeding to make any specific determinations with respect to the actual contractual effect of the sales effort engaged in by the Summitt retail salespersons in the cases before us. Accordingly, the Board makes no finding as to whether the organization of the sales actually resulted in binding contractual relationships with the customers, or if some or all of the specific terms are enforceable.

28 It is certainly not necessarily the case that a two-part contract must inevitably be misleading. There are many contracts which are comprised of different parts, usually incorporated by reference. A two-part contract properly presented and described could create a clear and unequivocal contractual offer. However, the Board does consider this ambiguity with respect to the nature of the contractual documents as devised by Summitt as a factor in its consideration of the cases before it.

Representation of Prices

29 A key part of the sales exercise undertaken by the Summitt retail salespersons was the comparison of current market prices to the offering being made by Summitt.

30 Price comparisons were generally made using the brochure described earlier in this decision. The brochures, and there were a number of versions of them, typically presented on its glossy exterior a graphic representation of price trends for natural gas and electricity. In both instances the graphic representation showed steep increases. This trendline was pointed to by the retail salespersons as representing the likely direction either electricity or natural gas prices would follow. It may be the case that under the current legislative framework neither Summitt, nor its retail salespersons had any obligation to embark on any form of price comparison discussion as part of these sales. But they chose to do so, and in so doing took on a responsibility to ensure that their representation of price and pricing trends was accurate and not misleading.

31 The Board has serious concerns with the price representations contained in Summitt's brochures. The trendlines in these brochures typically misrepresented the actual market price of the respective commodities at the time the sale was being made and illustrated a fixed price that was lower than what the customer was actually being offered under Summitt's program. The result was that the price comparison dramatically overstated the potential benefit of a fixed price contract with Summitt.

The Provincial Benefit

32 Another shortcoming of Summitt's comparative pricing information is that it did not take into account the Provincial Benefit.

33 The Provincial Benefit is a creation of the provincial government which has had the effect of collecting from electricity consumers a variety of costs that are not recoverable through the wholesale market. The cost of the Provincial Benefit is included in the prices set by the Board under the Regulated Price Plan ("RPP"). Customers who are supplied electricity by their local distribution company are charged the RPP. When customers switch their electricity supply to a retailer such as Summitt, the Provincial Benefit is added on to their energy retailer contract price as a separate line item on their bill. While the Provincial Benefit can be either a debit or credit to customers, since 2007 there has been only been one month during which the Provincial Benefit operated as a credit to customers. On all other occasions it was a debit.

34 Therefore, a comparison of an RPP customer's electricity bill, which includes the Provincial Benefit, with a retailer's price offering which does not include any reference to the Provincial Benefit is inherently misleading. The most notable example of this appeared on some versions of Summitt's Registration Form, which set out Summitt's fixed price and the applicable RPP prices, but did not disclose that a customer would also have to pay the Provincial Benefit if they signed up with Summitt. In fact, some of the Registration Forms contained language that suggested that the customer might "...be entitled to the...Provincial Benefit Rebate. Under this program you keep these rebates, if any." Whatever else this language may convey, it does not alert the customer to the likelihood, or even the possibility, that the Provincial Benefit would add to the Customer's electricity bills.

35 From the evidence provided by a number of the complainants, it is apparent that Summitt's retail salespersons did not generally inform customers that they would have to pay the Provincial Benefit in addition to Summitt's fixed charge. This is supported by the evidence of two retail salespersons that they made no reasonable attempt to accurately represent the likely effect of the Provincial Benefit to their prospective customers. In one case, a complainant testified that the retail salesperson indicated that she was now "eligible" for the Provincial Benefit and was misled into believing that the Provincial Benefit would have the effect of reducing her energy charges, when in fact during that period the Provincial Benefit operated to increase electricity bills. Only later when her bill from Summitt arrived did she learn that the Provincial Benefit for which she was now "eligible" actually added significantly to her expected household expense for energy.

The Reaffirmation Call

36 The Legislature has made provision in subsection 88.9 (4.1) of the Act for a cooling off period for energy contracts which consists of a 10 day period after which the customer can "reaffirm" the original contract.

37 Pursuant to subsection 88.9(3) of the Act, a contract ceases to have effect unless it is reaffirmed by the consumer before the 61st day following the day on which the written copy of the contract is delivered to the consumer. The consumer may not reaffirm a contract before the 10th day after a written copy of the contract is delivered to the consumer.(See 88.9(4.1) of the Act)

38 Ontario Regulation 200/02 prescribes the means by which a consumer can reaffirm a contract. Generally, a consumer may reaffirm a contract or give notice to not reaffirm a contract by giving written notice to the retailer of electricity or gas marketer. A consumer can reaffirm a contract by telephone only if a voice recording of the telephone call is made and given to the consumer on request.

39 Summitt utilizes a telephone reaffirmation process. Summitt calls the consumers who have signed the Registration Form within the prescribed timelines with the intent of having them reaffirm the contract for natural gas, electricity or both depending on what the consumer had signed at the door. As is required by Ontario Regulation 200/02, Summitt records the reaffirmation calls and the transcripts of these calls were filed as evidence in this proceeding by Summitt.

40 Interestingly, the reaffirmation call was characterized in a variety of ways by the retail salespersons when conducting door-to-door sales. In some instances the reaffirmation call was represented to be a confirmation that the retail salespersons had in fact attended at the house of the prospective customer. In other instances it was described as a quality assurance kind of exercise where the performance of the agent would be vetted by the head office. It was rarely described as what it was intended to be -- an opportunity for the consumer to review the contractual terms and reaffirm or not reaffirm a long term fixed price contract for the supply of electricity and/or natural gas.

41 It appears to the Board that the effectiveness of the reaffirmation call as a genuine cooling off device was fatally undermined by the fundamental misunderstanding created by the retail salesperson during the sale. Further, little or no effort was made during the reaffirmation call to determine if the customer understood its purpose and, where necessary, to correct any misconception. It is also noteworthy that in some instances the reaffirmation call appeared to be in the nature of a sales effort, and not a simple reaffirmation.

42 Further, the ambiguities in the contractual documents noted above infect the reaffirmation calls and make them of questionable value in a number of the cases before us.

43 For the reasons noted above, it is not clear to the Board that customers understood they had agreed to a fixed price contract or that the glossy brochure they had received contained detailed terms and conditions which they needed to review. When the transaction is viewed as a whole, it is understandable that customers receiving a brief reaffirmation call would often answer "yes" without truly appreciating the significance of what they were being asked.

Characterization of the Offences

44 Compliance Counsel and Summitt are sharply divided on how the enforceable provisions which are the subject matter of this proceeding ought to be characterized. Compliance counsel urges the Board to consider the offences to be offences of absolute liability, while Summitt contends that the proper characterization is that they are offences of strict liability.

45 The distinction is important. If the Board concludes that the offences are to be considered absolute liability offences there is effectively no defence open to Summitt once the facts establishing the *actus reus* of the offence have been proven. On this construction due diligence would only operate in possible mitigation of sentence. On the other hand, if the offences are strict liability offences, then Summitt would be entitled to have its defence of due diligence considered by the Board at the liability stage. If the Board were to find that Summitt's defence of due diligence met the requisite standard, it would be entitled to be acquitted and would not be subject to any penalty.

46 The distinction between offences of strict liability and absolute liability respectively derives from the seminal Supreme Court of Canada decision in *R. v. Sault Ste Marie*[7].

47 The parties agree that the Supreme Court of Canada in that case established that a presumption exists in favour of the characterization of offences as strict liability offences. This presumption can be rebutted by reference to the language used by the legislature in the charging statute and consideration of a number of primary factors enumerated by the Supreme Court. Specifically, the Court said that the offences that will be held to be ones of absolute liability are those "in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act."[8] The court listed four factors that should be considered when making this determination:

* consideration of the overall regulatory pattern adopted by the Legislature;

* the subject matter of the legislation;

* the importance of the penalty; and

* the "precision of the language used" by the legislature.[9]

48 To rebut the presumption of strict liability, Compliance Counsel points to the language of subsections 88.4 (2) and (3), which read as follows:

> (2) A gas marketer **shall be deemed** to be engaging in an unfair practice if,
>
> (c) a salesperson acting on behalf of the gas marketer does or fails to do anything that would be an unfair practice if done or if failed to be done by the gas marketer.
>
> 88.4 (3) a retailer of electricity **shall be deemed** to be engaging in unfair practice

if:

(c) a sales person acting on behalf of the retailer of electricity does or fails to do anything that would be an unfair practice if done or failed to be done by the retailer. (Emphasis added)

49 Compliance Counsel argues that the emphasized language of these provisions establishes vicarious liability for the electricity retailer with respect to the actions of its retail salespersons and is determinative of the question as to how the offences ought to be characterized.

50 The Board agrees with Compliance Counsel that in this case the language of the provisions are of primary importance in the consideration of this issue and so will begin its analysis with the fourth factor of the *Sault Ste. Marie* test.

51 The Board does not agree with Compliance Counsel that the phrase "shall be deemed" is a statutory direction that is determinative as to how these enforceable provisions ought to be characterized. The term "deem" is common in legislative drafting and has been the subject of considerable judicial scrutiny. In *Hickey v. Stalker*[10] an Ontario appeal court ruled the word "deem" may mean either "deemed conclusively" or "deemed until the contrary is proved." Similarly, in *St. Peter's Evangelical Lutheran Church v. Ottawa*, the Supreme Court of Canada recognized "that the words deemed' or deeming' do not always import a conclusive deeming into a statutory scheme. The word must be construed in the entire context of the statute concerned."[11] In the more recent case of *Manitoba Chiropractors Assn. v. Alevizos*, the court interpreted the phrase "shall be deemed" in the context of a professional misconduct case as providing a respondent with an opportunity in some circumstances to displace "the statutory presumption ... by evidence to the contrary."[12]

52 Further, while the provisions do establish that a retailer is vicariously liable for the actions of its sales persons as Compliance Counsel notes, that alone is not a definitive indication that the offences are absolute liability offences. A whole host of regulatory regimes including environmental protection, health and safety standards, and product liability are founded on the vicarious liability of corporations for the actions of their employees or agents. However, these regulatory regimes still allow for the advancement of due diligence defences in those cases.

53 The question therefore is whether the Legislature intended to create conclusive or rebuttable presumptions with the language of subsections 88.4(2) and (3). As noted above, this exercise requires a consideration of the "entire context of the statute concerned", which effectively encompasses the first two factors under the *Sault Ste. Marie* test.

54 In the Board's view, the overall legislative regime at issue in this case and its subject matter (the regulation of an economic, contractual activity) are not amenable to a finding of absolute liability. For good reason, many of the regulatory regimes governing important societal values such as environmental protection are notoriously strict liability regimes. Part of the regulatory

architecture is the development by responsible companies of effective, comprehensive and evolutionary due diligence systems. It is thought by many regulators that the most important attribute within the regulatory regime is a strong incentive for regulated entities to develop and implement such due diligence systems. Such systems are particularly relevant when they can substantially limit or eliminate the contraventions of regulatory standards. In this way, the incentive of having the ability to defend oneself against charges through the use of a due diligence defence is considered an important element of overall public safety and the public interest.

55 By contrast, apart from traffic violations and technical noncompliance with licensing requirements, absolute liability tends to be imposed only in circumstances where the consequences of noncompliance can be extremely serious and hazardous. In that context, it may well be appropriate to impose absolute liability without recourse to a due diligence defence.

56 When subsections 88.4(2) and (3) are viewed in light of the entire regulatory regime and its subject matter, it is appears that the construct more closely resembles strict liability regulatory regimes than absolute liability regimes. This observation is not intended to disregard the harmful consequences that may ensue where consumers are improperly induced to enter into retail energy contracts which have the effect of increasing their household expenses significantly. There is no doubt that noncompliance can have devastating effects for families trying to make ends meet. But this kind of damage and consequence can be dealt with within the context of a strict liability regime.

57 The remaining factor of the *Sault Ste. Marie* test is the importance of the penalty. An important element of our system of justice is that serious penalties ought not to be imposed without a commensurate opportunity for the defendant to mount a defence. Not only are the monetary penalties in this case potentially very substantial, but the sanctions that can be imposed by the Board for contravention can include cancellation of the retailer's license or suspension of its license privileges. The cancellation or suspension of a license effectively terminates the business for the company and all of its employees and subcontractors. It also places in doubt the ability of the company to continue to provide its service to its existing customers.

58 In the Board's view, absent precise direction from the Legislature, it would not be just to impose absolute liability on an energy retailer for the actions of its sales persons in light of the potentially significant consequences. Support for this view can be found in the jurisprudence on the interpretation of the word "deem", which provides that in the event of ambiguity where one construction will do injustice and the other will avoid the injustice, "it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions."[13]

59 It must also be noted that administrative expediency or convenience with respect to enforcement is not one of the factors enumerated in *Sault Ste. Marie.* While the ability of the regulatory body to enforce compliance is a consideration, it cannot be the governing factor in characterizing the nature of an offence.

60 In conclusion, it is the Board's view the presumption of strict liability enunciated by the

Supreme Court in *Sault Ste. Marie* has not been rebutted with respect to the enforceable provisions engaged in this proceeding. Accordingly, the Board will apply a strict liability standard, and will consider the due diligence defence advanced by Summitt as a defence to liability per se.

Onus of Proof

61 It is not controversial that Compliance Counsel has the obligation to prove on a balance of probabilities each of the allegations upon which it seeks a finding of non-compliance. Similarly, it is settled that the onus of establishing due diligence as a defence to the charges, or as a factor in mitigating symptoms lies with Summitt.

Due Diligence Defence

62 As indicated above, the Board will consider Summitt's due diligence defence in assessing its liability for the infractions of its retail salespersons. In addition to challenging the specific allegations of noncompliance on an incident-by-incident basis, Summitt has sought to persuade the Board that the system that it had in place during the relevant period was sufficiently detailed, comprehensive, and effective in protecting the public from noncompliance with the legislation, the regulations, and the Codes. This system touches on the training of agents, response to complaints and the correction of errors among its retail salespersons.

63 The Supreme Court of Canada in the *Sault Ste. Marie* case emphasized that when a due diligence defence is raised the question is not simply whether the accused established "a proper system to prevent commission of the offence" but also whether it took "reasonable steps to ensure the effective operation of the system."[14] The standard when judging due diligence is whether the accused took reasonable care in the circumstances.

64 In order to meet the standard of reasonable care, a due diligence program must be responsive to the circumstances it is intended to address. This means where the activity sought to be controlled is complex, highly varied, and dynamic, the compliance plan, or the due diligence system, must be equally complex, varied, and dynamic. It must take into account the known weaknesses and areas for potential noncompliance and must deal with them aggressively and definitively.

65 The standard is also increased in a context where the consequences for customers may be serious. Entering into a long-term fixed priced energy retail contract is not a trivial event in the life of a household. The Board heard evidence to the effect that these contracts, and in some instances, the liquidated damages demanded to cancel them, represented hardship for families in meeting their day-to-day obligations. In this kind of context it is absolutely essential that in order to qualify as a competent and operational compliance plan the system must be very acute in avoiding misunderstandings and reducing the potential opportunities for misrepresentations by salespersons.

66 It is the Board's view that the company has failed in many respects in meeting the standard and the defence of due diligence is of no avail to Summitt in this proceeding.

67 One of the cornerstones of an effective due diligence defence is the proper training of employees and contractors. It is apparent that the structure of Summitt's training regime was simply not effective. As discussed above, there does not appear to have been a predictable, standard practice for retail salesperson training, but at best it amounted to a few hours of classroom instruction and some limited in-field observation. The amount of training required by Summitt was not an adequate foundation for a retail salesperson who is expected to go into homes to sell these very significant contracts to relatively uninformed consumers on the basis of price comparisons or promises of lower prices.

68 Further, while on paper the training materials used by Summitt seemed adequate (with the one exception noted below), it is difficult to believe that materials could be adequately covered in a few hours. Indeed, one of Summitt's subcontractors acknowledged that while he received Summitt's training materials, he did not provide them to the retail salespersons he trained and did not expect them to review these materials in a four-hour training session. This highlights that the efforts to impart the relevant information to the retail salespersons was not consistent or predictable. Training was left to Summitt's subcontractors and the Board saw scant evidence of any steps taken by Summitt to monitor the effectiveness of this training either by observing training sessions or conducting in-field reviews of its agents. In the Board's view, in order to establish an effective and operational due diligence program the company needed to ensure that the prospective retail salespersons were well conversant with the fundamentals of the energy market in Ontario, especially if they were being directed to engage in price comparisons as part of their sales technique. The training required by Summitt was clearly inadequate.

69 The one exception referred to above concerns the fact that the Summitt training materials do not require the retail salespersons to clearly stipulate that the company they represent, that is Summitt Energy Management Inc., is an energy retailer which is not the consumer's natural gas or electricity distributor. This is inconsistent with Subsection 2.1 (a) of the Codes.

70 Summitt also adopted an organization for the sale of energy contracts which was predicated on at best ambiguous, and at worst misleading, contractual documents. No due diligence system would be complete or reasonable that did not emphasize the importance to the retail salespersons of ensuring that prospective customers understood unequivocally the nature of the arrangement they were entering into at the time they were entering into it. Having created a materially ambiguous context for the interaction with the customer through the use of the Registration Form and a "brochure", it was incumbent upon Summitt to ensure that the retail salespersons convincingly, effectively, and in every case demonstrated to the prospective customer the nature of the arrangement that was being entered into.

71 In addition, as in the "ticket" cases discussed above, there was an obligation on the part of the retail salespersons, which Summitt was obliged to require and enforce, to ensure that particular terms of the arrangement were unequivocally brought to the attention of the prospective customers. In fact, the sales activity as sponsored by and created by Summitt's own organization of the sale

obfuscated the nature of the contractual relationship and much of its detail. The effective operation of the compliance system could only be accomplished if this important element of the sales interaction was effectively scripted, monitored, and enforced by Summitt. This it failed to do.

72 As noted earlier in this decision, there were further deficiencies with respect to the price comparison materials provided by Summitt to its retail salespersons. It was incumbent upon Summitt to ensure that price comparison information was current, accurate, and appropriately nuanced to enable prospective customers to make informed decisions about retail energy contracts. In case after case before us the actual price of the natural gas commodity and the supply of electricity were misrepresented. In order for an effective compliance plan to qualify as a genuine due diligence effort, Summitt needed to demonstrate that it took its obligations with respect to price comparisons seriously. This would entail ensuring that the message delivered by its retail salespersons was clear, unequivocal and accurate as at the date of its utterance. In order to accomplish this, not only did it need to be communicating this information directly to the retail salespersons force on a current basis, but it also needed to monitor its sales force and its interaction with prospective customers to ensure that accurate comparisons were being represented. In this, Summitt failed.

73 As a subset of the price comparison strategy, Summitt needed to address, and ensure that its retail salespersons addressed, the role of the "Provincial Benefit" in the electricity market place. When making price comparisons in its sales materials and contractual documentation, Summitt had an obligation to ensure that the Provincial Benefit was properly disclosed. There was no evidence that Summitt took adequate steps to ensure that its retail salespersons understood the Provincial Benefit, described it accurately, and represented its effect on potential Summitt customers. An effective compliance plan would have ensured that the retail salespersons consistently expressed in an unequivocal and accurate way the likely effect of the Provincial Benefit on prospective electricity retail customers. This it did not do.

74 In the context of the fundamental misunderstanding experienced by customers as to the nature of the contractual relationship they had entered into, the reaffirmation call was in many instances meaningless and cannot be relied upon to support a due diligence defence. As noted above, not only was the implication and effect of the reaffirmation call misrepresented by the salesperson in many instances, it was fundamentally undermined by the completely understandable lack of appreciation of the prospective customers as to the kind of contractual relationship they were about to cement. Summitt has a positive obligation as part of its compliance plan to ensure that it's reaffirmation callers were alert to indications of misunderstanding on the part of the prospective customer, and that it really represented nothing more than a simple, unequivocal, and direct confirmation by the customer that the customer understood and accepted the complex contractual arrangement Summitt wished to rely upon.

75 In relying on its due diligence defence, Summitt references a series of cases which can be generally characterized as "rogue employee" cases and points to its compliance program and the

compliance measures taken against the five salespersons involved in this case. The basic proposition is that notwithstanding that a company has an acute and effective compliance program, there will always be rogue employees who refuse to comply with the company's requirements.

76 The Board does not find this is to be a case of five rogue agents. As detailed above, a substantial contributor to the misunderstanding of prospective customers about the true nature of the contractual arrangement they were entering was not rooted in the actions of the retail salespersons, but rather directly in the organization of the sale devised and designed by Summitt itself.

77 Further, the Board finds that while Summitt may have had, on paper, a compliance program, in all of the circumstances it fell far short of any reasonable standard in its operation. The company's compliance plan substantially failed to provide for appropriate re-training, monitoring, scripting, correction, sanction, and redress. Given the absence of forceful and direct engagement by Summitt to ensure that the necessary elements were addressed on a door-to-door basis, it cannot rely on the failure of its retail salespersons to respond to a compliance plan that was inadequate and poorly enforced. The claw-back of commission for noncompliance was only imposed in one case. It also appears from the cases that so long as Summitt was able to cull "yes" answers from the customer on the reaffirmation call, the company felt that all was well with the sale. This approach completely overlooked the possibility that the reaffirmation call had been substantially undermined through misrepresentation by the retail salesperson as to its effect.

78 To this point we have described what we have found to be deficiencies in the Summitt due diligence program. It is perhaps as important to provide our opinion on what we consider to be a conforming due diligence approach.

79 To identify the components of such a program we need look no farther than the proposal made by Summitt at the conclusion of the hearing, referred to as its "14 Point Program". In the Board's view with the exception of the deficiency highlighted above with respect to the retail salespersons' obligation to state that Summitt is not the consumer's natural gas or electricity distributor, it is the Board's view that the 14 points represent a reasonable and comprehensive due diligence program. Of course as also noted above, a due diligence program is only as good as it is effective. And the components of the program are of no independent value unless they form part of an operational due diligence activity.

80 The 14 Point Program provides for the following incidents surrounding door-to-door sales. In providing this description of the 14 points, the Board has purposely omitted language such as "continuation" or "continued" which was used in Summit's description of the program.

1. Summit will issue to each energy salesperson a business card that incorporates its own EB license numbers, Summitt energy's name, the name of the sales person, the salesperson ID number, Summitt's toll-free number, and Summitt's website address. Summit agrees to adopt recommendations of the Board with respect to the sizing of the business

card.

2. Summitt will issue to its salespersons and will require them to wear an ID badge that includes, in addition to the information currently reflected on the badge, a statement that Summitt Energy does not represent the local distribution gas or electricity utility, a yearly expiry date, and the issuance of a new ID badge will be dependent upon the completion of annual recertification training and the test. This means of course that each salesperson would be subject to annual recertification training.

3. Summitt will employ a point-of-sale quality assurance call program, identical to the one that it put in place on June 30, 2010 in response to the Board's interim compliance order. Pursuant to this quality assurance call program, the customer must positively confirm all the points on the call in order for the contract to be sent for reaffirmation and processed for enrollment with the utility. The points covered by the call include the following: confirmation that the representative was wearing a Summitt energy ID badge and had identified him or herself as being from Summitt energy, not the local distribution utility, the government or the Board. Further, the call must confirm that the customer has been provided with a copy of the agreement. In addition the call needs to elicit a response from the customer that the price and duration of the agreement is understood by the customer and a clear, unequivocal statement of understanding by the customer that the contract provides for price stability and does not guarantee cost savings. Finally the quality assurance call program will confirm that the contract has been entered into voluntarily, that the customer is not a minor, and that if the customer is a senior that additional disclosure will be provided to ensure that the customer appreciates the nature of the arrangement entered into. This quality assurance call is to be made at the time of sale.

4. Summitt will employ a revised reaffirmation call script which will include each of the applicable topics proposed in attachment D to the OEB's August 12, 2010 proposed code of conduct amendments.[15]

5. Summitt will employ a revised disclosure form, which was implemented in response to the Board's interim compliance order on June 30, 2010. The customer signature as an acknowledgment on that disclosure form is

required before the contract will be processed. That disclosure form acknowledgment that must be signed by the customer confirms the customer's understanding that the agreement entered into is with Summitt Energy not with the local gas or electricity utility, the Ontario government or the OEB, that the agreement is being entered into voluntarily and that the customer will continue to be supplied with natural gas and or electricity even if they don't sign the agreement. In addition, the disclosure form acknowledgment confirms that the customer appreciates that the disclosure of the global adjustment, formerly known as the Provincial Benefit, as a separate line on the utility bill and that it may be either a credit or charge, and that consistently since 2007 it has resulted in a charge to electricity customers. The disclosure form shall also confirm the customer's understanding that the customer may be required to pay Summitt Energy exit fees for early termination of the agreement, and that the price quoted is for the commodity only and the other regulated charges will be required to be paid. Summitt will further revise its disclosure form to include the applicable topics listed in attachment C (proposed disclosure statements) to the OEB's August 12, 2010 Proposed Code of Conduct Amendments.

6. In response to the Board's interim compliance order, Summitt Energy implemented the use of a new combined agreement format on June 30, 2010 that incorporates the registration form and the terms and conditions (the "brochure") into one agreement. In addition this new format discontinues use of a natural gas AECO price chart, and includes a statement that a global adjustment charge or credit may apply, that Summitt energy is not affiliated with the utility, the government or the Board, and that financial savings are not guaranteed.

7. Summitt agrees to cancel its contract without an exit fee if a customer is already on a contract with an existing retailer.

8. Summitt agrees to implement new code of conduct training for all its salespersons consistent with its response to the Board's interim compliance order. Summitt agrees to further redesign its training and testing modules to ensure that they meet the requirements of section 5 of the OEB's new proposed code of conduct as reflected in the August 12, 2010 Proposed Code of Conduct Amendments.

9. Summitt agrees to enhance its training and testing modules with respect to reaffirmation agent training to meet the requirements of sections 4 and 5 of the August 12, 2010 Proposed Code of Conduct Amendments.

10. Summitt agrees to cause amendments to be made to its contractual arrangements with its sales agency and salesperson independent contractor agreements. These amendments will outline a specific sales agent compliance monitoring program which will be further described below, and a definitive remedial action schedule.

11. Summitt agrees to enhance its process and procedures respecting the management and handling of low-volume consumer agent conduct complaints by implementing the requirement appearing in section 7.2 of the proposed OEB August 12, 2010 Proposed Code of Conduct Amendments. These amendments provide that if a complaint is not resolved to the consumer's satisfaction, Summitt Energy will provide to the consumer the OEB's Consumer Relations Center contact information.

12. In addition to its current practice, Summitt agrees to augment its compliance monitoring program by developing a new agent complaint point system; and to employ an agent complaint system report and a complementary remedial action schedule. The agent complaint point system consists of assigning points to the number of complaints and type of agent complaints in order to identify trends. In addition, Summitt agrees to include in its compliance monitoring program a requirement that salespersons sign off and review each low-volume consumer complaint report alleging agent misconduct respecting the individual sales person involved. In addition, Summitt agrees to automate the process of the distribution of the weekly agent complaint reports to facilitate their early consideration by management. Once a salesperson reaches any of the remedial action phases identified in the remedial schedule, the sales person will be subject to complete retraining with one of Summitt's compliance department employees.

13. Summitt agrees to conduct a process audit, and to implement the recommendations of that process audit. Summitt's proposal in this regard relates specifically to the allegations of noncompliance made in this proceeding. The Board construes Summit's proposal to include its

acceptance of the need for periodic process audits respecting the sales activities of its sales force, with a view to ensuring that the rest of the 14 Point Program is having the desired effect with respect to compliance.

14. Summitt agrees to provide the Board with quarterly reports confirming its adherence to any Board order issued in this proceeding, which confirmation is to be made by way of certificate executed by a senior officer of the company.

81 The timing of the implementation of the 14 Point Program is noteworthy. None of it was adopted prior to the issuance of the Notice in June 2010. It cannot therefore serve in any degree as a defence to the allegations made in this proceeding. Quite to the contrary, the adoption of this comprehensive due diligence program after the Notice was issued really highlights the deficiencies of the system existing at the relevant time. This is even more telling when one considers that Summitt was involved in the development of better and more comprehensive practices through its involvement in the Ontario Energy Association working group from about 2008. The system in place governing the actions of the retail salespersons described in this proceeding was, or should have been, known to Summitt to be deficient in its content and its operationality.

82 It is also to be noted that the Board's acceptance of the 14 Points as a viable due diligence program is rooted in the current regulatory regime and its requirements. Changes to the regulatory requirements, as are expected to be implemented in the near future will require a re-examination and possible re-calibration of the due diligence program.

Credibility and Reliability

83 Before beginning a review of each of the 19 complainants at issue in this case, it is helpful to make some general observations and findings that are relevant for all of the cases advanced by Compliance Staff.

84 Much of the hearing before the Board focused on the credibility of witnesses. While the Board will, as necessary, address specific issues of credibility in its consideration of each of the 19 complaints, the Board's focus on this aspect of the proceeding is generally on the reliability of the respective testimony of the witnesses, not their credibility. In assessing the witnesses' reliability the Board has taken into account the following findings.

85 The Board considers it to be significant in its consideration of the reliability of the evidence of the respective witnesses that none of the retail salespersons had specific recollection of any of the instances giving rise to the alleged contraventions. In each case, the complainants were able to provide a significant amount of detail in their narrative of the interaction with the retail salesperson. By contrast, the retail salespersons had no such recollection, and cast their evidence on the basis of what they would "normally" or "typically" have done in a door-to-door sales effort. To some extent,

this is understandable, given that the retail salespersons made a significant number of contacts within the relevant period. However, it is also somewhat surprising that the retail salespersons were unable to remember even a single case. In some cases the retail salespersons were alerted by Summitt of the complaints which form part of this proceeding and were subject to retraining as a result of the complaint. One would have expected that the retail salespersons would have been able to provide a more detailed, precise and non-generic response to at least some of those allegations.

86 It is also apparent that the evidence of the diverse complainants with respect to the individual retail salespersons seems to establish similar noncompliant behavior on the part of the respective retail salespersons. For example, more than one complainant testified that a specific retail salesperson had not identified himself unequivocally as the retail salesperson of Summitt, an energy retailer. In other cases, diverse complainants described similar nonconforming behavior by a retail salesperson. This corroboration by unrelated witnesses tends to support the testimony of the complainants where it differs from that of the retail salesperson. It should be noted that witnesses were subject to a sequestration rule which kept them out of the hearing room while the testimony of other complainants was being given.

87 The Board also notes that in a couple of cases, two complainants were present at the door-to-door encounter and gave substantially the same evidence respecting it. This testimony was given in a forthright and direct manner, and was not seriously impugned during cross-examination.

88 There is no evidence of any kind that any of the complainants had been offered any inducements to provide their evidence or to sustain their complaints. A number of them had travelled considerable distances to attend and give their evidence. In some cases, Summitt had unilaterally canceled the contractual arrangements without penalty or liquidated damages, meaning the complainants had no incentive of any kind to maintain their complaint. Many of the complainant witnesses testified that their motivation for testifying was simply to try to protect other consumers from the treatment they asserted they had experienced with Summitt.

89 For these reasons, the Board finds the complainants' testimony to be consistently preferable to that of the retail salespersons who were only able to provide the most generic and unconvincing rebuttals.

The Conduct of the Investigation

90 During the course of the proceeding and in its submissions, Summitt expressed concerns respecting the fairness of the Board's investigation itself. The tone of this complaint was rooted in a sense that Summitt was unfairly targeted for an in-depth investigation by Compliance Staff, and that in the course of the investigation Compliance Staff "framed" the complainants evidence by asking specific questions about whether a salesperson wore a uniform, badges, left a business card, etc.

91 The Board was not convinced that Compliance Staff acted in any way inappropriately in conducting this investigation. Summitt suggests that it was singled out for investigation because of

the number of complaints made respecting its sales effort without regard to the overall proportionality of complaints to the number of contracts entered into. While that may be so, each complaint has its own history, and unless obviously frivolous, deserves to be explored, understood, and where necessary, acted upon.

92 Further, there is simply no evidence to the effect that Compliance Staff did anything that was inappropriate in trying to investigate the complaints which form the basis of this proceeding. In seeking detail from complainants, it was necessary to ask specific questions rooted in the regulatory requirements. It would have been strange for Compliance Staff to have proceeded in any other way. It was clear that none of the witnesses felt as though they had been cajoled or even encouraged by Compliance Staff into making their complaints or amplifying them in any way. Counsel for Summitt sought this kind of evidence through cross-examination, but it did not materialize.

93 Summitt also appeared to be concerned about the possibility that the respective complainants had been influenced in their testimony or even the motivation to bring a complaint by certain Internet sites which have become dedicated to consumer discontent with Summitt and energy retailers in general. While counsel for Summitt probed aggressively on this point during the cross-examination, the Board is not convinced that there is any meaningful or inappropriate influence from this source.

Relevant Statutory Provisions

94 It is worthwhile to outline the specific statutory provisions which Summitt has allegedly breached through the actions of its retail salespersons.

95 First, section 88.4 of the Act makes it an offence for a retailer of electricity or a gas marketer to engage in an unfair practice. The section goes on to say that an unfair practice is a practice that is prescribed by regulation. Section 88.4 also provides that the actions of a salesperson acting on behalf of the retailer or marketer are attributable to the retailer and marketer. The most directly relevant regulation is Ontario regulation 200/02 under the Act (Consumer Protection). This regulation provides a list of practices which are to be considered unfair practices for the purposes of the Act, including section 88.4.

96 Of very direct relevance is section 2 of Ontario Regulation 200/02 which provides that it is an unfair practice to make any false, misleading or deceptive statements to the public or to consumers. It then goes on to provide examples of subject matters related to the retailing and marketing function which could give rise to an unfair practice through the use of false misleading or deceptive statements. These include statements respecting the rate for the distribution of electricity or gas or the total price of electricity or gas, the difference between any price charged for the provision of electricity or gas by any retailer of electricity or gas marketer including a distributor, the amount of money to be saved by a consumer expressed in any manner if the consumer were to choose one retailer of electricity or gas marketer over another, including the local distribution companies, and the failure to disclose information about the products, services or business of a retailer of electricity

or gas marketer if the failure has the effect of deceiving or misleading a consumer or if the retailer of electricity or gas marketer knows, or ought to know, that the failure has the capacity or tendency to deceive or mislead a consumer.

