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March 5, 2019

DELIVERED VIA E-MAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Submissions of the Utilities on Legal Effect of Repeal of *Climate Change Act* and treatment of Strictly Confidential Information
File Number: EB-2018-0331

We are counsel to Enbridge Gas Inc. (formerly Enbridge Gas Distribution Inc. and Union Gas Limited). We will refer to these parties as "the Utilities" in this submission.

In Procedural Order No. 3[1], the Ontario Energy Board (OEB, or the Board) requested that parties provide written submissions on the legal effect of a repeal of legislation including where the repealing act is silent as to the effect of the repeal on specific provisions that had been in force. The OEB requested that the submissions address the required treatment of strictly confidential evidence in this proceeding that follows from the determination of the legal effect of the repeal of the *Climate Change Act.*[2]

As explained below, an important principle of statutory interpretation is that a statute is not to be read or interpreted retroactively (to apply to prior events before the enactment of the statute) unless the statute clearly indicates this intent. More specifically, the applicable legal authorities are clear that where legislation is repealed without reference to retrospective effect then the repealed legislation continues to apply in respect of transactions and events that arose during the currency of the legislation.

In this case, the statutory obligation on the Utilities not to disclose information related to its participation and plans for Ontario government Cap and Trade auctions was in full force and effect at the time when all auctions were held (between January 2017 to May 2018). The repeal of the *Climate Change Act*, effective on October 31, 2018, did not include any transition provisions related to the prohibition against disclosure of auction information.[3] It

[1] EB-2018-0331, Procedural Order No. 3, February 12, 2019.
[2] The full title of the statute is the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, S.O. 2016, c. 7. See Tab 1 of Brief of Authorities.
[3] See *Cap and Trade Cancellation Act*, 2019, S.O. 2018, c. 13, section 16. See Tab 2 of Brief of Authorities.

is clear, therefore, that the prohibition against public disclosure continues to apply in relation to information submitted during or relating to the time when the *Climate Change Act* was in force. The types of information already classified and/or accepted by the Board as "Auction Confidential" and "Market Sensitive" should continue to be treated as confidential, and managed as prescribed in the Board's *Regulatory Framework for the Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities* (the Framework)[4]. Even after this proceeding, the prohibitions against disclosure will continue where disclosure of past Cap and Trade transactional activity and strategies is requested.

Background

The Framework describes the confidentiality obligations from the *Climate Change Act* as follows:

> *The Climate Change Act prohibits a person from disclosing whether or not the person is participating in an auction or "any other information relating to the person's participation in an auction, including the person's identity, bidding strategy, the amount of the person's bids for a specified quantity of emissions allowances and the financial information provided to the Director in connection with the auction". Disclosure of this information may only be made as 'prescribed'. Section 65 of the Cap and Trade Regulation* [O. Reg. 144/16] *specifies that the OEB is a 'prescribed' person to whom Auction Confidential Information may be disclosed.*[5]

Taking this statutory direction into account, the OEB developed an approach through which the Utilities would provide "Auction Confidential Information" and "Market Sensitive Information" for review by the OEB and OEB staff only, and then the OEB would prepare a non-confidential public report as to the reasonableness of the Cap and Trade costs incurred by a Utility.

The OEB recognized that this approach is a departure from its general practice. Typically, the OEB places materials on the public record so that all interested parties can have equal access to those materials, or alternately makes confidential materials available to parties who follow the OEB's confidentiality guidelines. The OEB determined that this different approach is required because of the restrictions in the *Climate Change Act*. The OEB stated that "[t]he *Climate Change Act* includes limitations on the disclosure of certain information, that must be respected despite the OEB's general approach to confidentiality" and confirming that "[t]hese limitations are reflected in this Regulatory Framework".[6]

The Utilities filed Cap and Trade Compliance Plans for each of 2017 and 2018.[7] Each of these filings contained Market Sensitive and Auction Confidential information which was

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[4] EB-2015-0363, September 26, 2016. See Tab 3 of Brief of Authorities.
[5] Framework, page 11. The restrictions described in this passage, which are found in subsections 32(6) to (9) of the *Climate Change Act*, relate to disclosure of information about auction transactions. Note that similar prohibitions against disclosure of information about secondary market transactions were set out in subsections 29(5) and (6) of the *Climate Change Act* – those prohibitions are what caused the OEB to create the "Market Sensitive Information" category.
[6] Framework, page 9.
[7] These proceedings are filed as EB-2016-0296/0300/0330 and EB-2017-0224/0255/0275.

statutorily prohibited from being publicly disclosed. The OEB applied its stated approach to Confidentiality of Cap and Trade Information as set out in the Framework in the processes related to the Utilities' Cap and Trade Compliance Plans for 2017 and 2018. This meant that the details of the strategies and participation of each of the Utilities in auctions and the secondary market in 2017 and 2018 was not disclosed to any party other than the Board and Board staff.

On July 25, 2018, the Ontario government introduced the *Cap and Trade Cancellation Act, 2018*, which was designed to implement the government's commitment to wind down Ontario's Cap and Trade Program. This followed the July 3, 2018 announcement that the government had revoked the *Cap-and-Trade Program Regulation* and prohibited registered participants from purchasing, selling, trading or otherwise dealing with emission allowances and credits. As a result, the May 2018 auction was the final Ontario Cap and Trade Auction.

The *Cap and Trade Cancellation Act* received Royal Assent on October 31, 2018[8] and came into force shortly thereafter. The *Cap and Trade Cancellation Act* indicated, at section 16, that "The *Climate Change Mitigation and Low-carbon Economy Act, 2016* is repealed."[9] The *Cap and Trade Cancellation Act* does not include any transition provisions or otherwise address the status of any provisions that were included in the *Climate Change Act*.

Since the time that the *Climate Change Act* was repealed, the OEB has not made any changes to the Framework, and the rules related to Confidentiality of Cap and Trade Information remain in place.

Following the repeal of the *Climate Change Act*, the OEB directed the Utilities to discontinue their Cap and Trade Unit Charges as of September 30, 2018, and approved the provisional clearance of amounts recorded in the Gas Utilities' Cap and Trade related deferral and variance accounts (C&T DVAs). The OEB then convened this proceeding to undertake a prudence review of the balances in the C&T DVAs.

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[8] See https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-4/status. See Tab 4 of Brief of Authorities.

[9] The *Cap and Trade Cancellation Act* also includes provisions related to how Cap and Trade instruments acquired under the *Climate Change Act* would be treated, and whether compensation would be paid to a person holding such instruments – see section 8.

Key Principles of Statutory Interpretation

There is a strong presumption that legislation is not intended to be retroactive unless this is expressly or necessarily implied by the language of the statute.[10] The rights and obligations set out in a new or amended statute apply prospectively to new events arising after the statute comes into effect, but do not ordinarily apply to events that predate the new or amended statute.[11]

This principle has been codified in Canadian "Interpretation Acts" (including Ontario's current *Legislation Act, 2006*) so that the principle also applies in relation to the repeal of legislation. The result is that repealed legislation does not apply to new events but will generally be taken to continue to apply to events that occurred during the currency of the legislation.[12] An exception exists where the language of the repealing legislation indicates otherwise.

Ontario's *Legislation Act, 2006*[13] clearly addresses this situation under the heading "Effect of repeal and revocation". The relevant provision reads as follows:

> ***51*** *(1) The repeal of an Act or the revocation of a regulation does not,*
>
> *(a) affect the previous operation of the repealed or revoked Act or regulation;*
>
> *(b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;*
>
> *(c) affect an offence committed against the repealed or revoked Act or regulation, or any penalty, forfeiture or punishment incurred in connection with the offence;*
>
> *(d) affect an investigation, proceeding or remedy in respect of,*
>
> > *(i) a right, privilege, obligation or liability described in clause (b), or*
> >
> > *(ii) a penalty, forfeiture or punishment described in clause (c).*

Thus, as can be seen, where a statute is repealed the rights and obligations that arose when the statute was still in force remain valid.

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[10] See *Re. Estate of Joseph Paul Grieco, deceased*, 2013 ONSC 2465, at para. 5, citing Halsburys Laws of Canada (Legislation, retroactivity) and G*ustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 279. See Tabs 5 and 6 of Brief of Authorities.

[11] This principle is described clearly in a seminal text on the topic of statutory interpretation, which states that "it is strongly presumed that legislation is not intended to be retroactive". See Sullivan, Ruth, *Sullivan on the Construction of Statutes* (LexisNexis Canada Inc., 2014, 6th Edition), at pages 771-772, and the cases cited therein. See also *Pyke v. Tri Gro Enterprises Ltd*., [1999] O.J. No. 3217 (S.C.J.), at paras. 255-259 (case affirmed at [2001] O.J. 3209 (C.A.)). See Tabs 7 and 8 of Brief of Authorities.

[12] See *Sullivan on the Construction of Statutes*, at pages 732-733.

[13] S.O. 2006, C. 21, Sched. F. See Tab 9 of Brief of Authorities.

As described in *Sullivan on the Construction of Statutes*, the implication of section 51 of the *Legislation Act* (and similar provisions in other jurisdictions) is that:

> [*T]he repeal of an enactment does not destroy any right, privilege, obligation or liability arising under the repealed enactment, nor does it obliterate any contravention of the repealed law. Investigations and proceedings related to pre-repeal events may be begun and continued under the old enactment despite its repeal. And the remedies and punishments provided for under the old enactment still apply as if the repeal had not occurred. In short, the repealed law continues to apply to pre-repeal facts for most purposes as if it were still good law.*[14]

This interpretation is confirmed by review of cases that have considered the operation of section 51 of the *Legislation Act* and corresponding provisions in other Canadian statutes. These cases demonstrate that where parties were governed by and acted in accordance with statutory law as it existed at the time of their transactions, then that law will continue to apply post-repeal to a review or determination related to those transactions.

For example, in *Re. Estate of Joseph Paul Grieco, deceased,* the Ontario Superior Court was faced with the question whether prior legislation or current legislation that repealed and replaced the prior legislation applied to determine the priority of support claims over other claims. Justice Salmers found that the legislation as it existed at the time that the entitlement to support payments arose was the applicable law. In coming to this conclusion, Justice Salmers noted that "the *Legislation Act, 2006* provides for the continued application of repealed legislation to facts that occurred prior to repeal."[15]

An older, oft-cited case looking at the question of when repealed legislation will continue to apply examined the phrasing of the predecessor provision to section 51 of the *Legislation Act* and confirmed that when specific rights or obligations are incurred before a statute is repealed, then they will be preserved post-repeal.[16] The principle is that parties who have acted in accordance with the legislation as it stood should be able to assume that the legislation will continue to be treated as applicable when issues around their past actions later arise.

Interestingly, the principle that repealed or replaced legislation will continue to apply to review of past transactions has been applied in the context of review of a deferral account by the Alberta Energy and Utilities Board. In a 2005 Alberta Court of Appeal decision considering the Alberta regulator's review of ATCO Gas and Pipelines Ltd.'s "Deferred Gas Account" balance, the Court noted that:

> *The gas sales in question and the decision under appeal took place prior to the coming into force of the 2000 Revised Statutes of Alberta on January 1, 2002 by proclamation O.C. 424/2001. Accordingly, although the R.S.A.*

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14 See *Sullivan on the Construction of Statutes*, at page 831.
15 *Re. Estate of Joseph Paul Grieco, deceased*, *supra*, at para. 5.
16 *Township of Nepean v. Leikin*, 1971 CanLII 642 (ON CA), at page 6. See Tab 10 of Brief of Authorities.