97 In addition to the provisions of section 88.4 and the requirements of Ontario Regulation 200/02, section 88.9 of the Act makes it an offence for a retailer of electricity or gas marketer to fail to deliver a written copy of the contract to the consumer within the time prescribed by regulation. Section 88.9 also deals with the reaffirmation process.

98 Contraventions of these statutory provisions are subject to the order and penalty provisions contained in Sections 112.1, 112.2, 112.3, 112.4, and 112.5. Penalty provisions include suspension or revocation of licenses and administrative, that is monetary, penalties, which are particularized in Ontario Regulation 331/03.

99 It is also a contravention if the electricity retailer or gas marketer fails to adhere to the requirements of the Codes of Conduct for those respective businesses. The Codes are documents produced by the Ontario Energy Board, and compliance with the respective Codes is a license condition for electricity retailers and gas marketers. Failure to conform to the requirements of the respective Codes is a violation of license conditions. The respective Codes contain provisions which include the obligations of the retail salespersons respecting the utterance of false or misleading statements to consumers, the identification of the sales person to the consumer and the positive stipulation that the retailer or gas marketer, as the case may be, is not the consumer's distributor. The respective Codes also explicitly require the retailer of electricity or marketer of gas, as the case might be, to ensure that their respective salespersons adhere to the requirements set out in the Codes.

100 Breaches of the respective Codes can lead to license suspension or revocation.

Specific Alleged Contraventions

101 Considerable argument was advanced respecting the "scope" of this proceeding, directed to the meaning or significance that should be attached to complaints delineated in the Notice, but for which there was no supporting evidence. The Board considers that these allegations which have not been proven, and for which no evidence was provided, should play no role whatsoever in the Board's determination of liability, or with respect to the imposition of sentence. In arriving at its findings in this case, the Board has paid no regard to these allegations. The allegations to which this applies are from complainants R.C., P.R., J.S., J.F., A.B., B.D., C.H., H.G., and J.L.

102 What follows is a consideration and determination of the specific allegations for which evidence was provided.

Retail Salesperson M.G.

103 Five of the 19 complaints for which evidence was submitted relate to the behavior of M.G. and his sales technique.

104 In four cases, the complainants reported that M.G. had not identified himself as a representative of Summitt, but rather had either identified himself as an agent of the gas distributor, another retailer, or was unclear and unspecific as to whose agent he really was.

105 In all five cases, the price to be paid by the customer under the plan for natural gas and/or electricity was either misrepresented or not stated at all. In fact, in three cases, the complainants testified that the electricity portion of the Registration Form was checked off, even though there had been no discussion respecting electricity supply with M.G.

106 Furthermore, in three cases, the complainants testified that they were not provided with a copy of the "brochure".

107 It was J.W.'s testimony that M.G. identified himself as being associated with the Ontario Energy Board and that he did not explicitly identify himself as a retail salesperson of an energy retailer, specifically Summitt Energy Management Inc. The thrust of M.G.'s sales pitch with respect to electricity supply was that smart meters were going to create a situation in which the price J.W. was going to be paying for electricity was going to be somehow unfair. With respect to gas, M.G. indicated that he would be sending a chart to J.W. showing the increase in gas prices over the last period so that the customer could verify for himself that the price comparison suggested by M.G. was accurate. That chart was never received by J.W., nor did M.G. testify that he had followed through on this offer of further information.

108 J.W. testified that he had read the registration form before signing it. However, this evidence must be considered in the context of the rest of J.W.'s testimony. J.W. testified that M.G. represented the Registration Form as a confirmation that he had in fact met with J.W. that he had explained the situation to him and that it was necessary documentation for him, that is M.G., to get paid. It is clear from his testimony that J.W. regarded this contact with M.G. as in the nature of a survey respecting the adequacy of service of his utility companies.

109 With respect to the reaffirmation call, J.W. indicated that M.G. told him that someone would be calling in the next little while, that this was a mere formality, intended to confirm that M.G. was at the house and that his confirmation was necessary in order for M.G. to get paid. When he received the reaffirmation call J.W. answered all the questions in the affirmative. J.W. testified that he did so because he thought that he was simply confirming what he had been told at the door by M.G. This misapprehension was shared by other complainants.

110 Summitt placed a great deal of importance on the reaffirmation call as a genuine confirmation that the customer had unequivocally entered into a contractual arrangement with Summitt. As discussed earlier in this decision, for the reaffirmation call to be genuinely effective it needed to be more sensitive to misunderstanding and misapprehension on the part of the customer

than it was. Summitt's due diligence program, in order to be effective and operational, needed to have these attributes in order to provide a defence to the allegation of non-compliance.

111 For J.W. the next event of consequence was the receipt in July of a utility bill which seemed to be extremely high. When J.W. called the gas company he was told that he was now a customer of an energy retailer and that the cost of supply of natural gas had accordingly increased. At this point J.W. formulated a complaint. In the end, his contract with Summitt was canceled without liquidated damages or any other form of penalty.

112 The fact that the complaint was not made until some months after the contract was actually signed comes as no surprise in these circumstances. J.W. did not believe that he had entered into a long-term fixed-price contract for the supply of natural gas or electricity on February 24, 2009. This circumstance was only brought home to him when he received his sharply increased utility bill in July of 2009. This lag, which is common to all of the cases because of the time it took to effect a transfer of the account to Summitt, is important. It means that Summitt should have had in place a much more rigorous process for assuring itself that its retail salespersons were conducting the sales calls in a manner that was consistent with the legal requirements. There should have been a scripted sales presentation, aggressive contemporaneous monitoring of the sales call and a more nuanced interaction with the customer to ensure that the prospective customer understood the nature of the relationship Summitt was going to rely upon. This is in fact the kind of approach adopted in the 14 Point Program implemented by Summitt in June 2010.

113 With respect to the complaints of D.B. and J.T., M.G. identified himself as a Summitt representative offering a price cap for natural gas. Specifically, it was D.B.'s testimony that M.G. offered them a contract for their natural gas supply at 35 cents per cubic meter and told them that the price would go down if gas prices went down but would never go above 35 cents per cubic meter . M.G. misrepresented the price to be paid under the contract. While it is true that under a fixed price contract, the price should not go above the contracted price for the term of the contract, M.G.'s statement that the "price would go down if gas prices went down" was false and misleading. The only means whereby that could occur was if the customer invoked a one-time adjustment described in the contract as the "Blend and Extend" option. Like every other term and condition appearing in the "brochure", the salesperson made no effort to disclose to the customer how this mechanism might work.

114 D.B. further testified that M.G. told them that the price of gas at that time was around 41 cents per cubic meter. This information is also inaccurate and misleading as the utility's price at that time was around 23.5 cents per cubic meter.

115 D.B. testified that the electricity portion of the registration form was checked off even though M.G. did not discuss electricity with them. During the reaffirmation call, D.B. advised the reaffirmation agent that M.G. had not spoken to them about electricity and as a result the electricity contract was cancelled by the reaffirmation agent. A copy of the brochure was not provided to D.B.

and J.T.

116 After filing a complaint with the Better Business Bureau and the Ontario Energy Board, D.B. and J.T.'s natural gas contract with Summitt was cancelled without penalty.

117 To the complainants A.H. and C.S., M.G. was unclear as to the entity for whom he was working. In their testimony, A.G. and C.S. were clear that M.G. told them that the purpose of his visit was to offer them better prices on gas and electricity. C.S. remembered that M.G. told them that Milton Hydro's (their local electricity distribution company) rates were guaranteed to increase within a very short period of time. A.H. signed the Registration Form based on M.G.'s presentation that they would save money on their bill. When she received the reaffirmation call, like J.W., A.H. answered all the questions in the affirmative not understanding that she was confirming a five year contract for the supply of natural gas and electricity with Summitt.

118 After receiving their bill with Summitt, A.H. and C.S. tried to cancel the contract for the supply of natural gas and electricity with Summitt. However, Summitt was only willing to cancel the contract upon payment of the liquidated damages assessed by Summitt. C.S. testified that he was not aware that cancellation charges would apply at the time of his encounter with M.G. and that they couldn't pay the liquidated damages assessed by Summitt. A.H. and C.S. are still under contract with Summitt for the supply of their natural gas and electricity.

119 To the complainant D.M., M.G. identified himself as being from "the energy company" and appeared to be wearing a Reliance Energy badge. D.M. testified that M.G. told her that the previous home owners had paid for a five year fixed rate plan and that D.M. could use the last three years and that the price under the plan was 32 cents per cubic meter. D.M. testified that M.G. told her that the price would go down if gas prices went down. D.M.'s testimony is consistent with the testimony of D.B. with respect to M.G.'s representation of the price to be paid under the plan. D.M. further testified that M.G. told her that the price of gas at that time was 39 cents per cubic meter. This information is also inaccurate and misleading as the utility's price at that time was around 20.5 cents per cubic meter.

120 Like D.B., D.M. testified that the electricity portion of the registration form was checked off even though M.G. did not discuss electricity with her and that she was not provided with a copy of the brochure.

121 M.G. told D.M. that she was "eligible" for the Provincial Benefit and someone would contact her about that. In fact, when she received the reaffirmation call, D.M. did inquire about the Provincial Benefit but didn't get a clear response from Summitt's agent.

122 When D.M. noticed Summitt as her energy provider on her bills, she called Union Gas and was told that Summitt was her supplier. She then contacted Summitt to cancel the contract and was told by Summitt that liquidated damages would apply. D.M.'s husband contacted the Ontario Energy Board and they sent an e-mail to Ellen Roseman, a Toronto Star journalist seeking help.

D.M. received an email from Summitt stating Summitt was willing to cancel her contract as a customer service gesture.

123 To the complainant A.S., M.G. identified himself as a supervisor from Union Gas and indicated that he was there to discuss energy saving programs with her. A.S. testified that she signed the Registration Form thinking she was registering for a Union Gas energy saving program. A.S. testified that M.G. advised her to call Union Gas in a few months to get her security deposit back.

124 Like D.B. and D.M., A.S. testified that the electricity portion of the registration form was checked off even though M.G. did not discuss electricity with her and that she was not provided with a copy of the brochure.

125 A.S. testified that when she received the reaffirmation call, she did not know it was Summitt and she misunderstood what was being discussed.

126 A.S. testified that when she called Union Gas a few months after the encounter with M.G. to get her security deposit back, she was told that M.G. was not from Union Gas. A.S. then called Summitt to cancel her contract but was told that cancellation fees would apply. A.S. complained to the Ontario Energy Board. After receiving an income verification letter from A.S., Summitt cancelled the contract for natural gas and electricity supply without penalty.

127 In the Board's view the testimony of complainants with respect to M.G. establishes that there have been numerous contraventions of the requirements of the Act, Ontario Regulation 200/02, and the Codes.

128 First, it is apparent that M.G. failed to explicitly identify himself as a representative of an energy retailer on four occasions. In three cases, he had actually identified himself or caused himself to be identified as an employee or agent of someone other than Summitt.

129 As noted elsewhere in this decision M.G. was unable to provide any specific rebuttal relating to these complaints, and could not specifically deny any of the allegations made by these complainants. M.G.'s general statement that he always identified himself as a Summitt representative cannot be preferred in the face of the complainants' quite specific recollections, especially when they appear to be corroborative of each other. It must also be noted that Summitt's training materials do not appear to have dealt with the obligation of the salesperson to positively stipulate that he did not represent the local distribution company. It is perhaps then not surprising that M.G. failed to meet this standard.

130 The Board finds therefore that there are four contraventions of section 2.1 of the Codes which requires the retail salesperson to immediately provide the name of the retailer and marketer he represents to the respective customers.

131 Second, the Board finds that M.G. provided false, misleading and deceptive statements to

each of the complainants and thereby engaged in an unfair practice contrary to section 88.4 of the Act. These misleading and deceptive statements touched on several aspects of the sale. The price comparison offered by M.G. was inaccurate. M.G. testified that he showed prospective customers their current gas prices as shown on their gas bills, and compared them to Summitt's gas prices and historic gas prices. He testified that he explained to customers that the utility price of gas went almost to 42 cents per cubic meter in 2008. This information was inaccurate and misleading. The effective price of the commodity had not risen to 42 cents per cubic meter in 2008. It had ranged between 24 .5 cents and 38.1 cents. At the time of the sales call, the price of natural gas was less than 30 cents.

132 M.G. indicated that he would be providing comparative data to J.W. with respect to the historic price of natural gas at the household. The Board finds that there was no intention on M.G's part to follow through with that promise, and that it therefore was false and misleading statement. To D.M., M.G. indicated that she was "eligible" for the Provincial Benefit and that someone would be contacting her with respect to that. The clear implication to D.M. was that she would be receiving a benefit of some kind associated with the Provincial Benefit. In fact, the Provincial Benefit, as was known, or should have been known by M.G., would result in significantly higher electricity charges for D.M. Further, the Board finds that there was no intention on the part of M.G. that he would take any steps to ensure that someone called D.M. to clarify this issue.

133 In addition, the Board finds that M.G.'s characterization of the reaffirmation call was intended to mislead these complainants into a misunderstanding respecting the meaning of and implications of the reaffirmation call.

134 The Board finds that in representing that the "comprehensive energy price protection plan" would result in energy savings, M.G. made false and misleading statements to these prospective customers. The plan, at least to the extent that it covered gas supply, could reasonably be described as a device which could minimize volatility in the customers' energy supply cost. But to describe it as a cost saving tool, without a more complete and nuanced description, is misleading.

135 The Board considers that enrolling customers in the electricity protection plan when there had been no discussion of that arrangement nor assent of any kind by the customer is an unfair practice contrary to section 88.4 of the Act.

136 In summary, the Board considers that the evidence with respect to M.G. establishes on a balance of probabilities the following contraventions of the Act and the Codes. Specifically the Board finds that:

1. M.G. provided false, misleading and deceptive statements to all five complaints: D.B. and J.T., A.H. and C.S., D.M., A.S. and J.W. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. M.G. did not provide a copy of the terms and conditions of the contract nor were they delivered to D.B. and J.T., D.M. or A.S. contrary to section 88.9 (1) of the Act.

3. M.G. breached section 2.1 of the Codes in all five cases:

   a. during the encounter with D.B. and J.T., by failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer;

   b. during the encounters with A.H. and C.S., D.M., A.S. and J.W., by failing to immediately and truthfully give the name of the retailer and marketer (Summitt) to the consumer, failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract.

Retail Salesperson G.W.

137 Three of the complaints concerned the sales presentation of G.W.

138 In two of these cases the complainants testified that G.W. either explicitly misrepresented who he worked for or did not say who he was representing.

139 With respect to the complainant C.L., it is clear that this customer was extremely reluctant to enter into any arrangement that did not result in immediate cost savings. In response to this G.W. represented that he was selling electricity at a discounted rate and that C.L. would save money on his hydro bill if he was to sign up with Summitt. A substantial portion of the sales effort by G.W. was directed to the effect that smart meters would have on C.L.'s electricity bill. He represented that C.L. would save money in the New Year, once the smart meters were installed. In the end C.L. paid $448 as liquidated damages to cancel this arrangement.

140 In this case, it appears that G.W. did identify himself as a retail salesperson associated with Summitt. It also appears that it was clear to the customer that there was no relationship between Summitt and the local distribution company. However, the promise of discounted rates related to the advent of smart meters in the New Year was a false or misleading statement. This is so because the actual date of the implementation of the smart meter program, which involves not merely the installation of the smart meter itself, but also the enrollment of the local distribution company in the Time of Use regime operated by the Smart Metering Entity was certainly unknown to G.W. It

served his purpose in making the sale to assert that the Time of Use regime would be in place "in the New Year", and also that that regime would necessarily result in electricity prices higher than those currently experienced by the customer, and higher than those provided for in the Summitt offering. There was no factual basis for this assertion. The advent of the Time of Use regime can have widely varying effects on customers depending on their respective energy usage patterns.

141 In addition, in so far as the salesperson had embarked on a pointed price comparison, it was incumbent upon him to also factor in the effect of the Provincial Benefit, which would have been to increase the amount payable under the Summitt offering, to the extent of the Provincial Benefit.

142 Not only did the customer's recollection of the sales call not touch on any such discussion, these nuances would very likely have caused him to reject the Summitt package because it did not meet his immediate stated goal: an unequivocal reduction in electricity prices in the new year. The saleperson's recollection of his generic sales technique, which is his only rebuttal, certainly did not contain any mention of the kind of discussion outlined above. In the Board's view this is precisely the kind of exchange that Section 88.4 of the Act and Regulation 200/02 were intended to prohibit.

143 The complainant Z.P. believed that G.W. was the representative of the gas company. Z.P. indicated that he only had an interest in one very specific product under offer. That product was described as a "Green Energy Contract" at a cost of $12.99 per month. It was Z.P.'s testimony which the Board finds to be credible and reliable that at no time did he discuss enrollment in any other product respecting the supply of electricity or natural gas. His sole interest was in participating in the Green Energy Contract. The customer also indicated that he was subject to a one-year lease and would have no interest in any contract that had a term longer than that. He clearly did not appreciate that he was entering into a five-year fixed term contract for the supply of electricity and natural gas, and would not have done so had he known. The customer also testified that he did not receive copies of any of the forms he had signed, and did not recall receiving the "brochure" at all.

144 At the time of the reaffirmation call, the customer expected to be confirming his interest in establishing the Green Energy Contract, but nothing else. Summitt apparently repeatedly tried to procure from the customer his utility account information which he refused to provide. When the customer's lease term concluded and the customer's name was removed from the utility account by the landlord he received a letter from Summitt demanding payment of $611 apparently as liquidated damages for the closing of his natural gas account. The status of this demand is unknown to the Board.

145 In the Board's view, this interaction resulted in a violations of Section 88.9 of the Act through the failure of the salesperson to provide a copy of the brochure, a violation of Section 88.4, by the enrollment of the customer in the price protection program against his stated wishes, and a violation of the Code of Conduct for Gas Marketers as a result of G.W.'s failure to unequivocally identify himself to the customer as a salesperson for Summitt, without any affiliation with Enbridge Gas, the local distribution company.

146 With respect to the complainant A.G., G.W. represented himself as an employee of Hydro One. This is significant because the customer had a number of relatives who work for Hydro One, and she had a generally positive attitude respecting that company. G.W. indicated that if she signed up for the electricity supply program through Hydro One, her electricity prices would never rise for five years. This would not appear to be accurate given that the Terms and Conditions contained in the "brochure" make provision for a Pool Balancing Adjustment which could result in the upward adjustment of the Summitt contractual price by up to one cent per kWh for the total volume over the term of the Agreement. At no time did G.W. indicate that he was a representative of Summitt.

147 When the reaffirmation call occurred, the customer testified that she believed that she was being contacted by Hydro One and was confirming an arrangement with that company. It was only after a subsequent family visit where she had described the contact from Hydro One (as she thought it was) that she began to have doubts about the arrangement. Her family members indicated that she had probably entered into a long-term fixed-price contract with an energy retailer. When she checked the documentation she realized that this was the case and took steps to try to cancel her contract. The response from Summitt was a claim for over a thousand dollars in liquidated damages, which the customer could not afford to pay. As of the date of writing this customer is still a customer of Summitt.

148 G.W.'s rebuttal of these claims is very unconvincing. He had no specific recollection of any of these customers. His evidence was limited to a general denial based on what he "always" or "typically" did. The fact that two of the three complainants asserted unequivocally that he had not identified himself as an agent of Summitt makes it hard to attach any credibility to his general denial. He suggested that customers had a misconception, but his testimony suggested that he knew that the customers may not have understood the true nature of the arrangements they were entering into because of "inattention". Under the circumstances it is the Board's view that the agent has a positive responsibility to ensure that the customers clearly understand the nature of the contractual arrangements they are entering into. The Board also considers that it is the responsibility of Summitt to ensure not only that the salespersons understand that responsibility but that they have the appropriate scripts and tools necessary to discharge it. This standard reflects the Board's view that Summitt had a responsibility to ensure that the communication to the customers was clear and unequivocal given the inherent ambiguity created by the overall organization of the sale.

149 The Board considers that the testimony respecting the sales activity of G.W. in this case results in numerous contraventions of the Act and the applicable Codes. Specifically, the Board finds that the following contraventions have been proven on a balance of probabilities.

1. G.W. provided false, misleading and deceptive statements to all three complainants: A.G., C.L. and Z.P. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. G.W. did not provide a copy of the terms and conditions of the contract nor were they delivered to Z.P. contrary to section 88.9 (1) of the Act.

3. G.W. breached section 2.1 of the Electricity Retailers Code of Conduct in two cases:

    a. during the encounter with A.G., by failing to give the name of the retailer (Summitt) to the consumer and failing to advise A.G. that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of electricity, and making representations or statements that were false or likely to mislead a consumer; and

    b. during the encounter with C.L., by failing to state the price to be paid under the contract for the supply of electricity, and making representations or statements that were false or likely to mislead a consumer.

4. G.W. breached section 2.1 of the Code of Conduct for Gas Marketers by failing to give the name of the marketer (Summitt) to the consumer and failing to advise Z.P. that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas, and making representations or statements that were false or likely to mislead a consumer.

Retail Salesperson G.S.

150 Three of the 19 complaints concern the conduct and sales technique of G.S. In each case, it was the testimony of the complainants that G.S. failed to identify himself as a representative of Summitt, an energy retailer, and actually either wore clothing associated with local distribution companies or otherwise represented himself as being their agent.

151 With respect to the complainant W.G., it appears as though G.S. specifically identified himself as an agent of the local distribution company, Oakville Hydro. The Complainant testified that G.S. did not appear to be wearing any identifiable clothing or logos. Part of his sales effort included the suggestion that W.G. was particularly lucky to be living in Oakville because "they" were offering, at no extra cost, a price protection program. According to her testimony he also represented to W.G. that were she to sign up for the price protection program the electricity price would not increase, and also that she would not be tied in to any contractual obligation. This would

appear to be consistent with the evidence of G.S. himself where he indicated that he did represent to customers that they were not jumping into anything. W.G. also indicated that G.S. represented to her that in signing the registration form she was doing nothing more than confirming her name and address and indicating that she was in fact responsible for the electricity bill. W.G. understood that signing the registration form would enable her to get more information about the price protection plan. It was not her understanding that they had entered into a contract of any kind with anyone at this stage.

152 W.G.'s husband participated in the reaffirmation call, but W.G. confirmed in her testimony that it was not in their understanding that this was a confirmation of a five-year fixed-price contract for the supply of electricity and natural gas.

153 When she received an electricity bill that was much higher than expected she contacted Oakville Hydro to complain. After this, she became aware that she had entered into a five-year fixed price contract for electricity and natural gas. W.G. paid almost $1000 to cancel the comprehensive price protection plan.

154 G.S.'s rebuttal of the complaint associated with W.G. is unconvincing. In fact, some of his testimony corroborated elements of her complaint. He testified that he referred to the Registration Form as an "application", not as the contractual document it actually was. He also asserted that he did indicate to customers that they were not jumping into anything in executing the "application", that is the registration form which is a contractual document. Again, he suggested that he had no specific knowledge of any of the complaints, and could only rely on what he normally did. To the extent that G.S.'s evidence is not corroborative of the complainant's evidence, it is not reliable in the face of the clear and distinct recollection of the complainant.

155 The complainants K.S. and R.S. testified that G.S. represented himself as a sales agent associated with Kitchener Wilmot Hydro. His sales pitch was linked to the installation of smart meters. It was their testimony that G.S. advised them that in order to have the smart meter "take effect" it was necessary for them to sign the Registration Form which he had described as an application.

156 In the course of their testimony, K.S. and R.S. asserted that the signature on the registration form had been forged and was not genuine. The Board has received such complaints in the past, and has developed a methodology to assess the authenticity of signatures. The so-called "forgery package" is made available to complainants who assert that the signature has been forged. Recourse to this process was offered to K S and R.S., but they have not availed themselves of it. As a result, the board is unable to conduct an assessment of the authenticity of the signature as part of this proceeding.

157 K.S. and R.S. also asserted that the reaffirmation call, which was introduced in the proceeding both as a sound recording and a transcript, had been materially altered. In the Board's view, in order to sustain such an allegation it was necessary for these complainants or Compliance

Counsel to provide evidence in support. This was not done, and the assessment of the completeness and authenticity of the reaffirmation call is beyond the scope of this proceeding.

158 The Board is concerned, however, with these unsubstantiated assertions, and considers that they have implications for the credibility and reliability of these witnesses. Accordingly, the Board will make no finding with respect to the allegations of K.S. and R.S. with respect to their interaction with G.S.

159 The third complainant associated with G.S. was P.K. While P.K. offered her evidence in a straightforward and confident manner, evidence was introduced challenging her capacity to definitively recall the relevant events. Accordingly, the Board will make no finding with respect to P.K.'s allegations with respect to her interaction with G.S.

160 The Board considers that the evidence with respect to G.S. establishes on a balance of probabilities a number of contraventions of the Act and the Codes. Specifically the Board finds:

1. G.S. provided false, misleading and deceptive statements to W.G. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. G.S. did not provide a copy of the terms and conditions of the contract nor were they delivered to W.G., contrary to section 88.9 (1) of the Act.

3. G.S. also breached section 2.1 of the Codes by failing to give the name of the retailer (Summitt) to the consumer and failing to advise W.G. that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer.

Retail Salesperson A.B.

161 Four of the 19 complaints relate to the conduct and sales technique of A.B.

162 In all four of the cases the complainants testified that A.B. had not clearly represented himself as a representative of Summitt, an energy retailer. In fact, in three cases the complainants testified that he had misrepresented himself as being a representative of the local utility, variously Enersource and Veridian. According to the testimony of two of the complainants A.B. represented that he was there at their doorstep having installed a smart meter. The Registration Form, which he also referred to as an "application" was needed, he said, to acknowledge the installation of the smart meter. Of course, this was a complete fabrication. In fact, the fabrications respecting smart meters made during these sales calls were manifold. It appears to be consistent throughout most of the

testimony of these complainants that A.B. made no attempt to actually or accurately describe the implications of signing the Registration Form. It appears as though he consistently misrepresented the form as being in the nature of an acknowledgment respecting the smart meter.

163 As to the complainant P.S., she testified that A.B. had told her that he was there to get her to sign documentation to set up a smart meter at her premises. Her recollection was particularly detailed in so far as she recalled that he advised her that the previous owners of the property, who had recently moved out, did not want smart meters and he had therefore waited for the new occupant, that is P.S., to sign the necessary documentation. She indicated that A.B. referred to a newspaper article respecting the upward pressure on electricity prices after smart meters were implemented. She testified that there was no specific discussion whatsoever with respect to a fixed price five-year contract for the supply of gas or electricity. Her account is further corroborated by her evidence to the effect that she had the documents left with her by A.B. and after reading them she realized that they were of very different effect than he had represented. She immediately contacted Summitt to cancel the arrangement. She then filed a complaint with the Ontario energy Board. In the Board's view this series and chronology of events lend support to her version of events.

164 It was the evidence of complainant V.T. that A.B. represented himself to be an agent of Enersource, the local distribution company. According to her testimony, he referred to a newspaper article which suggested that there is considerable discontent surrounding the implementation of smart meters. According to her testimony, A.B. represented that if she "locked in", she would be saving money. It was her belief that when she signed the registration form that she was signing to receive more information about the price protection program that she believed the local utility was offering. She did not appreciate that she had signed a contractual document for a five-year fixed price contract for the supply of electricity. She indicated that A.B. had not provided her with a copy of the brochure.

165 The reliability of V.T.'s version of events is supported by her next steps. Shortly after the reaffirmation call, which she did not appreciate to be a confirmation of the fixed-price contract, she contacted her local utility Enersource to reconfirm everything that happened on the phone during the course of that call. She learned that the call was not from her local utility. It was at that point that she called Summitt to cancel the contract. Up until this time it was her belief that the only long-term contract that was in issue was for the supply of electricity. But sometime after this it became apparent that she had also been enrolled in a gas supply arrangement. She complained to Summitt and to the Ontario Energy Board. Initially the Board considered that insofar as she had answered "yes" to all of the questions during the reaffirmation call that she was bound to the contract. Finally, she paid the liquidated damages assessed by Summitt to cancel the gas contract.

166 With respect to the misrepresentation by A.B. of his identity, the complainant T.V.'s evidence with respect to her exchange with A.B. was quite similar to that described by V.T. According to her evidence A.B. had represented himself to be an agent of Veridian, the local

distribution company, who had just replaced her meter. It was her evidence that A.B. was actually wearing a Veridian jacket. According to her testimony she was asked to sign a form to acknowledge the agent's presence at her home. There was no discussion whatsoever with respect to natural gas. It was her evidence that she did not receive any documents from A.B. or from Summitt with the exception of the signed registration form, which she believed to be a mere acknowledgment of his visit. It appears that a reaffirmation call was made to the residence and a man answered in the affirmative to all of the questions. About two weeks after this, she found the registration form, discussed it with her husband and then called the number on the form thinking that it was Veridian's number with the intention to switch back to system supply. This action is supportive of her testimony that she believed at all times that she was dealing with Veridian, her local distribution company. In fact, the number was Summitt's number and she was advised that if she wanted to cancel the contract she would be required to pay a sum in liquidated damages. She has not paid liquidated damages and at the present time she does not know the status of her "account" with Summitt.

167 As to the complainant Z.A., her evidence is strikingly similar to the evidence of the other two complainants who had dealings with A.B. Her testimony is to the effect that A.B. identified himself as an agent for Veridian, the local distribution company and that he was there with respect to smart meters. Once again, according to the evidence of this complainant there was no explicit discussion of the electricity or gas supply contracts. She testified that A.B. presented her with the registration form and indicated that it needed to be signed in order for the smart meter to be installed. He did not indicate that it was a contract for the supply of natural gas and electricity. A.B. did indicate that she would receive a telephone call that was in the nature of a credit check designed to enable the utility to set up an account. Z.A. indicated that she called Veridian two days after the visit from A.B. and learned that A.B. did not represent her local distribution company. Z.A. then called Summitt to cancel the contract. Her contract was canceled by Summitt without penalty.

168 A.B.'s rebuttal of these complaints is utterly unconvincing. Not only are there substantial areas of consistency in the evidence of the complainants, he had no specific recollection of any of these sales. The consistent modus operandi reflected in the testimony of these witnesses lends their testimony reliability and credibility. The Board considers it noteworthy that even customers whose contracts have been canceled without penalty or liquidated damages wanted to pursue their complaints in the public interest. This is the case for example with Z.A., who persisted with her complaint notwithstanding that Summitt had canceled her contract. This certainly lends reliability to her evidence and her complaint, which was made without any prospect of gain.

169 Accordingly the Board finds that the following contraventions of the Act and the Codes have been proven on the balance of probabilities with respect to the sales activity of A.B.:

1. A.B. provided false, misleading and deceptive statements to all four complainants: Z.A., P.S., V.T. and T.V. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. A.B. did not provide a copy of the terms and conditions of the contract nor were they delivered to V.T. or T.V. contrary to section 88.9 (1) of the Act.

3. A.B. breached section 2.1 of the Codes in all four cases by failing to immediately and truthfully give the name of the retailer and marketer (Summitt) to the consumer, failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer.

Retail Salesperson A.T.

170 Four of the 19 complaints are attributable to the conduct and sales technique of A.T. In three of the cases the complainants testified that A.T. represented that it was necessary to sign the Registration Form in order to ensure continued gas service at their homes. This of course was completely inaccurate.

171 Two complainants testified that A.T. made specific representations respecting the price of natural gas. Their testimony was consistent in describing his sales pitch as including either a general statement respecting the upward pressure on natural gas prices or very specific representations that the price of gas would rise, for example, to 42 cents per cubic meter in the near term. At the time the representation respecting the 42 cents per cubic meter price was made the actual rate charged by Enbridge gas for the supply of natural gas was between 17 and 23 cents per cubic meter.

172 In three of the cases, the prospective customers canceled any relationship with Summitt very shortly after A.T.'s visit. This means two things: first that the misrepresentations made by this retail salesperson were so obvious that customers knew almost immediately that there was something fundamentally wrong with this sales call. Second, it means that these complainants had nothing whatsoever to gain by pursuing their complaints. They did so in the public interest, which lends credibility and reliability to their testimony.

173 In the fourth case, Summitt made a demand for about $1000 in liquidated damages in order to cancel the contract ostensibly entered into by J.M. J.M. testified that she could not afford to pay that amount, and she continues to be bound to the Summitt Price Protection Plan.

174 As to complainant J.M., her testimony was to the effect that A.T. identified himself as being "from the gas company" and believed that he was wearing a shirt bearing the logo of either Direct Energy or Enbridge, Enbridge being the local distribution company. She testified that A.T.

specifically asked her if she wanted to continue receiving gas services at the home. When presented with the registration form, she believed it to be a continuation of her account with the local distribution company, and not a fixed-price contract for the supply of gas and electricity. She indicated that there had been no discussion whatsoever about electricity with A.T.

175 J.M. acknowledged receiving a reaffirmation call, believing it to be a confirmation that she wanted to continue gas supply at her home. Shortly after the reaffirmation call, she started to receive several calls a day requesting that she provide the caller with her electricity account number. At this point, she contacted Enbridge to complain. This supports her in her evidence that she believed that she merely arranged a continuation of gas supply from her local distribution company. Enbridge advised her to contact Summitt or the Ontario Energy Board, which she did. She was advised by Summitt that in order to cancel the contract she would be required to pay liquidated damages. At the time of this decision she continues to be bound to the price protection plan.

176 Complainant J.M(1) testified that A.T. did identify himself as an agent of Summitt. According to his testimony he was told by A.T. that because the previous owners had a contract for gas supply with Summitt that he was obliged to do so as well, and could not choose to not enter into the arrangement. It was his impression that his gas supply would be terminated if he did not enter into the arrangement. This element is consistent with that described by J.M. where a similar suggestion about termination of gas service was reported. This complainant did receive a copy of both the registration form and the brochure. Shortly after the visit, this complainant reviewed the documentation more carefully and realized that he had executed what appeared to be a fixed-price contract for the supply of gas and electricity. Shortly thereafter, after doing some online research, he contacted Summitt to cancel the arrangement. His contract was canceled without penalty, but J.M. (1) has persisted with his complaint.

177 The testimony of the complainant L.M. is strikingly similar to that of J.M.(1). L.M. testified that A.T. did identify himself as an agent from Summitt and was wearing the Summitt logo. He was also advised in a manner similar to that reported by J.M. and J.M. (1) that he had no choice but to continue an arrangement with Summitt that had begun with the previous occupant of the home. L.M. testified that he specifically asked the salesperson if he had a choice to deal directly with his local distribution company for the supply of gas, and was advised by A.T. that he did not have a choice. He signed the registration form in order to get A.T. to leave his house, but immediately felt that there was something fundamentally wrong with the representations made by A.T. Accordingly, L.M. called Summitt to cancel the contract. Like J.M. (1) L.M. has persisted in his complaint, even though there is no prospect of any advantage to him in doing so.

178 The complainant A.Z. testified that A.T. identified himself as a Summitt agent at his doorstep. According to this witness, A.T.'s sales pitch was directed primarily to price comparison. A.T. told the witness that the price of natural gas would be rising to over 42 cents per cubic meter but that Summitt was offering price protection at 38 cents per cubic meter. The witness indicated that there was no discussion whatsoever with respect to electricity supply. A short time later, A.Z.

actually compared the price offering from Summitt with the current Enbridge rate which was between 17 and 23 cents per cubic meter. At that point A.Z. contacted Summitt to cancel the arrangement which was accomplished without penalty. Like L.M. and J.M. (1) A.Z. has persisted in his complaint. The signal event in this exchange from a regulatory point of view is the price comparison.

179 A.T.'s rebuttal of these complaints is not convincing. His representation of the price trend for natural gas was particularly telling. It was clear that A.T. did not have an accurate appreciation of the current natural gas pricing in the market. It appears that his knowledge of natural gas pricing was gleaned almost exclusively from the graphic presentation on the brochure, which was not designed to provide accurate information respecting natural gas prices prevailing at the time of sale.

180 The consistency of the testimony of these complainants respecting A.T.'s representation that they had really no choice but to enter into the price protection program lends credibility and reliability to the complaints.

181 It was clear from the testimony of the witnesses, and A.T. himself, that new homeowners were specifically targeted in these sales efforts. One can only conclude that the retail salespersons and their employers saw a specific advantage in targeting this category of prospective customers. While there is no evidence to the effect that Summitt knew about this focus on new homebuyers, it would certainly have been aware of it if had monitored the retail salespersons effectively. Such customers would have no reliable information respecting the utility costs associated with the properties, the nature of any arrangements made by their predecessors at the property, or the binding nature of those arrangements on themselves. In such circumstances, the Board finds that it was incumbent upon Summitt to ensure that the sales technique used by its representatives took this into account in a manner that was sensitive to this deficiency. In fact, it appears that the sales effort was focused on these customers specifically because they would be more likely to be confused about the true state of affairs of their utility supply. This has implications for the adequacy of Summitt's due diligence defence. In order to be effective, its due diligence system should have addressed this issue forthrightly, and provided its sales agents with appropriate scripts and information necessary to ensure that customers understood the nature of the arrangements they were entering into.

182 The Board finds that with respect to A.T.'s sales the following contraventions of the Act and Codes have been proven on the balance of probabilities.

1. A.T. provided false, misleading and deceptive statements to all four complainants: J.M., J.M.(1), L.M. and A.Z. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. A.T. did not provide a copy of the terms and conditions of the contract nor were they delivered to J.M. contrary to section 88.9 (1) of the Act.

3. A.T. breached section 2.1 of the Codes in all four cases as follows:

a. during the encounter with J.M., by failing to immediately and truthfully give the name of the retailer and marketer (Summitt) to the consumer, failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer;

b. during the encounters with J.M.(1), L.M. and A.Z., by failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer.

Issuance of an Order, Corrective Orders and Penalties

183 The Board has made a number of findings above that Summitt through its retail salespersons has contravened the Act and the Codes.

184 The Board's authority to issue an order respecting compliance derives from sections 112.3 and 112.4 of the Act. The Board's authority to impose monetary penalties, which are referred to as administrative penalties in the Act, derives from section 112.5 of the Act. In addition, the imposition of any administrative penalty is governed by Ontario Regulation 331/03.

185 In determining the appropriate remedy in this case, the Board has been guided by the "protective and preventive" aim of regulatory provisions identified by the Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.*:

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of

minimum standards of conduct and care.[16]

Suspension and Audit

186 In its submissions, Compliance Counsel urges the Board to make an order suspending Summitt's door-to-door sales activities immediately pending completion of an audit of its operations and processes relating to these activities and the implementation of any other recommendations the Board may make.

187 Summitt, while denying liability with respect to all of the allegations, argues in the alternative that the Board ought not to impose a suspension of its door-to-door activities. In its view, such an order would have the effect of imposing sanctions on persons not responsible for the contraventions, and is otherwise inappropriate given the circumstances illuminated during the course of this proceeding.

188 It is the Board's view that it certainly has the authority pursuant to section 112.3 and 112.4 of the Act to make an order suspending the door-to-door sales activity of Summitt. Section 112.3 provides the Board with broad authority to prevent further contraventions and section 112.4 permits the Board to grant "an order suspending or revoking" a person's licence.

189 However, the Board does not believe that suspension of Summitt's door-to-door sales activities is the appropriate approach in this case. As indicated by the introduction of its 14 Point Program on June 30, 2010, Summitt appears to recognize that some of its past practices were deficient and that improvement is needed. In light of this development, the Board will require Summitt to procure a review and audit of the sales practices of its retail salespersons in accordance with the following terms:

* The review and audit shall involve a review of 20 transactions entered into between September 1 and September 30, 2010 chosen at random.

* The entity undertaking the review and audit shall be an independent third-party recognized as an expert in conducting such activities.

* The review and audit will assess compliance by Summitt and its agents in the conduct of these transactions, in light of the 14 Point Program described elsewhere in this Decision.

* The product of that review and audit will be a report which will be filed with the Board and Compliance Staff.

* The review and audit will contain a conclusion respecting the extent to which Summitt and its sales agents have substantially complied with the 14 Point Program.

190 If the conclusion of the review and audit is that Summitt and its agents have substantially complied with the 14 Point Program, the Board will take no further action with respect to this aspect of its decision. On the other hand, if the conclusion of the third-party review and audit is that Summitt was not in substantial compliance with the 14 Point Program, the Board will then reconvene to receive submissions from Summitt and Compliance Staff respecting next steps. In such circumstances, suspension or revocation of Summitt's door-to-door sales activity will be at issue, in addition to any other remedial direction the Board may impose.

Compensatory and Restitutionary Remedy

191 Compliance Staff also urged the Board to make orders requiring Summitt to provide "restitution" to customers who have been harmed by contraventions found to have been proven in this case.

192 Summitt argues that the Board has no such power and that any order providing for restitution of any form for affected customers is beyond the Board's authority. Summitt's position on the subject is rooted in its view that unless the Board had been given he specific power to grant a compensatory or restitutionary remedy it is beyond its jurisdiction to do so. Summitt points to sections in the Act that direct retailers or marketers to provide restitution to customers as indicating that if the legislature had intended to provide a broader power to the Board, it would have done so. It also suggests that a proposed amendment to the Act giving authority to the Superior Court, not the Board, to make compensatory and restitutionary orders upon conviction of an offence as indicating that it was not the legislature's intention to bestow that power on the Board under the current legislation.

193 The Board finds that subsection 112.3 of the Act is sufficiently broad and clear in its effect to permit the Board to make orders to remedy a contravention by providing compensation and restitution to parties affected by the contravention. That section reads as follows:

> 112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to ... (a) remedy a contravention that has occurred:

194 In the Board's view, this provision was intended to provide the Board with significant flexibility in crafting an appropriate order to remedy a contravention. This approach is consistent with the Supreme Court of Canada's decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)* where the Court found that a similar broadly worded provision of the Canada Labour Code provided "the flexibility and the authority to create the innovative remedies which are needed to

counteract breaches of the Code and to fulfil its purposes and objectives."[17]

195 In the Board's view, it would be very odd and inconsistent with the "purposes and objectives" of the Act if the Board were to find, as it has, that specific contraventions of the statute have been committed by Summitt but be unable to remedy those breaches by ordering compensation and restitution, particularly where the breach resulted in material and quantifiable costs to innocent consumers.

196 The evidence in this case shows that customer after customer was misled into signing contracts that provided an economic benefit to Summitt at the expense of the customer.

197 To permit Summitt to retain that money is inappropriate by any measure. Clearly, if the Board was precluded from making such orders, or if section 112.3 of the Act was less clear than it seems to be, the Board would have no option but to ignore this aspect of the circumstances arising in this case. But it is our view that section 112.3 of the Act does contemplate the making of compensatory and restitutionary orders.

198 Accordingly, the Board directs that:

> In cases where the Board made a finding of non-compliance, the Board directs Summitt to cancel without any penalty or cost whatsoever the electricity or natural gas supply contracts entered into by each of the complainants where it has not already done so, and to compensate the customers who have been subject to those contracts an amount equivalent to the difference between the sums paid by them pursuant to the contracts and the prevailing RPP prices, in the case of electricity supply contracts, and system gas prices, in the case of gas supply contracts over the period, together with interest on that amount equal to the prime rate charged by Summitt's bank within 90 days of the date of this Decision and Order . This aspect of our order affects D.B. and J.T., A.H. and C.S., D.M., A.S., J.W., A.G., C.L, Z.P., W.G., Z.A., P.S., V.T., T.V., J.M., J.M.(1), LM., and A.Z.
>
> In cases where the Board made a finding of non-compliance and the customer was required to pay liquidated damages to cancel their electricity and/or natural gas supply contracts, Summitt shall repay each of the complainants the amount of those liquidated damages together with interest on that amount equal to the prime rate charged by Summitt's bank within 90 days of the date of this Decision and Order. This aspect of our Decision affects CL., W.G., and V.T.
>
> There were a couple of complainants that testified their status with Summitt was unclear. The Board directs Summitt to provide a letter to those complainants indicating unequivocally that Summitt has no outstanding claim with respect to

> these customers. To the extent that Summitt may have referred some matters affecting complainants who testified in this proceeding to collection agencies, Summitt is directed to terminate all such proceedings and to take all steps necessary to ensure that the credit rating of the affected customers does not reflect any outstanding claim from Summitt. This aspect of our decision affects ZP. and T.V.

199 Compliance Staff should ensure that all of the complainants entitled to restitution receive a copy of this decision.

Administrative Penalty

200 As noted above, the imposition of administrative penalties arises through the operation of section 112.5 of the Act as informed by Ontario Regulation 331/03.

201 Pursuant to Regulation 331/03 the Board is required to make a determination as to the extent of the deviation from the requirements of the respective enforceable provisions. The regulation provides a schedule which categorizes contraventions as major moderate or minor, and provides a range of penalty for each category.

202 In making this determination the Board is also required to take into account the extent to which the adverse effects of the contravention have been mitigated by the person who committed the contravention, whether the person who committed the contravention has previously contravened any enforceable provision, and whether the person who committed the contravention derived any economic benefit from the contravention. The Board is also empowered to take into account any other criteria that it considers relevant in this determination of the extent of deviation.

203 The Board has never before had to engage in this characterization of contraventions, and accordingly there is no guidance for the panel from previous decisions. Nor does the Board consider it particularly useful for the purposes of this case to review the amounts of fine imposed in other jurisdictions for like contraventions. It is the Board's view that the imposition of administrative penalties pursuant to section 112.5 of the Act is a matter that needs to be determined within the context of this marketplace and its rather unique circumstances.

204 Compliance Counsel argues that the contraventions in this case were consistently in the major category. In its view, the use of unfair practices designed to ensnare consumers into contractual arrangements they would not otherwise have entered into is a serious, hence major, contravention.

205 Summitt argues that these contraventions fall within the minor or moderate category of severity. It based this view on several factors. First, it suggests that the complaint-to-registration ratio for the retail salespersons is very low. This means in its submission that the contraventions should be dealt with as isolated events of sales agent conduct for which Summitt Energy exercised

an appropriate degree of due diligence. Summitt also suggests that the effect of the contravention in a number of the instances is minor. It bases this submission on the observation that a number of the customers terminated the agreement during the statutory cooling off period or prior to the reaffirmation call. In other cases, Summitt unilaterally released the customers from their presumed contractual obligations.

206 These contraventions were clearly committed with a view to economic gain both on the part of the retail salespersons and Summitt itself. The consequences of entering into a long-term fixed-price contract can be very serious. This element of household expense can be virtually doubled as a result of the energy price protection plans, especially those respecting the supply of electricity.

207 On the other hand, the Board notes that there were a number of occasions where Summitt appeared to recognize that something very seriously had gone wrong with the particular sale and cancelled the contract unilaterally, without penalty.

208 It is the Board's intention that Summitt will be denied any economic benefit from these transactions as a result of the Board's restitutionary order under section 112.3. of the Act.

209 The Board does not consider Summitt's due diligence program in place during the relevant period to be in any degree in mitigation of penalty. The due diligence program was inadequate for the purposes of avoiding liability and is also inadequate in providing mitigation of sentence. The due diligence program did not adequately take into account the dynamic and complex nature of the market, and the potential for confusion by customers, a confusion materially contributed to by the organization of the sale devised by Summitt.

210 However, with a few exceptions the Board is of the view that the contraventions proven in this case fall into the high end of the moderate category both with respect to the effect of the contravention, and the nature of the contravention.

211 The exceptions relate to the representations made by retail salespersons to the effect that continued service from the local distribution utility was contingent upon signing the contract. In the Board's view, these unfair practices achieve a higher level of turpitude, and fall within the major category with respect to the nature of the contravention, and the moderate category with respect to the effect of the contravention. It is not determinative of this analysis that some customers avoided binding contractual relations. It was certainly the intention of the retail salespersons that the sale would be effective, notwithstanding that it had been procured through a seriously improper representation. Further, the Regulation stipulates that it is the "potential" for adverse effects on consumers, not actual effects that should govern the characterization of the contraventions.

212 This assessment leads to our finding that for 15 of the violations of Section 88.4 of the Act found to have occurred the administrative penalty should be set at $9,000 per contravention. For the two contraventions which the Board considers to be Major the penalty is set at $13,500.

213 In addition, the Board has found there to be eight contraventions of Section 88.9 of the Act. The Board considers each of these to fall into the moderate category for both potential to adversely affect consumers and the extent of deviation from the requirement. Accordingly, the administrative penalty for these violations is set at $9,000 for each contravention.

214 The Board considers the violations of the respective Codes to be subsumed in the contraventions of the Act delineated above.

Costs

215 The Board will require Summitt to pay the costs associated with the prosecution of the Notice to a ceiling of $65,000.

Implementation

216 This panel will remain seized of this case for the purposes of the audit process, and to provide the parties with guidance with respect to the implementation of any aspect of this Decision.

217 IT IS THEREFORE ORDERED THAT:

1. Summitt shall take all necessary step to ensure compliance with sections 88.4 (2) (c), 88.4 (3) (c) and 88.9 (1) of the Act and section 2.1 of the Codes.

2. Summitt shall pay an administrative penalty in the amount of $234,000.

3. Summitt shall procure a review and audit of the sales practices of its retail salespersons in accordance with all of the terms and conditions contained in the Decision portion of this Decision and Order.

4. Summitt shall file the result of the review and audit ordered in item No. 3 above with Board by January 15, 2011.

5. Summitt shall remedy the individual contraventions found by the Board in accordance with all of the terms and conditions contained in the Decision portion of this Decision and Order.

6. Summitt shall pay the Board's costs of and incidental to, this proceeding including the costs incurred by Compliance Counsel to a ceiling of

$65,000 immediately upon receipt of the Board's invoice.

7. In the event of a dispute over the terms of this Order, including the interpretation of any of the provisions of this Order, Summitt or Compliance Counsel may apply to the Board to adjudicate the dispute.

DATED at Toronto, November 18, 2010

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

qp/e/qlspi

1 John D. McCamus, *The Law of Contracts,(Toronto: Irwin Law, 2005) at pp* 182-183

2 McCamus, at 182-183

3 *Harris v. Great Western Railway Co.* (1876), 1 Q.B.D. 515

4 McCamus at 184

5 *Parker v. South Eastern Railway Co.*, (1877), 2 C.P.D. 416 (C.A.)

6 McCamus at 184

7 *R. v. Sault Ste. Marie,[*1978] S.C.R. 1299 (*"Sault Ste. Marie"*)

8 *Sault Ste. Marie at pp.1312*

9 *Sault Ste. Marie at pp.1326*

10 [1924] 1 D.L.R. 440 at 442 (Ont. S.C. (A.D.)).

11 [1982] 2 S.C.R. 616 at 629.

12 2003 MBCA 80.

13 *Hill v. East & West India Dock Co.*, (1884), 9 App. Cas. 448 at 456 (H.L.).

14 *Sault Ste. Marie at pp.1331*.

15 Implementation of Consumer Protection (Retailer/Marketer) Provisions of the Energy Consumer Protection Act, 2010 (EB-2010-0245.

16 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 219.

17 *Royal Oak Mines Inc. v. Canada (Labour Relations Board),* [1996] 1 S.C.R. 369 at paras. 64-65.

TAB 8

2013 ONSC 318
Ontario Superior Court of Justice (Divisional Court)

Summitt Energy Management Inc. v. Ontario (Energy Board)

2013 CarswellOnt 4037, 2013 ONSC 318, [2013]
O.J. No. 1617, 228 A.C.W.S. (3d) 306, 309 O.A.C. 85

Summitt Energy Management Inc., Appellant and Ontario Energy Board, Respondent

Kiteley J., Ducharme J., Daley J.

Heard: December 11, 2012
Judgment: April 9, 2013
Docket: Toronto 624/10

Counsel: W. Burden, S. Selznick, J.I. Knol, for Applicant
M. Philip Tunley, A. Gonsalves, M.A. Helt, for Respondent

Subject: Public; Civil Practice and Procedure; Contracts; Natural Resources; Torts

APPEAL by retail energy marketer from decision of Ontario Energy Board issuing compliance order, imposing penalty, and directing restitution.

Decision of the Board:

I. Introduction

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

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

II. The Hearing

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

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

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

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

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

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

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

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

III. The Decision of the Board

10 The Board issued its Decision and Order on November 18, 2010 [2010 CarswellOnt 10638 (Ont. Energy Bd.)], which was followed by a clarifying Order on December 13, 2010. In its Decision and Order, the Hearing Panel noted that the proceeding was the Board's first opportunity to hear, under oath, testimony of customers of an energy retailer with respect to the practices of door-to-door retail sales persons in the energy retail market.

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

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

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

A. The nature of Summitt's sales force

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

B. Summitt's two-part contract

15 The Board noted that it was beyond the scope of the proceeding to make any specific determination with respect to the actual contractual effect of the sales effort engaged in by Summitt's retail sales persons; however, the Board did find that the presentation of the two-part contract document to the customer, referred to by its retail sales persons as

a "brochure," fell short of reasonable notice of the contents and the significance of the contractual documents.

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

C. The representations regarding comparative pricing

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

D. The representation of the Provincial Benefit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Issues in the Appeal

36 The following issues are raised on this appeal:

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

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

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

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

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

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

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

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

V. Standard of Review

37 Various standards apply. First, if the Appellant establishes bias, an abuse of process or a breach of procedural fairness then there must be a new hearing. Second, the Board's ruling on the standard of proof and its treatment of due diligence are subject to a standard of review of correctness. They are issues of general law that are both central to the legal system as a whole and outside the Board's specialized area of expertise. Third, as for the failure to have a separate penalty hearing and whether the Board had jurisdiction to order restitution, the appropriate standard of review is reasonableness.

VI. Fresh Evidence

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

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

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

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

> (a) The evidence should generally not be admitted if, by due diligence it could have been adduced at trial; (this general principle will not be applied as strictly in a criminal case as in civil cases);
>
> (b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (c) The evidence must be credible in the sense that it is reasonably capable of belief; and,
>
> (d) It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [1]

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

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

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

VII. Reasonable Apprehension of Bias

44 As mentioned above, Summitt seeks leave to revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias by reason of

Patrick Duffy of Stikeman Elliott LLP ("Stikeman Elliott") having acted as the independent legal counsel ("ILC") retained to advise the Board in the compliance proceeding below. Summitt bases its argument of reasonable apprehension of bias entirely on the following two facts:

> (a) Stikeman Elliott's representation of certain of the Appellant's competitors during the period 2008 - 2011, including involvement by Stikeman Elliott in other proceedings before the Board and/or other regulatory agencies on behalf of such parties; and
>
> (b) Stikeman Elliott's Membership in the Ontario Energy Association (OEA), of which the Appellant and Appellant's counsel are also members, and involvement by Stikeman Elliott in certain OEA Committees.

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

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

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

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

47 This means that the reasonable person would understand: (1) the role of a member of the Ontario Energy Board, a quasi-judicial function. In particular, she would understand the obligation of Board Members to base their decisions on the evidence before them and the applicable law; (2) the ethical restraints and rules of professional conduct that

govern lawyers and the fiduciary relationships they have with their clients. In particular, she would understand the rules relating to a lawyer's relationship to clients, quality of service, confidentiality, avoidance of conflicts of interest; [6] and encouraging respect for the administration of justice; (3) the nature of the industry, in particular the nature of the retail energy marketing sector; (4) the nature of the Ontario Energy Association, including its scope of activities and membership.

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

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

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

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

51 To find a reasonable apprehension of bias would require the reasonable, right minded and informed person mentioned in *Committee for Justice & Liberty v. Canada (National Energy Board)* to assume that (1) the members of the Board ignored their duty to base their decision on the evidence before it and the applicable law; and (2) that Mr. Duffy, the ILC, acted unethically in advising the Board. At a minimum, he would be breaching his

duty of honesty and candour to his client, the Board; his obligation to avoid conflicts of interest and his obligations to the administration of justice. We also reject the submission that a reasonable, right minded and informed person would think that his duty of loyalty to other clients would move the ILC to seek an outcome in this case that would comparatively advantage his other clients by encouraging a result that negatively affects Summitt. This submission is based on a misunderstanding of a lawyer's duty of loyalty to a client.

52 It should also be emphasized that Summitt does not claim that the ILC actually did anything improper. While the factual record is understandably sparse there is no basis to assume that the ILC did anything improper. Moreover, given the Board's statement that "all of the information that has been made available to or considered by the Board has been on the public record" there can be no suggestion that the ILC surreptitiously gave information to the Board that worked to Summitt's detriment.

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

B. The fact that the ILC was a member of the OEA

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

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

them, this is irrelevant. The Board did not consider the new regulations but based its decision on Summitt's procedures and their sufficiency with respect to each of the various infractions.

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

C. A closing observation on bias

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

VIII. Standard of Proof: Was Summitt Convicted of "Strict Liability Offences"?

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

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

60 The resolution of this question is complicated by how the matter was dealt with before the Board. All counsel at the hearing referred to these matters as offences and seemed to accept that the classification of offences in *Sault Ste. Marie (City)* as "absolute liability", "strict liability" and full "mens rea" applied to these compliance proceedings. Summitt argued that these were strict liability offences while Compliance Counsel argued that they were

absolute liability offences. Relying on the presumption of strict liability in *Sault Ste. Marie (City)*, the Board concluded that the "enforceable provisions engaged in this proceeding" were strict liability offences. In reaching this conclusion the Board expressed the view that the overall legislative regime and the subject matter of the Act were not amenable to an absolute liability regime. The Board also considered that the imposition of absolute liability would be unjust given: (1) the fact that Summitt was vicariously liable for the actions of its sales persons; and (2) the potential size of the monetary penalties as well as the possibility of suspension or revocation of Summitt's licence. Consequently the Board concluded, "The Board will apply a strict liability standard, and will consider the due diligence defence advanced by Summitt as a defence to liability per se."

61 Despite this apparent acceptance of *Sault Ste. Marie (City)* before the Board neither counsel for Summitt nor Compliance Counsel made any reference to the requirement in *Sault Ste. Marie (City)* that, for strict liability offences, "the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act."[9] Instead Compliance Counsel referred the Board to *C. (R.) v. McDougall* [2008 CarswellBC 2041 (S.C.C.)] where the Supreme Court confirmed that the balance of probabilities standard applies in all civil cases, and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." At para 49 of *McDougall* the Court clarified that:

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

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

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

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

A. The scheme of the Act

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

> 126. (1) A person is guilty of an offence who,
>
> (a) undertakes an activity without a licence for which a licence is required under this Act and for which a person has not been granted an exemption from the requirement to hold a licence;
>
> (b) knowingly furnishes false or misleading information in any application, statement or return made under this Act or in any circumstances where information is required or authorized to be provided under this Act;
>
> (c) fails to comply with a condition of a licence or an order of the Board made under this or any other Act;
>
> (c.1) fails to comply with an assurance of voluntary compliance given under section 112.7;
>
> (c.2) fails to comply with an assurance of voluntary compliance entered into under section 88.8 before that section was repealed;
>
> (d) contravenes this Act, the regulations or a rule made under section 44; or
>
> (e) contravenes the *Energy Consumer Protection Act, 2010* or the regulations made under it.

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

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

B. The nature of the proceeding

67 That conclusion is further supported by the nature of the proceedings. These proceedings are neither criminal nor quasi-criminal. Rather, they are protective and

preventative rather than penal in nature. They concern economic, contractual activity with a focus on regulatory compliance and consumer protection. We accept the Respondent's submission that these proceedings are "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity." [10] They are also "proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute." [11] This is supported by the language of s. 112.5(1.1) of the Act which provides that "The purpose of an administrative penalty is to promote compliance with the requirements established by this Act and the regulations." These proceedings are analogous to disciplinary or regulatory proceedings under the *Law Society Act*, R.S.O. 1990, c. L.8; the *Securities Act*, R.S.O. 1990, c. S.5 or the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18. According to the analysis in *Wigglesworth*, these are not offences within the meaning of s. 11 of the *Canadian Charter of Rights and Freedoms*. This is another reason to reject Summit's contention that they were convicted of quasi-criminal offences.

C. Nature of the penalties

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

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

D. Conclusion

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

IX. Due Diligence Defence

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

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

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

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

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

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

future will require a reexamination and possible re-calibration of the due diligence program.

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

X. Lack of a Separate Hearing on Penalty

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

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

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

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

XI. Did the Board Have Jurisdiction to Order Restitution to Certain Complainants?

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

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

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

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

83 Mr. Burden argues that the Board erroneously relied on the Supreme Court of Canada's decision in *C.A.S.A.W., Local 4 v. Royal Oak Mines Inc.* [22] in holding that section 112.3(1)(a) of the Act gave it the jurisdiction to make a restitutionary order. He notes that the *Canada Labour Code*, the statute being considered in that case, specifically gave the Labour Board the jurisdiction to order an equitable remedy. As the Act does not specifically give the Board the jurisdiction to order an equitable remedy, he submits that the Board exceeded its jurisdiction when it ordered restitution.

84 It is certainly correct that the Act does not expressly speak of equitable remedies. Section 112.3(1)(a) of the Act provides that the Board "*may make an order* requiring the person to comply with the enforceable provision and to *take any such action* as the Board may specify

to remedy a contravention that has occurred." By any measure this is a clear and broad grant of remedial powers.

85 In *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)* [23] the Ontario Court of Appeal has confirmed the Board's statutory power to determine the scope of its own jurisdiction in circumstances such as those raised in this case, stating that:

> Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers... **If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal**. Its substance may still be reviewed for other reasons — on either a reasonableness or correctness standard — but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity".
>
> [Emphasis added]

86 The Board should be able to interpret its own statute in deciding remedies appropriate to ensure compliance, under the broad discretion given to it. Summitt's argument, which relies on the distinction between equitable and common law remedies, is a technical point that runs counter to the principle of deference to the tribunal, and contrary to the purposes of the *Act*. It also ignores the clear instruction in *Rizzo & Rizzo Shoes Ltd., Re* that:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [24]

87 In our view the Board had express authority under s. 112.3 of the Act to "remedy a contravention" of any of the enforceable provisions in issue, which the Board found had occurred. The Board's interpretation of this authority to include the specific remedial orders made in this case was a reasonable one, based upon the Board's specialized expertise in the regulation of retail energy marketing, and is entitled to deference on this appeal. Even if a standard of correctness is applied, that standard affords no basis to read down the plain wording of s. 112.3 of the Act to preclude such remedies, as Summitt suggests on this appeal.

XII. Abuse of Process

88 In its factum, Summitt submitted that the entire proceeding was an abuse of process and as a result, the order should be quashed and the charges should be stayed. Summitt took the position that the Board led Summitt to reasonably believe that it was in compliance with

its regulatory obligations and that it would work with Summitt if any perceived deficiencies arose. Summitt based this assertion on the following:

> (1) The settlement on January 30, 2009 of a prior Notice of Intention against Summitt in connection with allegations that Summitt's reaffirmation calls were non-compliant and that Summitt was thereby engaging in unfair marketing practices;
>
> (2) On August 11, 2009, the Board released its RCP. In this report the Board inspected and assessed sales agent training and monitoring and contract management of the five most active licensed energy retailers in Ontario, including Summitt. Part of the Executive Summary included the following statement "[T]he inspections completed as part of Phase 1 provided validation that the licensees operating in the gas and electricity retail markets of Ontario are, for the most part, doing so in accordance with applicable legal and regulatory requirements pertaining to consumer protection;
>
> (3) The Board had previously closed the files in relation to 17 of the 19 consumer complaints for which it led evidence at the hearing; and
>
> (4) The Board previously concluded that the complaint by K.S. and R.S. was without merit.

89 Further Summit submitted that while it was working co-operatively with the Board on compliance-related issues, the Board commenced a secret investigation of Summitt, and then issued the Notice of Intention without any warning and without giving Summitt a reasonable opportunity to address any concerns and, if relevant, rectify any perceived deficiencies. The Board led Summitt to believe that its programs and materials were compliant with the Act, the Regulation and the Codes and that they met the standards required. To then commence fresh enforcement proceedings was vexatious, unfair and oppressive such as to constitute an abuse of process.

90 During oral submissions, counsel for Summitt observed that he was not advancing the issue of abuse of process because he conceded that the circumstances did not meet the requisite threshold but he observed that it gave context to his other submissions. When pressed as to whether abuse of process was or was not an issue in this appeal, counsel for Summitt said that he was not abandoning it but he would make no oral submissions.

91 Summitt raised the issue of abuse of process with Compliance Counsel at various times prior to the hearing, but never brought a motion or otherwise sought relief from the Board in that regard. In anticipation of such a motion, Compliance Counsel called Ms. Christine Marijan, whose investigation led to the proceeding. Counsel for Summitt cross-examined her at length, but in closing submissions did not argue abuse of process. Summitt raised that issue for the first time on appeal.

92 Having raised the issue with Compliance Counsel and having cross-examined the Board's witness, we conclude that Summitt deliberately did not argue any abuse of process during the proceedings before the Board. It thereby denied the Board any opportunity to lead evidence in response to such allegations. It also denied the Board any opportunity to rectify the alleged abuse before the conclusion of its proceedings. The Board made no ruling on any alleged abuse of process, from which appeal can be taken under s. 33 of the Act. As such, these issues should not now be raised for the first time on appeal.

93 In any event, we are not persuaded that the enforcement proceedings constituted vexatious, unfair or oppressive conduct. We agree with Compliance Counsel that the earlier proceedings did not, and could not, limit the Board's ability to seek compliance remedies in respect of Summitt's door-to-door sales activities, or the ability of a duly constituted Hearing Panel to make findings in that regard. Furthermore, this is not one of those "clearest cases" where a stay would be an appropriate remedy. It cannot be said that anything done in this case "would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious". [25]

XIII. Procedural Fairness

94 In its factum and in submissions, Summitt raises four issues which it says undermined procedural fairness: (a) inadequate disclosure; (b) the Board's use of the 2009 Retail Compliance Plan; (c) the compressed schedule of the proceeding; and (d) reliance by the Board on the binder that contained complaints from additional consumers.

95 Counsel agree that a duty of fairness applies to administrative decisions that affect the rights, privileges or interests of a defendant. The following factors are relevant to a determination of the content of the duty of procedural fairness: the nature of the decision being made; the nature of the statutory scheme; the importance of the decision to those affected by it; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the tribunal. [26] Based on those factors, Summitt argues that the doctrine of legitimate expectations supports its assertion that the content of the duty of fairness owed to it was at the high end of the spectrum, akin to a judicial proceeding.

A. Inadequate Disclosure

96 After receiving the Notice of Intention and before the hearing date was set, Summitt asked Compliance Counsel to agree to a procedural timetable that included disclosure and written interrogatories. In the absence of agreement, Summitt brought a motion before the Hearing Panel. The motion to set a timetable (including an "issues conference" and a

"technical conference") as well as for specific disclosure was dismissed with reasons, except for one item to which Compliance Counsel consented.

97 In dismissing Summitt's motion, the Board followed recent appellate decisions holding that the strict *Stinchcombe* standard, developed in the context of true criminal proceedings, does not apply to regulatory proceedings, because

> (a) no individual rights are at stake;
>
> (b) the sanctions available are administrative rather than penal in nature; and
>
> (c) "To require a Board to disclose all possibly relevant information gathered in the course of regulatory activities could easily impede its work from an administrative standpoint." [27]

98 Furthermore, the Supreme Court held in *May v. Ferndale Institution*:

> The *Stinchcombe* principles do not apply in the administrative context. In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. [28]

99 As Compliance Counsel pointed out, on June 24, 2010 Summitt was given an extensive disclosure package and further disclosure was made over time. Counsel has failed to persuade us that Summitt was prejudiced as a result of the inability to obtain the increased disclosure. Simply because the motion was dismissed does not constitute inadequate disclosure. The decision by the Board was reasonable. Summitt has failed to establish that the lack of further disclosure constituted a denial of natural justice or led to a failure of procedural fairness.

B. The Board's use of the 2009 Retail Compliance Plan ("RCP")

100 In August 2009, the Board released its Retail Compliance Plan which was a non-binding Board staff report, based on an inspection of the offices, records and compliance systems of Summitt and four other retail energy marketers. Its express purpose was to focus Board Staff's future compliance activities.

101 Summitt objects to the fact that the RCP was not disclosed to it until the day before the hearing commenced. Furthermore, counsel argues that if Summitt had known that the Board was going to use the RCP, Summitt would have sought disclosure of all the data underlying the Report.