> *2000 statutes apply with respect to ATCO's application for leave to appeal, which occurred after the proclamation date, the matters before the Board, now under appeal, are governed by the Gas Utilities Act, R.S.A. 1980, c. G-4, as amended ("GUA"), the Alberta Energy and Utilities Board Act, S.A. 1994, c. A-19.5 ("AEUBA"), and the Public Utilities Board Act, R.S.A. 1980, c. P-37, as amended ("PUBA").*[17]

The passage reproduced above reflects the principle that where new legislation is purely procedural, then the repealed legislation no longer applies[18] (that is why the new leave to appeal rights in the Alberta statute applied to an appeal of an earlier decision). However, that principle does not apply in the current OEB proceeding. The rights and obligations of parties to keep certain Cap and Trade transaction information confidential are not purely procedural. Instead, they are substantive rights and obligations, with associated penalties. In any event, the confidentiality provisions in the *Climate Change Act* were not replaced with any different or contradictory direction or requirement.

Application of law to the facts

Section 51 of the *Legislation Act* directs that the prohibitions against disclosure of Auction Confidential Information and Market Confidential Information will continue to apply where such information relates to and dates from the time while the *Climate Change Act* was in force and effect. That conclusion is clear when the background facts described earlier are applied to the law that is highlighted above. The prohibition against disclosure governs not only this proceeding, but all current and future circumstances where the Utilities are requested to provide specific information about their Cap and Trade market activities.

While the application of the section 51 of the *Legislation Act* to the facts of the case ought to be dispositive, the Utilities also want to repeat their position as set out in their December 27, 2018 letter that harm may result from disclosure of the Auction Confidential Information and Market Confidential Information.

The prohibitions against disclosure existed at all relevant times both within the confines of the Board's review of the Utilities' Compliance Plans and in respect of the Utilities' activities relating to the acquisition of compliance instruments. Throughout the term contemplated by this 2016-2018 C&T DVA proceeding, the Utilities retained consultants to support the development of their respective compliance and procurement strategies under the conditions of strict confidentiality protections. Disregarding these conditions and the requirements of the *Climate Change Act* retroactively by disclosing the proprietary work of these consultants to parties other than the OEB, even under the protection of the OEB's confidentiality guidelines, would discourage certain consultants from providing the Utilities the same level of assistance and guidance in the future, ultimately disadvantaging ratepayers.

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[17] *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2005 ABCA 122, at para. 26. See Tab 11 of Brief of Authorities.
[18] This principle is discussed in *Sullivan on the Construction of Statutes*, at pages 802-807.

Additionally, there is potential harm that may result from the disclosure of information about the Utilities' plans and transactions involving compliance instruments, even after the end of Ontario's Cap and Trade Program. The Utilities have an affiliate, Gazifère, operating in the province of Québec who is an active participant in cap and trade programs in Québec and California under the Western Climate Initiative (WCI). Market participants in the WCI would benefit from knowing the strategies employed by Gazifère's affiliates in Ontario. Further, the Utilities themselves will be participating in future climate change compliance programs, such as the federal Clean Fuel Standard. Where the Utilities' general compliance strategies and plans are made public, that may require the Utilities to develop new strategies and plans if other parties in the competitive market can use this information and take steps to make the Utilities' existing approaches more expensive. This will result in more cost for ratepayers, including requiring new advice from expert consultants. Such an outcome will devalue the investments already made by the Utilities and their ratepayers in preparing detailed Utility-specific compliance and procurement strategies.

More broadly, with the current volatile state of federal and provincial climate change policies, it would be inappropriate for the OEB to put the Utilities in a position of perpetual disadvantage relative to other climate change market participants whose past practices and strategies are not subject to public disclosure. The regulatory review of the C&T DVAs can proceed as it has in the past with maintaining confidential treatment of Auction and Market Confidential Information. The OEB will have all necessary information, and OEB Staff will, as always, be able to represent the public interest.

Finally, it should be highlighted that disclosure of the Auction Confidential Information and Market Confidential Information may result in the OEB inadvertently breaching obligations of the Ontario government to keep such information confidential. The Province of Ontario entered into an agreement with the Province of Quebec and the State of California with respect to the operation of the Cap and Trade regime in all three jurisdictions and to undertake joint auctions.[19] In that Agreement, Ontario agreed to harmonize and integrate its regime in a manner consistent with and materially in compliance with the regimes in California and Quebec. The Agreement included provisions that specifically dealt with the protection of confidential information which clearly included information about activities relating to joint auctions. While Ontario has given notice of its withdrawal from the Agreement, it has not been relieved of its obligations during the currency of the Agreement nor in important respects, certain obligations which continue after withdrawal. It is important to note that the Agreement specifically provides at Article 17 that: "Withdrawal from this Agreement does not end a Party's obligations under Article 15 regarding confidentiality of information, which continue to remain in effect". Nothing in the *Cap and Trade Cancellation Act* eliminates this obligation.

For all of the reasons detailed in this letter, the Utilities submit that the OEB should proceed in the manner proposed in Procedural Order No. 1, and treat Auction Confidential

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[19] Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions Between The Gouvernement du Québec, The Government of California and The Government of Ontario, September 22, 2017 (the Agreement). See Tab 12 of Brief of Authorities.

Information and Market Confidential Information in accordance with the *Climate Change Act* and the Guidelines. Proceeding in this manner will see the prudence review conducted in the way that was expected during the time when the Cap and Trade transactions now being reviewed were planned and executed.

Yours truly,

AIRD & BERLIS LLP

David Stevens

EB-2018-0331

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an Application by Enbridge Gas Inc. (formerly Enbridge Gas Distribution Inc. and Union Gas Limited) and EPCOR Natural Gas Limited Partnership for an Order or Orders approving the disposition of Cap and Trade-Related Deferral and Variance Accounts for the Period 2016-2018.

ENBRIDGE GAS INC. BRIEF OF AUTHORITIES FOR MARCH 5, 2019 SUBMISSIONS

Enbridge Gas Inc. Brief of Authorities for March 5, 2019 Submissions

Tab	Item	Hyperlink
1.	*Climate Change Mitigation and Low-carbon Economy Act, 2016*	https://www.ontario.ca/laws/statute/16c07
2.	*Cap and Trade Cancellation Act*, 2019	https://www.ontario.ca/laws/statute/S18013#s16
3.	*Regulatory Framework for the Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities*	https://www.oeb.ca/sites/default/files/uploads/Report_Cap_and_Trade_Framework_20160926.pdf
4.	Bill 4, Cap and Trade Cancellation Act, 2018 - Legislative Assembly of Ontario	https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-4/status
5.	*Re. Estate of Joseph Paul Grieco, deceased*, 2013 ONSC 2465	https://www.canlii.org/en/on/onsc/doc/2013/2013onsc2465/2013onsc2465.pdf
6.	*Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue*, [1977] 1 S.C.R. 271	https://www.canlii.org/en/ca/scc/doc/1975/1975canlii4/1975canlii4.pdf
7.	*Sullivan on the Construction of Statutes* (LexisNexis Canada Inc., 2014, 6th Edition), at pages 732-733, 771-772, 802-804 and 831.	N/A
8.	*Pyke v. Tri Gro Enterprises Ltd*., [1999] O.J. No. 3217 (S.C.J.) (case affirmed at [2001] O.J. 3209 (C.A.)).	https://www.canlii.org/en/on/onca/doc/2001/2001canlii8581/2001canlii8581.pdf
9.	*Legislation Act, 2006*	https://www.ontario.ca/laws/statute/06l21
10.	*Township of Nepean v. Leikin*, 1971 CanLII 642 (ON CA)	https://www.canlii.org/en/on/onca/doc/1971/1971canlii642/1971canlii642.pdf
11.	*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2005 ABCA 122	https://www.canlii.org/en/ab/abca/doc/2005/2005abca122/2005abca122.pdf
12.	Agreement on the Harmonization and Integration of Cap-and-Trade Programs	https://news.ontario.ca/opo/en/2017/09/agreement-on-the-harmonization-and-integration-of-cap-and-trade-programs-for-reducing-greenhouse-gas.html

TAB 1

Français

Climate Change Mitigation and Low-carbon Economy Act, 2016

S.O. 2016, CHAPTER 7

Note: This Act was repealed on November 14, 2018. (See: 2018, c. 13, s. 16)

Last amendment: 2018, c. 13, s. 16.

Legislative History: 2018, c. 3, Sched. 5, s. 12; 2018, c. 8, Sched. 3; 2018, c. 13, s. 16.

CONTENTS

Preamble

Human-induced climate change is real and impacts are being experienced around the globe. The Intergovernmental Panel on Climate Change has concluded that warming of the climate is unequivocal and that most of the observed increase in global average temperature is due to human activity.

To prevent dangerous climate change, the global community has identified the objectives of holding the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial temperatures and pursuing efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial temperatures. A rise beyond 2 degrees Celsius poses the very real risk that countries around the world will experience irreversible damage to their environment. Such a rise in temperature poses a risk of irreversible widespread impacts on human and natural systems and threatens Ontario's agricultural resources, natural areas and ecosystems, and economic well-being.

This risk justifies action to mitigate climate change, including reducing greenhouse gas that causes climate change. The global community is mobilizing around this goal through the United Nations Framework Convention on Climate Change and its related agreements, and Ontario is committed to playing its part.

By taking action now, Ontario's households and communities, infrastructure, agricultural resources, natural areas and ecosystems, including the Great Lakes and the boreal forest, will be better protected for the benefit and enjoyment of all. Ontario will also be well positioned to take advantage of the low-carbon economy through local job creation, an expanding low-carbon technology sector and other global economic opportunities.

All Ontarians have a role to play in addressing climate change, including understanding how Ontarians contribute to greenhouse gas emissions and changing their behaviour to reduce those emissions.

The Government of Ontario believes that the public interest requires a broad effort to reduce greenhouse gas and to build a cleaner and more prosperous Province. The Government will continue to involve and engage individuals, businesses, communities, municipalities, non-governmental organizations and First Nation and Métis communities in the ultimate goal of fostering a high-productivity low-carbon economy and society in Ontario.

First Nation and Métis communities have a special relationship with the environment and are deeply connected spiritually and culturally to the land, water, air and animals. They may offer their traditional ecological knowledge as the Government of Ontario develops specific actions.

The Government of Ontario cannot address this challenge alone. Collective action is required. As a leading sub-national jurisdiction, Ontario will participate in the international response to reduce greenhouse gas by establishing a carbon price. A key purpose of this Act is to establish a broad carbon price through a cap and trade program that will change the behaviour of everyone across the Province, including spurring low-carbon innovation. A cap and trade program in Ontario will allow Ontario to link to other regional cap and trade markets as part of the international, national and interprovincial responses to reduce greenhouse gas.

In addition to the carbon price signal and to further support the reduction of greenhouse gas, the Government of Ontario will pursue complementary actions to support and promote the transition to a low-carbon economy.