102 Summitt concedes it did not ask for a copy of the RCP when it was referenced in the first witness statement and never requested the underlying data. It submits that a failure to request does not excuse a failure to disclose.

103 When counsel for Summitt objected to the request to make the RCP an exhibit at the hearing, Compliance Counsel redacted objected parts. However, as Compliance Counsel pointed out, in cross-examination of Summitt's Compliance Manager on the issue of due diligence, the Panel accepted that the RCP had broader relevance and admitted the whole Report. Summitt claims that any reliance on the RCP was unfair because it is hearsay and because Summitt was denied the chance to test the contents.

104 We are not persuaded that the approach by the Board to the RCP constituted procedural unfairness. Summitt was aware of the 2009 Report because it was mentioned in a witness statement, but more importantly, because it had been one of the subjects of the survey and analysis. Yet Summitt made no request for disclosure when it was referred to in an early witness statement, nor was it included in its motion for disclosure. When the Board asked for an unredacted copy and thereby showed interest in its contents, Summit made no request for an adjournment. Summitt's lack of due diligence is a significant factor in determining whether the earlier non-disclosure affected the fairness of the hearing process. [29]

C. Compressed schedule

105 Summitt referred to the Board's Rules of Practice and Procedure in sections 14, and 27 to 33 to support its contention that it had legitimate expectations that it was entitled to make written interrogatories, access alternative dispute resolution procedures and technical, issues and pre-hearing conferences. Instead, the Board forced Summitt to an early hearing without the opportunity to explore those expectations.

106 On June 17, 2010, the Board issued the Notice of Intention which provided 15 days within which Summit could request a hearing, failing which the Board could proceed with making an order. Also on June 17, 2010, the Board issued an Interim Order for Compliance which required Summitt to take all necessary steps to ensure that its sales agents complied with the Act, the Regulation and the Codes. On June 24, 2010, Summitt requested an extension of time to request a hearing. On June 28th, the Board issued Procedural Order No. 1, in which it extended the time for Summitt to request a hearing to July 9 and ordered Summitt to provide written assurance that it would take steps to ensure its sales agents were complying with the Interim Compliance Order. On June 30th and July 7th, Summitt wrote letters to the Board detailing the response to the Interim Compliance Order. On July 8th, Summitt requested a hearing. On July 9th, the Board ordered an oral hearing to commence the week of August 23rd.

107 On August 4th, Summitt served a notice of motion seeking disclosure, written interrogatories, an order directing that the parties participate in a technical conference, an issues conference, facilitated mediation or alternative dispute resolution and a pre-hearing conference; a timetable that would incorporate the pre-hearing steps; and an adjournment of the hearing. On August 23rd, the Board denied Summitt's motion in its entirety, with the exception of ordering Compliance Staff to produce some consumer data that had been requested by Summitt's expert, and the Board ordered that the hearing commence on August 30th.

108 The hearing occurred over the six days of August 30 to September 3 and September 8, 2010.

109 In comparison with the typical course of litigation, that does represent a compressed schedule. However, that is not the proper comparison. The Board has its own Rules of Practice and Procedure and has experience in their application. As counsel agree, this was a matter of first instance in that it was the first hearing of the Board at which consumer complainants would give evidence. But that does not mean that Summitt was entitled to expect that all of the Rules of Practice and Procedure would be available. All of the decisions challenged by Summitt are within the discretion of the Board. The Appellants have not demonstrated that any of these decisions were unreasonable or that they adversely affected the procedural fairness of the hearing.

D. Use of the binder

110 At the conclusion of the oral hearing, Compliance Counsel submitted to the Board a binder containing allegations of additional consumer complaints against Summitt. Compliance Counsel asked the Board to consider the additional allegations when imposing penalty. Summitt strongly objected to the admission of these additional allegations. The Board directed the parties to make submissions concerning the admissibility of the binder of additional complaints as part of its written closing submissions. In the Decision and Order the Board made no mention of whether it decided to admit the binder of additional allegations into evidence, or whether it relied on any of the additional allegations in its determinations that violations had been established and/or penalty.

111 Summitt submits that the Board's broad sweeping comments and conclusions concerning Summitt's due diligence program strongly suggest that the Board did consider the additional allegations in its determinations that violations had been established and penalty, as such comments and conclusions extended well beyond the conduct of the 5 agents in respect of the 28 consumer contracts that formed the subject of the charges in the Notice of Intention.

112 We reject that contention. The Board's findings about the deficiencies in Summitt's systems were based on the evidence before it. Nothing in the reasoning suggests that the evidence was buttressed by the other allegations in the binder.

113 The Board made no mention of the binder in their reasons. There is no reason to consider that this was an oversight. Compliance Counsel and Summitt made written submissions on the admissibility of that material. The Board could not have considered the materials without first ruling on their admissibility. As the Board made no such ruling, the only proper inference is that it did not admit, consider, or in any way rely on that material.

E. Conclusion on procedural fairness

114 We are not persuaded that the doctrine of legitimate expectations supports Summitt's submission that it was owed a duty of fairness at the high end of the spectrum. Without establishing precisely where on the spectrum the duty lay in this case, none of the grounds for challenging the procedural fairness of the hearing have been established.

ORDER TO GO AS FOLLOWS:

115 The appeal is dismissed. As confirmed by counsel in correspondence dated January 17, 2013, the Appellant shall pay to the Board costs on a partial indemnity scale in the amount of $25,000 all inclusive.

Appeal dismissed.

Footnotes

1 *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), at 13

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

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

4 *R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256 (Eng. K.B.); *Hutterian Brethren Church of Starland v. Starland (Municipal District) No. 47* (1993), 9 Alta. L.R. (3d) 1 (Alta. C.A.); *Mitchell v. Institute of Chartered Accountants (Manitoba)*, [1994] M.J. No. 65 (Man. Q.B.) at para. 17, 18, 24; aff'd [1994] M.J. No. 551 (Man. C.A.)

5 *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.). *R. v. S. (R.D.)*, *supra*, note 3.

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

7 [1978] 2 S.C.R. 1299 (S.C.C.)

8 [1987] 2 S.C.R. 541 (S.C.C.) at para. 23.

9 *Sault Ste. Marie (City)* at p. 1325

10 *Wigglesworth*, at para. 23.

11 *Supra*, at para. 23.

12 *Supra*, at para. 21.

13 The Board set the administrative penalties as follows: (1) $9,000 for each of 15 moderate violations of s. 88.4 of the *Act*; (2) $13,500 for two major contraventions of s. 88.4 of the *Act*; (3) $9,000 for each of eight moderate violations of s. 88.9 of the *Act*.

14 2012 ONCA 208 (Ont. C.A.) at para. 52.

15 *Supra*, para. 46.

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

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

18 *Therrien c. Québec (Ministre de la justice)*, [2001] 2 S.C.R. 3 (S.C.C.) at para. 89.

19 Decision and Order, p. 8 [AB & C, Tab 3]

20 Decision and Order, p. 52 [AB & C, Tab 3]

21 [2004] 1 S.C.R. 629 (S.C.C.)

22 [1996] 1 S.C.R. 369 (S.C.C.)

23 (2010), 99 O.R. (3d) 481 (Ont. C.A.) at para. 24

24 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21

25 *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.) at para. 118, adopting *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.).

26 *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paras. 23 to 28; *Shooters Sports Bar Inc. v. Ontario (Alcohol & Gaming Commission)*, [2008] O.J. No. 2112 (Ont. Div. Ct.) at para. 40.

27 *Toronto Hydro-Electric System Ltd., Re* (October 14, 2009), Doc. EB-2009-0308 (Ont. Energy Bd.) at paras. 12-21.

28 *May v. Ferndale Institution*, [2005] 3 S.C.R. 809 (S.C.C.) at paras. 91-92.

29 *R. v Dixon* [N.S.C.C. sub nom *R. v. McQuaid*, [1998] 1 S.C.R. 244 (S.C.C.)]

End of Document

TAB 9

2012 SCC 8
Supreme Court of Canada

Richard v. Time Inc.

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

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

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

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

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

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

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

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

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

Per curiam:

Introduction

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

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

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

II. Origin of the Case

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

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

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

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

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

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

> *If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we'll confirm that*
>
> **WE ARE NOW AUTHORIZED TO PAY $833,337.00 IN CASH TO MR JEAN MARC RICHARD!**
>
> . . . . .
>
> ... And now that we've been authorized to pay the prize money, the very next time you hear from us if you win, it will be to inform you that
>
> **A BANK CHEQUE FOR $833,337.00 IS ON ITS WAY TO _____ ST!**
>
> . . . . .
>
> ... The truth is, if you hold the Grand Prize winning number,
>
> **YOU WILL FORFEIT THE ENTIRE $833,337.00 IF YOU FAIL TO RESPOND TO THIS NOTICE!**

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

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

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

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

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

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

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

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

III. Judicial History

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

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

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

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

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

18 Cohen J. added that the Document contained two false representations. First, its signer, Elizabeth Matthews, did not exist, so she could not have "certified" the content of the Document, contrary to what was stated. That fiction was in clear contravention of ss. 219 and 238 *C.P.A.*, since it gave an imaginary person a particular status or identity (para. 38). Next, the fact that the appellant might not be the grand prize winner had been withheld from him by the respondents or, at the very least, had been "buried in a sea of text" with the expectation that his enthusiasm would induce him to subscribe to *Time* magazine (para. 39). In Cohen J.'s opinion, the failure to reveal such an important fact was contrary to s. 228 *C.P.A.* She summed up her view on the presence of false or misleading information in the Document as follows: "It is patently obvious to any reader that the mailing from Time was not only false and incomplete, it was specifically designed to be misleading, both in the words chosen, the size of the conditions or disclaimers and their ambiguity, especially to a person who is not reading in his or her mother tongue" (para. 40).

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

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

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

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

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

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

the "Bonus" prize to which the appellant would have been entitled if he had had the winning entry and returned the reply coupon within five days.

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

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

25 Both parties appealed the Superior Court's decision. The Quebec Court of Appeal, in reasons written by Chamberland J.A., allowed the respondents' appeal and dismissed the incidental appeal. It thus dismissed the appellant's recourse in damages in its entirety, but without costs because of the nature of the case and the novelty of the issues (para. 53).

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

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

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

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

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

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

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

IV. Analysis

A. Issues

32 This appeal raises the following issues:

> 1. What is the proper approach in Quebec for determining whether an advertisement constitutes a false or misleading representation for the purposes of the *Consumer Protection Act*?
>
> 2. In the absence of a contract referred to in s. 2 *C.P.A.*, can a consumer exercise a recourse in damages under s. 272 *C.P.A.*?
>
> 3. What are the conditions for exercising the recourse in punitive damages provided for in s. 272 *C.P.A.*?
>
> 4. Should punitive damages be awarded in this case and, if so, what criteria should be considered in determining their quantum?

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

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

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

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

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

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

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

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

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

40 Quebec consumer law has essentially centred around two successive consumer protection statutes enacted in 1971 and 1978, which were subsequently supplemented by

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

41 Today's *Consumer Protection Act* establishes a much more elaborate legal scheme than the previous version did. Its enactment reflects the Quebec legislature's desire to extend the protection of the *C.P.A.* to a broader range of contracts and to explicitly regulate certain business practices that are considered fraudulent as regards their effect on consumers. In practical terms, the Act is divided into seven titles that reflect the main concerns of Quebec consumer law. Title I, "Contracts Regarding Goods and Services", contains provisions whose primary purpose is to restore the contractual balance between merchants and consumers. Title II, "Business Practices", identifies certain types of business conduct as prohibited practices in order to ensure the veracity of information provided to consumers through advertising or otherwise.

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

(2) Protection Against False or Misleading Advertising

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

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

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

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

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

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

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

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

48 What is meant by the expression "general impression" requires further explanation, however. Although there have been few cases on this point, the courts seem in some

recent decisions to have established more explicit principles from which a predominant interpretation can be drawn.

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

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

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

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

[Emphasis added.]

(*Loi sur la protection du consommateur: analyse et commentaires* (1999), at p. 828)

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

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

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

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

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

then make it possible to determine whether a representation made by a merchant constitutes a prohibited practice.

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

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

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

60 This dissection of the text by the Court of Appeal resembles the classical civil law approach to contract analysis and strays from the determination of the general impression the entire advertisement conveys to a consumer. Furthermore, the purpose of Title II of the *C.P.A.* is to make merchants responsible for the content of their advertisements on the basis of the general impression the advertisements convey. By adopting so exacting a standard in s. 218 *C.P.A.*, the legislature intended to ensure that consumers could view commercial advertising with confidence rather than suspicion. Thus, the objective of the current legislation is to enable a consumer to assume that the general impression conveyed

by an advertisement is accurate and not the opposite. In sum, the analytical approach chosen by the Court of Appeal for establishing the general impression conveyed by the respondents' advertisement was inconsistent with the general impression test adopted by the legislature.

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

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

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

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

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

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

66 This Court's decisions relating to trade-marks provide a good example of this interpretive approach. In *Mattel U.S.A. Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772 (S.C.C.), the Court was asked to clarify the standard to be used by the courts to determine whether a trade-mark causes confusion with a registered trade-mark. Binnie J., writing for the Court, concluded that the average consumers protected by the *Trade-marks*

Act are "ordinary hurried purchasers" (para. 56). He explained that "[t]he standard is not that of people 'who never notice anything' but of persons who take no more than 'ordinary care to observe that which is staring them in the face'" (para. 58).

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

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

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

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

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

ltée, the "general impression" referred to in s. 218 *C.P.A.* is the impression of a commercial representation on a credulous and inexperienced consumer.

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

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

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

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

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

false or misleading representation. This would decrease the level of protection provided to consumers by the *C.P.A.*

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

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

78 For all these reasons, we cannot endorse the definition of the average consumer proposed by the Court of Appeal. In our opinion, the concept of the credulous and inexperienced consumer applied by the Quebec courts in the line of authority that prevailed before the judgment of the Court of Appeal in the instant case is more consistent with the Quebec legislature's objective of protecting consumers from false or misleading advertising. A court asked to assess the veracity of a commercial representation must therefore engage, under s. 218 *C.P.A.*, in a two-step analysis that involves — having regard, provided that the representation lends itself to such an analysis, to the literal meaning of the words used by the merchant — (1) describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and (2) determining whether that general

impression is true to reality. If the answer at the second step is no, the merchant has engaged in a prohibited practice.

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

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

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

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

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

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

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

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

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

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

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

86 Despite all the conditions laid down in the Document, on which the respondents placed great emphasis, a point was made in the Document of referring to the appellant as the sweepstakes winner. In the column on the left, he was listed with other winners — real or fictitious — and the entry contained the notation "PRIZE STATUS: AUTHORIZED FOR PAYMENT". There were repeated indications that a cheque was about to be mailed to the appellant. He was also urged to put aside all his doubts and hurry to return the reply coupon, for otherwise he might lose everything! The reply coupon received by the appellant

even referred to the number assigned to him as a "Prize Claim Number", not as a contest participation number. It would be possible to continue this list of tricks used in writing and laying out the text for a long time.

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

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

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

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

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

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

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

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

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

> **272.** If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,
>
> (a) the specific performance of the obligation;
>
> (b) the authorization to execute it at the merchant's or manufacturer's expense;
>
> (c) that his obligations be reduced;
>
> (d) that the contract be rescinded;
>
> (e) that the contract be set aside; or
>
> (f) that the contract be annulled,
>
> without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

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

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

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

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

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

96 The most thorough critique of Professor L'Heureux's view has come from Professor Pauline Roy. According to Professor Roy, to exclude the prohibitions set out in Title II of the *C.P.A.* from the application of s. 272 *C.P.A.* is to forget that in Quebec civil law, the failure to fulfil an obligation not to do something can trigger civil liability in the same way as the failure to fulfil an obligation to do something. For this reason, she does not believe that [TRANSLATION] "the [legislature's] choice of a negative wording to describe the obligation not to mislead and not to engage in unfair practices to induce consumers to enter into contracts can have the effect of depriving consumers of the civil recourses specifically provided for in the *Consumer Protection Act*" (P. Roy, "Les dommages exemplaires en droit québécois: instrument de revalorisation de la responsabilité civile", doctoral thesis (1995), at p. 476).

97 Professor Roy also advances arguments related to the general interest and the objectives of the *C.P.A.* If the contrary view were to prevail, she says, it would have to be concluded that the Quebec legislature intended to prevent consumers from claiming punitive damages from merchants or manufacturers who had engaged in practices prohibited by the Act. In

her view, such an outcome would be inconsistent with the role the legislature intended for Title II of the *C.P.A.* She explains this as follows:

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

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

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

Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977), 15 *Osgoode Hall L.J.* 327, at pp. 356-57).

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

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

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

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

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

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

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

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

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

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

108 Nevertheless, there is an important point with regard to legal interest that needs to be clarified. A consumer contract is not necessarily formed at the precise time when the consumer purchases or obtains goods or services. In Quebec civil law, a contract is formed when the acceptance of an offer to contract is received by the offeror (art. 1387 *C.C.Q.*). If a

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

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

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

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

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

(a) Contractual Remedies

112 Subject to the other recourses provided for in the *C.P.A.*, a consumer with the necessary legal interest can institute proceedings under s. 272 *C.P.A.* to have the court sanction a failure by a merchant or a manufacturer to fulfil an obligation imposed on the merchant or manufacturer by the *C.P.A.*, by the regulations made under the *C.P.A.* or by a voluntary undertaking. The Court of Appeal has correctly confirmed that the recourse provided for in

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

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

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

115 In the case of prohibited practices, some judges and authors have asserted that the contractual remedies provided for in s. 272 *C.P.A.* are available to a consumer only if the consumer has suffered prejudice as a result of an unlawful act committed by a merchant

or a manufacturer (see *Ata v. 9118-8169 Québec inc.*, 2006 QCCS 3777, [2006] R.J.Q. 1883 (C.S. Que.)). For advocates of this view, the contravention of a provision of Title II of the *C.P.A.* does not give rise to an irrebuttable presumption of prejudice, since s. 272 *C.P.A.* is intended only to sanction unlawful acts that have actually deceived a consumer (see also Lluelles and Moore, at p. 312). This view corresponds in substance to the position taken by the respondents in the case at bar (R.F., at para. 57).

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

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

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

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

that the consumer's decision to enter into a contractual relationship with the merchant was fundamentally tainted by the misleading advertisement.

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

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

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

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

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

(b) Compensatory Damages

125 Where a merchant or a manufacturer fails to fulfil an obligation to which s. 272 *C.P.A.* applies, the consumer can ask the court for an award of compensatory damages. The respondents argue that the recourse in compensatory damages is available only if the court awards one of the contractual remedies provided for in s. 272(*a*) to (*f*) *C.P.A.* (R.F., at para. 72). This argument is without merit. Section 272 *C.P.A.* contains the words "without prejudice to his claim in damages, in all cases". This phrase, which is in no way ambiguous, means that the recourse in damages, regardless of whether it is contractual or

extracontractual in nature, is not dependent on the specific contractual remedies set out in s. 272(*a*) to (*f*). By using these words in s. 272 *C.P.A.*, the legislature intended to leave consumers free to choose the sanctions they consider appropriate to repair any prejudice they suffer.

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

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

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

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

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

> **253.** Where a merchant, manufacturer or advertiser makes use of a prohibited practice in case of the sale, lease or construction of an immovable or, in any other case, of a

> prohibited practice referred to in paragraph *a* or *b* of section 220, *a*, *b*, *c*, *d*, *e* or *g* of section 221, *d*, *e* or *f* of section 222, *c* of section 224 or *a* or *b* of section 225, or in section 227, 228, 229, 237 or 239, it is presumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price.

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

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

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

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

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

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

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

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

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

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

of the natural persons targeted by the advertisement entered into a contract as a result of the advertisement. It is enough that the advertisement target a [TRANSLATION] "potential consumer" (L'Heureux and Lacoursière, at p. 489).

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

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

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

(6) Application of the Principles to This Appeal

140 The appellant has not asked for any contractual remedies in this case. He is instead seeking the equivalent of US$1 million in damages. Although his motion to institute proceedings is unclear in this respect, it became apparent as the case progressed that this amount is mainly for punitive damages and also includes an incidental amount for an extracontractual claim. We must begin by determining whether the appellant has established the respondents' extracontractual liability on the basis of the principles discussed above.

141 To establish the respondents' extracontractual liability, the appellant had to show that they had engaged in a prohibited practice. He then had to prove that he had seen the representation constituting a prohibited practice before the contract was formed, amended or performed and that a sufficient nexus existed between the representation and the goods or services covered by the contract. If these facts were proven, the absolute presumption

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

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

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

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

(1) Independent Nature of Punitive Damages

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

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

146 Moreover, our interpretation is consistent with the one adopted by this Court in *de Montigny c. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64 (S.C.C.). In that case, the Court stated that s. 49(2) of the *Charter of human rights and freedoms* ("*Quebec Charter*") creates an independent and distinct right to claim punitive damages. In its decision, the Court accepted (at para. 40) the opinion expressed by L'Heureux-Dubé J., dissenting in part, in *F.E.E.S.P. c. Béliveau St-Jacques*, [1996] 2 S.C.R. 345 (S.C.C.), at para. 62, that the words "in addition" in s. 49(2) of the *Quebec Charter*

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

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

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

(2) General Criteria for Awarding Punitive Damages

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

148 The respondents argue that, even if this Court finds that the appellant has the legal interest required to claim punitive damages, such damages cannot be awarded on the facts of

this case. The respondents urge the Court to accept that an award of punitive damages under s. 272 *C.P.A.* is appropriate only if the conduct of the merchant or manufacturer was in bad faith or malicious (R.F., at para. 133). They rely in this regard on this Court's reasons in several decisions rendered in cases concerning the common law: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.), and *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.). In our opinion, this argument is wrong and must fail.

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

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

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

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

151 The legislature has thus retained greater flexibility in structuring specific schemes for awarding punitive damages. A review of Quebec legislation containing provisions that authorize awards of punitive damages confirms the flexibility and variability of the rules applicable to such damages in Quebec law. On the one hand, the enabling provisions take a variety of forms. Not all of them require proof that the act was malicious, oppressive or high-handed, which is required at all times at common law. For example, a violation of s. 1 of the *Tree Protection Act*, R.S.Q., c. P-37, automatically entails the payment of punitive

damages. As well, art. 1899 *C.C.Q.*, s. 56 of the *Act respecting prearranged funeral services and sepultures*, R.S.Q., c. A-23.001, and, of particular relevance in this appeal, s. 272 of the *C.P.A.* do not explicitly require malicious or high-handed conduct.

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

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

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

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

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

justice system. This denunciatory function also helps ensure that the preventive purpose of punitive damages is fulfilled effectively.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Criteria for Awarding Punitive Damages

175 In establishing the criteria for awarding punitive damages under s. 272 *C.P.A.*, it must be borne in mind that the *C.P.A.* is a statute of public order. No consumer may waive in advance his or her rights under the Act (s. 262 *C.P.A.*), nor may any merchant or manufacturer derogate from the Act, except to offer more advantageous warranties (s.

261 *C.P.A.*). The provisions on prohibited practices are also of public order (L'Heureux and Lacoursière, at pp. 443 *et seq.*).

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

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

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

(d) Summary of Principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

187 Finally, according to the respondents, the trial judge's decision to fix the quantum of punitive damages at $100,000 was arbitrary. At para. 71 of her reasons, the trial judge stated that she had chosen that amount because it was the amount of the bonus prize the appellant had a chance to win in addition to the grand prize of US$833,337 if he validated his entry within five days after receiving the Document. The respondents seem to be arguing that it was irrational to fix the quantum at $100,000 in these circumstances.

(1) Role of Trial Courts

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

189 Since this task requires trial judges to examine the facts carefully, the Court of Appeal must show considerable deference before varying the quantum of damages. It must

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

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

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

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

192 This argument is untenable. William Miller, Director of Promotion Policy for the respondent Time Consumer Marketing Inc., himself testified that "[t]he sweepstakes are used to attract attention to our subscription promotions" (A.R., vol. II, at p. 4). He also explained in detail that Time Inc. had decided to send out direct mailings using several lists of names in order to increase subscriptions (*ibid.*, at p. 5). The mailings were personalized to attract the attention of consumers and invite them to subscribe to *Time* magazine (trial judgment, at para. 21; *ibid.*, at pp. 4 and 5). We infer from Mr. Miller's testimony that the distribution of such mailings was not only a common practice for the respondents but was also done on

a large scale. In light of this evidence, although the trial judge did not have evidence that could indicate the precise number of mailings, her finding cannot be characterized as wholly erroneous. In our opinion, the gist of her finding was that the respondents had sent many mailings in Quebec to a large number of consumers. The evidence supporting this finding was something she could properly consider in analysing the gravity of the respondents' conduct in this case. The quantum of punitive damages cannot therefore be revised on this basis.

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

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

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

> [**THE COURT**]:
>
> [William Miller] admitted [that Time Inc.] did [use the advertising scheme at issue over the years]. Why don't you ask him if Time is able to pay that amount if I would award the amount in the claim, the part of the claim which relates to moral and punitive damages?

HUBERT SIBRE:

Q. 338 Would Time be able to pay this amount? Would it have the solvency to pay this amount if ever condemned?

[A]. You know, I'm not part of the financial structure of the company so I really can't comment on that.

[Emphasis added; A.R., vol. II at pp. 31-32.]

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

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

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

(a) Criteria for Assessing the Quantum

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

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

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

202 The third factor mentioned in art. 1621(2) *C.C.Q.*, the extent of the reparation already awarded under other heads, is an analytical criterion that has been used frequently (*St-*

Ferdinand; *Augustus v. Gosset*, [1996] 3 S.C.R. 268 (S.C.C.); *Macara c. 2845-4288 Québec inc.*, [2004] R.J.Q. 2637 (C.A. Que.)). According to it, the court must not award punitive damages unless compensatory damages are not enough to discourage repetition either because their amount is too small or because they will have no impact on the debtor's financial situation. However, this principle does not change the independent nature of punitive damages. Even if an award of compensatory damages is generous, it will not necessarily preclude an award of punitive damages.

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

(b) Other Criteria to be Considered

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

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

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

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

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

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

(3) Application to the Facts

210 Where a court decides to award punitive damages, it must relate the facts of the case before it to the objectives that underlie such damages and ask itself how, in that particular case, awarding them would further those objectives. It must try to fix the most appropriate amount, that is, the lowest amount that would serve the purpose (*Whiten*, at para. 71). Even if we disregard the alleged violation of the *Charter of the French language* as an aggravating factor, the fact remains that the respondents' conduct was serious and deliberate and that it was capable of affecting a large number of consumers. Moreover, even after the consumer complained about their misleading practices, there is no evidence that the respondents did anything to correct them. This must also be considered an aggravating factor.

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

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

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

214 Finally, the fact that the amount of the award of compensatory damages is small favours awarding a significant amount of punitive damages. At trial, the respondents were ordered to pay $1,000 in compensatory damages, and we propose to uphold that award.

However, that amount is clearly inadequate to meet the preventive purpose of art. 1621 *C.C.Q.*

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

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

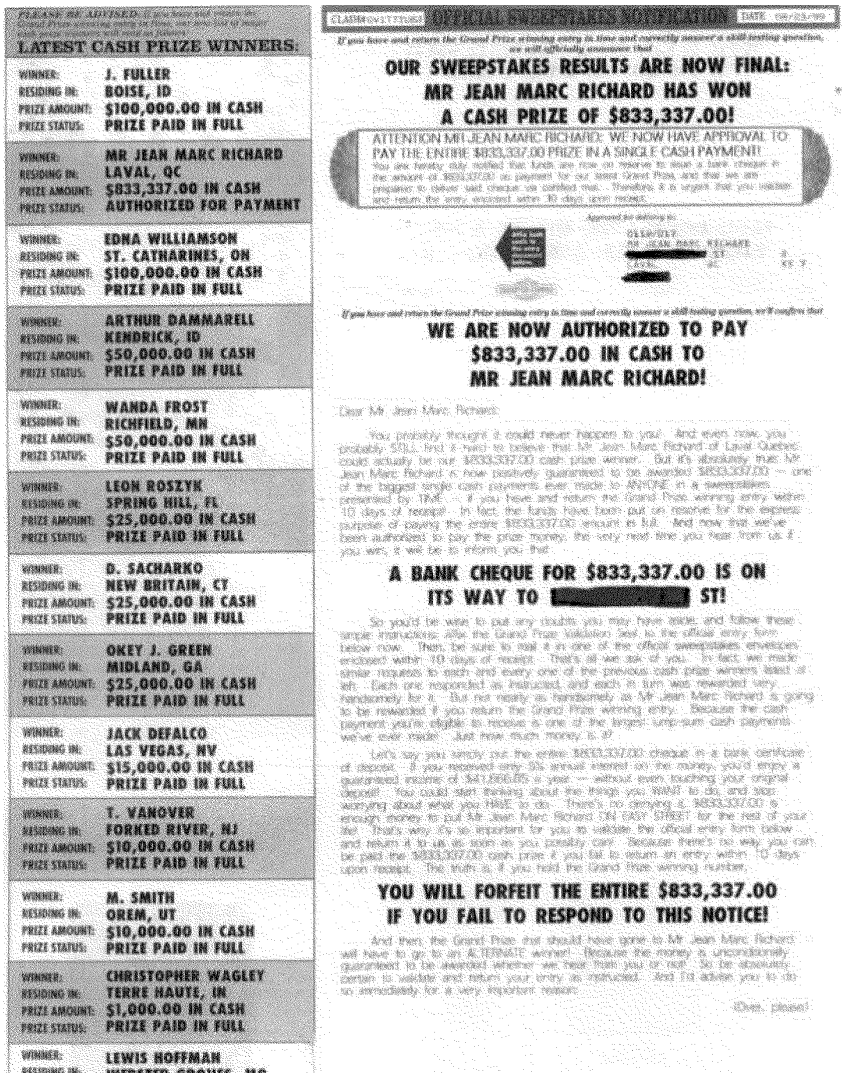
V. Conclusion

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

Appeal allowed in part.

Pourvoi accueilli en partie.

Appendix



LATEST CASH PRIZE WINNERS:

WINNER:	J. FULLER
RESIDING IN:	BOISE, ID
PRIZE AMOUNT:	$100,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	MR JEAN MARC RICHARD
RESIDING IN:	LAVAL, QC
PRIZE AMOUNT:	$833,337.00 IN CASH
PRIZE STATUS:	AUTHORIZED FOR PAYMENT
WINNER:	EDNA WILLIAMSON
RESIDING IN:	ST. CATHARINES, ON
PRIZE AMOUNT:	$100,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	ARTHUR DAMMARELL
RESIDING IN:	KENDRICK, ID
PRIZE AMOUNT:	$50,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	WANDA FROST
RESIDING IN:	RICHFIELD, MN
PRIZE AMOUNT:	$50,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	LEON ROSZYK
RESIDING IN:	SPRING HILL, FL
PRIZE AMOUNT:	$25,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	D. SACHARKO
RESIDING IN:	NEW BRITAIN, CT
PRIZE AMOUNT:	$25,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	OKEY J. GREEN
RESIDING IN:	MIDLAND, GA
PRIZE AMOUNT:	$25,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	JACK DEFALCO
RESIDING IN:	LAS VEGAS, NV
PRIZE AMOUNT:	$15,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	T. VANOVER
RESIDING IN:	FORKED RIVER, NJ
PRIZE AMOUNT:	$10,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	M. SMITH
RESIDING IN:	OREM, UT
PRIZE AMOUNT:	$10,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	CHRISTOPHER WAGLEY
RESIDING IN:	TERRE HAUTE, IN
PRIZE AMOUNT:	$1,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	LEWIS HOFFMAN

OFFICIAL SWEEPSTAKES NOTIFICATION

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

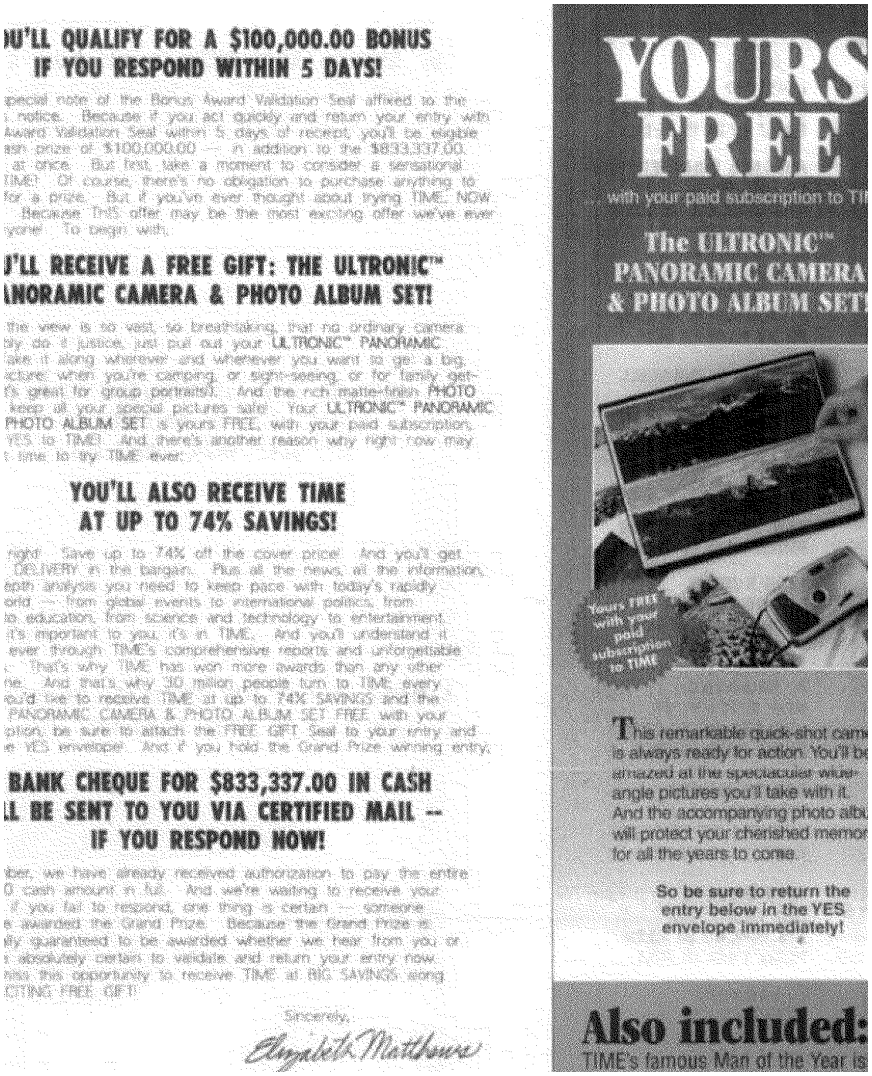
ATTENTION MR JEAN MARC RICHARD: WE NOW HAVE APPROVAL TO PAY THE ENTIRE $833,337.00 PRIZE IN A SINGLE CASH PAYMENT!

WE ARE NOW AUTHORIZED TO PAY
$833,337.00 IN CASH TO
MR JEAN MARC RICHARD!

A BANK CHEQUE FOR $833,337.00 IS ON
ITS WAY TO [redacted] ST!

YOU WILL FORFEIT THE ENTIRE $833,337.00
IF YOU FAIL TO RESPOND TO THIS NOTICE!

Graphic 1



U'LL QUALIFY FOR A $100,000.00 BONUS IF YOU RESPOND WITHIN 5 DAYS!

special note of the Bonus Award Validation Seal affixed to the notice. Because if you act quickly and return your entry with Award Validation Seal within 5 days of receipt, you'll be eligible ash prize of $100,000.00 — in addition to the $833,337.00 at once. But first, take a moment to consider a sensational TIME! Of course, there's no obligation to purchase anything to for a prize. But if you've ever thought about trying TIME, NOW Because THIS offer may be the most exciting offer we've ever yone. To begin with,

J'LL RECEIVE A FREE GIFT: THE ULTRONIC™ ANORAMIC CAMERA & PHOTO ALBUM SET!

the view is so vast, so breathtaking, that no ordinary camera ay do it justice, just pull out your ULTRONIC™ PANORAMIC ake it along wherever and whenever you want to get a big, icture: when you're camping, or sight-seeing, or for family get- t's great for group portraits!. And the rich matte-finish PHOTO keep all your special pictures safe! Your ULTRONIC™ PANORAMIC PHOTO ALBUM SET is yours FREE, with your paid subscription. YES to TIME! And there's another reason why right now may time to try TIME ever.

YOU'LL ALSO RECEIVE TIME AT UP TO 74% SAVINGS!

right! Save up to 74% off the cover price! And you'll get DELIVERY in the bargain. Plus all the news, all the information, epth analysis you need to keep pace with today's rapidly orld — from global events to international politics, from to education, from science and technology to entertainment, it's important to you, it's in TIME. And you'll understand it ever through TIME's comprehensive reports and unforgettable . That's why TIME has won more awards than any other ne. And that's why 30 million people turn to TIME every ou'd like to receive TIME at up to 74% SAVINGS and the PANORAMIC CAMERA & PHOTO ALBUM SET FREE with your option, be sure to attach the FREE GIFT Seal to your entry and e YES envelope. And if you hold the Grand Prize winning entry,

BANK CHEQUE FOR $833,337.00 IN CASH L BE SENT TO YOU VIA CERTIFIED MAIL -- IF YOU RESPOND NOW!

ber, we have already received authorization to pay the entire 0 cash amount in full. And we're waiting to receive your if you fail to respond, one thing is certain — someone e awarded the Grand Prize. Because the Grand Prize is ly guaranteed to be awarded whether we hear from you or absolutely certain to validate and return your entry now. iss this opportunity to receive TIME at BIG SAVINGS along CITING FREE GIFT!

Sincerely,

Elizabeth Matthews

YOURS FREE

... with your paid subscription to TI

The ULTRONIC™ PANORAMIC CAMERA & PHOTO ALBUM SET

Yours FREE with your paid subscription to TIME

This remarkable quick-shot cam is always ready for action. You'll b amazed at the spectacular wide- angle pictures you'll take with it. And the accompanying photo albu will protect your cherished memor for all the years to come.

So be sure to return the entry below in the YES envelope immediately!

Also included:

TIME's famous Man of the Year is

Graphic 2

Graphic 3

Graphic 4

End of Document

TAB 10

2006 SCC 22
Supreme Court of Canada

Mattel U.S.A. Inc. v. 3894207 Canada Inc.

2006 CarswellNat 1400, 2006 CarswellNat 1401, 2006 SCC 22,
[2006] 1 S.C.R. 772, [2006] S.C.J. No. 23, 268 D.L.R. (4th) 424, 348
N.R. 340, 49 C.P.R. (4th) 321, 53 Admin. L.R. (4th) 1, J.E. 2006-1159

Mattel, Inc., Appellant v. 3894207 Canada Inc., Respondent

McLachlin C.J.C., Major [*], Bastarache, Binnie,
LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: October 18, 2005
Judgment: June 2, 2006
Docket: 30839

Proceedings: affirming *Mattel U.S.A. Inc. v. 3894207 Canada Inc.* (2005), 2005 FCA 13, 2005 CarswellNat 180, *(*sub nom. *Mattel Inc. v. 3894207 Canada Inc.)* 329 N.R. 259, *(*sub nom. *Mattel Inc. v. 3894207 Canada Inc.)* 38 C.P.R. (4th) 214 (F.C.A.); affirming *Mattel U.S.A. Inc. v. 3894207 Canada Inc.* (2004), 248 F.T.R. 228, 30 C.P.R. (4th) 456, 2004 FC 361, 2004 CarswellNat 660 (F.C.); reversing in part *Mattel U.S.A. Inc. v. 3894207 Canada Inc.* (2002), 23 C.P.R. (4th) 395, 2002 CarswellNat 4497 (T.M. Opp. Bd.)

Counsel: Paul D. Blanchard, Henry S. Brown, Q.C., Lisa R.W. Vatch, for Appellant
Sophie Picard, for Respondent

Subject: Civil Practice and Procedure; Intellectual Property; Property

APPEAL by opponent of trade-mark registration from judgment reported at *Mattel U.S.A. Inc. v. 3894207 Canada Inc.* (2005), 2005 FCA 13, 2005 CarswellNat 180, *(*sub nom. *Mattel Inc. v. 3894207 Canada Inc.)* 329 N.R. 259, *(*sub nom. *Mattel Inc. v. 3894207 Canada Inc.)* 38 C.P.R. (4th) 214 (F.C.A.), affirming dismissal of opponent's application to strike mark.

POURVOI de la partie s'opposant à l'enregistrement d'une marque de commerce à l'encontre de l'arrêt publié à *Mattel U.S.A. Inc. v. 3894207 Canada Inc.* (2005), 2005 FCA 13, 2005 CarswellNat 180, *(*sub nom. *Mattel Inc. v. 3894207 Canada Inc.)* 329 N.R. 259, *(*sub nom. *Mattel Inc. v. 3894207 Canada Inc.)* 38 C.P.R. (4th) 214 (F.C.A.), qui a confirmé le rejet de son opposition demandant la radiation de la marque.

***Binnie J.*:**

1 The BARBIE doll is said by the appellant toy manufacturer to be an iconic figure of pop culture. And so, within limits, it is. The sale of various BARBIE products annually exceeds $1.4 billion worldwide, representing 35 percent of the appellant's sales. The appellant advises that Canadian girls aged three to eleven years are given an average of two BARBIE dolls per year. The appellant therefore opposes the respondent's application to register trade-marks in connection with its small chain of Montreal suburban "Barbie's" restaurants on the basis that use of the name (albeit in relation to different wares and services) would likely create confusion in the marketplace. On a casual acquaintance with both marks, it is contended, there is a likelihood that consumers would think that the doll people had something to do with a restaurant called "Barbie's". Or, as the appellant framed its point in a consumer survey by asking the following question "Do you believe that the company that makes Barbie dolls *might* have *anything* to do with the restaurant identified with this sign or logo?" (emphasis added.).

2 Merchandising has come a long way from the days when "marks" were carved on silver goblets or earthenware jugs to identify the wares produced by a certain silversmith or potter. Their traditional role was to create a link in the prospective buyer's mind between the product and the producer. The power of attraction of trade-marks and other "famous brand names" is now recognized as among the most valuable of business assets. However, whatever their commercial evolution, the legal purpose of trade-marks continues (in terms of s. 2 of the *Trade-marks Act*, R.S.C. 1985, c. T-13) to be their use by the owner "to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others". It is a guarantee of origin and inferentially, an assurance to the consumer that the quality will be what he or she has come to associate with a particular trade-mark (as in the case of the mythical "Maytag" repairman). It is, in that sense, consumer protection legislation.

3 The appellant advises that the name BARBIE and that of her "soul mate", Ken, were borrowed by their original designer from the names of her own children. The name, as such, is not inherently distinctive of the appellant's wares. Indeed, Barbie is a common contraction of Barbara. It is also a surname. Over the last four decades or so, however, massive marketing of the doll and accessories has created a strong secondary meaning which, in appropriate circumstances, associates BARBIE in the public mind with the appellant's doll products.

4 The appellant's argument is that the trade-mark BARBIE now transcends the products which originally it served to distinguish. Moreover, the appellant says, its fame goes *beyond* wares and services aimed at girls in the 3- to 11- year-old age group (its primary market) to the diverse products set out in various of its registrations ("cologne, hand lotion and body

lotion"), food products ("spices, breads, cakes, cereal, coffee, crackers, flour, fresh herbs, pies, ice cream, pizza"), as well as bicycles, backpacks, books and construction pads. Of course, nothing prevents the appellant from using its BARBIE trade-mark to boost (if it can) sales of everything from bicycles to cologne, or for that matter lawn mowers and funeral services, but the question is whether the appellant can call in aid trade-mark law to prevent other people from using a name as common as Barbie in relation to services (such as restaurants) remote to that extent from the products that gave rise to BARBIE's fame.

5 Unlike other forms of intellectual property, the gravaman of trade-mark entitlement is actual use. By contrast, a Canadian inventor is entitled to his or her patent even if no commercial use of it is made. A playwright retains copyright even if the play remains unperformed. But in trade-marks the watchword is "use it or lose it". In the absence of use, a registered mark can be expunged (s. 45(3)). There was no credible evidence that BARBIE has been used in Canada either by the appellant or by one of its licencees in connection with the services for which the respondent made trade-mark application, namely "restaurant services, take-out services, catering and banquet services".

6 In opposition proceedings, trade-mark law *will* afford protection that transcends the traditional product lines unless the applicant shows the likelihood that registration of its mark will *not* create confusion in the marketplace within the meaning of s. 6 of the *Trade-Marks Act*. Confusion is a defined term, and s. 6(2) requires the Trade-marks Opposition Board (and ultimately the court) to address the *likelihood* that in areas where both trade-marks are used, prospective purchasers will infer (incorrectly) that the wares and services - though not being of the same general class - are nevertheless supplied by the same person. Such a mistaken inference can only be drawn here, of course, if a link or association is likely to arise in the consumer's mind between the source of the well- known BARBIE products and the source of the respondent's less well-known restaurants. If there is no likelihood of a link, there can be no likelihood of a mistaken inference, and thus no confusion within the meaning of the Act.

7 The substance of the appellant's argument (set out at para. 48 of its factum) is that "Mattel's BARBIE trade-marks are famous in Canada and worldwide, instantly evoking the image of the brand in the minds of consumers. Having acquired such fame, marks such as ... BARBIE may not now be used in Canada on *most consumer wares and services* without the average consumer being led to infer the existence of a trade connection with the owners of these famous brands" (emphasis added). Some trade-marks may have that effect, but the Board found BARBIE's fame to be tied to dolls and doll accessories. At this stage, its fame is not enough to bootstrap a broad zone of exclusivity covering "most consumer wares and services". The Board was not required to speculate about what might happen to the BARBIE trade-mark in the future. It was required to deal with the respondent's application on the facts established in the evidence.

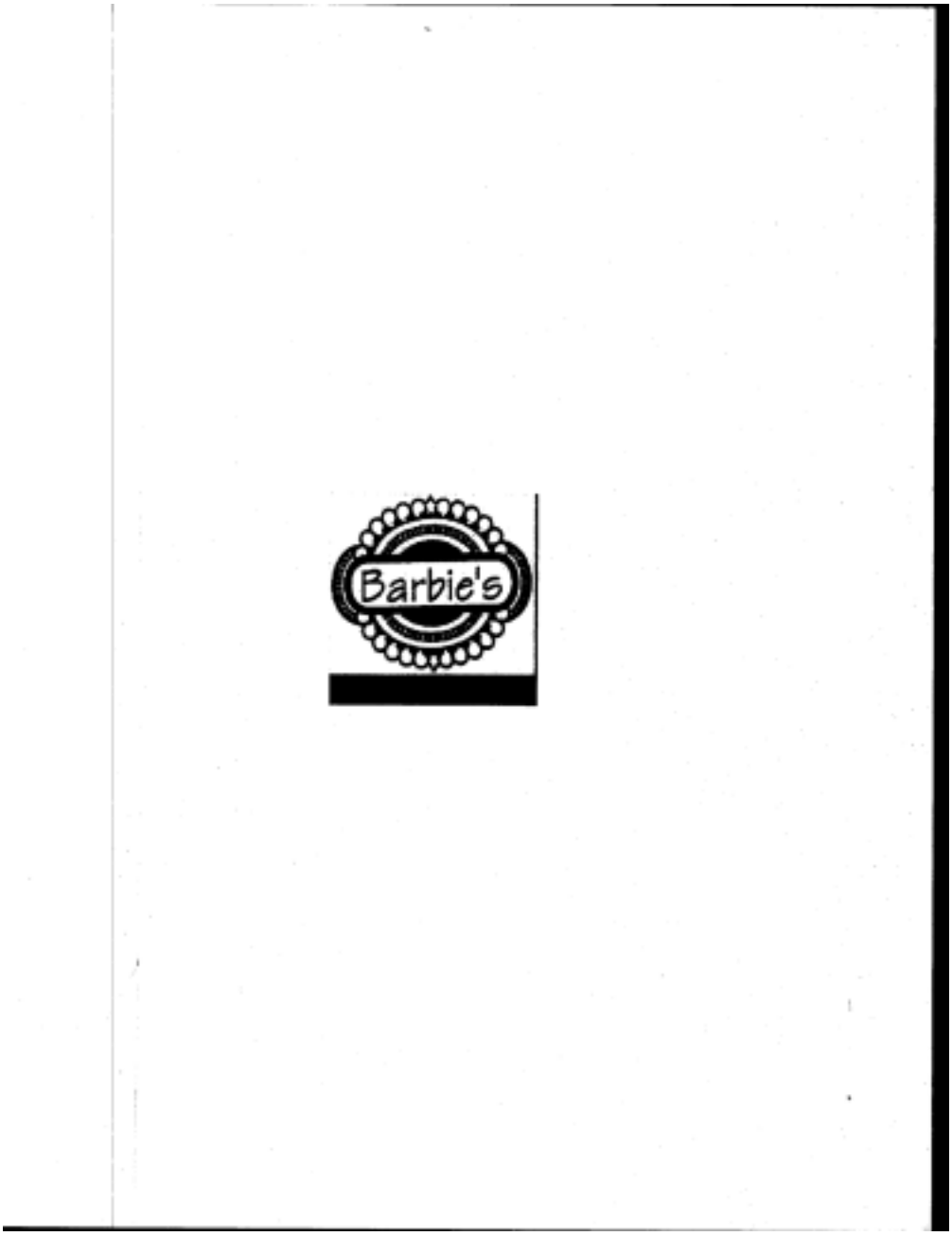
8 The appellant relies on Professor J. T. McCarthy's *dictum*, discussed below, that "a relatively strong mark can leap vast product line differences at a single bound" (*McCarthy on Trademarks and Unfair Competition* (loose-leaf ed.), at p. 11-150.1). However, the evidence before the Board was that, for BARBIE, the present case was a leap too far, and that on the evidence prospective consumers will likely *not* infer that whoever owns the BARBIE doll trade-mark is associated in some way with the restaurants identified by the applied-for mark. This is a conclusion that was open to the Board.

9 As is permitted under s. 56(5) of the Act, the appellant sought to introduce fresh evidence before the applications judge about the likelihood of confusion but the proffered evidence was found to be unresponsive to the statutory test and on that account it was rightly rejected.

10 On this appeal, the Board's decision should be upheld unless it is shown to be unreasonable. On the admissible evidence, the Board was not shown to be clearly wrong in its decision that the respondent restauranteur has established that it is *not* likely that prospective consumers will draw the mistaken inference. I would therefore affirm the reasonableness of the decision of the Board to accept registration of the respondent's trade-mark and dismiss the appeal.

I. Facts

11 The respondent opened its first Barbie's restaurant in Montreal in 1992. Over the years it has added three more (one of which subsequently closed). These are medium-priced "bar-and-grill" type operations, with meals including ribs, smoked meat, souvlaki, steak, chicken, seafood and pizza, much of which is barbecued (or, as the menu puts it, done on the "barbie-Q"), along with alcoholic beverages. There are also breakfast and lunch menus. The bulk of the business is sit-down clientele. The decor is predominantly geared to adults and the bar is an important feature of each location. The restaurants do offer a kids' menu and a "kids eat free" promotion one night of the week but the Board found its target clientele to be adults. Compared to that of the appellant, it is a modest operation. Total restaurant sales for the six years 1992-1997 inclusive totalled about $11 million. Advertising expenses, including television, radio and newspaper advertising, amounted to about $616,000 for the same time period. In September 1993, an application (now assigned to the respondent) was made to register the trade-mark BARBIE'S & DESIGN in association with "restaurant services, take-out services, catering and banquet services". The applicant's mark is prominently displayed on the exterior of the restaurants and on menus, napkins, matchbooks, receipts, order forms and business cards. The mark, as now applied for, looks like this:



Graphic 1

12 There are clearly significant points of resemblance between the trade-marks of the appellant and the trade-marks applied for by the respondent. The appellant's registered trade-mark looks like this:

BARBIE

Graphic 2

13 The appellant's trade-marks enjoy an extensive worldwide reputation for dolls and accessories primarily targeted at the market of 3- to 11-year-old girls. There are some adult collectors of BARBIE doll products. By 2001, sales, promotion, and advertising of BARBIE products across Canada generated annual sales revenue approximately $75 million, annual licensing revenues approximately $5 million, and annual advertising expenses approximately $5 million. The appellant describes itself in these proceedings as being "in the business of building brand equity". Licensing of the BARBIE trade-mark is commonplace and the wares or goods to which the trade-mark is attached are growing. The appellant sees licencing of the BARBIE trade-marks as an expanding and lucrative commercial opportunity. To date, BARBIE has not been used in Canada by the appellant or any of its licencees for restaurant services, take-out services, catering and banquet services. I generally will refer to the appellant's trade-marks collectively as the BARBIE mark.

II. Relevant Statutory Provisions

14 See Appendix.

III. History of the Proceedings

A. Canadian Intellectual Property Office, Trade-marks Opposition Board (2002), 23 C.P.R. (4th) 395 (T.M. Opp. Bd.) (Member Herzig for the Registrar of Trade-marks)

15 The Board found that both marks possessed a relatively low degree of inherent distinctiveness as they would be perceived as a nickname for or truncation of the name Barbara. Mattel's mark was very well known in Canada when used in association with dolls and doll accessories. The trade-mark sought to be registered by the applicant restauranteur had established some reputation in the vicinity of Montreal but the length of time of use of the marks favoured Mattel. The nature of the opponent's wares and the applicant's services were "quite different". Mattel's target market is children and, to some extent, adult collectors, whereas the applicant is in the restaurant business and its primary target market is adults. The marks were essentially the same aurally and in the ideas they suggested, and the overall visual impressions of the marks were essentially the same after the fairly non-distinctive design feature of the applicant's mark was discounted.

16 Though the opponent (now the appellant) in this case had attempted to demonstrate a connection between food and food-related products sold under its own BARBIE trade-marks and the applicant's restaurant services, the Board did not accept the submission that there was any real connection between the two. Although the opponent was not required to show any instances of actual confusion, and it had not done so, the absence of such evidence was only one circumstance among many to be considered.

17 In the circumstances, the Board found that the respondent's mark was not likely to be confusing with any of Mattel's BARBIE marks at the relevant times. The Board rejected the opposition and allowed the registration.

B. Federal Court (2004), 248 F.T.R. 228, 2004 FC 361 (F.C.) (Rouleau J.)

18 The applications judge observed that "[i]t cannot be automatically presumed that there will be confusion just because [Mattel's BARBIE] mark is famous" (para. 40). The test was that of reasonable likelihood of confusion and the fame of a mark "could not act as a marketing trump card such that the other factors are thereby obliterated" (para. 40). All of the relevant factors listed in s. 6(5) of the *Trade-marks Act* had to be evaluated, and "[o]ne of the key factors in this case is the striking difference between the wares" (para. 17). He stated that "...confusion is less likely when the wares are significantly different, even when the mark is well known" and that "...when the wares are significantly different, this factor must be given considerable weight" (paras. 17-18). In this case, he stated "...the nature of the wares, as well as the nature of the business of both parties, could not be more different" (para. 21) and "there is nothing about these restaurants that is suggestive of toys, dolls or childhood" (para. 20).

19 The applications judge rejected Mattel's application to introduce fresh evidence in the form of a survey proffered to show the likelihood of confusion between the marks because in his view the survey "ha[d] some blatant and determinative shortcomings that undermine[d] its relevance considerably" (para. 27). The result was that the survey could not be used to establish the existence of a real likelihood of confusion. It only served to show that Mattel's BARBIE trade-marks were indeed famous. There was no evidence of any concrete case of confusion despite the co-existence of the marks in the Montréal area for ten years. In the result, the applications judge dismissed the appeal.

C. Federal Court of Appeal (2005), 329 N.R. 259, 2005 FCA 13 (F.C.A.) (Létourneau, Noël and Pelletier JJ.A.)

20 The appellate court concluded that no error had been committed by the applications judge in rejecting the survey evidence because of the way the survey firm had framed its questions. At best, the survey results might be probative of a *possibility* of confusion, which falls short of the threshold of a reasonable *likelihood* of confusion. In the result, the conclusion of the applications judge was agreed with. The appeal was dismissed.

IV. Analysis

21 Trade-marks are something of an anomaly in intellectual property law. Unlike the patent owner or the copyright owner, the owner of a trade-mark is not required to provide the public with some novel benefit in exchange for the monopoly. Here, the trade-mark is not

even an invented word like "Kodak" or "Kleenex". The appellant has merely appropriated a common child's diminutive for Barbara. By contrast, a patentee must invent something new and useful. To obtain copyright, a person must add some expressive work to the human repertoire. In each case, the public through Parliament has decided it is worth encouraging such inventions and fostering new expression in exchange for a statutory monopoly (i.e. preventing anyone else from practising the invention or exploiting the copyrighted expression without permission). The trade-mark owner, by contrast, may simply have used a common name as its "mark" to differentiate its wares from those of its competitors. Its claim to monopoly rests not on conferring a benefit on the public in the sense of patents or copyrights but on serving an important public interest in assuring consumers that they are buying from the source from whom they think they are buying and receiving the quality which they associate with that particular trade-mark. Trade-marks thus operate as a kind of shortcut to get consumers to where they want to go, and in that way perform a key function in a market economy. Trade-mark law rests on principles of fair dealing. It is sometimes said to hold the balance between free competition and fair competition.

22 Fairness, of course, requires consideration of the interest of the public and other merchants and the benefits of open competition as well as the interest of the trade-mark owner in protecting its investment in the mark. Care must be taken not to create a zone of exclusivity and protection that overshoots the purpose of trade-mark law. As Professor David Vaver observes:

> On the one hand, well-known mark owners say that people should not reap where they have not sown, that bad faith should be punished, that people who sidle up to their well-known marks are guilty of dishonest commercial practice. These vituperations lead nowhere. One might as well say that the well-known mark owner is reaping where it has not sown when it stops a trader in a geographic or market field remote from the owner's fields from using the same or a similar mark uncompetitively. (D. Vaver, "Unconventional and Well-known Trade Marks", [2005] *Sing. J.L.S.* 1, at p. 16)

23 The purpose of trade-marks is to create and symbolize linkages. As mentioned, s. 2 of the *Trade-marks Act* defines "trade-mark" to mean

> (a) a mark that is used by a person *for the purpose* of distinguishing or so as *to distinguish wares or services* manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others...

To the same effect is art. 15 of the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1869 *U.N.T.S.* 299, which defines "trade-mark" in part as

> Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings...

24 As the Court put it in *Kirkbi AG v. Ritvik Holdings Inc. / Gestions Ritvik Inc.*, [2005] 3 S.C.R. 302, 2005 SCC 65 (S.C.C.), a trade-mark is "a symbol of a connection between a source of a product and the product itself" (*per* LeBel J., at para. 39). If, as the Board found, it is not likely that even casual consumers will make a connection between the source of BARBIE dolls and the respondent's restaurants, then the appellant's marks have received the protection to which the law entitles them.

25 The onus remained throughout on the respondent to establish the *absence* of likelihood, but the Board was only required to deal with potential sources of confusion that, in the Board's view, have about them an air of reality.

26 The appellant's aggressive defence of trade-mark protection is, of course, understandable. It not only seeks to exploit the BARBIE "brand equity" it has worked to establish but, like all trade-mark owners, is required by law to protect its trade-marks from piracy or risk having such marks lose their distinctiveness, and, potentially their legal protection: *Aladdin Industries Inc. v. Canadian Thermos Products Ltd.* (1972), [1974] S.C.R. 845 (S.C.C.); *Magder v. Breck's Sporting Goods Co.* (1975), [1976] 1 S.C.R. 527 (S.C.C.).

27 At common law, the appellant's recourse would have been to commence an action for "passing off" with its roots in the law of deceit. There is a good deal of that flavour about the appellant's complaint. In its factum, it says the respondent offered "no credible explanation" for choosing the Barbie name for its restaurants which "arouses suspicion" and should be seen as "an attempt to trade on the goodwill and reputation of the famous trade-mark". In an action for passing off, it would have been necessary for the appellant to show that the respondent restauranteur intentionally or negligently misled consumers into believing its restaurant services originated with the appellant and that the appellant thereby suffered damage. (*Consumers Distributing Co. v. Seiko Time Canada Ltd.*, [1984] 1 S.C.R. 583 (S.C.C.), at p. 601; *Kirkbi*, at para. 68). Quite apart from the issue of damages, the disparity between dolls and restaurant services would have posed, in the context of a passing-off action, an uphill battle and the appellant has not even tried to climb it.

28 Under the *Trade-marks Act*, however, the appellant's protected commercial space is not so limited. It relies in particular on the 1953 amendments and the antecedent *Report of Trade Mark Law Revision Committee to the Secretary of State of Canada* chaired by the redoubtable Dr. Harold G. Fox, Q.C. ("Fox Report"). The appellant contends that "[t]he scope of protection of famous marks in Canada was an important justification for the enactment by Parliament and proclamation" of the amendment and notes the following passage in the Fox Report:

> Some trade marks are so well known that the use of the same or similar trade marks on any wares of any kind would cause the general purchasing public to believe that the original user and owner of the trade mark was in some way responsible for the wares to which the use of the mark has been extended. [Emphasis added.] ((1953), 18 C.P.R. 1, at p. 34)

Parliament recognized the truth of that statement in 1953 and the subsequent experience of more than 50 years has borne out its wisdom. The problem is to apply the broad principle to particular situations in a way that is fair to all concerned.

29 In my view, with respect, the appellant's case is based on an overgeneralization. The fact that Parliament has recognized that *some* trade-marks are so well known that use in connection with *any* wares or services *would* generate confusion is not to say that BARBIE has that transcendence. As the Fox Report (1953) also stated:

> In a proper case this [new] ambit of protection can be widened to include the whole of the course of trade or restricted to a field limited by the use which has been made of a trade mark or trade name and the reputation acquired by it. The particular ambit of protection will in the future so far as applies to registration, be a matter for determination, having regard to all the circumstances, by the Registrar in the first instance, and by the Exchequer Court on appeal. (p. 40)

30 No doubt some famous brands possess protean power (it was submitted, for example, the distinctive red and white "*Virgin*" trade-mark has now been used in connection with such a diversity of wares and services that it knows virtually no bounds), but other famous marks are clearly product specific. "*Apple*" is said to be a well-known trade-mark associated in separate markets simultaneously with computers, a record label and automobile glass. The Board's conclusion that BARBIE's fame is limited to dolls and dolls' accessories does not at all mean that BARBIE's aura cannot transcend those products, but whether it is likely to do so or not in the context of opposition proceedings in relation to restaurant, catering and banquet services is a question of fact that depends on "all the surrounding circumstances" (s. 6(5)). Neither the "*Virgin*" nor "*Apple*" situations are before us and I make no pronouncement on either except to note them as illustrations that surfaced in the course of argument.

A. The Legal Framework

31 The respondent is not entitled to registration of its trade-mark unless it can demonstrate that use of both trade-marks in the same geographic area will not create the likelihood of confusion, i.e. mistaken inferences in the marketplace. If, on a balance of probabilities, the Board is left in doubt, the application must be rejected.

B. Standard of Review

32 The Board found the respondent had demonstrated that if granted, its trade-mark would be unlikely to create confusion with that of the appellant. While this is essentially a question of mixed fact and law, the appellant says the Board's consideration was fundamentally flawed by the erroneous interpretation given to s. 6 of the Act by the Federal Court of Appeal in *United Artists Pictures Inc. v. Pink Panther Beauty Corp.*, [[1998] 3 F.C. 534 (Fed. C.A.)] [hereinafter "*Pink Panther*"] and *Toyota Jidosha Kabushiki Kaisha v. Lexus Foods Inc.* (2000), [2001] 2 F.C. 15 (Fed. C.A.) ("*Lexus*").

33 In choosing the proper standard of review from the available options (correctness, reasonableness, or patent unreasonableness) the Court has regard to the elements of the test set out most recently in *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), and *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.). These elements have not greatly altered since *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), where Beetz J., speaking for the Court, said at p. 1088:

> ...the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

34 I turn then to the elements of the *Q.* test:

(1) Presence or Absence of a Privative Clause or Statutory Right of Appeal

35 The Act provides for a full right of appeal to a Federal Court judge who is authorized to receive and consider fresh evidence (ss. 56(1) and 56(5). There is no privative clause. Where fresh evidence is admitted, it may, depending on its nature, put quite a different light on the record that was before the Board, and thus require the applications judge to proceed more by way of a fresh hearing on an extended record than a simple appeal (*Philip Morris Inc. v. Imperial Tobacco Ltd.*) (1987), 17 C.P.R. (3d) 289 (Fed. C.A.)). Section 56 suggests a legislative intent that there be a full reconsideration not only of legal points but also of issues of fact and mixed fact and law, including the likelihood of confusion. See generally *Molson Breweries, A Partnership v. John Labatt Ltd.*, [2000] 3 F.C. 145 (Fed. C.A.), at paras. 46-51; *Novopharm Ltd. v. Bayer Inc.* (2000), 9 C.P.R. (4th) 304 (Fed. C.A.), at para. 4, and *Garbo Creations Inc. v. Harriet Brown & Co.* (1999), 3 C.P.R. (4th) 224 (Fed. T.D.).

(2) The Board's Expertise

36 The determination of the likelihood of confusion requires an expertise that is possessed by the Board (which performs such assessments day in and day out) in greater measure than is typical of judges. This calls for some judicial deference to the Board's determination, as this Court stressed in *Benson & Hedges (Canada) Ltd. v. St. Regis Tobacco Corp.* (1968), [1969] S.C.R. 192 (S.C.C.), at p. 200:

> In my view the Registrar's decision on the question of whether or not a trade mark is confusing should be given great weight and the conclusion of an official whose daily task involves the reaching of conclusions on this and kindred matters under the Act should not be set aside lightly but, as was said by Mr. Justice Thorson, then President of the Exchequer Court, in *Freed and Freed Limited v. The Registrar of Trade Marks et al*: [[1951] 2 D.L.R. 7, at p. 13]:
>
> > ...reliance on the Registrar's decision that two marks are confusingly similar must not go to the extent of relieving the judge hearing an appeal from the Registrar's decision of the responsibility of determining the issue with due regard to the circumstances of the case.

37 What this means in practice is that the decision of the registrar or Board "should not be set aside lightly considering the expertise of those who regularly make such determinations": *McDonald's Corp. v. Silverwood Industries Ltd.* (1989), 24 C.P.R. (3d) 207 (Fed. T.D.), at p. 210, aff'd (1992), 41 C.P.R. (3d) 67 (Fed. C.A.). Reception of new evidence, of course, might (depending on its content) undermine the factual substratum of the Board's decision and thus rob the decision of the value of the Board's expertise. However, the power of the applications judge to receive and consider fresh evidence does not, in and of itself, eliminate the Board's expertise as a relevant consideration: *Lamb v. Canadian Reserve Oil & Gas Ltd.* (1976), [1977] 1 S.C.R. 517 (S.C.C.), at pp. 527-28.

(3) The Purpose of the Trade-marks Act and in Particular the Trade-mark Registration Scheme

38 In *Q.*, the Chief Justice pointed out that "[a] statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court" (para. 31). An inquiry into the likelihood of the "mistaken inference" does not call for the exercise of discretion. Nor is the Board in this respect making public policy decisions or allocating scarce resources. Essentially, the Board is deciding a *lis* between the parties in a procedure that looks like an informal version of an everyday court case.

(4) Nature of the Question in Dispute

39 While the appellant frames its argument as a challenge to the correctness of the interpretation given to s. 6 by the Federal Court of Appeal in *Pink Panther* and *Lexus*, I think that in reality, for reasons which I will develop, its challenge is directed to the relative weight to be given to the s. 6(5) enumerated and unenumerated factors. The legal issue is not neatly extricable from its factual context, but calls for an interpretation within the expertise of the Board. In answer to the *Bibeault* question ("Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" (p. 1087)), I think the answer is yes, within reasonable limits. See also *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), at p. 595; *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at p. 185; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 43; *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.), at para 61.