Enabled and supported by the cap and trade program and related actions, the Government of Ontario envisions, by 2050, a thriving society generating fewer or zero greenhouse gas emissions. Businesses and innovators will be creating world-leading low-carbon technologies and products that drive new economic growth, productivity and job creation. Ontarians will live, work and travel in sustainable ways in healthier and more liveable communities.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

INTERPRETATION

Interpretation

Definitions

1 (1) In this Act,

"cap and trade accounts" means, in relation to a registered participant, the accounts established under section 22 for the participant; ("comptes du programme de plafonnement et d'échange")

"compliance period" means the compliance period established under section 14; ("période de conformité")

"credit" means an Ontario credit or an instrument created by a jurisdiction other than Ontario that, under section 38, is to be treated as a credit for the purposes of this Act; ("crédit")

"Director" means a person appointed as a Director under section 72; ("directeur")

"designated account agent" means an account agent designated under section 24; ("agent de comptes désigné")

"emission allowance" means an Ontario emission allowance or an instrument created by a jurisdiction other than Ontario that, under section 38, is to be treated as an emission allowance for the purposes of this Act; ("quota d'émission")

"Greenhouse Gas Reduction Account" means the account in the Public Accounts that is required by section 71; ("Compte de réduction des gaz à effet de serre")

"mandatory participant" means a person who is required by section 15 to register or who is registered as a mandatory participant; ("participant assujetti")

"market participant" means a person who is registered as a market participant under section 17; ("participant au marché")

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

"Ontario credit" means a credit created under section 35; ("crédit de l'Ontario")

"Ontario emission allowance" means an emission allowance created under section 30; ("quota d'émission de l'Ontario")

"person" includes an individual, corporation, partnership, sole proprietorship, association or any other organization or entity; ("personne")

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

"provincial officer" means a person designated as a provincial officer under section 73; ("agent provincial")

"public servant" means a public servant appointed under Part III of the *Public Service of Ontario Act, 2006*; ("fonctionnaire")

"record" includes any information that is recorded or stored by means of any device; ("dossier")

"registered participant" means a person who is registered under section 15, 16 or 17; ("participant inscrit")

"voluntary participant" means a person who is registered as a voluntary participant under section 16. ("participant volontaire")

Interpretation, amount of an emission allowance, credit

(2) A reference in this Act to the amount of an emission allowance or credit is a reference to the amount of greenhouse gas emissions that is represented by the allowance or credit.

Related persons

(3) For the purposes of this Act, a person is considered to be related to another person in such circumstances as may be prescribed by regulation.

Intention of the Legislature

(4) For greater certainty, all of the provisions of this Act, including Schedule 1, remain in full force and effect, even if some provisions are held to be invalid, the intention of the Legislature being to give separate and independent effect to the extent of its powers to every provision contained in this Act.

Purpose

2 (1) Recognizing the critical environmental and economic challenge of climate change that is facing the global community, the purpose of this Act is to create a regulatory scheme,

(a) to reduce greenhouse gas in order to respond to climate change, to protect the environment and to assist Ontarians to transition to a low-carbon economy; and

(b) to enable Ontario to collaborate and coordinate its actions with similar actions in other jurisdictions in order to ensure the efficacy of its regulatory scheme in the context of a broader international effort to respond to climate change.

Same

(2) The cap and trade program is a market mechanism established under this Act that is intended to encourage Ontarians to change their behaviour by influencing their economic decisions that directly or indirectly contribute to the emission of greenhouse gas.

Existing aboriginal or treaty rights

3 For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*.

Crown bound

4 This Act binds the Crown.

GREENHOUSE GAS

Greenhouse gas

5 This Act applies with respect to the following types of greenhouse gas and such other contaminants as may be prescribed as greenhouse gas by the regulations:

1. Carbon dioxide.
2. Methane.
3. Nitrous oxide.
4. Hydrofluorocarbons.
5. Perfluorocarbons.
6. Sulphur hexafluoride.
7. Nitrogen trifluoride.

Emission reduction targets

6 (1) The following targets are established for reducing the amount of greenhouse gas emissions from the amount of emissions in Ontario calculated for 1990:

1. A reduction of 15 per cent by the end of 2020.
2. A reduction of 37 per cent by the end of 2030.
3. A reduction of 80 per cent by the end of 2050.

Increase

(2) The Lieutenant Governor in Council may, by regulation, increase the targets specified in subsection (1).

Interim targets

(3) The Lieutenant Governor in Council may, by regulation, establish interim targets for the reduction of greenhouse gas emissions.

Temperature goals

(4) When increasing the targets specified in subsection (1) or establishing interim targets for the reduction of greenhouse gas emissions, the Lieutenant Governor in Council shall have regard to any temperature goals recognized by the Conference of the Parties established under Article 7 of the United Nations Framework Convention on Climate Change.

Baseline

(5) For the purposes of this section, the amount of greenhouse gas emissions in Ontario calculated for 1990 is the amount specified as such by the Minister. The Minister may, as he or she considers appropriate, recalculate the specified amount from time to time.

Public notice of baseline

(6) The Minister shall inform the public about the amount specified under subsection (5) by making notice of the amount available to the public on a website of the Government or in such other manner as may be prescribed by the regulations.

Non-application

(7) Part III (Regulations) of the *Legislation Act, 2006* does not apply with respect to the decisions of the Minister under subsections (5) and (6).

Climate change action plan

7 (1) The Government of Ontario shall prepare a climate change action plan that sets out actions under a regulatory scheme designed to modify behaviour that will enable Ontario to achieve its targets for the reduction of greenhouse gas emissions.

Traditional ecological knowledge

(2) If a First Nation or Métis community offers its traditional ecological knowledge to the Minister, the Minister shall take into consideration the role of traditional ecological knowledge with respect to the action plan.

Impact on low-income households

(3) The action plan must consider the impact of the regulatory scheme on low-income households and must include actions to assist those households with Ontario's transition to a low-carbon economy.

Contents of plan

(4) For each of the actions set out in the action plan, the plan shall establish a timetable for taking the action.

Same

(5) The action plan shall include the following information:

1. The potential reduction in greenhouse gas resulting from the action.
2. An assessment of the cost per tonne of the potential reduction in greenhouse gas.
3. If an action could be funded, in whole or in part, using the amounts in the Greenhouse Gas Reduction Account, the estimated amount of any funding from the Account that may be contemplated.

Public notice

(6) The Minister shall, before January 1, 2017, lay the action plan before the Assembly and make it available to the public on a website of the Government or in such other manner as may be prescribed by the regulations.

Periodic revision and review

(7) The action plan may be revised at any time and must be reviewed at least every five years or as otherwise prescribed.

Public notice after review

(8) If the action plan is revised following a review, the Minister shall, at the earliest reasonable opportunity, lay the revised action plan before the Assembly and make it available to the public on a website of the Government or in such other manner as may be prescribed by the regulations.

Status

(9) For greater certainty, the action plan and any revisions to it are not undertakings within the meaning of the *Environmental Assessment Act*.

Minister's progress reports

8 (1) The Minister shall prepare a report at least once every year, or as otherwise prescribed, and the report must describe the status of the actions set out in any climate change action plan prepared in respect of the reporting period.

Public notice

(2) The Minister shall, at the earliest reasonable opportunity, lay the report before the Assembly and make it available to the public on a website of the Government or in such other manner as may be prescribed by the regulations.

Duty to quantify emissions

Emissions during activities

9 (1) Each of the following persons shall quantify the amount of greenhouse gas that is emitted during the person's prescribed activities at its prescribed facility in Ontario during a prescribed period:

1. The owner or operator of a prescribed facility who satisfies such other criteria as may be prescribed by regulation.
2. Such other persons who satisfy such criteria, or are in such circumstances, as may be prescribed by regulation.

Same

(2) The person shall, in accordance with the regulations, quantify the amount of greenhouse gas that is emitted during prescribed activities at a prescribed facility and shall keep the records required by regulation.

Emissions associated with activities

(3) Each of the following persons shall calculate the amount of the greenhouse gas emissions that are determined, in accordance with the regulations, to be associated with the person's prescribed activities in Ontario during a prescribed period:

1. A person who imports electricity into Ontario during the period and who satisfies such other criteria as may be prescribed by regulation.
2. A person who distributes natural gas in Ontario and who satisfies such other criteria as may be prescribed by regulation.
3. A person who supplies petroleum products for consumption in Ontario and who satisfies such other criteria as may be prescribed by regulation.
4. Such other persons who satisfy such criteria, or are in such circumstances, as may be prescribed by regulation.

Same, direct and indirect links

(4) The greenhouse gas emissions that are determined, in accordance with the regulations, to be associated with a person's prescribed activity may be greenhouse gas emitted by the person during its prescribed activity and may include greenhouse gas emissions of another person ("third party"), if there is a direct or indirect link between the person and the third party and a direct link between the prescribed activity and the greenhouse gas emissions of the third party.

Calculation

(5) The person shall, in accordance with the regulations, calculate the amount of the greenhouse gas emissions that are associated with the person's prescribed activity and shall keep the records required by regulation.

Duty to report

Emissions during activities

10 (1) This section applies, in such circumstances as may be prescribed, to a person who is required by subsection 9 (1) to quantify the amount of greenhouse gas that is emitted during a prescribed activity at a prescribed facility during a prescribed period.

Emissions associated with activities

(2) This section applies, in such circumstances as may be prescribed, to a person who is required by subsection 9 (3) to calculate the amount of the greenhouse gas emissions that are associated with a prescribed activity during a prescribed period.

Duty to report

(3) The person shall give the Director one or more reports, as required by regulation, with respect to the greenhouse gas emissions during the period and shall do so before the prescribed deadline.

Revised reports

(4) The person shall revise a report and give the revised report to the Director in the following circumstances:

1. The Director is of the opinion that the report has not been prepared in accordance with this Act or the regulations.
2. Such other circumstances as may be prescribed by regulation.

Contents, etc.

(5) A report under this section shall contain such information as may be prescribed, and such additional information as the Director may request, and shall be prepared and submitted in accordance with this Act and the regulations.

Duty to verify

11 (1) This section applies, in such circumstances as may be prescribed, to a person who is required by section 10 to give the Director one or more reports with respect to greenhouse gas emissions relating to a prescribed activity during a prescribed period.

Same

(2) The person shall have prescribed reports under section 10 verified in accordance with the regulations by a person who is authorized by regulation to do so.

Information request by Director

12 (1) The Director may ask a person to provide information described in subsection (2) to the Director for the purposes of,

(a) assessing whether a person may be required to comply with section 9, 10 or 11;

(b) reviewing any record required to be kept or submitted for the purposes of section 9, 10, 11 or 13 or that is required to be prepared in relation to any of those sections; or

(c) making a determination under subsection 13 (2).

Information

(2) The information that may be requested under subsection (1) is such information as may be specified in the regulations or as may be specified by the Director.

Duty to comply with request

(3) The person shall comply with the Director's request, in the manner and within the period specified by the Director.

Duty to provide assistance

(4) Subsections 42 (8) and 43 (1) and (2) apply, with necessary modifications, with respect to a request by the Director under this section.

Attribution of emissions

13 (1) For the purposes of this Act, the amount of greenhouse gas emissions relating to a prescribed activity during a prescribed period that is attributed to a person is the amount prescribed by the regulations or determined in accordance with the regulations.

Same

(2) Despite subsection (1), in prescribed circumstances, the amount of greenhouse gas emissions shall be determined by the Director in accordance with the regulations.

Opportunity to be heard

(3) If the Director proposes to determine the amount of greenhouse gas emissions to be attributed to a person, the Director shall give the person notice of the proposal in accordance with the regulations and shall, in accordance with the regulations, give the person an opportunity to be heard.

THE CAP AND TRADE PROGRAM

Duty to submit emission allowances and credits

14 (1) Each of the following persons shall submit emission allowances and credits to the Minister in an amount equal to the aggregate amount of all greenhouse gas emissions attributed to the person under section 13 for a compliance period:

1. A person who is required to be registered as a mandatory participant under section 15 at any time during the compliance period.

2. A person who is registered as a voluntary participant under section 16 at any time during the compliance period.

Same

(2) If the amount of greenhouse gas emissions associated with a person under section 9 includes emissions associated with the activities or other actions of a third party, emission allowances in respect of the emissions associated with the activities or other actions of the third party are submitted by that person in the place of the third party.

Compliance period

(3) Compliance periods are established by regulation.

Deadline, etc.

(4) The participant shall submit the emission allowances and credits for a compliance period on or before the prescribed deadline and in accordance with the regulations.

Restriction

(5) The regulations may impose restrictions with respect to the classes of emission allowances and credits that may be submitted by a participant for a compliance period, including limiting the amount of any class of allowance or credit that may be submitted.