(5) Conclusion on the Standard of Review

40 Given, in particular, the expertise of the Board, and the "weighing up" nature of the mandate imposed by s. 6 of the Act, I am of the view that despite the grant of a full right of appeal the appropriate standard of review is reasonableness. The Board's discretion does not command the high deference due, for example, to the exercise by a Minister of a discretion, where the standard typically is patent unreasonableness (e.g. *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), at para. 157), nor should the Board be held to a standard of correctness, as it would be on the determination of an extricable question of law of general importance (*Chieu v. Canada (Minister of Citizenship & Immigration)*), [2002] 1 S.C.R. 84, 2002 SCC 3 (S.C.C.), at para. 26). The intermediate standard (reasonableness) means, as Iacobucci J. pointed out in *Ryan*, at para. 46, that "[a] court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did". The question is whether the Board's decision is supported by reasons that can withstand "a somewhat probing" examination and is not "clearly wrong": *Southam Inc.*, at para. 60.

41 The foregoing analysis of the proper standard of review is consistent with the jurisprudence of the Federal Court of Appeal: see in particular *Molson Breweries, A Partnership v. John Labatt Ltd.* Rothstein J.A., at para. 51; *Novopharm Ltd.* per Strayer J.A., at para. 4; *Polo Ralph Lauren Corp. v. United States Polo Assn.* (2000), 9 C.P.R. (4th) 51 (Fed. C.A.), *per* Malone J.A., at para. 13, and Isaac J.A., at para. 10; *Christian Dior S.A. v. Dion Neckwear Ltd.*, [2002] 3 F.C. 405, 2002 FCA 29 (Fed. C.A.) *per* Décary J.A., at para. 8, and *Purafil Inc. v. Purafil Canada Ltd. / Purafil Canada Ltée* (2004), 31 C.P.R. (4th) 345, 2004 FC 522 (F.C.), *per* MacKay D.J., at para. 5.

C. Admission of the Fresh Survey Evidence

42 Before the applications judge, the appellant sought to adduce fresh evidence in the form of a survey which purported to show that

> • For 57% of the participants, BARBIE dolls came to mind when they saw the Barbie's restaurant logo.
>
> • 36% of the participants believed that the company that manufactured BARBIE dolls might have something to do with the logo of Barbie's restaurant.
>
> • 99.3% of the participants were familiar with the BARBIE dolls. (Rouleau J., at para. 10)

43 Until comparatively recently, evidence of public opinion polls was routinely held to be inadmissible because it purports to answer the factual component of the very issue before the Board or court (i.e. the likelihood of confusion), and in its nature it consists of an aggregate of the hearsay opinions of the people surveyed who are not made available for cross-examination, see e.g. *Building Products Ltd. v. B.P. Canada Ltd.* (1961), 36 C.P.R. 121 (Can. Ex. Ct.); *Rowntree Co. v. Paulin Chambers Co.* (1966), 51 C.P.R. 153 (Can. Ex. Ct.). The more recent practice is to admit evidence of a survey of public opinion, presented through a qualified expert, provided its findings are relevant to the issues and the survey was properly designed and conducted in an impartial manner.

44 The principal attack on the survey evidence in this case rests on relevance. The issue in these opposition proceedings is the *likelihood* of confusion. The survey question ("Do you believe that the company that makes Barbie dolls *might* have *anything* to do with this sign or logo?" (emphasis added)) addresses the wholly different issue of possibilities. If the survey is not responsive to the point at issue, it is irrelevant and should (as the Federal Court of Appeal held) be excluded on that ground alone.

45 As to the usefulness of the results, assuming they are elicited by a relevant question, courts have more recently been receptive to such evidence, provided the survey is both reliable (in the sense that if the survey were repeated it would likely produce the same results) and valid (in the sense that the right questions have been put to the right pool of respondents in the right way, in the right circumstances to provide the information sought). See *Canadian Schenley Distilleries Ltd. v. Canada's Manitoba Distillery Ltd.* (1975), 25 C.P.R. (2d) 1 (Fed. T.D.), at p. 9; *Joseph E. Seagram & Sons Ltd. v. Canada (Registrar of Trade Marks)* (1990), 33 C.P.R. (3d) 454 (Fed. T.D.); *Walt Disney Productions v. Fantasyland Hotel Inc.* (1994), 20 Alta. L.R. (3d) 146 (Alta. Q.B.)). Thus, in *Cartier Inc. v. Cartier Optical Ltd.* (1988), 20 C.P.R. (3d) 68 (Fed. T.D.), the court accepted as helpful a survey found to be properly designed and impartially administered and whose findings were directly relevant to the likelihood of

confusion. This was also the case in *Sun Life Assurance Co. of Canada v. Sunlife Juice Ltd.* (1988), 22 C.P.R. (3d) 244 (Ont. H.C.).

46 On the other hand, surveys have been excluded

(i) where the individuals surveyed did not constitute the relevant population, see *Joseph E. Seagram*, at p. 472; *New Balance Athletic Shoes Inc. v. Matthews* (1992), 45 C.P.R. (3d) 140 (T.M. Opp. Bd.); *National Hockey League v. Pepsi-Cola Canada Ltd.* (1992), 70 B.C.L.R. (2d) 27 (B.C. S.C.), at para. 44; *McDonald's Corp. v. Coffee Hut Stores Ltd.* (1994), 55 C.P.R. (3d) 463 (Fed. T.D.), at p. 475 or only included a subset of the relevant population: *Unitel Communications Inc. v. Bell Canada* (1995), 92 F.T.R. 161 (Fed. T.D.), at para. 117;

(ii) where the trade-mark used in the survey was not precisely the trade-mark applied for: *Canada Post Corp. v. Mail Boxes Etc. USA Inc.* (1996), 77 C.P.R. (3d) 93 (T.M. Opp. Bd.);

(iii) where the wrong question is asked, e.g. a survey done for Coca-Cola was excluded on the basis that it was not directed to the issue of confusion but rather to measure public recognition of the word Classic as part of soft drink names: *Coca-Cola Ltd. v. Southland Corp.* (2001), 20 C.P.R. (4th) 537 (T.M. Opp. Bd.). See also: *Molson Cos., A Partnership v. S.P.A. Birra Peroni Industriale* (1992), 45 C.P.R. (3d) 28 (T.M. Opp. Bd.); *Molson Breweries, a Partnership v. Swan Brewery Co.*, [1994] T.M.O.B. No. 253 (T.M. Opp. Bd.); *Toys "R" Us (Canada) Ltd. v. Manjel Inc.* (2003), 229 F.T.R. 71, 2003 FCT 283 (Fed. T.D.);

(iv) where the survey had not been carried out in an impartial and independent manner: *Unitel Communications* per Gibson J., at para. 120.

47 In the present case, the appellant retained a reputable and qualified firm to conduct the survey. However, the evidence showed that the persons questioned by the pollsters were merely shown without any context the respondent's Barbie's design logo, subsequently had it removed from their sight, and were then asked a series of questions, some of them suggestive. The key question, which the Federal Court of Appeal found to be irrelevant, was "Do you believe that the company that makes Barbie dolls *might* have *anything* to do with the restaurant identified with this sign or logo?" (emphasis added). The Montreal respondents were posed the question in French: « Croyez-vous que la compagnie qui fabrique les poupées Barbie *pourrait* avoir *quelque chose* à faire avec le restaurant identifié par cette enseigne ou ce logo? » (je souligne).

48 Other alleged shortcomings included:

(i) the lack of information provided to those who responded to the survey;

(ii) the survey *excluded* anyone who was even aware of the respondent's Barbie's restaurants. It is pointed out that such people were part of the relevant universe of individuals in the market for the respondent's services and are therefore *potentially* some of the people who may or may not "likely" be misled by the applied-for trade-mark. The survey need not be limited to such people of course, but nor should they be excluded. A similar objection was sustained in both *McDonald's Corp.* and in the *Fantasyland Hotel* case which referred with approval to *Safeway Stores Inc. v. Safeway Insurance Co.*, 657 F. Supp. 1307 (U.S. M.D. La. 1985), in this respect;

(iii) the survey methodology included questions suggestive of the answers the appellant apparently wanted to hear.

49 The appellant has not made any application to adduce the survey testimony or results as fresh evidence in this Court, and in my view the exclusion of that evidence by the applications judge does not constitute reversible error in light of the broad power given to him under s. 56(5), which provides:

> (5) On an appeal under subsection (1), evidence in addition to that adduced before the Registrar may be adduced and the Federal Court may exercise any discretion vested in the Registrar.

The use of the word "might" (or « pourrait ») in the survey question was directed to a mere possibility, rather than a probability, of confusion. The respondents who answered "yes" to this question may merely have believed that it was within the realm of possibility that the appellant had something to do with the restaurant, rather than actually inferring from the trade-marks that it was *likely* that the two trade-marks represented wares or services emanating from the same source. It is relevant if even a limited percentage of the population surveyed is confused, but evidence that a lot of people *might* or *could* possibly make the mistaken inference is not. The other grounds of objection go to the weight rather than to admissibility of the survey evidence and, subject to assessing that weight (or the lack of it), the survey evidence could have been admitted over the respondent's other objections. Lack of relevance, however, was fatal.

50 At most, the proferred survey indicated that the BARBIE trade-mark is well known. Even without the survey however, the courts below were content to proceed on the basis that BARBIE is a "well known" if not "famous" mark, and I do so as well.

D. The Statutory Test of "Confusion"

51 Trade-mark confusion is a term defined in s. 6(2) and arises if it is likely in *all* the surrounding circumstances (6(5)) that the prospective purchaser will be led to the mistaken inference

> ...that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class. [Emphasis added.]

This is not to say the nature of the wares or services is irrelevant. Section 6(5) specifically identifies "the nature of the wares, services or business" as a relevant consideration. The point of the underlined words in s. 6(2) is simply to lay it down in clear terms that the general class of wares and services, while relevant, is not controlling.

52 It is also relevant that the appellant's mark is symbolic of wares while the respondent's applied-for mark identifies services. It is possible to have confusion between the source of wares and services (*Building Products Ltd.*) but that distinction, as well, is but one of the surrounding circumstances that may be taken into consideration.

53 The appellant argued that the courts below erred in looking at the respondent's actual operations rather than at the terms set out in its application for the proposed trade-mark. It is quite true that the proper focus is the terms of the application, because what is at issue is what the registration would authorize the respondent to do, not what the respondent happens to be doing at the moment. Still, the appellant itself led a great deal of evidence (as is the practice) about the actual operation of the respondent's restaurants, including many photographs, numerous sample menus and clippings of various advertisements. In these circumstances, it is not surprising that the Board and the applications judge felt it appropriate to comment on the respondent's operation, based largely on the evidence the appellant itself had adduced. That said, I do not think the Board or the courts below were under misapprehension about the nature of the dispute. The terms of the respondent's application ("restaurant services, take-out services, catering and banquet services") were referred to by both the Board and the applications judge, and reading their respective reasons as a whole, I do not think they misapprehended the question before them.

54 Within the "all the surrounding circumstances" test, s. 6(5) of the Act lists five factors to be considered when making a determination as to whether or not a trade-mark is confusing. These are: "(*a*) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; (*b*) the length of time the trade-marks or trade-names have been in use; (*c*) the nature of the wares, services or business; (*d*) the nature of the trade; and (*e*) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them". The list of circumstances is not exhaustive and different circumstances will be given different weight in a context-specific assessment. See *Gainers Inc.*

v. Marchildon (1996), 66 C.P.R. (3d) 308 (Fed. T.D.). In opposition proceedings, as stated, the onus is on the applicant (here the respondent) to show on a balance of probabilities that there is no likelihood of confusion.

55 Evidence of actual confusion would be a relevant "surrounding circumstance" but is not necessary (*Christian Dior S.A.*, at para 19) even where trade-marks are shown to have operated in the same market area for ten years: *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19 C.P.R. (3d) 3 (Fed. C.A.). Nevertheless, as discussed below, an adverse inference *may* be drawn from the lack of such evidence in circumstances where it would readily be available if the allegation of likely confusion was justified.

(1) The Casual Consumer Somewhat in a Hurry

56 What, then, is the perspective from which the likelihood of a "mistaken inference" is to be measured? It is not that of the careful and diligent purchaser. Nor, on the other hand, is it the "moron in a hurry" so beloved by elements of the passing-off bar: *Morning Star Cooperative Society Ltd. v. Express Newspapers Ltd.* (1978), [1979] F.S.R. 113 (Eng. Ch. Div.), at p. 117. It is rather a mythical consumer who stands somewhere in between, dubbed in a 1927 Ontario decision of Meredith C.J. as the "ordinary hurried purchasers": *Klotz v. Corson* (1927), 33 O.W.N. 12 (Ont. H.C.), at p. 13. See also *Barsalou v. Darling* (1882), 9 S.C.R. 677 (S.C.C.), at p. 693. In *Aliments Delisle Ltée/Delisle Foods Ltd. v. Anna Beth Holdings Ltd.* (1992), 45 C.P.R. (3d) 535 (T.M. Opp. Bd.), the Registrar stated at p. 538:

> When assessing the issue of confusion, the trade marks at issue must be considered from the point of view of the average hurried consumer having an imperfect recollection of the opponent's mark who might encounter the trade mark of the applicant in association with the applicant's wares in the market-place.

And see *American Cyanamid Co. Record Chemical Co.*, [1972] F.C. 1271 (Fed. T.D.), at p. 1276, aff'd (1973), 14 C.P.R. (2d) 127 (Fed. C.A.) . As Cattanach J. explained in *Canadian Schenley Distilleries*, at p. 5.

> That does not mean a rash, careless or unobservant purchaser on the one hand, nor on the other does it mean a person of higher education, one possessed of expert qualifications. It is the probability of the average person endowed with average intelligence acting with ordinary caution being deceived that is the criterion and to measure that probability of confusion. The Registrar of Trade Marks or the Judge must assess the normal attitudes and reactions of such persons.

57 Having repeated that, I fully agree with Linden J.A. in *Pink Panther* that in assessing the likelihood of confusion in the marketplace "we owe the average consumer a certain amount

of credit" (para. 54). A similar idea was expressed in *Michelin & Cie v. Astro Tire & Rubber Co. of Canada* (1982), 69 C.P.R. (2d) 260 (Fed. T.D.), at p. 263:

> ...one must not proceed on the assumption that the prospective customers or members of the public generally are completely devoid of intelligence or of normal powers of recollection or are totally unaware or uninformed as to what goes on around them.

58 A consumer does not of course approach every purchasing decision with the same attention, or lack of it. When buying a car or a refrigerator, more care will naturally be taken than when buying a doll or a mid-priced meal: *General Motors Corp. v. Bellows*, [1949] S.C.R. 678 (S.C.C.). In the case of buying ordinary run-of-the-mill consumer wares and services, this mythical consumer, though of average intelligence, is generally running behind schedule and has more money to spend than time to pay a lot of attention to details. In appropriate markets, such a person is assumed to be functionally bilingual: *Four Seasons Hotels Ltd. v. Réseau de television Quatre Saisons Inc./Four Seasons Television Network Inc.* (1992), 43 C.P.R. (3d) 139 (T.M. Opp. Bd.). To those mythical consumers, the existence of trade-marks or brands make shopping decisions faster and easier. The law recognizes that at the time the new trade-mark catches their eye, they will have only a general and not very precise recollection of the earlier trade-mark, famous though it may be or, as stated in *Pepsi-Cola Co. v. Coca-Cola Co.*, [1942] 2 D.L.R. 657 (Canada P.C.), "as it would be remembered by persons possessed of an average memory with its usual imperfections" (p. 661). The standard is not that of people "who never notice anything" but of persons who take no more than "ordinary care to observe that which is staring them in the face": *Coombe v. Mendit Ltd.* (1913), 30 R.P.C. 709 (Eng. Ch. Div.), at 717. However, if ordinary casual consumers somewhat in a hurry are likely to be deceived about the origin of the wares or services, then the statutory test is met.

(2) Did Pink Panther Skew the Test?

59 The argument for the appellant is that in the case of a famous mark like BARBIE the words in s. 6(2) "whether or not the wares or services are of the same general class" take on added significance. *Pink Panther*, it is said, laid undue weight on the similarity or dissimilarity of the wares and services. Modern commerce is driven to a significant extent by famous brands. The Virgin conglomerate, appellant's counsel argues, has diversified from records to airlines to insurance to superstores. The marketing strategy predicts that very different services will benefit from cross-selling. The message is that the people who can fly you cheaply across the Atlantic can probably get you a good deal on your house insurance. The same, he suggests, is true of BARBIE.

60 The appellant is correct that, following introduction of the 1953 amendment, "famous brands" received a significantly broader ambit of protection. In some cases, the courts

emphasized that a significant dissimilarity in wares or services was no longer fatal. Thus, in *Carson v. Reynolds*, [1980] 2 F.C. 685 (Fed. T.D.), it was held that the use of the mark "*Here's Johnny*" for portable trailers, outhouses and lavatory facilities would likely suggest to a "significant number of people in Canada" (p. 690), a connection with Johnny Carson and the Tonight Show. In *Walker & Sons Ltd. v. Steinman* (1965), 44 C.P.R. 58 (Reg. T.M.), the Registrar of the Trade Marks refused an application for the mark "*Johnny Walker*" for sporting equipment over a prior registration of the mark "*Johnnie Walker*" for whisky. In *James Burrough Ltd. v. Reckitt & Colman (Canada) Ltd.* (1967), 53 C.P.R. 276 (Reg. T.M.), the owner of the mark "*Beefeaters*" for gin defeated an application to trade-mark "*Beefeater*" for sauce mixes, Yorkshire pudding mixes, spices and condiments. In *Maple Leaf Gardens Ltd. v. Leaf Confections Ltd.* (1986), 12 C.P.R. (3d) 511 (Fed. T.D.), aff'd (1988), 19 C.P.R. (3d) 331 (Fed. C.A.), the court rejected an application to register a mark consisting of the word "leaf" in a maple leaf for bubble gum because of the likelihood of confusion with the Toronto Maple Leafs, the judge holding that "I am convinced that a young person seeing bubble gum packaged in a wrapper which bore as its principal identifying mark the appellant's LEAF & Design would be misled into thinking that the product was associated with the Toronto Maple Leafs hockey club and would confuse the appellant's mark and design with those of the respondent" (p. 521). In *Danjaq Inc. v. Zervas* (1997), 75 C.P.R. (3d) 295 (Fed. T.D.), the court refused to allow a pizza shop to register the trade-marks "*007*", "*007 Pizza & Subs and Design*" and "*007 Submarine and Design*" because of the likelihood it would lead to confusion with the respondent's trade-mark related to the famous and irresistible James Bond.

61 According to the appellant, the continuity of this line of cases was interrupted by *Pink Panther* which the appellant says wrongly limited the scope of protection available to a famous mark to cases where there is a "connection" or "similarity" between the wares or services associated with the famous mark and the wares or services of "the newcomer". The appellant criticizes particularly the following passages of the *Pink Panther* decision (factum, at para. 66):

> [44] The wide scope of protection afforded by the fame of the appellant's mark only becomes relevant when applying it to a connection between the applicant's and the opponent's trade and services. No matter how famous a mark is, it cannot be used to create a connection that does not exist.
>
> . . . . .
>
> [46] ...in each case a connection or similarity in the products or services was found. Where no such connection is established, it is very difficult to justify the extension of property rights into areas of commerce that do not remotely affect the trade-mark holder. Only in exceptional circumstances, if ever, should this be the case.
>
> . . . . .

> [51] ...What the Trial Judge did not give sufficient weight to is that, not only were the wares in each case completely disparate, but there is no connection whatsoever between them. As I stated earlier, where no such connection exists a finding of confusion will be rare. [Emphasis added by appellant.]

62 In *Pink Panther*, a majority of the Federal Court of Appeal allowed the registration of "*Pink Panther*" as a trade-mark for a line of hair care and beauty product supplies over the opposition of an existing trade-mark holder which had produced a very successful series of films of the same name starring Peter Sellers as Inspector Clouseau. McDonald J.A., dissenting, complained that "it is precisely because of the fame and goodwill associated with the name 'The Pink Panther' that the appellant has chosen that name for its business" (para. 58). However, his objection was rejected by the majority, which observed at para. 50:

> ...the issue to be decided is not how famous the mark is, but whether there is a likelihood of confusion in the mind of the average consumer between United Artists' mark and the one proposed by the appellant with respect to the goods and services specified. That question must be answered in the negative. There is no likelihood of confusion as to the source of the products. The key factor here is the gaping divergence in the nature of the wares and in the nature of the trade. It is not a fissure but a chasm.

63 After referring to a number of cases where the famous trade-mark prevailed, Linden J.A. stated that

> ...in each case a connection or similarity in the products or services was found. Where no such connection is established, it is very difficult to justify the extension of property rights into areas of commerce that do not remotely affect the trade-mark holder. Only in exceptional circumstances, if ever, should this be the case. [para. 46]

I agree with the appellant that the "exceptional circumstances ... if ever" test puts the bar too high and may be seen as an attempt to impose rigidity where none exists. If the result of the use of the new mark would be to introduce confusion into the marketplace, it should not be accepted for registration "whether or not the wares or services are of the same general class" (s. 6(2)). The relevant point about famous marks is that fame *is* capable of carrying the mark across product lines where lesser marks would be circumscribed to their traditional wares or services. The correct test is that which Linden J.A. earlier stated at para. 33:

> The totality of the circumstances will dictate how each consideration should be treated.

64 The appellant argues that the rigidity of the *Pink Panther* approach was repeated in *Lexus*. In that case, the applicant sought to register the mark "*Lexus*" in association with

canned foods and canned fruit juice. Toyota argued this would likely cause confusion with its mark "*Lexus*" in association with automobiles. Linden J.A., stated at paras. 7 and 9:

> [7] The use of the phrase "whether or not the wares or services are of the same general class" as used in subsections 6(2), 6(3) and 6(4) does not mean that the nature of the wares is irrelevant in determining confusion; they suggest only that confusion may be generated with goods that are not in the "same general class", but still have some resemblance or linkage to the wares in question. [Emphasis added.]
>
> . . . . .
>
> [9] Famousness alone does not protect a trade-mark absolutely. It is merely a factor that must be weighed in connection with all the rest of the factors. If the fame of a name could prevent any other use of it, the fundamental concept of a trade-mark being granted in relation to certain wares would be rendered meaningless.

65 I believe Linden J.A. misspoke to the extent he suggested that, for confusion to occur, there must be "some resemblance or linkage to the wares in question", i.e. to the wares for which registration of a trade-mark is sought. Resemblance is clearly not a requirement under s. 6. On the contrary, the point of the legislative addition of the words "whether or not the wares or services are of the same general class" conveyed Parliament's intent that not only need there be no "resemblance" to the specific wares or services, but the wares or services marketed by the opponent under *its* mark and the wares or services marketed by the applicant under *its* applied-for mark need not even be of the same *general* class.

66 The International Trademark Association, which intervened in the *Veuve Clicquot Ponsardin c. Boutiques Cliquot Ltée*, 2006 SCC 23 (S.C.C.) appeal, heard concurrently, said with respect to the *Pink Panther* and *Lexus* decisions that the Court of Appeal "made the same error in both cases of requiring a connection between the wares and services when the real issue in a s. 6 analysis is consumer confusion" (factum, at para. 30).

67 I agree with the appellant and the intervenor that the issue in s. 6 is consumer confusion (or, in other words, the likelihood of a mistaken inference), but I do not agree that in their dispositive passages (as opposed to stray *dicta*) *Pink Panther* or *Lexus* departed from the totality of the circumstances test. What Linden J.A. actually held in Pink Panther was that

> [45] ...The fact that the opponent's mark was world-renowned could not be a factor so important as to make the differences in wares and services irrelevant.
>
> . . . . .
>
> [52] ...I do not see how the fame of the mark acts as a marketing trump card such that the other factors are thereby obliterated. [Emphasis added.]

68 In *Lexus*, Linden J.A. stated

> [12] In conclusion, taking into account all the factors listed in subsection 6(5), I am of the view that the Trial Judge erred and that the Registrar was correct when he decided that the appellant met the onus of proof resting on it and allowed the registration of the trade-mark "Lexus" in connection with certain canned foods. [Emphasis added.]

69 In my view, Linden J.A. was disputing what he took to be the argument of the filmmaker and car maker that fame "trumps" all other factors. (It is perhaps of interest that at an earlier date, Toyota had successfully argued in the United States that its Lexus mark *could* co-exist with the Lexis legal database without confusion: see *Mead Data Central Inc. v. Toyota Motor Corp.*, 875 F.2d 1026 (U.S. C.A. 2nd Cir. 1989).) *Pink Panther* was thus understood by the applications judge in the present case:

> It cannot be automatically presumed that there will be confusion just because the applicant's mark is famous. Under the circumstances, if we keep in mind that the test to satisfy was the likelihood of confusion (and not the possibility of confusion), the fame of the mark could not act as a marketing trump card such that the other factors are thereby obliterated. [para. 40]

70 It may be, as the appellant argues, that "the nature of wares or services should have less weight because the famous mark more likely will lead to the inference that the source of the two is the same" (factum, at para. 70) and "...fame itself can and does *create* a connection in the mind of the ordinary consumer who first sees a famous mark in a new context" (factum, at para. 73 (emphasis in original)), but in *Pink Panther*, Linden J.A. clearly said that "[t]he key factor *here* is the gaping divergence in the nature of the wares and in the nature of the trade" (para. 50 (emphasis added)). The jurisprudence is clear that different factors may be given different weight in different situations. For example, Professor Mostert points out that

> Collectors of engraved, high quality shotguns may, for instance, be few and far between in any given country but the PURDEY mark is undoubtedly exceptionally well-known among the circle of such shotgun cognoscenti. (F.W. Mostert, *Famous and Well-Known Marks: An International Analysis* (1997), at p. 26)

Even so, I doubt that even the *cognoscenti* would think the world famous shotgun specialist is likely associated with the well-known Vancouver purveyor of chocolates, such is the divergence in the type of wares and channels of trade.

71 To the extent Linden J.A. held that the difference in wares or services will *always* be a dominant consideration, I disagree with him, but given the role and function of trade-

marks, it will generally be an important consideration. The appellant contends that some of Linden J.A.'s *obiter* statements can be read virtually to require a "resemblance" between the respective wares and services. In that respect, the *obiter* should not be followed.

72 On a more general level, however, it seems to me that it is the appellant, not the Federal Court of Appeal, which seeks to sidestep the "all the surrounding circumstances" test in the case of a famous trade-mark and place fame in the ascendent. I agree with the appellant that a difference in wares or services does not deliver the knockout blow, but nor does the fame of the trade-mark. Each situation must be judged in its full factual context.

73 I acknowledge that the result of *Pink Panther* has been somewhat controversial on the facts. Professors Gervais and Judge, for example, comment that

> Given current marketing practices, such as the increasing use of character merchandising on a broader range of goods outside the typical entertainment field, consumers may come to expect (or at least not be surprised) that a single company will be selling disparate products (like shampoo and movies) and the likelihood of confusion when similar marks are used on different products may increase. (D. Gervais and E.F. Judge, *Intellectual Property: The Law in Canada* (2005), at p. 212))

Be that as it may, the view is correct that "all of the surrounding circumstances" must be taken into consideration but that, in some cases, some circumstances (such as the difference in wares) will carry greater weight than others.

E. Applying the Section 6(5) Circumstances to the Facts of this Case

74 It follows from the foregoing discussion that, while the fame of the BARBIE brand is a "surrounding circumstance" of importance, the scope of its protection requires consideration of all the circumstances, including the enumerated s. 6(5) factors. The Board found that while the BARBIE trade-mark is indeed famous, its fame in Canada is "in association with dolls and doll accessories", not the other items listed in the appellant's registrations, including coffee, pizza and other food products. Nor, in particular, is its fame likely to generate any confusion in relation to the mark applied for by the respondent as a symbol of "restaurant services, take-out services, catering and banquet services". It is important to keep in mind, as the appellant says, that the issue is not the scope of the respondent's existing business but the scope of protection it seeks by its trade-mark application.

(1) The Inherent Distinctiveness of the Trade-marks or Trade-names and the Extent to Which They Have Become Known

75 "Distinctiveness is of the very essence and is the cardinal requirement of a trade-mark": *Western Clock Co. v. Oris Watch Co.*, [1931] Ex. C.R. 64 (Can. Ex. Ct.), *per* Audette J., at p.

67. The word "Barbie" is an everyday expression not originated by the appellant, and on that account would normally receive less protection "than in the case of an invented or unique or non-descriptive word" (like *Kleenex*), *per* Rand J. in *General Motors*, at p. 691, to which one might add: "No person is entitled to fence in the common of the English or French languages and words of a general nature cannot be appropriated over a wide area": K. Gill and R.S. Jolliffe, *Fox on Canadian Law of Trade-Marks and Unfair Competition* (4th ed. 2002), at p. 8-56. I accept, as discussed earlier, that BARBIE has now acquired a strong secondary meaning associated with the appellant's doll products, and on that account has achieved considerable distinctiveness. While the mark as registered is just the plain word BARBIE, its use in advertising and packaging is accompanied with distinctive designs and graphics.

76 The mark applied for by the respondent has become somewhat known within the area where both parties' marks are used. Its applied-for trade-mark is not only the word "Barbie's" but the totality of the effect, including the script in which it is written, and the surrounding design: *Henry K. Wampole & Co. v. Hervay Chemical Co.* (1929), [1930] S.C.R. 336 (S.C.C.), and *Battle Pharmaceuticals v. British Drug Houses Ltd.*, [1944] Ex. C.R. 239 (Can. Ex. Ct.). In assessing the issue of confusion, attention should be paid to the differences as well as the similarities in the marks said to be confusing. However, as none of the s. 6(5) circumstances "trump" the others, this is but one consideration to be weighed in the balance of "all the surrounding circumstances".

(2) The Length of Time the Trade-marks and Trade-names Have Been in Use

77 Dr. Fox noted that "[length] of user is only important in considering the question of fact, whether the trade mark has really and truly become distinctive": *The Canadian Law of Trade Marks and Unfair Competition* (3rd ed. 1972), at p. 133. The appellant's marks have been widely publicized since the early 1960s, the respondent's only since 1992. The appellant's mark has deeper roots, and has been much more highly publicized over a much larger geographic area.

(3) The Nature of the Wares, Services or Business

78 The traditional rule was that "[i]f [a manufacturer] does not carry on trade in iron, but carries on trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron": *Ainsworth v. Walmsley* (1866), L.R. 1 Eq. 518 (Eng. Ch.), at pp. 524-25. While I agree with Professor McCarthy, quoted earlier, that "a relatively strong mark can leap vast product line differences at a single bound" (p. 11-150.1), nevertheless it is implicit in Professor McCarthy's statement that the "product line" will generally represent a significant obstacle for even a famous mark to leap over. The doll business and the restaurant business appeal to the different tastes of a largely different clientele. As was found by the Board:

> The nature of the opponent's wares and the applicant's services are quite different. In this regard, the opponent has established that its mark is very well known, if not famous in Canada, in association with dolls and doll accessories. The opponent's target market are children and to some extent adult collectors. By contrast, the applicant is in the restaurant business and its target market are [sic] adults. [p. 400]

79 There is no evidence that adult consumers would consider a doll manufacturer to be a source of good food, still less that the BARBIE trade-mark would be understood to guarantee, as the 1953 Report (at p. 38) put it, "character and quality". The appellant suggests that the BARBIE doll has become part of pop culture, and there is some truth to that, but the meaning is not necessarily a positive recommendation for all wares and services:

> **Barbie doll** /'babi dol/ *noun Colloquial* a female who is superficially attractive in a conventional way, especially with blue eyes and blonde hair, but who lacks personality. (*The Macquarie Dictionary* (rev'd 3rd ed. 2002), at p. 147)

In that regard the association of the BARBIE doll with food might be taken as a warning of blandness.

80 The appellant points to the broad scope of some of its licences, and the potential growth of BARBIE into new fields of commerce, but as the Fox Report (1953) points out

> ...there might be many users of the same trade mark with many variations in the quality of the wares or services available under the trade mark with consequent public confusion and deception. [p. 60]

81 The appellant relies on s. 50(1) of the Act which states that provided the trade-mark owner retains direct or indirect control of the character or quality of the wares or services use by the licensee is deemed to have the same effect as use by the owner. Acknowledging this to be so, it is also true that profligate use by the owner alone can destroy the distinctiveness of the mark, and licences granted too widely and unwisely may aggravate its problem. Nevertheless, the recognition in our society that "famous brands" are widely licenced for wares and services not traditionally associated with the mark must be kept in mind as another "surrounding circumstance".

82 The Board did not accept that the BARBIE mark is "famous" or distinctive of anything other than dolls and dolls' accessories. The very specificity of BARBIE dolls in the mind of the consumer arguably constrains its capacity for growth. In *Joseph E. Seagram*, the appellant argued that the natural tendency towards corporate diversification would lead the consumer to presume that its alcoholic beverage business was connected with the respondent's real estate business. MacKay J. dismissed this argument, stating at pp. 467-68:

> I do not agree with this proposition. In my view, consideration of future events and possibilities of diversification is properly restricted to the potential expansion of existing operations. It should not include speculation as to diversification into entirely new ventures, involving new kinds of wares, services or businesses...

83 The point, I think, is that the law of trade-marks is based on use. In an earlier era it was not possible to register a "proposed" use. Here, expansion of the BARBIE mark is more than just speculation, but if the BARBIE mark is not famous for anything but dolls and doll accessories in the area where both marks are used and there is no evidence that BARBIE's licensees, whoever they may be, are in the marketplace using the BARBIE mark for "restaurant services, take-out services, catering and banquet services", it is difficult to see the basis on which the mistaken inference is likely to be drawn.

84 On this point, the Board found that the appellant's

> average annual advertising expenditure of $3.5 million, for the years 1990-1995, was dedicated solely to doll and doll accessory items. I do not accept [the appellant's] submissions that there is any real connection between [its] wares and [the respondent's] services. In my view, the connections postulated by the opponent are too tenuous to be anything other than theoretical. [Emphasis added; p. 402.]

85 This assessment is supported by the evidence. The appellant's real complaint is that the Board's negative view on this point was given too much weight in the Board's "weighing up" of "all the surrounding circumstances".

(4) The Nature of the Trade

86 The parties operate in different and distinct channels of trade within which their respective wares and services do not intermingle. In *McDonald's Corp. v. Silverwood Industries Ltd.*, at p. 474, McKeown J. pointed out that even though both parties sold coffee, a specialty coffee store occupies a different market niche than a fast food outlet (aff'd 68 C.P.R. (3d) 168 (Fed. C.A.). The nature and kind of customer who would be likely to buy the respective wares and services has long been considered a relevant circumstance: *General Motors Corp. v. Bellows* (1949), 10 C.P.R. 101 (S.C.C.), at pp. 116-17; *Fox* (2002), at pp. 8-38 to 8-40.

87 In the present case, quite apart from the great difference between the appellant's wares and the respondent's services, they occupy different channels of trade and the increased potential for confusion that might arise through intermingling in a single channel of trade does not present a serious problem.

(5) The Degree of Resemblance Between the Trade-marks or Trade-names in Appearance or Sound or in the Ideas Suggested by Them

88 Both marks use the name "Barbie" but the respondent's applied-for mark wraps the name in a design, whereas the appellant's mark as registered does not. On the other hand, if the appellant's mark as *used* in packaging and advertising is taken into account, there is a considerable resemblance.

(6) Other Surrounding Circumstances

89 No doubt, as an abstract proposition, the appellant's mark is "famous" whereas the respondent's applied-for mark is not. The question, however, is whether there will likely be (or has been) confusion in the marketplace where both may operate. In that respect, evidence of actual confusion, though not necessary, would have been helpful (*ConAgra Inc. v. McCain Foods Ltd.* (2001), 14 C.P.R. (4th) 288, 2001 FCT 963 (Fed. T.D.); *Panavision Inc. v. Matsushita Electric Industrial Co.* (1992), 40 C.P.R. (3d) 486 (Fed. T.D.), but it was not forthcoming. Décary J.A. commented in *Christian Dior*, at para. 19:

> While the relevant issue is "likelihood of confusion" and not "actual confusion", the lack of "actual confusion" is a factor which the courts have found of significance when determining the "likelihood of confusion". An adverse inference may be drawn when concurrent use on the evidence is extensive, yet no evidence of confusion has been given by the opponent.

I agree. The lack of any evidence of actual confusion (i.e. that prospective consumers are drawing the mistaken inference) is another of the "surrounding circumstances" to be thrown into the hopper: *Pepsi-Cola Co. v. Coca-Cola Co.* (1939), [1940] S.C.R. 17 (S.C.C.), at 30; *General Motors Corp. v. Bellows*, [1947] Ex. C.R. 568 (Can. Ex. Ct.), at p. 577, aff'd [1949] S.C.R. 678 (S.C.C.); *Freed & Freed Ltd. v. Canada (Registrar of Trade Marks)*, [1950] Ex. C.R. 431 (Can. Ex. Ct.); *Monsport Inc. v. Vêtements de Sport Bonnie (1978) Ltée* (1988), 22 C.P.R. (3d) 356 (Fed. T.D.), at p. 360; *Petit Bateau Valton S.A. c. Boutiques Le Bateau Blanc Inc.* (1994), 55 C.P.R. (3d) 372 (Fed. T.D.), at p. 379.

90 The appellant contended in effect that the respondent was a deliberate free rider who had no reasonable explanation for adopting its trade-mark. The obvious conclusion, argues the appellant, is that the respondent seeks to register a mark which is designed to pirate whatever goodwill it can from the mark of the appellant. It points to a subsequent trade-mark application by the respondent (now abandoned) that included in its design the head and shoulders of a female waitress with a "B" monogram on her blouse. It seems to me there is some justice to this complaint, but the relevant perspective of s. 6(2) of the *Trade-marks Act* is not that of the respondent but rather the perception of the relevant mythical consumer. *Mens*

rea is of little relevance to the issue of confusion: *Lexus*. It has been established since *Edelsten v. Edelsten*, [1860] 46 E.R. 72 (Eng. L.C.), at pp. 78-9, that a trade-mark is a proprietary right. If, as the appellant says, the respondent's activities have trespassed on the marketing territory fenced off by its BARBIE trade-marks, it would be no defence for the respondent that it did not intend to trespass. Equally, however, if the respondent's activities did not in fact trespass, evidence that it may have wished to do so does not constitute confusion: *Fox* (1972), at p. 403. Historically, courts have been slow to conclude that a demonstrated piratical intent has failed to achieve its purpose, but in this case no such intent was found as a fact by the Board.

V. Conclusion

91 The Board held that, notwithstanding the fame of the appellant's trade-mark, it was satisfied by the respondent that there was no likelihood of confusion in the marketplace having regard to all the surrounding circumstances. In the absence of fresh evidence to shed further light on the correctness of this conclusion, I would not be prepared to say that in reaching its conclusion the Board was unreasonable.

92 The appeal will therefore be dismissed with costs.

The following are the reasons delivered by

***Lebel J.*:**

93 I agree that Mattel's appeal should be dismissed. The Trade-marks Opposition Board at the Canadian Intellectual Property Office had to weigh a number of factors in its assessment of the distinctiveness of the two marks. Its decision was entitled to deference, but had to be reasonable ((2002), 23 C.P.R. (4th) 395 (T.M. Opp. Bd.)). On the facts of this case, as demonstrated by the analysis of the legal and factual issues in the reasons of Binnie J., I agree that the decision of the Board was indeed reasonable.

Appeal dismissed.

Pourvoi rejeté.

APPENDIX

Loi sur les marques de commerce, L.R.C. 1985, ch. T-13	***Trade-marks Act***, R.S.C. 1985, c. T-13
2. Les définitions qui suivent s'appliquent à la présente loi.	**2.** In this Act,
— créant de la confusion — Relativement à une marque de commerce ou un nom commercial, s'entend au sens de l'article 6.	— confusing — , when applied as an adjective to a trade-mark or trade-name, means a trade-mark or trade-name the use of which would cause confusion in the manner and circumstances described in section 6;

Quand une marque ou un nom crée de la confusion

6. (1) Pour l'application de la présente loi, une marque de commerce ou un nom commercial crée de la confusion avec une autre marque de commerce ou un autre nom commercial si l'emploi de la marque de commerce ou du nom commercial en premier lieu mentionnés cause de la confusion avec la marque de commerce ou le nom commercial en dernier lieu mentionnés, de la manière et dans les circonstances décrites au présent article.

6.(2) L'emploi d'une marque de commerce crée de la confusion avec une autre marque de commerce ou un autre nom commercial si l'emploi de la marque de commerce ou du nom commercial en premier lieu mentionnés cause de la confusion avec la marque de commerce ou le nom commercial en dernier lieu mentionnés, de la manière et dans les circonstances décrites au présent article.

Éléments d'appréciation

6.(5) En décidant si des marques de commerce ou des noms commerciaux créent de la confusion, le tribunal ou le registraire, selon le cas, tient compte de toutes les circonstances de l'espèce, y compris :

a) le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;

b) la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;

c) le genre de marchandises, services ou entreprises;

d) la nature du commerce

e) le degré de ressemblance entre les marques de commerce ou les noms commerciaux dans la présentation ou le son, ou dans les idées qu'ils suggèrent.

Interdictions

7. Nul ne peut :

— ... —

b) appeler l'attention du public sur ses marchandises, ses services ou son entreprise de manière à causer de la confusion au Canada, lorsqu'il a commencé à y appeler ainsi l'attention, entre ses marchandises, ses services ou son entreprise et ceux d'un autre;

When mark or name confusing

6. (1) For the purposes of this Act, a trade-mark or trade-name is confusing with another trade-mark or trade-name if the use of the first mentioned trade-mark or trade-name would cause confusion with the last mentioned trade-mark or trade-name in the manner and circumstances described in this section.

6.(2) The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or service associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

What to be considered

6.(5) In determining whether trade-marks or trade-names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

(a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;

(b) the length of time the trade-marks and trade-names have been in use;

(c) the nature of the wares, services or business;

(d) the nature of the trade; and

(e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

Prohibitions

7. No person shall

— ... —

(b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business of another;

c) faire passer d'autres marchandises ou services pour ceux qui sont commandés ou demandés;

Violation

20. (1) Le droit du propriétaire d'une marque de commerce déposée à l'emploi exclusif de cette dernière est réputé être violé par une personne non admise à l'employer selon la présente loi et qui vend, distribue ou annonce des marchandises ou services en liaison avec une marque de commerce ou un nom commercial créant de la confusion.

Dépréciation de l'achalandage

22.(1) Nul ne peut employer une marque de commerce déposée par une autre personne d'une manière susceptible d'entraîner la diminution de la valeur de l'achalandage attaché à cette marque de commerce.

Action à cet égard

(2) Dans toute action concernant un emploi contraire au paragraphe (1), le tribunal peut refuser d'ordonner le recouvrement de dommages-intérêts ou de profits, et permettre au défendeur de continuer à vendre toutes marchandises revêtues de cette marque de commerce qui étaient en sa possession ou sous son contrôle lorsque avis lui a été donné que le propriétaire de la marque de commerce déposée se plaignait de cet emploi.

(c) pass off other wares or services as and for those ordered and requested;

Infringement

20. (1) The right of the owner of a registered trade-mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade-mark or trade-name...

Depreciation of goodwill

22.(1) No person shall use a trade-mark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto.

Action in respect thereof

(2) In any action in respect of a use of a trade-mark contrary to subsection (1), the court may decline to order the recovery of damages or profits and may permit the defendant to continue to sell wares marked with the trade-mark that were in his possession or under his control at the time notice was given to him that the owner of the registered trade-mark complained of the use of the trade-mark.

Footnotes

* Major J. took no part in the judgment.

TAB 11

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0102

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

AND IN THE MATTER OF a proceeding commenced on the Ontario Energy Board's own motion under section 19(4) of the *Ontario Energy Board Act, 1998* to determine whether certain activities are permitted to be undertaken by affiliates of municipally-owned electricity distributors under section 73 of the *Ontario Energy Board Act, 1998*.

BEFORE: Ken Quesnelle
Presiding Member

Cathy Spoel
Member

Christine Long
Member

DECISION WITH REASONS

December 13, 2012

On April 23, 2012, the Ontario Energy Board (the "Board") issued a Notice of Proceeding and Notice of Written Hearing (the "Notice") giving notice that it was commencing a proceeding on its own motion under section 19(4) of the *Ontario Energy Board Act, 1998* (the "Act") to determine whether certain street lighting activities are permitted to be undertaken by affiliates of municipally-owned electricity distributors under section 73 of the Act.

Background

On August 2, 2011, Langley Utilities Contracting Ltd. ("Langley Utilities") filed an application (the "Langley Utilities Application") with the Board under Rule 34 of the Board's *Rules of Practice and Procedure* seeking a hearing before the Board to determine whether the services contemplated under City of Brampton contract No. 2008-079 are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the Act. The services at issue under the City of Brampton contract are the performance of routine and emergency maintenance for street lighting and related devices. The affiliate at issue in relation to that contract is Enersource Hydro Mississauga Services Inc. ("EHMSI"), an affiliate of Enersource Hydro Mississauga Inc., an electricity distributor licensed by the Board.

Before deciding whether to hear the matters raised by the Langley Utilities Application, the Board heard argument on the following threshold questions:

1. Is there a statutory basis for the Langley Utilities Application under the Act?
2. If the Act does not provide a statutory basis on which Langley may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matter raised by the Langley Utilities Application under section 19(4) of the Act?

These questions were addressed in a combined proceeding (EB-2011-0361/EB-2011-0376) involving both the Langley Utilities Application and an application of another party that raised the same threshold questions but in an unrelated context (the "Combined Proceeding"). On January 23, 2012, the Board issued a Decision with Reasons and Order on the above threshold questions in which it determined that it would, on its own motion, consider the matter raised by the Langley Utilities Application to the extent that Langley Utilities seeks the Board's view with respect to the scope of activities permitted by section 73 of the Act.

The current proceeding was commenced further to that determination.

The full record of this proceeding is available for review at the Board's offices and on its website. While the Board has considered the full record, the Board has summarized and referred only to those portions of the record that it considers helpful to provide context to its findings.

The Issue to be Determined in this Proceeding

As indicated in the Notice, the issue that the Board is determining in this proceeding is as follows:

> Does section 73 of the Act permit an affiliate of a municipally-owned electricity distributor to undertake the provision of street lighting services as a business activity, whether inside or outside of the licensed service area of the affiliated electricity distributor?

For this purpose:

(a) an electricity distributor is a municipally-owned electricity distributor if one or more municipal corporations own, directly or indirectly, voting shares carrying more than 50 percent of the voting rights attached to all voting securities of the distributor;

(b) an affiliate of a municipally-owned electricity distributor does not include a municipal corporation; and

(c) "street lighting services" means services pertaining to the installation, maintenance, repair or replacement of street lighting assets.

For convenience of reference, section 73 of the Act is reproduced in its entirety in Appendix A to this Decision with Reasons.

As also indicated in the Notice, this proceeding is not an enforcement proceeding, and it is not intended to address or redress any matters of compliance. Any enforcement or compliance activities which may arise will therefore be prospective in nature.

Parties and Procedural Order No. 1

The following were accepted as intervenors in this proceeding:[1]

1. Langley Utilities
2. City of Brampton
3. EHMSI
4. Electricity Distributors Association ("EDA")
5. Powerline Plus Ltd. ("Powerline")

[1] The first five of these parties were accepted by the Board as intervenors in the Notice.

6. Electrical Contractors Association of Ontario ("ECAO")
7. Enbridge Gas Distribution Inc.
8. Enersource Hydro Mississauga Inc.
9. EnWin Energy Ltd. and EnWin Utilities Ltd, jointly
10. ERTH Corporation
11. Dundas Power Line Ltd.
12. Horizon Utilities Corporation
13. HVAC Coalition
14. Hydro Ottawa Limited
15. Oakville Hydro Energy Services Inc.
16. Power Workers' Union ("PWU")
17. PowerStream Inc.
18. School Energy Coalition (SEC)
19. Toronto Hydro-Electric System Limited ("THESL")
20. Veridian Connections Inc.

On May 28, 2012, the Board issued Procedural Order No. 1. In that Procedural Order, the Board:

- made provision for the filing of submissions on the issue set out above by all parties and Board staff at the same time, and subsequently for the filing of reply submissions again by all parties and Board staff at the same time;

- determined that ECAO and Dundas Power Line Ltd. are not eligible for an award of costs in this proceeding; and

- indicated that, given the context of this proceeding, it did not anticipate the need for the provision or testing of evidence on the business practices of any given affiliate of a municipally-owned electricity distributor in relation to the provision of street lighting services.

Board Staff Compliance Bulletins

The issue in this proceeding is the subject of two Board staff Compliance Bulletins, both issued prior to the filing of the Langley Utilities Application. The first Bulletin was issued on November 5, 2010 (the "November Bulletin") and the second on April 12, 2011 (the "April Bulletin").

The submissions of a number of parties to this proceeding referred to and, in some cases, relied on, the views expressed by Board staff in these Bulletins. It is therefore useful to summarize those views here. The Bulletins together conclude that an affiliate of a municipally-owned distributor (a "Municipal Affiliate") is not precluded by section 73(1) of the Act from providing street lighting services, whether inside or outside of the affiliated distributor's licensed service area. In summary, the Bulletins state the following:

- Street lighting services can be permitted under paragraph 6 of section 73(1) of the Act, where they make more effective use of (a) street lighting assets that are owned by a municipality that is itself an affiliate of a distributor, (b) distribution poles that are owned by the affiliated distributor, or (c) specialized equipment owned by the affiliated distributor, such as bucket trucks.

- Street lighting services can be permitted under paragraph 9 of section 73(1) of the Act, to the extent that the services involve, for example, the installation and maintenance of more energy efficient lights.

- If and to the extent that an activity is permitted under section 73(1) of the Act, a Municipal Affiliate is permitted to undertake that activity both inside and outside of its affiliated distributor's licensed service area. In this regard, it is noted that section 73(1) of the Act is silent on the geographic area in which activities may be undertaken by a Municipal Affiliate and that Municipal Affiliates, unlike licensed electricity distributors, do not have licensed service areas that constrain the geographic scope of their activities.

Submissions of the Parties

Initial Submissions

The submissions of Langley Utilities and Powerline are to the effect that a Municipal Affiliate is precluded by section 73 of the Act from providing street lighting services.

Langley Utilities submitted that the Board should use a purposive approach in its determination of the issue in this proceeding, considering the ordinary meaning of the language in section 73, the context in which that language is found and the purpose of the legislation. Langley Utilities added that policy arguments for the inclusion of street

lighting in section 73, efficiencies or even past practice are irrelevant to the Board's determination.

Langley Utilities argued that the underlying purpose of section 73(1) of the Act is generally to limit Municipal Affiliates from taking part in competitive markets, for the purpose of protecting competition in those markets. In the view of Langley Utilities, the objectives of, and the legislative context underlying, the Act are grounded in a recognition that Municipal Affiliates are fundamentally different from their private sector counterparts, and that the Legislature intended to prevent their presence outside of a few select competitive markets. Langley Utilities pointed to a number of documents associated with or related to the enactment of the Act, including the White Paper "*Direction for Change: Charting a Course for Competitive Electricity and Jobs in Ontario"*, the *Report of the Advisory Commission on Competition in Ontario's Electricity System* and the legislative history of section 73 itself.[2] According to Langley Utilities, if the Board were to interpret section 73(1) of the Act as allowing Municipal Affiliates to engage in street lighting activities, the balance intended between municipally-owned distributors and their affiliates, on the one hand, and private distributors and their affiliates on the other, would be lost. Langley Utilities also submitted that section 73(1) of the Act must be understood in the context of the restrictions imposed on distributors under section 71 of the Act.

Langley Utilities further submitted that the absence of a reference to street lighting services in section 73(1) of the Act is a clear indication that street lighting services are not permitted activities for Municipal Affiliates. Among the points noted by Langley Utilities in support of its submission that street lighting services were deliberately excluded from section 73(1) of the Act are the following:

- street lighting was referred to in other statutes that existed at the time at which Bill 35, the *Energy Competition Act, 1998,* was introduced, including the *Municipal Act* which itself was referred to in Bill 35;
- the Legislature chose to define "public utility" in paragraph 7 of section 73(1) of the Act by reference to a statutory definition that did not include street lighting, when other definitions that did include street lighting could have been used; and

[2] When Bill 35 was introduced, it was section 72 of the Act. For simplicity, this Decision and Order will refer to the section as section 73.

- when street lighting services are permitted, legislative provisions expressly so state. Langley Utilities noted that Ontario Regulation 161/99 (Definitions and Exemptions) made under the Act (amended in 2002) specifically allowed a subsidiary of the Services Corporation[3] to provide municipal street light services. Langley Utilities also noted references to street lighting in certain Board documents.

Langley Utilities further submitted that the plain wording of section 73(1) of the Act demonstrates a presumption that Municipal Affiliates are not to participate in business activities other than those specifically identified in that section. More particularly, Langley Utilities stated that that the intention of the phrase "shall not carry on any business activity other than the following" is to provide a restrictive and exhaustive list of the business activities in which Municipal Affiliates are permitted to engage, and that interpreting section 73(1) as permitting street lighting activities would completely undermine the clear intention of the Legislature.

Langley Utilities also referred to the Decision of the Board in a proceeding involving THESL and street lighting assets (EB-2009-0180/0182/0183/0183) (the "THESL Street Lighting Proceeding"). In Langley Utilities' view, there would be no point to the Board's ruling in that case regarding the issue of whether street lighting is permitted under section 71 of the Act if Municipal Affiliates could make the same argument regarding economic efficiency or conservation to justify the inclusion of street lighting services under paragraphs 6 and 9 of section 73 of the Act.

Langley Utilities further submitted that the two Board staff Compliance Bulletins failed to consider the intention of the Legislature in restricting the activities of Municipal Affiliates under section 73(1) of the Act, the Act's primacy over the Affiliate Relationships Code for Electricity Distributors and Transmitters (the "ARC") and the fact that the ARC definition of "energy service provider" specifically excludes from its ambit "a shareholder of a utility that is a municipal corporation or the provincial government".

[3] The "Services Corporation" was the designation given to the holding company (now Hydro One Inc.) to be established under Bill 35 for the purposes of holding shares in one or more subsidiaries that would in turn assume ownership of the transmission and distribution business of Ontario Hydro (now Hydro One Networks Inc.).

Langley Utilities also submitted that Municipal Affiliates have governed their affairs as if street lighting is impermissible, noting that distributors would not be seeking to undertake these activities themselves if their Municipal Affiliates could do so.

With respect to paragraph 9 of section 73(1) of the Act, Langley Utilities argued that there is no basis for interpreting that paragraph as including street lighting. In this regard, Langley Utilities noted that street lighting is not necessarily related to the promotion of conservation, energy efficiency or load management, and that if Board staff's views as expressed in the April Bulletin were to prevail conceivably any activity could be included under paragraph 9 of section 73(1).

In the alternative, if street lighting activities were to be found to be permitted under section 73(1) of the Act, Langley Utilities submitted that allowing a Municipal Affiliate to offer services outside of the licensed service area of its affiliated distributor would defeat the purpose of section 73(1) and would open the door to unfair competition between private companies and municipally-owned companies.

Finally, Langley Utilities submitted that the Board staff Compliance Bulletins should be wholly disregarded, and that in neither of the Board decisions cited in the Compliance Bulletins did the Board deal directly with the issue of the ability of a Municipal Affiliate to carry out street lighting.

In support of its submission that the Act and regulations, policies and rules prohibit distributors and their affiliates from acting as private contractors and from acting outside their geographic area, Powerline submitted that the inclusion of a specific list such as that set out in section 73(1) of the Act excludes everything else, and referred in this regard to "the legal maxim…*inclusio unius est exclusio alterius*". Powerline also argued that there are strong public policy considerations in favour of protecting the integrity of the bidding system.

SEC submitted that the issue before the Board is what the statute says, and not what the best policy might be. However, to the extent that the words of section 73 of the Act are capable of multiple meanings, SEC submitted that the Board should ensure that its interpretation is consistent with the most reasonable policy outcome supported by the words of the statute. According to SEC, there is no "one size fits all" approach to determining whether street lighting services are permitted under section 73(1) of the Act; rather, some such services can be permitted whereas others cannot.

SEC noted that, in its view, street lighting services are not excluded from paragraph 6 of section 73(1) of the Act by reason of not being referred to specifically there, but they should be included within the scope of that paragraph only if they are similar to things like meter reading and billing.

SEC went on to urge the Board to draw a reasonable line in identifying how expansive paragraph 6 of section 73(1) of the Act should be in light of the reasonable intentions of the Legislature, and that the Board's focus should be on the direct and indirect impacts on ratepayers. In that regard, SEC noted that the beneficial ratepayer impacts resulting from business activities under paragraph 6 include economies of scope and a broader management perspective, and that direct detrimental ratepayer impacts include hidden subsidies, potential credit standing and risk issues for the distributor, less management focus on the regulated business and conflicts of interest. SEC also noted that unregulated activities create the potential for reduced competition, which can have both direct and indirect detrimental ratepayer impacts in terms of utility procurement and customer procurement.

In SEC's view, the Legislature did not intend to allow for an unlimited scope of business activities, nor for paragraph 6 of section 73(1) of the Act to operate as a prohibition against seeking reasonable economies of scope. In determining the appropriate balance in relation to the interpretation of paragraph 6 of section 73(1) of the Act, SEC suggested that the Board adopt the following three tests: (i) is the activity the same or very similar to an activity that the utility is already doing? (ii) is the activity incidental to the main activities of the utility? (iii) is the activity capable of being carried on in full compliance with the ARC?

With respect to paragraph 9 of section 73(1) of the Act, SEC submitted that an activity should be permitted under that paragraph only where the activity is at its essence a conservation and demand management ("CDM") activity, as opposed to an activity that only includes an incidental CDM component.

ECAO noted that it has consistently maintained that, so long as the "ratepayer and competitiveness protections contained in the ARC are followed", an interpretation of paragraphs 6 and 9 of section 73(1) of the Act that would allow Municipal Affiliates to provide street lighting services accords with the Board's objectives. ECAO submitted that the Board should affirm that the provision of street lighting services by Municipal

Affiliates as a business activity under paragraphs 6 and 9 is only permitted if done in compliance with the ARC.

ECAO also submitted that section 73 of the Act and the ARC do not contain territorial restrictions that would prevent a Municipal Affiliate from providing street lighting services outside of the licensed service area of its affiliated distributor, but that particular care must be taken that such transactions do not contravene section 71 of the Act or the ARC. There is, in ECAO's view, an increased risk of such contravention occurring when an affiliate engages in activities outside of its affiliated distributor's licensed service area. ECAO also urged the Board to, among other things, devote additional resources to monitoring and enforcing compliance with the ARC to address improper dealings that it asserts are occurring between municipally-owned distributors and their affiliates.

EHMSI submitted that it is clear, based on a review of the Act, the ARC, the Compliance Bulletins and decisions of the Board, that an affiliate of a distributor, municipally-owned or otherwise, can perform street lighting services in any jurisdiction. EHMSI noted that the provision of street lighting services is clearly not prohibited by the Act; that the list of activities identified in paragraph 6 of section 73(1) of the Act is not exhaustive; that the ARC specifically contemplates that an affiliate of a distributor can provide street lighting services; and that any concerns about unfair competition are fully addressed by the ARC. EHMSI also noted that the Board has expressly considered and approved the provision of street lighting services in at least four cases: one proceeding involving Lakeland Power Distribution Ltd. and street lighting (EB-2006-0029); two cases involving THESL, one being the THESL Street Lighting Proceeding and the other being a rate proceeding; and the definition of "energy service provider" in the ARC.

THESL submitted that, as a matter of statutory interpretation, paragraph 6 of section 73(1) of the Act permits affiliates to provide street lighting services. In THESL's view, this conclusion is most apparent when section 73 is considered in light of: (i) the Board staff Compliance Bulletins; (ii) the ARC, which specifically refers to street lighting in the definition of "energy service provider"; (iii) the Board's objectives in relation to the protection of ratepayer interests and the promotion of a cost-effective and efficient electricity industry, noting in particular that Municipal Affiliates are uniquely situated to provide efficient and cost-effective street lighting services; and (iv) the use of the word "including" in paragraph 6 itself. Like EHMSI, THESL also referred to the Lakeland Power Distribution Ltd. case and THESL Street Lighting Proceeding in support of its submission that the Board has already addressed the issue of whether street lighting

services may be provided by Municipal Affiliates, and argued that the Board's decision in this proceeding should be consistent with these past decisions.

The EDA submitted that, on simple reading of the Act, there can be no doubt that street lighting services are business activities that are permitted to be performed by a Municipal Affiliate, and that there is no reason of legislative interpretation or logic to interpret section 73 of the Act as limiting the territory in which a Municipal Affiliate can provide street lighting services. The EDA's submissions in this regard relied heavily on the reasoning set out in the Board staff Compliance Bulletins. The EDA also raised a number of concerns regarding this proceeding; specifically, (i) that it is contradictory for the Board to have commenced this proceeding given that the Board has to date taken no compliance action in relation to the provision of street lighting services by Municipal Affiliates, and hence has already addressed the issue; (ii) that complaints should not justify a reconsideration of the issue, particularly absent any legislative change, a Ministerial Directive or even a change in factual circumstances; (iii) that this proceeding is incongruous (it is not an enforcement proceeding yet could have future compliance implications) and unprecedented; and (iv) that the Board should not concern itself with the competitive activities of distributor affiliates absent an urgent public welfare concern or evidence that they are interfering with the Board's legislated objectives or that a violation of the ARC might exist.

PWU submitted that Municipal Affiliates are permitted to provide street lighting services under section 73(1) of the Act. PWU, like other parties, referred to the Board's decision in the THESL Street Lighting Proceeding, noting that there was no suggestion in that case that THESL's Municipal Affiliate was legally prohibited by section 73 of the Act from owning or operating street lighting assets. PWU submitted that street lighting "easily falls" within paragraph 6 of section 73(1) of the Act, noting that the equipment used to provide street lighting is typically directly connected to, and very closely integrated with, distributor equipment used to provide distribution services. In PWU's view, to the extent that the street lighting assets are distribution assets, the street lighting business is permitted under paragraph 1 of section 73(1), and to the extent that they are not distribution assets, the street lighting business is permitted under paragraph 6 of that section.

PWU stated that, in its view, the legislative purpose of section 73(1) of the Act is not to prevent or restrict Municipal Affiliates from engaging in competitive activities, noting that this is very clear from the fact that the section refers to certain competitive activities

(electricity retailing and water heater rentals). Rather, PWU submitted that the legislative purpose of section 73(1) is to ensure that municipalities are not able to avoid the limits on their activities imposed on them by the provisions of the *Municipal Act* and other provincial legislation. In PWU's view, achievement of this legislative purpose does not require that section 73(1) of the Act be read narrowly or restrictively.

Board staff's submission reiterated the views set out in the November Bulletin and the April Bulletin.

Reply Submissions

In its reply submission, Langley Utilities argued that the use of the word "including" in paragraph 6 of section 73(1) should be interpreted as reflecting a legislative intention to take an exhaustive approach. In Langley Utilities' view, by referring to "including" rather than "including but not limited to" – a phrase that is also used in the Act – the Legislature intended for the list set out in that paragraph to be exhaustive.

Langley Utilities also noted that, when Bill 35 was before the Legislature, what is now paragraph 6 of section 73(1) of the Act was amended in a manner that eliminated the connection between permitted business activities and a "distributor's distribution system". In Langley Utilities' view, it follows that the Legislature "in balancing the elimination of the connection to the 'distributor's distribution system', imposes a restrictive list of activities". Langley Utilities also stated that the consideration of a connection between a Municipal Affiliate's business activity and the distributor, which Langley Utilities' views as being stressed in the Board staff Compliance Bulletins, is wholly irrelevant and not provided for in the Act. Langley Utilities added that if the Board begins to consider the "nature of the connection of the proposed business activity to paragraph 6", the Board will be inviting numerous applications to consider the inclusion of such activities without a statutory test.

With respect to paragraph 9 of section 73(1) of the Act, Langley Utilities cited the Board's decision in the THESL Street Lighting Proceeding, and stated that there is nothing about street lighting or street lighting services which, in and of itself, relates to the promotion of energy conservation, energy efficiency, load management or the use of cleaner energy sources. According to Langley Utilities, if street lighting services were to be included under paragraph 9, then almost any other activity could fit under it as well,

which would not be in keeping with the "extremely restrictive" nature of section 73(1) of the Act.

Langley Utilities also reiterated in the alternative that, if street lighting activities are found to be permitted under section 73(1) of the Act, they cannot be conducted outside of the licensed service area of the affiliated electricity distributor. Langley Utilities submitted in this regard that the Legislature did not intend for Municipal Affiliates to compete against one another, stating that one of the reasons for separating distributors from affiliates was to limit the liability of taxpayers from potential losses from certain business activities, "not to pit one taxpayer against another taxpayer in a different jurisdiction". Noting that a municipality is geographically constrained by section 19 of the *Municipal Act, 2001,* Langley Utilities argued that allowing a Municipal Affiliate to conduct business outside of the licensed service area of its affiliated distributor would allow a municipality to do indirectly what it cannot do directly. Langley Utilities also submitted that the ARC is based on an understanding that a Municipal Affiliate's activities occur within the affiliated distributor's licensed service area, and that if the Board were to find that a Municipal Affiliate can conduct business activities elsewhere the Board would need to implement new rules to ensure that the purposes of the ARC are fulfilled.

Powerline's reply submission reiterated the view that Municipal Affiliates are not permitted to undertake street lighting activities. Powerline argued that section 73(1) of the Act is a "prohibition section", and that things that are not specifically referred to (including street lighting) are hence not allowed, particularly in cases where provision in question does not use the words "including but not limited to". Powerline further argued that opening section 73(1) of the Act to any other interpretation would not only change the law of interpretation of statutes, but would also defy logic by creating a regime where virtually any activity might be permitted.

Powerline also submitted that an interpretation of section 73(1) that allows Municipal Affiliates to operate outside of the affiliated distributor's licensed service area similarly defies logic and is contrary to public policy. Powerline noted that "the *Municipal Act* governs by definition entities within a specific geographic area", and to suggest that a municipality could act with authority beyond its boundaries in competition is counter to public policy. According to Powerline, even if this were not the case the legislation does not contemplate allowing publicly-funded entities to engage in business activities in direct competition with private enterprise.

Powerline further submitted that, to the extent that the ARC allows Municipal Affiliates to compete with private enterprise in prohibited activities or can be used to support that argument, the ARC is incorrect and in any event it cannot trump the legislation. The fact that street lighting may have been allowed to continue in the past is not, in Powerline's view, a good reason for allowing that view to prevail if it is incorrect.

Powerline also reiterated the objection to the preparation and filing of submissions by Board staff in this proceeding that Powerline raised in oral argument during the Combined Proceeding. According to Powerline, such submissions "offend against the basic tenets of natural justice, primarily that a party to a matter cannot also be an arbiter in the same matter".

In its reply submission, SEC argued that street lighting services are neither allowed without restriction nor prohibited entirely under paragraph 6 of section 73(1) of the Act. According to SEC, the test is whether the particular street lighting services of a Municipal Affiliate more effectively use the assets of a distributor or of an affiliate of the distributor. SEC therefore urged the Board to describe the characteristics of a street lighting business that will qualify under paragraph 6 and the characteristics of one that will not, and provided examples to demonstrate its proposed approach. SEC submitted that the competitive impact of the street lighting services should not be a key consideration in determining which street lighting activities are permitted and which are not.

SEC also submitted that while the Board's responsibility to interpret section 73 of the Act cannot be delegated to Board staff, the Board can and should have regard to the analysis and reasoning in the Compliance Bulletins. In SEC's view, the Compliance Bulletins can be considered for their content, but the fact that they were prepared by Board staff is and should be irrelevant to that consideration.

The EHMSI reply submission asserted that the Langley Utilities' submissions include a number of assertions that have no foundation in evidence or law. According to EHMSI, the Langley Utilities submissions on paragraph 6 of section 73(1) of the Act disregard the fact that the list of activities identified in that paragraph is not exhaustive. In EHMSI's view, the sole legislative requirement for bringing a business activity within the scope of that paragraph is that its principal purpose is to use more effectively the assets of the distributor, and street lighting satisfies that requirement. Second, the Langley Utilities submissions on the anti-competitive impact of allowing Municipal Affiliates to

engage in street lighting activities are not, in EHMSI's view, supported by evidence, and ignore one of the primary purposes of the ARC. EHMSI also submitted that Langley Utilities has misunderstood the definition of "energy service provider" in the ARC. In response to Langley Utilities' argument that the Compliance Bulletins should be disregarded, EHMSI submitted that Compliance Bulletins serve a critical function in the electricity sector, that the value of such guidance has been recognized by the Courts, that regulated entities should be entitled to assume that Compliance Bulletins reflect Board policy, and that the Board should not interfere with the guidance set out in the Compliance Bulletins unless the information contained in them is clearly wrong or there are changed circumstances.