Reduction

(6) The regulations may prescribe circumstances in which no emission allowances or credits, or a reduced amount of allowances and credits, must be submitted by a participant for a compliance period.

Shortfall, consequences

(7) The following consequences arise if a participant fails to submit all of the required emission allowances and credits on or before the prescribed deadline in accordance with the regulations:

1. The Minister may remove emission allowances and credits held in, or subsequently transferred into, the participant's cap and trade accounts in an amount sufficient to satisfy the shortfall.
2. The participant shall submit to the Minister additional emission allowances in an amount equal to three times the shortfall.
3. The Minister may remove emission allowances held in, or subsequently transferred into, the participant's cap and trade accounts in an amount sufficient to satisfy the participant's obligation under paragraph 2.
4. The participant's authority to deal with emission allowances and credits in the participant's cap and trade accounts shall be restricted, in accordance with the regulations, until the participant's obligations under subsection (1) and paragraph 2 are satisfied in full.

Continuing shortfall, consequences

(8) If the Director gives the participant notice, in accordance with the regulations, of the participant's outstanding obligations under subsections (1) and (7), and if the participant does not satisfy the obligations in full by the deadline specified in the notice, the following consequences arise:

1. The Director may, by order, require the participant to pay to the Minister of Finance an amount determined in accordance with the regulations in satisfaction of the participant's outstanding obligations.
2. Until the participant's outstanding obligations are satisfied in full, the Minister may decline to distribute emission allowances free of charge to the participant.
3. The Director may, by order, impose such other consequences as may be authorized by regulation.

Effect of revised attribution

(9) If the amount of greenhouse gas emissions attributed to a participant under section 13 for a prescribed period within a compliance period is increased after the prescribed deadline for submitting emission allowances and credits under this section, subsections (4) to (8) apply with necessary modifications with respect to the amount of the increase, and the regulations shall specify the applicable deadline that is the prescribed deadline for submitting the allowances and credits for that amount.

Interpretation re prosecutions

(10) For greater certainty, the consequences that may arise under subsections (7) and (8) do not affect the prosecution of an offence for a failure to comply with subsection (1).

Mandatory participants: registration

15 (1) A person who satisfies such criteria as may be prescribed by regulation is required to register as a mandatory participant in the cap and trade program under this Act.

Facility, etc.

(2) If the regulations so authorize, a person may be required to register only with respect to one or more activities at a facility.

Registration process

(3) The person shall give the Director such information as may be required by regulation and such additional information as may be required by the Director for the purposes of registering, and shall do so in accordance with the regulations.

Director's duty to register

(4) Upon receiving the information and any applicable fee, the Director shall register the person as a mandatory participant in the cap and trade program if the Director is satisfied that the person satisfies the criteria described in subsection (1).

Voluntary participants: registration

16 (1) A person who satisfies such criteria as may be prescribed by regulation may apply to the Director in accordance with the regulations for registration as a voluntary participant in the cap and trade program under this Act.

Facility, etc.

(2) For greater certainty, a person who is required to register as a mandatory participant under section 15 with respect to one or more activities at a facility may apply for registration under this section as a voluntary participant with respect to other activities or other facilities.

Registration process

(3) The applicant shall give the Director such information as may be required by regulation and such additional information as may be required by the Director for the purposes of the application.

Director's duty to register

(4) Upon receiving the application, information and any applicable fee, the Director shall register the applicant if the Director determines that the applicant satisfies the eligibility criteria referred to in subsection (1) and such additional requirements as may be prescribed by regulation.

Refusal of registration

(5) Despite subsection (4), the Director may refuse to register the applicant if the Director is of the opinion that the applicant should not be registered, having regard to such circumstances as may be prescribed and such other matters as the Director considers appropriate.

Opportunity to be heard

(6) If the Director proposes to refuse to register an applicant, the Director shall give the applicant notice of the proposal in accordance with the regulations and shall, in accordance with the regulations, give the applicant an opportunity to be heard.

Market participants: registration

17 (1) A person who satisfies such eligibility criteria as may be prescribed may apply to the Director in accordance with the regulations for registration as a market participant in the cap and trade program under this Act.

Same

(2) The applicant shall give the Director such information as may be required by regulation and such additional information as may be required by the Director for the purposes of the application.

Director's duty to register

(3) Upon receiving the application, information and any applicable fee, the Director shall register the applicant if the Director determines that the applicant satisfies the eligibility criteria referred to in subsection (1).

Refusal of registration

(4) Despite subsection (3), the Director may refuse to register the applicant if the Director is of the opinion that the applicant should not be registered, having regard to such circumstances as may be prescribed and such other matters as the Director considers appropriate.

Opportunity to be heard

(5) If the Director proposes to refuse to register an applicant, the Director shall give the applicant notice of the proposal in accordance with the regulations and shall, in accordance with the regulations, give the applicant an opportunity to be heard.

Conditions of registration

18 (1) Conditions of registration may be established by regulation for mandatory participants, voluntary participants and market participants, respectively.

Duty to audit

(2) Without limiting the generality of subsection (1), the conditions of registration may include a requirement that the registrant cause an audit to be undertaken, in such circumstances as may be prescribed, of any of the matters specified by regulation, and the audit shall comply with such requirements as may be prescribed.

Other duties

(3) Without limiting the generality of subsection (1), the conditions of registration as a mandatory or voluntary participant may include a requirement to give reports to the Director and have the reports verified in accordance with the regulations by a person who is authorized by regulation to do so.

Conditions imposed by the Director

(4) When registering a mandatory participant, voluntary participant or market participant, the Director may impose conditions with respect to the registration of the participant.

Same

(5) The Director may change, or cancel, any of the conditions imposed by the Director with respect to a registration.

Hearing

(6) Section 60 applies if the Director imposes, or changes, conditions with respect to the registration of a registered participant.

Duty to comply with conditions of registration

19 (1) A registered participant shall comply with the conditions of registration established by regulation and the conditions imposed on the participant by the Director.

Same

(2) A mandatory participant who is not registered shall comply with the conditions of registration established by regulation for mandatory participants.

Cancellation of registration

Mandatory participants, on request

20 (1) Upon request, the Director may cancel the registration of a mandatory participant, in accordance with the regulations, if the registrant ceases to satisfy the criteria referred to in subsection 15 (1) for such a registration and if the prescribed criteria for cancellation are satisfied.

Other participants, on request

(2) Upon request, the Director may cancel the registration of a voluntary participant or a market participant in accordance with the regulations if the prescribed criteria for cancellation are satisfied.

Opportunity to be heard

(3) If the Director proposes to refuse a participant's request under subsection (1) or (2), the Director shall give the applicant notice of the proposal in accordance with the regulations and shall, in accordance with the regulations, give the applicant an opportunity to be heard.

Deemed registration

(4) Upon request, a person who ceases to be registered as a mandatory participant under subsection (1) and who satisfies the eligibility criteria for registration as a voluntary participant is deemed to have applied for registration under section 16 as a voluntary participant and is automatically registered as such.

Same

(5) Upon request, a person who ceases to be registered as a mandatory participant under subsection (1) or as a voluntary participant under subsection (2) and who satisfies the eligibility criteria for registration as a market participant is deemed to have applied for registration under section 17 as a market participant and is automatically registered as such.

Cancellation by Director

(6) The Director may cancel a registration, in accordance with the regulations, in such other circumstances as may be prescribed.

Conditions

(7) The Director may impose conditions on the cancellation of a participant's registration under this section.

Hearing

(8) Section 60 applies if the Director cancels a participant's registration otherwise than on request, or imposes conditions on the cancellation.

Prohibition, transactions by unregistered persons

21 (1) No person other than a registered participant shall purchase, sell, trade or otherwise deal with emission allowances and credits.

Prohibition, transactions with unregistered persons, etc.

(2) No registered participant shall,

(a) purchase emission allowances and credits from a person who is not,

(i) a registered participant, or

(ii) a person who is permitted by a prescribed jurisdiction to purchase, sell, trade or otherwise deal with emission allowances and credits;

(b) sell emission allowances and credits to a person who is not a person described in subclause (a) (i) or (ii); or

(c) trade or otherwise deal with emission allowances and credits with a person who is not a person described in subclause (a) (i) or (ii).

Prohibition, transactions prohibited etc. under conditions of registration

(3) No registered participant shall purchase, sell, trade or otherwise deal with emission allowances and credits except in accordance with this Act, the regulations and the conditions of the participant's registration.

Exceptions

(4) Subsection (1) does not apply to the Minister, the Director and such other persons as may be prescribed.

Same

(5) Subsection (1) does not apply to a person who is permitted by a prescribed jurisdiction to purchase, sell, trade or otherwise deal with emission allowances and credits.

Registered participants' cap and trade accounts

22 (1) Upon registering a person under section 15, 16 or 17, the Director shall establish one or more accounts for the registered participant in accordance with the regulations for the purpose of allowing the participant to purchase, sell, trade and otherwise deal with emission allowances and credits and to submit them to the Minister under this Act.

Requirements, etc.

(2) The regulations may impose requirements and restrictions applicable to cap and trade accounts including requirements and restrictions about the following matters:

1. The number or amount of emission allowances or credits that may be held in a registered participant's accounts or in the accounts of registered participants who are related persons.
2. The procedures to be followed by registered participants for transferring emission allowances and credits between accounts.
3. The procedures to be followed by registered participants for submitting emission allowances and credits to the Minister under this Act.

Same, imposed by the Director

(3) The Director may impose requirements and restrictions with respect to a registered participant's accounts.

Duty to comply with requirements, etc.

(4) A registered participant and its designated account agents shall comply with the requirements and restrictions imposed under this section with respect to the participant's accounts.

Recognition as account agent

Application

23 (1) A person who satisfies such eligibility criteria as may be prescribed may apply to the Director in accordance with the regulations for recognition as an account agent.

Same

(2) An applicant shall give the Director such information as may be required by regulation and such additional information as may be required by the Director for the purposes of the application.

Director's duty to recognize

(3) Upon receiving the application, information and any applicable fee, the Director shall recognize the applicant if the Director determines that the applicant satisfies the applicable eligibility criteria.

Conditions of recognition

(4) An individual who is recognized shall comply with such conditions of recognition as may be imposed by regulation.

Refusal of recognition

(5) Despite subsection (3), the Director may refuse to recognize the applicant if the Director is of the opinion that the applicant should not be recognized, having regard to such circumstances as may be prescribed and such other matters as the Director considers appropriate.

Cancellation of recognition

(6) The Director may cancel the recognition of an account agent, in accordance with the regulations, in such circumstances as may be prescribed.

Designation of account agents

Who may be designated

24 (1) A registered participant may designate an individual as an account agent of the participant if the individual is recognized under section 23 and meets such other criteria as may be prescribed with respect to the class of account agent.

Same

(2) A registered participant may designate an individual as an account agent of the participant if the individual is authorized by a prescribed jurisdiction to perform a similar function under a corresponding program of that jurisdiction.

Powers and duties

(3) The designated account agent may exercise such powers and shall perform such duties as may be specified by regulation with respect to the cap and trade accounts of the registered participant.

Classes of agents

(4) Regulations may establish different classes of designated account agents and may assign different powers and duties to each class.

Same

(5) Regulations may require registered participants to designate one or more account agents in each class and may restrict the number of agents in each class that may be designated by a registered participant.

Powers deemed to be exercised, etc. by registered participant

(6) While a designated account agent is exercising powers and performing duties with respect to a registered participant's cap and trade accounts, all representations, acts, errors or omissions of the agent are deemed to be those of the registered participant.

Suspension of registrant's authority re: accounts

Automatic suspension

25 (1) The authority of a registered participant or a designated account agent to deal with emission allowances and credits held in the participant's cap and trade accounts is automatically suspended in such circumstances as may be prescribed.