Along similar lines, EHMSI submitted that ECAO's assertions regarding current non-compliance with the ARC and the increased risk of section 71 of the Act being contravened where Municipal Affiliates provide services outside of the affiliated distributor's licensed service area are made without evidence and are incongruent in the context of a proceeding that the Board has clearly stated is not an enforcement proceeding.

In EHMSI's view, SEC's proposal that there should be no "one size fits all" approach to determining whether street lighting services are permitted under section 73 of the Act has no basis, and that the adoption of SEC's approach would be both unfair and impractical.

EHMSI also submitted that Powerline's assertion that it would be unfair to allow Municipal Affiliates to compete in unregulated business activities has no merit.

The EDA's reply submission focused on three points, the first two in response to the submissions of ECAO and the last in response to the submissions of Langley Utilities. First, in the EDA's view any suggestion of improper competition by Municipal Affiliates, whether through cross-subsidization, contravention of the ARC, or otherwise, is inappropriate in the context of this proceeding and should be disregarded by the Board. Second, section 71 of the Act restricts the business activities of distributors, not of affiliates, and hence according to the EDA the conduct of affiliates can have no impact on any alleged contravention of section 71 of the Act. Third, the EDA asserted that a plain and reasonable reading of section 73(1) of the Act cannot support the conclusion that street lighting services are prohibited, and a plain and reasonable reading of the

ARC cannot support the conclusion that Municipal Affiliates are not "energy service providers" who may be involved in street lighting services.

THESL submitted that this proceeding is not the proper venue in which to address compliance with the ARC, and noted that in its view the ARC is effective in addressing cross-subsidization and other potentially improper use of a utility's monopolistic business. THESL did, however, respond specifically to one ARC issue raised by Langley Utilities; namely, in respect of the definition of "energy service provider". In this regard, THESL submitted that Langley Utilities' interpretation is based on a fundamental misunderstanding of the definition.

With respect to section 73(1) of the Act, THESL urged the Board to recognize that, although the business activities in that section are exhaustive, the Legislature has deliberately described the permitted activities in open-ended terms in furtherance of the Board's objectives. Accordingly, in THESL's view paragraphs 6 and 9 of section 73(1) of the Act should be given a large and liberal interpretation commensurate with the objectives set out in the Act.

In its reply submission, Board staff proposed that the issue to be determined in this proceeding should be examined through a purposive approach to statutory interpretation and with regard to the objectives set out in section 1(1) of the Act. In Board staff's view, the views expressed in the two Board staff Compliance Bulletins are supported by the plain language of section 73(1) of the Act and are in keeping with the statutory objectives of the Board.

Board staff agreed that Municipal Affiliates are, by virtue of section 73(1) of the Act, treated differently than are affiliates of electricity distributors that are not municipally-owned. Board staff submitted that there is merit in PWU's submission regarding the legislative purpose underlying section 73(1), and suggested that reference materials referred to by Langley Utilities do not speak directly to section 73(1) of the Act and hence do not support the conclusion that the purpose of section 73(1) is to protect competitive markets. However, Board staff also submitted that, regardless of the legislative purpose that underpins section 73(1) of the Act, the Board is not required to "read down", or give a narrow or restrictive interpretation to, section 73(1) of the Act as a whole, or individually to any of the paragraphs listed in that section. In this regard, Board staff noted that: (i) paragraph 6 of section 73(1) of the Act does not contain any express limitations on the affiliate whose assets may be used more effectively, the

nature of the assets that may be used more effectively or how the assets may be used more effectively; and (ii) paragraph 9 of section 73(1) of the Act does not, by its terms, limit the nature of the services that can be related to the promotion of energy conservation or energy efficiency. Board staff also noted that there is some question as to the application of the *ejusdem generis* rule of statutory construction in the context of paragraph 6 of section 73(1) of the Act, and that in any event the Board has likened street lighting services to the other activities listed in that paragraph.

In response to the submissions of Langley Utilities regarding the definition of "public utility" in paragraph 7 of section 73(1) of the Act, Board staff submitted that the scope of that paragraph should not be used to restrict the scope of other independent paragraphs in section 73(1) and that there is an equally plausible rationale for the Legislature's choice of definition. Board staff also submitted that no inference can usefully be drawn from the reference to street lighting in Ontario Regulation 161/99 (Definitions and Exemptions), or from the fact that certain statutory provisions or Board documents make specific reference to street lighting. Board staff also noted that, in its view, the submission by Langley Utilities that distributors are of the belief that Municipal Affiliates are precluded from providing street lighting services does not find support in the 2006 Compliance Bulletin (200605) that Langley Utilities cited in its submissions on this point.

In response to the submissions of Langley Utilities regarding paragraph 9 of section 73(1) of the Act, Board staff confirmed that the two Compliance Bulletins state that street lighting *can* fit within this paragraph, rather than stating that street lighting is, by definition, an energy conservation or energy efficiency activity. Board staff also pointed to the fact that the Board has, in the past, approved a number of "signal street lighting efficiency" programs in the context of "3rd tranche" CDM programs, and submitted that the views expressed in the Compliance Bulletin are not incompatible with the decision of the Board in the THESL Street Lighting Proceeding.

Board staff further submitted that the restrictions on a distributor's activities that are set out in section 71(1) of the Act are not germane to the interpretation of section 73(1), as the two sections serve distinct purposes. Board staff also expressed the view that the assertions made by Langley Utilities regarding the ARC definition of "energy service provider" and the objectives of the ARC do not accurately reflect the nature and purpose of the relevant ARC provisions.

Finally, Board staff submitted that Langley Utilities' submissions regarding staff Bulletins misunderstand or misrepresent what staff Bulletins are, and that there is no merit to the suggestion that the staff Compliance Bulletins of relevance to this proceeding should be "wholly disregarded".

Board Findings

Section 73 of the Act

As indicated in the Notice, this proceeding pertains to the Board's interpretation of section 73(1) of the Act, and more specifically to the question of whether that section precludes Municipal Affiliates from engaging in the provision of street lighting services. In making a determination of this kind, the Board takes a purposive approach by examining the words of the statute "in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[4] The Board also notes section 64(1) of the *Legislation Act, 2006*, which states that legislation is to be "interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects".

While the Board's own codes and policies may reflect the Board's understanding of a statutory provision at a given time, those codes and policies are not themselves determinative of the meaning of the statutory provision. Similarly, although the Board considers the underlying intention or purpose of a statutory provision, the Board is not driven in its interpretation by the implications that one interpretation might have relative to another in terms of impact on the market, distributors, ratepayers or other stakeholders whose interests might be at issue. If, based on a proper interpretation of the statute, there are adverse implications for any one or more stakeholders, the solution rests with the legislature and not with the Board.

The Board is not bound in any way by Board staff bulletins. As all bulletins themselves note, they represent the views of Board staff and are not binding on the Board. The Board is not, however, required to ignore them. Similarly, Board staff's submissions are no more authoritative than any others, and have been considered by the Board with the same and no greater weight.

[4] Elmer A. Driedger, The Construction of Statutes (Toronto: Butterworths, 1974), at p. 76; quoted in Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002), at p. 1.

Section 73(1) of the Act limits the activities of Municipal Affiliates, subject to enumerated exceptions. The Board finds that, on a plain reading of section 73(1), street lighting services can be permitted activities for Municipal Affiliates under the exception found in paragraph 6. That paragraph allows the following:

> Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services, and carrying on activities authorized under section 42 of the *Electricity Act, 1998*.

Some of the arguments submitted by parties and Board staff spoke to the issue of whether the list of activities in paragraph 6 is exhaustive or illustrative.

The Board finds that the words used in paragraph 6 to describe the nature of the permitted business activities - those "the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of a distributor"- would serve no purpose if the term "including" was interpreted so as to render the enumerated list exhaustive. In other words, if the intention had been to limit the scope of the paragraph to meter installation and the other specifically noted activities, the earlier portion of the paragraph would not have been necessary.

The Board finds that, on a plain reading of paragraph 6 of section 73(1) of the Act, the word "including" should be given its usual meaning of connoting that the list that follows is not exhaustive but rather sets out examples.

A purposive approach to the interpretation of section 73(1) that results in a determination that the list in paragraph 6 is not exhaustive is also in keeping with the Board's objectives as set out in the Act. The provision of services that make more effective use of assets supports the Board's objective of promoting economic efficiency and cost effectiveness in the electricity sector.

It follows that, in the Board's view, any business activity "the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of a distributor" is permitted under paragraph 6 of section 73(1) of the Act, whether specifically mentioned in that paragraph or not. Street lighting activities that meet this test – a question of fact in each case – are permitted activities.

The Board also finds that Municipal Affiliates can avail themselves of the exception in paragraph 9 of section 73(1) of the Act for the purpose of providing street lighting services if the service in question relates to the promotion of energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources. Again, this will be a question of fact in each case.

Section 73(1) of the Act is silent on the issue of the territory within which a Municipal Affiliate can undertake the activities permitted by that section. The Board also notes that a Municipal Affiliate, unlike its affiliated distributor, is not subject to licence conditions that restrict the geographic scope of its operations. Therefore, a Municipal Affiliate is not constrained by the Act or the Board's regulatory instruments from operating outside the licensed service territory of its affiliated distributor. The Board does not believe that it is appropriate to interpret section 73(1) of the Act in a manner that would essentially read in such a constraint.

Langley Utilities and Powerline raised a number of points in putting forward their positions. The Board has considered all of these points in their entirety, as it has the submissions of all other participants in this proceeding. The following sets out the Board's views on a subset of those points.

The Board does not dispute that, through section 73(1) of the Act, the legislature has chosen to treat Municipal Affiliates differently from their private sector counterparts. The fact remains, however, that section 73(1) provides a list of permitted activities, and hence allows the participation of Municipal Affiliates in competitive markets. It is the interpretation of these exceptions from the general prohibition that is the issue at hand. The Board notes that both paragraph 6 and paragraph 9 of section 73(1) of the Act are worded in open-ended terms. The Board is not persuaded by the submissions made in support of the argument that a purposive approach to the interpretation of those paragraphs requires that they be narrowly construed.

It was submitted that the inclusion of a specific reference to street lighting in other statutes which existed at the time that section 73(1) was drafted is proof that street lighting services were deliberately excluded from the ambit of that section. The Board does not consider that argument to be either conclusive or sufficiently probable. The fact that other statutes may make specific reference to street lighting is not

determinative of whether street lighting can be captured under any of the exceptions listed in section 73(1) of the Act.

Langley Utilities also urged the Board to interpret section 73(1) of the Act in the context of section 71, which itself places certain restrictions on the business activities that a distributor can undertake. In the Board's view, these two sections deal with distinct subject matter, one being the permitted activities of a distributor and the other being the permitted activities of a Municipal Affiliate. The interpretation of one of these sections should not be used to read down the other. This is consistent with the Board's findings in the THESL Street Lighting Proceeding regarding the appropriate classification of certain assets in view of the restrictions imposed on distributors in respect of the servicing of street lighting assets.

The Board is aware that its interpretation of section 73(1) of the Act may have implications for private companies that are engaged in the provision of street lighting services. The Board notes that it has regulatory mechanisms in place under the ARC that have as their purpose to, among other things, prevent distributors from cross-subsidizing affiliate activities, ensure that there is no preferential access to distributor services and prevent distributors from acting in a manner that provides an unfair business advantage to an affiliate that is an energy service provider.

Cost Awards

In Procedural Order No. 1, in addition to finding that ECAO and Dundas Power Line Ltd. are not eligible for an award of costs, the Board also indicated that it did not then intend to order any party to pay any of the Board's costs in relation to this proceeding. The Board confirms that this remains the case.

Nonetheless, there are two cost awards issues that remain outstanding; one relating to the cost award eligibility of SEC and the other relating to the payment of the Board's costs in relation to the Combined Proceeding.

<u>SEC Request for Cost Eligibility</u>

In its June 4, 2012 late intervention filing, SEC requested that it be eligible for an award of costs in this proceeding. On June 12, 2012, the Board issued a Decision on Cost

Award Eligibility in which it denied SEC's request for cost award eligibility, stating as follows:

> In the Notice, the Board indicated that cost eligibility requests must specifically include a statement of how the requesting party's interests will be affected by the outcome of this proceeding. In the absence of further particulars, the Board is not satisfied that the interests of ratepayers such as the members of SEC are directly engaged in this proceeding, which has as its focus affiliates whose activities are not generally regulated by the Board. Therefore, the Board approves SEC as an intervenor but finds that SEC is not eligible for an award of costs in relation to this proceeding.

In its submissions filed in this proceeding in response to Procedural Order No. 1, SEC made submissions with a view to providing the "further particulars" referenced in the Board's Decision on Cost Award Eligibility. SEC stated that its substantive submissions on the issues demonstrate that the interpretation of section 73(1) of the Act has both direct and indirect impacts on ratepayers; that the interpretation of section 73(1) must, as a matter of law and good policy, be carried out with ratepayer impacts as a key – and perhaps the primary – consideration; that SEC provides a unique perspective on the question of the interpretation of section 73(1), and one that is unlikely to be addressed at all, or at least fully or in quite the same way, by any other party to this proceeding; and that participation by SEC in this proceeding is of assistance to the Board.

The Board does not consider SEC's submissions regarding how its interests are affected by the outcome of this proceeding to be convincing. SEC was denied cost award eligibility in light of the focus of this proceeding; namely the permitted activities of entities (Municipal Affiliates) whose activities are not generally regulated by the Board.

Much of SEC's submissions are devoted to articulating the approach that the Board should use in interpreting section 73(1) of the Act and the test that the Board should apply to determine whether an activity is permissible under that section. SEC's submissions do invite the Board to focus on certain identified ratepayer impacts when considering the scope to be attributed to paragraph 6 of section 73(1) in particular. However, the Board does not consider that SEC's submissions clearly demonstrate how the outcome of this proceeding (in other words, a decision on the merits one way or the other, irrespective of the approach or test to be applied) affects its interests.

The Board therefore confirms that SEC is not eligible for an award of costs in this proceeding.

The Board's Costs of the Combined Proceeding

In the Board's January 23, 2012 Decision with Reasons and Order issued in respect of the Combined Proceeding, the Board stated that the Board's costs in relation to the Combined Proceeding would be apportioned equally between the Langley Utilities Application and the other application that gave rise to the Combined Proceeding. The Board also stated that, with respect to the portion of the Board's costs related to the Langley Utilities Application, the recovery of those costs would be determined as part of the hearing in this proceeding.

In Procedural Order No. 1 issued in this proceeding, the Board stated that it would address the payment of these outstanding costs when it issues its decision.

As a result of the Combined Proceeding, the Board determined that there was merit in hearing the matter brought forward by Langley Utilities, and the Board initiated this hearing on its own motion for that purpose. As noted above, the Board will not order any party to pay any of the Board's costs in relation to this proceeding. The Board considers it appropriate to extend this same treatment to the proceeding that was the impetus for this hearing. The Board will therefore not order any party to pay that portion of the Board's costs of the Combined Proceeding related to the Langley Utilities Application.

DATED at Toronto, December 13, 2012

ONTARIO ENERGY BOARD

Original signed by

Ken Quesnelle
Presiding Member

Original signed by

Cathy Spoel
Member

Original signed by

Christine Long
Member

APPENDIX A

Section 73 of the *Ontario Energy Board Act, 1998*

Municipally-owned distributors

73 (1) If one or more municipal corporations own, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of a corporation that is a distributor, the distributor's affiliates shall not carry on any business activity other than the following:

1. Transmitting or distributing electricity.
2. Owning or operating a generation facility that was transferred to the distributor pursuant to Part XI of the *Electricity Act, 1998* or for which the approval of the Board was obtained under section 82 or for which the Board did not issue a notice of review in accordance with section 80.
3. Retailing electricity.
4. Distributing or retailing gas or any other energy product which is carried through pipes or wires to the user.
5. Business activities that develop or enhance the ability of the distributor or any of its affiliates to carry on any of the activities described in paragraph 1, 3 or 4.
6. Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998*.
7. Managing or operating, on behalf of a municipal corporation which owns shares in the distributor, the provision of a public utility as defined in section 1 of the *Public Utilities Act* or sewage services.
8. Renting or selling hot water heaters.
9. Providing services related to the promotion of energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources.

(2) In acting under paragraph 7 of subsection (1), the distributor's affiliate shall not own or lease any works, pipes or other machinery or equipment used in the manufacture, processing or distribution of a public utility or in the provision of sewage services.

(3) Subsection (1) does not restrict the activities of a municipal corporation.

TAB 12

Ruth Sullivan

Sullivan on the Construction of Statutes, 6th Ed.

CHAPTER 2 - DRIEDGER'S MODERN PRINCIPLE

Analysis of the Modern Principle

Introduction

§2.1 ***Introduction.*** In the first edition of the *Construction of Statutes*, published in 1974, Elmer Driedger described an approach to statutory interpretation which he called the modern principle:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[1]

In the years following that first edition, the modern principle was frequently cited and relied on, and in 1998, in *Re Rizzo & Rizzo Shoes Ltd.*, it was declared to be the preferred approach of the Supreme Court of Canada. Speaking for the Court, Iacobucci J. wrote:

> Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone.[2]

Since the Rizzo case, Driedger's modern principle has been the starting point for statutory interpretation in innumerable decisions by Canadian courts. It has even been applied to interpretation of Quebec's Civil Code.[3]

§2.2 The chief virtue of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. In interpreting a legislative provision, a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, it must also take into account the purpose of the provision and all relevant context. It must do so regardless of whether the legislation is considered ambiguous.

§2.3 The first dimension emphasized is textual meaning. Although texts issue from an author and a particular set of circumstances, once published they are detached from their origin and take on a life of their own -- one over which the reader has substantial control. Research in psycholinguistics has shown that the way readers understand the words of a text depends on the expectations they bring to their reading. While these expectations are rooted in linguistic competence and shared linguistic convention, they are also dependent on the wide-ranging knowledge, beliefs, values and experience that readers have stored in their brain. The content of a reader's memory constitutes the most important context in which a text is read and influences in particular his or her impression of

ordinary meaning -- what Driedger calls the grammatical and ordinary sense of the words.

§2.4 A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct as a result of the communication. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.

§2.5 A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. They are also an integral part of legislative intent, as that concept is explained by Driedger. In the second edition he wrote:

> It may be convenient to regard 'intention of Parliament' as composed of four elements, namely
>
> o the expressed intention -- the intention expressed by the enacted words;
>
> o the implied intention -- the intention that may legitimately be implied from the enacted words;
>
> o the presumed intention -- the intention that the courts will in the absence of an indication to the contrary impute to Parliament; and
>
> o the declared intention -- the intention that Parliament itself has said may be or must be or must not be imputed to it.[4]

Presumed intention embraces the entire body of evolving legal norms which contribute to the legal context in which official interpretation occurs. These norms are found in Constitution Acts, in constitutional and quasi-constitutional legislation and in international law, both customary and conventional. Their primary source, however, is the common law.[5] Over the centuries courts have identified certain values that are deserving of legal protection and these have become the basis for the strict and liberal construction doctrine and the presumptions of legislative intent. These norms are an important part of the context in which legislation is made and read.

§2.6 The modern principle says that the words of a legislative text must be read in their ordinary sense *harmoniously* with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. A serious weakness of the modern principle is its failure to acknowledge and address the dilemma created by hard cases.

§2.7 The modern principle may also be criticized for encouraging the assumption that statutory interpretation consists of resolving doubt about the meaning of words. A significant number of interpretation disputes involve attempts to read down clear, but over-inclusive provisions or to supplement clear, but under-inclusive ones. Other disputes address the relationship between overlapping provisions or between legislation and the common law. Occasionally the issue is whether the drafter has made a mistake or there is a gap in the legislative scheme.

Relation of the modern principle to the rules of statutory interpretation

§2.8 ***Relation of the modern principle to the rules of statutory interpretation.*** Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:

- what is the meaning of the legislative text?
- what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
- what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

In answering these questions, interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes.

§2.9 At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.

§2.10 These several dimensions of statutory interpretation are not accidental or arbitrarily chosen. As Driedger indicated in his initial formulation of the modern principle, they reflect the evolution of statutory interpretation over many centuries.

Footnote(s)

1 Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67. This principle was reproduced in the second edition, published in 1983, without modification at p. 87.

2 [1998] S.C.J. No. 2, at para. 21, [1998] 1 S.C.R. 27, at 41 (S.C.C.). For a comprehensive and critical analysis of Driedger's modern principle, see Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimation" (2006), 40 Thémis 131-72.

3 See *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] S.C.J. No. 55, [2004] 3 S.C.R. 257, at para. 20*ff*. (S.C.C.).

4 Elmer A. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at p. 106. [Bullets added.]

5 This is true in Quebec in matters of public law, which is derived from common law sources. In matters of private law, the *Civil Code of Québec* is the primary source of legal norms.

Ruth Sullivan

Sullivan on the Construction of Statutes, 6th Ed.

CHAPTER 4 - TECHNICAL AND LEGAL MEANING, STATUTORY DEFINITIONS, INTERPRETATION ACTS AND RECURRING LEGISLATIVE TERMINOLOGY

Part 4 Interpretation Acts and Recurring Legislative Terminology

Interpretation Acts

§4.51 ***Interpretation Acts.*** Every Canadian jurisdiction has an Interpretation Act that sets out rules and definitions applicable to all legislation enacted within the jurisdiction -- subject to evidence of a contrary intention. Interpretation Acts typically contain rules respecting the operation and application of statutes and a range of interpretation rules.

§4.52 In addition, they usually contain a section that stipulates meanings for recurring words like "Her Majesty", "person", "corporation", "holiday", "newspaper" and the like. The meanings set out in the section are presumed to apply each time the word is used in statutes or regulations. It is doubtful, however, that the definitions would apply to texts that have been incorporated by reference, unless the incorporating enactment provides otherwise.

§4.53 It is important to distinguish the provision in Interpretation Acts setting out definitions that are applicable to the entire statute book of the jurisdiction from the provision (usually s. 1 or 2 of the Act) that sets out definitions that are applicable to the Interpretation Act itself. This point was made by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, where Charron J. wrote:

> ... The definition contained in the Interpretation Act could arguably be relevant, as s. 3(1) states: 'Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act'. However, ... the definition "public officer" is contained in the list of definitions under s. 2 of the Interpretation Act, which is expressly stated to apply "[i]n this Act'. The definition is not repeated in the definitions contained in s. 35, which conversely, apply '[i]n every enactment'.[1]

§4.54 Interpretation Acts also contain a miscellany of rules governing a wide range of matters -- powers of corporations, computation of majorities and quorums, calculation of time, appointments and removals from office, declaration of offences, default arrest powers, how oaths are to be taken and more.

§4.55 In addition to Interpretation Acts, interpretation rules may be found in Acts like Official Languages Acts, Regulation Acts, and Statute Revision Acts.

action.[76]

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

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

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

Deems

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

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

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

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

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

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CHAPTER 7 - PLAUSIBLE MEANING

The Plausible Meaning Rule

Formulation of the rule

§7.4 *Formulation of the rule.* Under Driedger's modern principle, a court's primary duty is to harmonize the grammatical meaning of the text with the other indicators of legislative intent gleaned from reading the text in the entire context. However, reliance on these other indicators is subject to the following constraint: the interpretation ultimately adopted must be one that the words of the text can reasonably bear. This is the plausible meaning rule.

In *Re: Sound v. Motion Picture Theatre Associations of Canada*, LeBel J. wrote: "Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament."[1]

In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, Charron J. wrote: " ... The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted."[2]

In *Saulnier v. Royal Bank of Canada*, Binnie J. wrote: " ... We cannot wish away the statutory language however much practical sense is reflected in the result reached by the courts below."[3]

These are all expressions of the plausible meaning rule.

Plausible meaning and adding words to the text

§7.5 *Plausible meaning and adding words to the text.* In resolving interpretation disputes, courts often reject a proposed interpretation on the grounds that to accept it would require the court to add words to the legislative text. The reasoning of the majority in *R. v. McIntosh*[4] is typical. In that case, the issue was whether the self-defence provision in s. 34(2) of the *Criminal Code* should be read as applying to non-provoked assaults alone, leaving provoked assaults to be dealt with exclusively under s. 35. In rejecting this interpretation, Lamer C.J. wrote:

> [T]he contextual approach allows the courts to depart from the common grammatical meaning of words where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually ... The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function.[5]

TAB 13

CED Restitution I

Canadian Encyclopedic Digest
Restitution
I — Introduction

For print citation information and the currency of the title, please click here.

I

See Canadian Abridgment: RST.I Restitution and unjust enrichment — General principles

§1 The law of restitution is that body of law, drawn from principles of both law and equity, which is designed to prevent one party being unjustly enriched at another's expense.[1] However, the principle of unjust enrichment is not sufficiently broad to explain all instances where a restitutionary remedy such as the constructive trust is available. Under the general rubric of good conscience, constructive trusts are recognized for wrongful acts such as fraud and breach of duty of loyalty and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground alone.[2]

§2 It is clear that the law of restitution stands apart from the law of contract. The obligation to restore benefits unjustly retained does not arise from there being any implied contract between the parties, but rests upon an obligation imposed by law to prevent unjust enrichment.[3]

§3 Unjust enrichment is a cause of action in itself and the granting of a remedy for unjust enrichment does not depend upon finding another cause of action.[4]

§4 The principle of unjust enrichment presupposes three things, namely (1) the receipt by the defendant of a benefit, (2) at the plaintiff's expense, (3) in such circumstances that it would be unjust to allow the defendant to retain the benefit.[5]

§5 Whilst there are many recognized categories of restitution, it is clear that these categories are not closed.[6] A remedy may be granted to prevent unjust enrichment even though the particular case cannot be slotted easily into an existing category of restitution.[7] There are many examples of this process.[8]

§6 The Canadian courts are also prepared to be flexible in their choice of a restitutionary remedy. In particular, they have been willing to utilize the constructive trust as a proprietary restitutionary remedy.[9] A constructive trust may be imposed by the courts in situations in which all three elements necessary to constitute unjust enrichment are not present.[10]

§7 Although restitution is an expanding area of the law, this Title, for purposes of exposition, will generally adhere to the organization laid out in a leading textbook.[11] The following topics will be addressed: recovery of benefits conferred under mistake,[12] recovery of benefits conferred under compulsion,[13] recovery of benefits conferred without request in an emergency,[14] recovery of benefits conferred pursuant to ineffective transactions,[15] recovery of benefits acquired through wrongful acts,[16] the remedy of subrogation,[17] the position of proprietary remedies in restitutionary claims[18] and defences to restitutionary claims.[19]

Footnotes

1 *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* (1942), [1943] A.C. 32 (U.K. H.L.) ("It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution"); *Morrison v. Canadian Surety Co.* (1954), 12 W.W.R. (N.S.) 57 (Man. C.A.); *Deglman v. Guaranty Trust Co. of Canada* (1954), [1954] S.C.R. 725 (S.C.C.); *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 (N.B. C.A.); *Stoicevski v. Nelson* (2007), 2007 CarswellOnt 8606 (Ont. S.C.J.) (court has power to order *quantum meruit* payments in order to avoid unjust enrichment); *Canadian-Automatic Data Processing Services Ltd. v. Syntecor Ltd.* (2004), 2004 CarswellBC 1710 (B.C. C.A.) (plaintiff supplied payroll data processing to defendant corporation; no unjust enrichment existed as plaintiff did not have legal obligation to make payments to employees); *Valley v. McLeod Valley Casing Services Ltd.* (2004), 2004 CarswellAlta 498 (Alta. Q.B.) (doctrine of unjust enrichment and remedy of imposition of constructive trust apply not only to domestic disputes but equally to commercial situations where elements are made out); Goff & Jones, The Law of Restitution, 6th ed. (2002), pp. 3-78; Fridman, Restitution, 2nd ed. (1992), pp. 1-40; Klippert, Unjust Enrichment, (1983), pp. 1-67.

2 *Soulos v. Korkontzilas* (1997), [1997] 2 S.C.R. 217 (S.C.C.) at 240; *Robertson v. Fieldstone Homes Ltd.* (2009), 2009 CarswellOnt 7794 (Ont. Master) (notion of constructive trust discussed); *Investit Financial Inc. v. Ingersoll 10 Mission Development Ltd.* (2006), 2006 CarswellAlta 381 (Alta. Q.B.) (letter upon which company relied was not basis for constructive trust but simply transmittal of information with certain representations; company aware that it was not in fully secured position).

3 *Deglman v. Guaranty Trust Co. of Canada* (1954), [1954] S.C.R. 725 (S.C.C.) (nephew performing tasks for aunt on faith of promise to leave him land in her will; nephew seeking to enforce promise against aunt's estate; promise unenforceable because of Statute of Frauds; aunt having received benefits of full performance of contract by nephew; law imposing upon estate obligation to pay fair value of services rendered); *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.) (money paid to municipality under mistake of fact; obligation to repay not contractual but depending upon what is just and equitable; open to municipality to avoid obligation to repay by showing it would be unjust for it to be compelled to do so because municipality having materially changed position as result of payment; no material change of position established on facts); *Banque Financière De La Cité v. Parc (Battersea) Ltd.* (1998), [1998] 1 All E.R. 737 (U.K. H.L.) at 744, 745 (contractual subrogation and subrogation to prevent unjust enrichment radically different institutions; contractual subrogation arising from common intention of parties; no requirement of mutual consent for restitutionary remedy; contractual features not to be imported into requirements for restitutionary subrogation); *McCarthy Milling Co.*

v. Elder Packing Co. (1973), 33 D.L.R. (3d) 52 (Ont. H.C.) (plaintiff sold product to defendant at reduced price because of defendant's representation that government subsidy applied to defendant's product; government paid subsidy to plaintiff but later stopped subsidy and claimed overpayment from plaintiff; plaintiff repaid overpayment to government; defendant liable to reimburse plaintiff for overpayment as otherwise defendant unjustly enriched); *Kang Corp. v. KRTT Group Ltd.* (2007), 2007 CarswellOnt 2414 (Ont. C.J.) (factors demonstrating agreement to jointly own and manage particular property; part performance sufficient to take agreement out of Statute of Frauds); *Stoicevski v. Nelson* (2007), 2007 CarswellOnt 8606 (Ont. S.C.J.) (purchaser not signing representation agreement with real estate agent who was friend; agent showing property which purchaser subsequently bought through another agent; unjust enrichment held as sole purpose of changing agent was to reduce commission).

4 *McLean v. Grandmont* (1993), [1993] 5 W.W.R. 686 (B.C. C.A.) (defendant's mother promising to give home to couple on marriage and encouraging plaintiff to improve property in meantime; failure of marriage to occur not justifying denying plaintiff compensation for efforts and expenditures).

5 *Becker v. Pettkus* (1980), [1980] 2 S.C.R. 834 (S.C.C.) at 848 (three requirements to be satisfied for unjust enrichment: enrichment, corresponding deprivation and absence of juristic reason for enrichment); **see also** §§518-553.

6 *James More & Sons Ltd. v. University of Ottawa* (1974), 5 O.R. (2d) 162 (Ont. H.C.); *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506 (Ont. C.A.); *ING Halifax v. Royal & SunAlliance Insurance Co. of Canada* (2004), 2004 CarswellOnt 2141 (Ont. S.C.J.) (insurance); *Manias v. Norwich Financial Inc.* (2008), 2008 CarswellOnt 3813 (Ont. C.A.) (denial of mortgage priority constituting unjust enrichment).

7 *Becker v. Pettkus* (1980), [1980] 2 S.C.R. 834 (S.C.C.); *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 (N.B. C.A.).

8 *Carleton (County) v. Ottawa (City)* (1965), [1965] S.C.R. 663 (S.C.C.) (one municipality discharging another's statutory obligation to provide board, lodging and medical assistance to indigent mistakenly believed to be resident within former municipality's boundaries); *James More & Sons Ltd. v. University of Ottawa* (1974), 5 O.R. (2d) 162 (Ont. H.C.) (plaintiff entering building contract with defendant; contract silent as to allocation of tax increases on building materials; defendant's architect promising plaintiff any such tax increases would be borne by defendant; architect acting without authority; taxes increased and plaintiff paying increase; defendant recovering taxes by statute as educational institution; court ordering defendant to reimburse plaintiff); *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 (N.B. C.A.) (stepfather requesting stepchildren release to him securities received from mother's estate; stepfather indicating stepchildren would benefit substantially under will; stepchildren releasing securities but receiving nothing under will; stepfather's estate ordered to pay value of securities to stepchildren); *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161 (B.C. C.A.) (mortgagee of construction project urging subcontractors to complete project by assurance that unadvanced mortgage funds would be paid to contractor; subcontractors completing work; mortgagee foreclosing and not advancing further funds; mortgagee unjustly enriched by completion of project without advancing remaining funds); *Canadian-Automatic Data Processing Services Ltd. v. Syntecor Ltd.* (2004), 2004 CarswellBC 1710 (B.C. C.A.) (labour and employment).

9 *Becker v. Pettkus* (1980), [1980] 2 S.C.R. 834 (S.C.C.); *Taypotat v. Surgeson* (1985), [1985] 3 W.W.R. 18 (Sask. C.A.) (builder constructing homes for landowner; basements completed on owner's land but houses built off-site then to be installed over basements; builder became bankrupt but owner had overpaid for work done; parties had agreed that owner would be owner of houses during all phases of construction; houses subject to constructive proprietary trust as unjust to permit bankruptcy trustee to retain houses); **see also** §§554-568.

10 **See** §§510, 516.

11 Goff & Jones, The Law of Restitution, 6th ed. (2002).

12 **See** §§8-74.

13 **See** §§75-207.

14 **See** §§208-232.

15 **See** §§233-399.

16 **See** §§400-478.

17 **See** §§479-507.

18 **See** §§508-589.16.

19 **See** §§590-597.

End of Document

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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