Notice of automatic suspension

(2) The Director shall, in accordance with the regulations, give the registered participant and the designated account agent such information as may be required by regulation with respect to an automatic suspension.

Suspension by the Director

(3) In such circumstances as may be prescribed, the Director shall, in accordance with the regulations, suspend the authority of a registered participant or designated account agent to deal with emission allowances and credits in the participant's accounts.

Automatic reinstatement

(4) The authority of a registered participant or designated account agent that is suspended under this section is automatically reinstated in such circumstances as may be prescribed.

Notice of automatic reinstatement

(5) The Director shall, in accordance with the regulations, give the registered participant and designated account agent such information as may be required by regulation with respect to an automatic reinstatement.

Reinstatement by the Director

(6) In such circumstances as may be prescribed, the Director shall, in accordance with the regulations, reinstate the authority of a registered participant or designated account agent.

Conditions

(7) The Director may impose conditions on the reinstatement of the authority of a registered participant or designated account agent.

Closing an account

Automatic closing

26 (1) A cap and trade account of a registered participant is automatically closed in such circumstances as may be prescribed, and in accordance with the regulations.

Conditions

(2) The registered participant shall comply with such conditions as may be prescribed with respect to the automatic closing of the participant's account.

Closing by the Director

(3) In such circumstances as may be prescribed, the Director may close an account of a registered participant in accordance with the regulations.

Conditions

(4) The Director may impose conditions on the closing of an account.

Hearing

(5) Section 60 applies if the Director closes an account of a registered participant otherwise than on request or in connection with the cancellation of the participant's registration, or if the Director imposes conditions on the closing of the account.

Removal from account

(6) When the account of a registered participant is closed, the Director shall remove from the account the emission allowances and credits, if any, held in the account and shall deal with them in accordance with the regulations.

Authority of Minister, Director re: accounts

27 (1) The Minister may, in accordance with the regulations, remove emission allowances and credits from a registered participant's cap and trade accounts in the circumstances specified in this Act and in such circumstances as may be prescribed.

Director's authority

(2) The Director may, in accordance with the regulations, remove emission allowances and credits from a registered participant's cap and trade accounts in such circumstances as may be prescribed.

No notice or consent

(3) The Minister or the Director is not required to notify the registered participant before removing emission allowances and credits from the participant's cap and trade accounts, and the consent of the registered participant is not required.

Reversal

(4) The Minister or Director may reverse a transfer between cap and trade accounts if the transfer was made in error by the Minister or Director, as the case may be, or in such other circumstances as may be prescribed.

Prohibitions re: cap and trade accounts

Unauthorized transfer between accounts

28 (1) No registered participant or designated account agent shall transfer an emission allowance or credit between the participant's cap and trade accounts in contravention of a requirement or restriction imposed under this Act.

Unauthorized holding

(2) No registered participant shall hold in the participant's cap and trade accounts an emission allowance or credit that is owned, directly or indirectly, by another person.

Exception

(3) Subsection (2) does not apply to such registered participants, or in such circumstances, as may be prescribed.

Prohibitions re: trading

Fraud and market manipulation

29 (1) No person shall, directly or indirectly, engage or participate in any act, practice or course of conduct relating to emission allowances or credits that the person knows or reasonably ought to know,

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, an emission allowance or credit; or

(b) perpetrates a fraud on any person.

Attempts

(2) No person shall, directly or indirectly, attempt to engage or participate in any act, practice or course of conduct that is contrary to subsection (1).

Misleading or untrue statements

(3) A person shall not make a statement that the person knows or reasonably ought to know,

(a) in a material respect and at the time and in the light of the circumstances in which it is made is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and

(b) would reasonably be expected to have a significant effect on the price or value of an emission allowance or credit.

Same, misleading or untrue information

(4) A person shall not provide any information that the person knows or reasonably ought to know,

(a) in a material respect and at the time and in the light of the circumstances in which it is provided is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the information not misleading; and

(b) would reasonably be expected to have a significant effect on the price or value of an emission allowance or credit.

Trading where undisclosed change

(5) No person shall purchase, sell, trade or otherwise deal with emission allowances or credits if the person has knowledge of information that has not been generally disclosed and that could reasonably be expected to have a significant effect on the price or value of an allowance or credit.

Tipping

(6) No person shall, other than in the necessary course of business, inform another person of information that has not generally been disclosed and that could reasonably be expected to have a significant effect on the price or value of an emission allowance or credit.

Defence

(7) A person shall not be found to have contravened subsection (5) or (6) if the person proves that the person reasonably believed that the information had been generally disclosed.

Exceptions

(8) Subsections (5) and (6) do not apply to the Minister, the Director or a person acting on their behalf.

EMISSION ALLOWANCES AND CREDITS

Ontario emission allowances

30 (1) The Minister shall create Ontario emission allowances in accordance with the regulations, and may create classes of allowances.

Maximum number, amount

(2) The regulations shall prescribe the maximum number or amount of Ontario emission allowances that may be created for a period, and the maximum shall be determined with reference to the targets established under section 6 for the reduction of greenhouse gas emissions.

Distribution of Ontario emission allowances

For valuable consideration

31 (1) The Minister may distribute Ontario emission allowances to registered participants for valuable consideration in accordance with the regulations.

Transitional measures, distribution free of charge

(2) In order to support the transition to a low-carbon economy, the Minister may distribute Ontario emission allowances to registered participants free of charge on a date or during a period prescribed by regulation, and shall do so in accordance with the regulations.

Restrictions re: distribution

(3) The regulations may establish a method for determining the number or amounts of Ontario emission allowances that are to be distributed for valuable consideration or free of charge, respectively, and a method for determining the number or amounts that are to be distributed by selling them at auction, by direct sale and in other prescribed ways.

Restrictions re: distribution free of charge

(4) If Ontario emission allowances are distributed free of charge, the regulations may specify the basis for determining which participants may receive allowances, and in what number or amount, and may prescribe circumstances in which a participant is ineligible to receive allowances.

Public notice

(5) If Ontario emission allowances are distributed free of charge, the Minister shall make the following information available to the public within 24 months after each such distribution:

1. A list of the mandatory participants and voluntary participants to whom allowances were distributed free of charge.
2. Subject to subsection (6), the number or amount of allowances that were distributed to each of them.
3. Such other information as the Minister considers appropriate.

Same

(6) In such circumstances as the Minister considers appropriate, aggregated information may be provided about the number or amount of Ontario emission allowances that were distributed free of charge to some, or all, recipients.

Same

(7) Without limiting the generality of subsection (6), the Minister shall take into account any issue of confidentiality in deciding whether to provide aggregated information for some, or all, recipients.

Transitional measures

(8) Before January 1, 2021, the Minister shall make available to the public an outline that describes how the distribution of Ontario emission allowances free of charge will be phased out as Ontario makes the transition to a low-carbon economy.

Payment to the Minister of Finance

(9) Amounts payable for Ontario emission allowances that are distributed by the Minister for valuable consideration shall be paid, in accordance with the regulations, to the Minister of Finance.

Financial assurance

(10) The regulations may require a prospective purchaser to provide financial assurance, in the form and amount authorized by the regulation, for any amounts payable for Ontario emission allowances that are distributed to the purchaser by the Minister.

Auction or sale of Ontario emission allowances

32 (1) The regulations may establish rules governing the auction or sale of Ontario emission allowances.

Prospective purchasers at auction or sale

(2) Only a person who satisfies the prescribed criteria, complies with the prescribed requirements, pays any applicable fee and is not otherwise prohibited under this Act or by an order may purchase emission allowances at an auction or sale.

Same

(3) Without limiting the generality of subsection (2), the regulations may impose requirements with respect to the persons that a person may retain to provide services with respect to the person's participation in the auction or sale.

Purchase limits for auction or sale

(4) The regulations may prescribe limits on the number of emission allowances that may be purchased by a person, or by related persons, at an auction or sale.

Rules re: auction or sale

(5) A prospective purchaser shall comply with the prescribed rules for an auction or sale, as the case may be.

Prohibition re: disclosure

(6) No person shall disclose whether or not the person is participating in an auction.

Same

(7) No person shall disclose whether or not the person is taking part in an auction or any other information relating to the person's participation in an auction, including the person's identity, bidding strategy, the amount of the person's bids and the quantity of emission allowances concerned, and the financial information provided to the Director in connection with the auction.

Same

(8) If a prospective purchaser retains the services of another person in connection with an auction, the other person shall not disclose any of the information described in subsection (7) relating to the prospective purchaser.

Exception

(9) Subsections (6), (7) and (8) do not apply with respect to a disclosure to such persons as may be prescribed.

Prohibition re: bidding strategy

(10) No person shall coordinate the bidding strategy of more than one prospective purchaser in connection with an auction.

Sale, auction on behalf of participant

(11) In such circumstances as may be prescribed, where Ontario emission allowances have been removed from a registered participant's cap and trade accounts, the Minister may, in accordance with the regulations, sell or auction the allowances on behalf of the participant.

Retiring, cancelling emission allowances

33 (1) The Minister may, in such circumstances as may be prescribed and in accordance with the regulations, retire emission allowances from circulation.

Cancellation

(2) The Minister may cancel Ontario emission allowances in accordance with the regulations in such circumstances as may be prescribed.

Offset initiatives: registration

34 (1) In this section,

"sponsor" means, with respect to an offset initiative, the person who applies for registration of the initiative.

Application for registration

(2) A person may apply to the Director in accordance with the regulations for registration of an offset initiative.

Same

(3) The sponsor shall give the Director such information as the Director may require for the purposes of the application and such other information as may be required by the regulations.

Registration

(4) Upon receiving the application, information and any applicable fee, the Director shall register the offset initiative if the Director determines that,

(a) the sponsor satisfies such eligibility criteria as may be prescribed;

(b) the offset initiative is designed to reduce greenhouse gas emissions, to avoid the emission of greenhouse gases or to remove greenhouse gases from the atmosphere; and

(c) the offset initiative satisfies such other eligibility criteria or requirements as may be prescribed.

Refusal of registration

(5) Despite subsection (4), the Director may refuse to register the offset initiative if the Director is of the opinion that it should not be registered, having regard to such circumstances as may be prescribed and such other matters as the Director considers appropriate.

Conditions of registration

(6) The registration of an offset initiative is subject to such conditions as may be established by regulation – including conditions that are imposed on the sponsor – and such conditions as may be imposed by the Director.

Same, reports and verification

(7) Without limiting the generality of subsection (6), the conditions established by regulation may include requirements relating to reporting and verification.

Duty to comply

(8) The sponsor shall comply with the conditions established by regulation and the conditions imposed by the Director with respect to the offset initiative.

Cancellation of registration

(9) The Director may cancel the registration of an offset initiative in accordance with the regulations in such circumstances as may be prescribed.

Opportunity to be heard

(10) If the Director proposes to refuse to register an offset initiative or to cancel the registration of an offset initiative, the Director shall give the sponsor notice of the proposal in accordance with the regulations and shall, in accordance with the regulations, give the sponsor an opportunity to be heard.

Ontario credits

35 (1) The Minister may create Ontario credits, and classes of credits, in accordance with the regulations.

Offset credits

(2) Without limiting the generality of subsection (1), the Minister may create Ontario offset credits in respect of offset initiatives that are registered under section 34.

Early reduction credits

(3) Without limiting the generality of subsection (1), the Minister may create Ontario credits in respect of actions taken by prescribed persons during any prescribed period before this Act receives Royal Assent to reduce greenhouse gas.

Application for credits

(4) The regulations may establish a process enabling a person to apply to the Minister for the creation of Ontario credits, and may provide for eligibility criteria, application deadlines and other matters.

Reporting and verification, Ontario offset credits

(5) If the Minister creates Ontario offset credits in respect of a registered offset initiative, the regulations may impose ongoing monitoring, reporting and verification requirements on the person who applied for the creation of the credits.

Issuing Ontario credits

36 (1) The Minister may issue Ontario credits to registered participants subject to such conditions as may be prescribed by regulation.

Same, to the Minister

(2) The regulations may specify that a prescribed number or amount of Ontario offset credits created in respect of an offset initiative registered under section 34 shall be retained by the Minister for such purposes as may be prescribed by regulation.

Retiring, cancelling credits

Retirement

37 (1) The Minister may, in such circumstances as may be prescribed and in accordance with the regulations, retire credits from circulation.

Cancellation

(2) The Minister may cancel Ontario credits in accordance with the regulations in such circumstances as may be prescribed.

Same, Ontario offset credits

(3) Without limiting the generality of subsection (2), the regulations may provide for the cancellation of Ontario offset credits if the Minister determines, in accordance with the regulations, that there has been a failure to comply with any requirements imposed under this Act with respect to the offset initiative to which the offset credits relate.

Number, amount cancelled

(4) The number or amount of Ontario credits to be cancelled is prescribed by the regulations or determined in accordance with the regulations.

Same

(5) Despite subsection (4), in prescribed circumstances, the number or amount of Ontario credits to be cancelled shall be determined by the Director in accordance with the regulations.

Opportunity to be heard

(6) If the Minister proposes to cancel Ontario credits, the Director shall give every registered participant in whose cap and trade accounts the credits are held, and such other persons as may be specified by regulation, notice of the proposal in accordance with the regulations and shall, in accordance with the regulations, give them an opportunity to be heard.

Conditions upon cancellation

(7) The regulations may provide that, if Ontario offset credits are cancelled, the sponsor of the registered offset initiative to which the credits relate is required to submit an equal number or amount of credits to the Minister in accordance with the regulations.

Recognition of instruments of other jurisdictions

38 (1) If the Minister enters into an agreement with a jurisdiction other than Ontario under section 76, the regulations may prescribe instruments created by that jurisdiction as instruments that are recognized for use in Ontario's cap and trade program under this Act and the regulation shall specify whether an instrument is to be treated as an emission allowance or a credit for the purposes of this Act and shall specify the amount of greenhouse gas emissions that is represented by the instrument.

Effect of cancellation, etc.

(2) If a prescribed instrument that is recognized under subsection (1) is cancelled or extinguished by the jurisdiction that created it, the Minister may remove the instrument from a registered participant's cap and trade accounts.

Actions not invalid

39 A failure by the Minister, the Director or a delegate or agent of either of them to act in accordance with any requirement or restriction imposed under this Act does not invalidate any of the following:

1. The creation, distribution, retirement from circulation or cancellation of an Ontario emission allowance.
2. The retirement of any other emission allowance from circulation.
3. The creation, issuance, retirement from circulation or cancellation of an Ontario credit.
4. The retirement of any other credit from circulation.

VERIFICATION, INSPECTION AND INVESTIGATION

Verification of reports

40 (1) This section applies if this Act, a regulation or an order requires the verification of a report given to the Director.

Verification

(2) Any verification, including any re-verification, must be conducted in accordance with the regulations by a person who is authorized by regulation to conduct it.

Re-verification

(3) The regulations may require a re-verification of a report in such circumstances as may be prescribed.

Same, required by Director

(4) The Director may require a re-verification of a report if the Director is of the opinion that it was not verified in accordance with this Act or the regulations or in such other circumstances as may be prescribed.

Duty to comply

(5) Upon receiving notice from the Director that he or she requires a re-verification, the person shall have the re-verification conducted in accordance with such requirements as the Director may specify in the notice.

Duty to provide assistance

(6) If a re-verification is required, the Director may require the person who conducts the re-verification, and such other persons as may be prescribed, to provide such assistance to the Director as he or she considers reasonably necessary.

Duty to make records available

41 Every person required under this Act to retain a record shall make it available to a provincial officer for inspection upon his or her request.

Inspection by provincial officer

42 (1) A provincial officer may, at any reasonable time, enter any place described in subsection (2) and conduct an inspection for the purpose of determining whether requirements imposed under this Act are being complied with, if the provincial officer reasonably believes that,

(a) the place contains records relating to the person's compliance with the requirements; or

(b) an activity relating to the person's compliance with the requirements is occurring or has occurred at the place.

Same

(2) Subsection (1) authorizes a provincial officer to enter a place only if it is owned or occupied by a person who is subject to requirements imposed under this Act.

Entry to dwellings

(3) A provincial officer shall not enter a place that includes a room that is used as a dwelling except with the consent of the occupier or under the authority of an order under section 49.

Powers during inspection

(4) A provincial officer may do one or more of the following things in the course of entering a place and conducting an inspection:

1. Make necessary excavations.
2. Require that any thing be operated, used or set in motion under conditions specified by the provincial officer.
3. Take samples for analysis.
4. Conduct tests or take measurements.
5. Examine, record or copy, in any form, by any method, any record that is required to be retained under this Act and any other record that is related to the purpose of the inspection.
6. Make a record, by any method, of anything that is related to the purpose of the inspection.
7. Require the production of any record, in any form, that is required to be retained under this Act and of any other record that is related to the purpose of the inspection.
8. Remove from the place, for the purpose of making copies, records produced under paragraph 7.
9. Make reasonable inquiries of any person, orally or in writing.
10. Require any person to provide reasonable assistance and to answer reasonable inquiries, orally or in writing.

Records in electronic form

(5) If a record is retained in electronic form, the provincial officer may require that a copy of it be provided to him or her on paper or electronically, or both.

Limitation re removal of documents

(6) The provincial officer shall not remove records under paragraph 8 of subsection (4) without giving a receipt for them and shall promptly return them to the person who produced them.

Power to exclude persons

(7) A provincial officer who exercises the power set out in paragraph 9 of subsection (4) may exclude any person from the questioning, except counsel for the person being questioned.

Assistance to be given

(8) A provincial officer may, in the course of exercising a power under subsection (4), require a person to produce a record and to provide whatever assistance is reasonably necessary, including using any data storage, processing or retrieval device or system to produce a record in readable form and the person shall produce the record or provide the assistance.

Inquiry by provincial officer

43 (1) For the purpose of determining whether requirements imposed under this Act are being complied with, a provincial officer may, at any reasonable time and with any reasonable assistance, require a person who is subject to requirements imposed under this Act to respond to reasonable inquiries.

Same

(2) For the purposes of subsection (1), the provincial officer may make inquiries using any means of communication.

Production of document

(3) In requiring a person referred to in subsection (1) to respond to an inquiry under that subsection, a provincial officer may require the production, in any form, of any record required to be retained under this Act and of any other record that is related to the purpose of the inquiry.

Records in electronic form

(4) If a record is retained in electronic form, the provincial officer may require that a copy of it be provided to him or her on paper or electronically, or both.

Power to prohibit entry, etc.

44 (1) A provincial officer may, by order, prohibit entry into all or part of any place or prohibit the use of, interference with, disruption of or destruction of any thing in any of the following circumstances:

1. During an inspection under section 42 or 49.
2. During the time required for the provincial officer to obtain an order under section 49 of this Act or a warrant under section 158 of the *Provincial Offences Act.*
3. During a search carried out under a warrant issued under section 158 of the *Provincial Offences Act*.

Requirements for order

(2) An order under subsection (1) shall not be issued unless the provincial officer reasonably believes that,

(a) in the case of an order prohibiting entry, there is on the land or in the place a thing that will afford evidence of an offence under this Act; or

(b) in the case of an order prohibiting the use of, interference with, disruption of, or destruction of a thing, the thing will afford evidence of an offence under this Act.

Notice of order

(3) The provincial officer shall give reasonable notice of the order in the manner that he or she reasonably considers appropriate in the circumstances.

Contents of notice

(4) Notice of the order shall include an explanation of the rights provided by subsections (6) and (7).

Order not effective where no notice

(5) An order under subsection (1) is not effective in any court proceeding against a person where the person satisfies the court that the person neither knew nor should have known of the order.

Request for rescission

(6) A person aggrieved by the order may make an oral or written request to the Director to rescind it and may make oral or written submissions to the Director in support of the request.

Powers of Director

(7) The Director shall give prompt consideration to any request or submissions made under subsection (6) and may rescind the order.

Same

(8) For the purposes of subsection (7), the Director may substitute his or her own opinion for that of the provincial officer.

Same

(9) A Director who rescinds an order under subsection (7) shall give such directions to a provincial officer as the Director considers appropriate to bring the rescission to the attention of persons affected.

No stay

(10) A request for rescission of an order under subsection (1) does not stay the order, unless the Director orders otherwise in writing.

Duration of order

(11) An order under subsection (1) shall,

(a) subject to clause (b), be effective for the shorter of the length of time necessary to complete the inspection or search referred to in that subsection or a period not exceeding two days excluding holidays; or

(b) where the inspection or search referred to in that subsection is under an order under section 49 of this Act or under a warrant issued under section 158 of the *Provincial Offences Act* and a time limit for the inspection or search is specified in the order or warrant, be effective until the expiration of that time.

Power to seize during inspection

45 (1) A provincial officer who is lawfully present in a place pursuant to a court order or otherwise in the execution of the provincial officer's duties may, without a warrant or court order, seize any thing that is produced to the provincial officer or that is in plain view,

(a) if the provincial officer reasonably believes that the thing will afford evidence of an offence under this Act; or

(b) if the provincial officer reasonably believes that the thing was used or is being used in connection with the commission of an offence under this Act and that the seizure is necessary to prevent the continuation or repetition of the offence.

Detention or removal, things seized

(2) A provincial officer who seizes any thing under this section may remove the thing or may detain it in the place where it is seized.

Reasons and receipt

(3) If possible, the provincial officer shall inform the person from whom a thing is seized under this section as to the reasons for the seizure and shall give the person a receipt for the thing seized.

Duty to report to justice, things seized

(4) A provincial officer who seizes a thing under this section shall bring the thing before a justice or, if that is not reasonably possible, shall report the seizure to a justice.

Application of *Provincial Offences Act*

(5) Section 159 of the *Provincial Offences Act* applies with necessary modifications in respect of a thing seized under this section.

Power to use force, request police assistance

46 (1) A provincial officer may use such force as is reasonably necessary to carry out a court order issued under section 48 or 49, to execute a warrant issued under the *Provincial Offences Act* or to prevent the destruction of any thing that the provincial officer reasonably believes may afford evidence of an offence under this Act.

Same

(2) A provincial officer who is authorized by an order under section 49 to do anything set out in subsection 42 (1) or (4) may take such steps and employ such assistance as is necessary to accomplish what is required, and may, when obstructed in so doing, call for the assistance of any member of the Ontario Provincial Police Force or the police force in the area where the assistance is required, and it is the duty of every member of a police force to render the assistance.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 46 (2) of the Act is amended by striking out "Ontario Provincial Police Force or the police force in the area where the assistance is required, and it is the duty of every member of a police force to render the assistance" at the end and substituting "Ontario Provincial Police or the police service in the area where the assistance is required, and it is the duty of every member of a police service to render the assistance". (See: 2018, c. 3, Sched. 5, s. 12)

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

2018, c. 3, Sched. 5, s. 12 - not in force

Other powers and duties of provincial officers

Duty to provide identification

47 (1) On request, a provincial officer who exercises a power under this Act shall identify himself or herself as a provincial officer either by the production of a copy of his or her appointment or in some other manner and shall explain the purpose of the exercise of the power.

Securing of place, thing

(2) If an order under section 44 or 48 is in effect, a provincial officer may take measures to secure the land, place or thing to which the order relates by means of locks, gates, fences, security guards or such other means as the provincial officer deems necessary to prevent entry into the land or place or to prevent the use of, interference with, disruption of, or destruction of the thing.

Samples and copies

(3) A provincial officer may detain samples and copies obtained under section 42 or 49 for any period and for any of the purposes of this Act.

Duty to restore property

(4) A provincial officer who makes or causes the making of an excavation in the course of his or her duties under this Act shall restore the property, so far as is reasonably possible, to the condition it was in before the excavation was made.

Court order prohibiting entry, etc.

48 (1) Where a justice is satisfied, on evidence under oath by a provincial officer, that there is reasonable ground for believing that it is appropriate for the administration of this Act or the regulations or to protect property, the justice may issue an order prohibiting entry into all or part of any land or place or prohibiting the use of, interference with, disruption of, or destruction of any thing.

Same

(2) Subsections 156.5 (2) to (9) of the *Environmental Protection Act* apply with necessary modifications with respect to an order under subsection (1).

Court order authorizing entry or inspection

49 (1) A justice may issue an order authorizing a provincial officer to do anything set out in subsection 42 (1) or (4) if the justice is satisfied, on evidence under oath by a provincial officer, that there are reasonable grounds to believe that,

(a) it is appropriate for the provincial officer to do anything set out in subsection 42 (1) or (4) for the purpose of determining any person's compliance with requirements imposed under this Act; and

(b) the provincial officer may not be able to carry out his or her duties effectively without an order under this section because,

(i) no occupier is present to grant access to a place that is locked or otherwise inaccessible,

(ii) a person has prevented or may prevent the provincial officer from doing anything set out in subsection 42 (1) or (4),

(iii) it is impractical, because of the remoteness of the place to be inspected or for any other reason, for a provincial officer to obtain an order under this section without delay if access is denied, or

(iv) an attempt by a provincial officer to do anything set out in subsection 42 (1) or (4) might not achieve its purpose without the order; or

(c) a person is refusing or is likely to refuse to respond to reasonable inquiries.

Same

(2) Subsections 42 (5) to (8) apply to an inspection carried out under an order issued under this section.

Expiry

(3) Unless renewed, an order under this section expires on the earlier of the day specified for the purpose in the order and the day that is 30 days after the date on which the order is made.

Renewal

(4) An order under this section may be renewed in the circumstances in which an order may be made under subsection (1), before or after expiry, for one or more periods of not more than 30 days.

When to be executed

(5) Unless the order provides otherwise, everything that an order under this section authorizes must be done between 6 a.m. and 9 p.m.

Same

(6) A renewal order under subsection (4) may be issued on application made with such notice, if any, as may be specified under subsection (7).

Application for dwelling

(7) An application for a judicial order authorizing entry to a dwelling or a place that includes a room that is used as a dwelling shall specifically indicate that the application relates to a dwelling.

ENFORCEMENT

Offences

50 (1) Every person who contravenes or fails to comply with this Act or the regulations is guilty of an offence except in the case of a failure to comply with the requirement set out in paragraph 2 of subsection 14 (7).

Offence re: orders

(2) Every person who contravenes or fails to comply with an order made under this Act, other than an order made under section 57 (administrative penalties), is guilty of an offence.

Offence re: fees

(3) Every person who fails to pay a fee that the person is required to pay under this Act is guilty of an offence.

Liability of directors and officers

(4) If a corporation commits an offence under this Act, every director or officer of the corporation who directed, authorized, assented to, acquiesced in or participated in the offence, or who failed to take reasonable care to prevent the corporation from committing the offence, is guilty of an offence, whether or not the corporation has been prosecuted or convicted.

Limitation

(5) No proceeding under this section shall be commenced more than six years after the day on which evidence of the offence first came to the attention of a provincial offences officer appointed under the *Provincial Offences Act*.

Penalties

Individual, general

51 (1) Every individual convicted of an offence under this Act, other than an offence described in subsection (3), is liable to the following penalties:

1. On a first conviction, a fine of not more than $50,000 for each day or part of a day on which the offence occurs or continues.
2. On each subsequent conviction, a fine of not more than $100,000 for each day or part of a day on which the offence occurs or continues, or imprisonment for a term of not more than one year, or both.

Corporation, general

(2) Every corporation convicted of an offence under this Act, other than an offence described in subsection (3), is liable to the following penalties for each day or part of a day on which the offence occurs or continues:

1. On a first conviction, a fine of not more than $250,000.
2. On each subsequent conviction, a fine of not more than $500,000.

Specified offences

(3) Subsections (4) and (5) apply with respect to the following offences under subsection 50 (1):

1. Failure to comply with subsection 14 (1) (duty to submit emission allowances and credits).
2. Contravention of subsection 29 (1), (2), (3), (4), (5) or (6) (prohibitions re: trading).
3. Contravention of subsection 32 (6) or (7) (prohibitions re: auction of Ontario emission allowances).
4. Contravention of subsection 64 (1), (2), (3), (4) or (5) (prohibitions affecting administration).

Corporation, for specified offences

(4) Every corporation convicted of an offence described in subsection (3) is liable to the following penalties for each day or part of a day on which the offence occurs or continues:

1. On a first conviction, a fine of not less than $25,000 and not more than $6 million.
2. On a second conviction, a fine of not less than $50,000 and not more than $10 million.
3. On each subsequent conviction, a fine of not less than $100,000 and not more than $10 million.

Individual, for specified offences

(5) Every individual convicted of an offence described in subsection (3) is liable to the following penalties:

1. On a first conviction, a fine of not less than $5,000 and not more than $4 million, or imprisonment for a term of not more than five years less a day, or both.
2. On a second conviction, a fine of not less than $10,000 and not more than $6 million, or imprisonment for a term of not more than five years less a day, or both.
3. On each subsequent conviction, a fine of not less than $20,000 and not more than $6 million, or imprisonment for a term of not more than five years less a day, or both.

Higher fines

(6) The court that convicts a person of an offence under this Act, in addition to any other penalty imposed by the court, may increase a fine imposed upon the person by an amount equal to the amount of the monetary benefit acquired by or that accrued to the person as a result of the commission of the offence, despite the maximum fines provided under subsections (1) to (5).

Number of convictions

52 In determining the number of a person's previous convictions for the purpose of section 51, the court shall include previous convictions of the person under,

(a) this Act;

(b) the *Commodity Futures Act*;

(c) the *Environmental Protection Act*, other than for an offence related to Part IX of that Act;

(d) the *Nutrient Management Act, 2002*;

(e) the *Ontario Water Resources Act*;

(f) the *Pesticides Act*;

(g) the *Safe Drinking Water Act, 2002*;

(h) the *Securities Act*;

(i) the *Toxics Reduction Act, 2009*.

Sentencing considerations

53 (1) Subject to subsection (3), in determining a penalty under section 51, the court shall consider each of the following circumstances to be aggravating factors:

1. The defendant committed the offence intentionally or recklessly.
2. In committing the offence, the defendant was motivated by a desire to increase revenue or decrease costs.
3. The defendant committed the offence despite having been warned by the Ministry of circumstances that subsequently became the subject of the offence.
4. After the commission of the offence, the defendant,
    i. attempted to conceal the commission of the offence from the Ministry or other public authorities,
    ii. failed to co-operate with the Ministry or other public authorities,
    iii. failed to take prompt action to mitigate the effects of the offence, including action to compensate persons for loss or damage that resulted from the commission of the offence, or
    iv. failed to take prompt action to reduce the risk of similar offences being committed in the future.
5. Any other circumstance that is prescribed by the regulations as an aggravating factor.

Severity of penalty

(2) Subject to subsection (3), the severity of a penalty under section 51 shall reflect the number of aggravating factors that apply under subsection (1) and the seriousness of the particular circumstances of each of those aggravating factors.

Reasons

(3) If the court decides that an aggravating factor that applies under subsection (1) does not warrant a more severe penalty, the court shall give reasons for that decision.

Compliance with order not a mitigating factor

(4) Without limiting the court's ability to consider other mitigating factors and the particular circumstances of the severity of the offence, and subject to subsection (5), the court shall not consider compliance with an order issued under this Act in response to the offence to be a mitigating factor in determining a penalty under section 51.

Reasons

(5) If the court decides that compliance with an order issued under this Act in response to the offence warrants a less severe penalty, the court shall give reasons for that decision.

Administrative penalty

(6) If an order is made requiring a person to pay an administrative penalty under section 57 in respect of a contravention and the person is also convicted of an offence in respect of the same contravention, the court, in determining a penalty under section 51, shall consider the order to pay the administrative penalty to be a mitigating factor and, if subsection 51 (4) or (5) applies, may impose a fine of less than the minimum fine provided for in that subsection.

Other matters

(7) If a person is required to submit emission allowances under paragraph 2 of subsection 14 (7) in respect of a contravention and the person is also convicted of an offence in respect of the same contravention, the court, in determining the penalty

under section 51, shall consider the obligation to submit those emission allowances and credits to be a mitigating factor and may impose a fine of less than the minimum fine provided for in subsection 51 (4) or (5).

Same

(8) Upon convicting a person of an offence, the court may make such other orders as the court considers appropriate in the circumstances.

Restitution orders

54 (1) On its own initiative or on the request of the prosecutor, the court that convicts a person of an offence under this Act, in addition to any other penalty imposed by the court, may make an order for restitution against the person convicted of the offence, requiring the person to compensate or make restitution to an aggrieved person or persons for reasonable expenses actually incurred by the aggrieved person that results from or is in any way connected to the commission of the offence, in such amount and on such terms and conditions as the court considers just.

No restitution to person who committed offence

(2) The court shall not make an order for restitution in favour of any person on account of damage that is the result of,

(a) the commission of an offence by the person; or

(b) a contravention in respect of which an order has been served on the person requiring the person to pay an administrative penalty under section 57, unless the order has been revoked.

Notification of order

(3) If a court makes an order for restitution, the court shall cause a copy of the order or a notice of the content of the order to be given to the person to whom the restitution is ordered to be paid.

Filing of order in court

(4) An order for restitution may be filed with a local registrar of the Superior Court of Justice and the responsibility for filing shall be on the person to whom the restitution is ordered to be paid.

Enforcement of order

(5) An order for restitution filed under subsection (4) may be enforced as if it were an order of the court.

Same

(6) Section 129 of the *Courts of Justice Act* applies in respect of an order for restitution filed under subsection (4) and, for the purpose, the date of filing is deemed to be the date of the order.

Civil remedy

(7) A civil remedy for an act or omission is not affected by reason only that an order for restitution under this section has been made in respect of that act or omission.

If fine not paid

55 (1) If a person is convicted of an offence under this Act and a fine is imposed,

(a) a thing seized in connection with the offence shall not be returned until the fine has been paid; and

(b) if payment of the fine is in default within the meaning of section 69 of the *Provincial Offences Act*, a justice may order that the thing be forfeited to the Crown.

Same

(2) Subsections 190.2 (2) to (6) of the *Environmental Protection Act* apply with necessary modifications in relation to an order under clause (1) (b).

Costs of seizure, etc.

56 If a person is convicted of an offence under this Act, the justice may, in addition to any other penalty, order the person to pay all or part of the expenses incurred by the Ministry with respect to the seizure, storage or disposition of any thing seized in connection with the offence.

Administrative penalties

57 (1) An administrative penalty may be imposed under this section for one or more of the following purposes:

1. To ensure compliance with this Act and the regulations.
2. To prevent a person or entity from deriving, directly or indirectly, any economic benefit as a result of contravening a provision of this Act or of the regulations.

Order by Director

(2) The Director may, subject to the regulations, make an order requiring a person described in subsection (4) to pay an administrative penalty if the Director is of the opinion that the person has contravened or failed to comply with a provision of this Act or the regulations, an order under this section or an agreement under subsection (12).

Exception re duty to submit emission allowances and credits

(3) Subsection (2) does not apply with respect to a failure to comply with section 14.

Scope of order

(4) An order under subsection (2) may be made against only such persons as may be designated by regulation, in relation to only such provisions, orders and agreements as may be designated by regulation or only in such circumstances as may be prescribed.

Limitation

(5) An order under subsection (2) shall be served not later than one year after the later of the following dates:

1. The date the contravention occurred.
2. The date on which the evidence of the contravention first came to the attention of the Director or provincial officer.

Orders not to be issued to directors, officers, employees or agents

(6) If a person who is required to comply with a provision of this Act or of the regulations is a corporation, an order under subsection (2) shall be issued to the corporation and not to a director, officer, employee or agent of the corporation.

Amount of penalty

(7) The amount of the administrative penalty shall be determined in accordance with the regulations.

Maximum penalty

(8) The amount of the administrative penalty shall not exceed $1 million.

Contents

(9) An order under subsection (2) shall be served on the person who is required to pay the penalty and shall,

(a) contain a description of the contravention to which the order relates, including, if appropriate, the date of the contravention;

(b) specify the amount of the penalty;

(c) give particulars respecting the time for paying the penalty and the manner of payment; and

(d) provide details of the person's rights under section 60 (hearings by the Environmental Review Tribunal).

Absolute liability

(10) A requirement that a person pay an administrative penalty applies even if,

(a) the person took all reasonable steps to prevent the contravention; or

(b) at the time of the contravention, the person had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the contravention innocent.

Same

(11) For greater certainty, nothing in subsection (10) affects the prosecution of an offence.

Agreements

(12) The Director and a person against whom an order may be or has been made under subsection (2) may enter into an agreement that,

(a) identifies the contravention in respect of which the order has been made;

(b) requires the person against whom the order may be or has been made to take steps specified in the agreement within the time specified in the agreement; and

(c) provides that the obligation to pay the administrative penalty may be cancelled in accordance with the regulations or the amount of the penalty may be reduced in accordance with the regulations and in accordance with the circumstances set out in the agreement.

Publication of agreements

(13) The Ministry shall publish every agreement entered into under subsection (12) in the environmental registry established under section 5 of the *Environmental Bill of Rights, 1993*.

Penalty does not prevent prosecution

(14) A person may be charged, prosecuted and convicted of an offence under this Act in respect of a contravention referred to in subsection (2) even if an administrative penalty has been imposed on or paid by the person or another person in respect of the contravention.

No admission

(15) If a person pays a penalty imposed under subsection (2) in respect of a contravention or enters into an agreement under subsection (12) in respect of the contravention, the payment or agreement is not, for the purposes of any prosecution in respect of the contravention, an admission that the person committed the contravention.

Failure to pay, consequences

(16) The following consequences arise if a person who is required to pay an administrative penalty imposed under this section fails to comply with the requirement:

1. The Director may, by order, suspend the person's authority to deal with emission allowances and credits in the person's cap and trade accounts until the administrative penalty is paid.
2. The Director may, by order, impose such other administrative penalties as may be authorized by regulation.

Same

(17) It is not an offence to fail to comply with a requirement to pay an administrative penalty imposed under this section.

Regulations

(18) The Lieutenant Governor in Council may make regulations,

(a) specifying the form and content of orders under subsection (2);

(b) for the purpose of subsection (4), designating persons, provisions, orders and agreements and prescribing circumstances;

(c) requiring and governing public consultation before an agreement is entered into under subsection (12) and, subject to that subsection and to any regulations made under subclause (d) (iii), governing the contents of agreements under that subsection;

(d) governing the determination of the amounts of administrative penalties, including,

(i) prescribing criteria to be considered by the Director,

(ii) providing for different amounts depending on when an administrative penalty is paid,

(iii) with respect to agreements under subsection (12), governing the cancellation of the obligation to pay an administrative penalty or the reduction of the amount of an administrative penalty;

(e) prescribing circumstances in which a person is not required to pay an administrative penalty;

(f) prescribing procedures related to administrative penalties;

(g) respecting any other matter necessary for the administration of a system of administrative penalties provided for by this section.

Compliance orders

58 (1) A provincial officer may issue an order to any person that the provincial officer reasonably believes is contravening or has contravened a provision of this Act or the regulations, a condition of a registration under this Act or a provision of an order made under this Act, other than an order of a court.

Information to be included in order

(2) The order shall specify the provision or condition contravened, briefly describe the nature and, if applicable, the location of the contravention and state that a review of the order may be requested in accordance with section 59.

What order may require

(3) The order may require the person to whom it is directed to comply with any directions set out in the order with respect to the following matters and to do so within the time specified in the order:

1. Achieving compliance with the provision or condition.
2. Preventing the continuation or repetition of the contravention.
3. Securing, whether through locks, gates, fences, security guards or other means, any land, place or thing.
4. Monitoring and recording and reporting on the monitoring and recording.

5. Submitting a plan for achieving compliance with the provision or condition, including the engagement of contractors, consultants and others satisfactory to a provincial officer.
6. Posting notice of the order.
7. Taking such other steps as may be prescribed by regulation.

Amendment or revocation of order

(4) An order issued under subsection (1) may, by order, be amended or revoked by the provincial officer who issued it or by the Director.

Same

(5) A provincial officer or Director who amends or revokes an order shall give written notice of the amendment or revocation to the person to whom the order is directed.

Review of a compliance order

59 (1) A person to whom an order under subsection 58 (1) is directed may request that the Director review the order, and the request must be made within seven days after the person is served with a copy of the order or within such longer period as may be prescribed by regulation.

Manner of making request

(2) The request may be made in writing or it may be made orally, with written confirmation served on the Director within the time specified in subsection (1).

Contents of request for review

(3) The written request for review, or written confirmation of an oral request, shall include the following information:

1. The portions of the order in respect of which the review is requested.
2. Any submissions that the applicant for the review wishes the Director to consider.
3. For the purpose of subsection (7), an address for service by mail or by electronic facsimile transmission or by such other means of service as the regulations may prescribe.

No automatic stay

(4) The request for review does not stay the order, unless the Director orders otherwise in writing.

Decision of Director

(5) The Director may, by order directed to the person who requested the review, confirm, amend or revoke the order of the provincial officer.

Same

(6) For the purposes of subsection (5), the Director may substitute his or her own opinion for that of the provincial officer.

Notice of decision

(7) The Director shall serve the person requesting the review with a copy of the Director's order under subsection (5) together with reasons.

Automatic confirmation of order

(8) The Director is deemed to have confirmed the order of the provincial officer, by order, if the Director does not give the person who requested the review oral or written notice of the Director's order under subsection (5) within seven days after the Director received the written request, or written confirmation of the oral request, or within such longer period as may be prescribed by regulation.

Deemed service of automatic order

(9) For the purpose of section 60 and a hearing required under that section, a confirming order deemed to have been made by the Director under subsection (8) is deemed to be directed to each person to whom the order of the provincial officer was directed and is deemed to have been served on each of those persons at the expiry of the period referred to in subsection (8).

Exception to automatic confirmation

(10) Subsections (8) and (9) do not apply if, within seven days of receiving the request for review or within such longer period as may be prescribed by regulation, the Director stays the order under subsection (9) and gives written notice to the person requesting the review that the Director requires additional time to make a decision under subsection (5).

Hearings by the Environmental Review Tribunal

60 (1) A person ("applicant") to whom any of the following decisions or orders is directed may require a hearing by the Environmental Review Tribunal:

1. Decision of the Director under subsection 18 (4) or (5) (conditions of registration).
2. Decision of the Director under subsection 20 (6) or (7) (cancellation of registration).
3. Decision of the Director under subsection 26 (3) or (4) (closing of cap and trade accounts).
4. Order of the Director under section 57 (administrative penalties).
5. Order of the Director under section 59 (review of compliance order).

Failure or refusal to issue, etc.

(2) For the purposes of subsection (1), the failure or refusal of a person to make a decision or to issue, amend or revoke an order is not itself an order.

Procedure

(3) The applicant may require the hearing by written notice served on the Tribunal within 15 days after the person is notified of the decision or is served with the order.

Extension of time for requiring hearing

(4) The Tribunal shall extend the time in which an applicant may give notice under subsection (3) requiring a hearing on a decision or an order if, in the Tribunal's opinion, it is just to do so because notice of the decision or service of the order was not effective to bring the decision or order to the person's attention.

Contents of notice requiring hearing

(5) The notice requiring the hearing shall include the following information:

1. The portions of the decision or order in respect of which the hearing is required.
2. The grounds on which the applicant intends to rely at the hearing.

Effects of contents of notice

(6) Except with leave of the Tribunal, the applicant is not entitled, at the hearing, to appeal a portion of the decision or order, or to rely on a ground, that is not stated in the notice requiring the hearing.

Leave by Tribunal

(7) The Tribunal may grant the leave referred to in subsection (6) if the Tribunal is of the opinion that to do so is proper in the circumstances, and the Tribunal may give such directions as the Tribunal considers proper consequent on the granting of the leave.

Parties

(8) The applicant and such other person as may be specified by the Tribunal are parties to the proceeding before the Tribunal.

Stay on appeal

(9) The commencement of a proceeding stays the operation of an order under section 57 (administrative penalties).

Exception

(10) Despite subsection (9), the commencement of a proceeding does not stay the operation of an order that meets the prescribed criteria.

Tribunal may grant stay

(11) The Tribunal may, on the application of a party to a proceeding before it, stay the operation of an order described in subsection (10).

Right to apply to remove stay: new circumstances

(12) A party to a proceeding may apply for the removal of a stay that was granted under subsection (11) if relevant circumstances have changed or have become known to the party since the stay was granted, and the Tribunal may grant the application.

Right to apply to remove stay: new party

(13) A person who is made a party to a proceeding after a stay is granted under subsection (11) may, at the time the person is made a party, apply for the removal of the stay, and the Tribunal may grant the application.

Powers of the Tribunal

(14) A hearing by the Tribunal shall be a new hearing and the Tribunal may confirm, vary or revoke the decision or order that is the subject matter of the hearing, and may substitute its opinion for that of the Director on grounds that the Tribunal considers reasonable.

Limitation

(15) If the hearing relates to an order to pay an administrative penalty under section 57, the Tribunal shall not vary the amount of the penalty unless the Tribunal considers the amount to be unreasonable.

Same

(16) For greater certainty, if the hearing relates to an order to pay an administrative penalty under section 57, a regulation made under that section governing the determination of the amounts of those penalties applies to the Tribunal.

Appeal to Divisional Court

61 (1) Any party to a hearing before the Environmental Review Tribunal under this Act may appeal from its decision on a question of law to the Divisional Court, with leave of the Divisional Court, in accordance with the rules of court.

Effect of appeal

(2) The appeal does not stay the operation of the decision of the Tribunal, unless the Tribunal orders otherwise.

Same

(3) On the appeal, the Divisional Court may stay the operation of the decision or set aside a stay ordered by the Tribunal under subsection (2).

Orders and decisions, consequential authority

62 (1) The authority to make an order under this Act includes the authority to require the person to whom the order is directed to take such intermediate action or such procedural steps or both as are related to the action required or prohibited by the order and as are specified in the order.

Same, authority to amend, revoke

(2) The authority to make a decision or an order includes the authority to amend or revoke the decision or order.

Same, authority to order access

(3) A person who has authority under this Act to order that a thing be done on or in any place also has authority to order any person who owns, occupies or has the charge, management or control of the place to permit access to the place for the purpose of doing the thing.

Collection, use and disclosure of information

Authentication of identity

63 (1) The regulations may specify the personal information that must be given to the Director in order to establish and authenticate the identity of an individual, on an ongoing basis, in connection with a person's registration, recognition or designation under this Act, including participation in an auction or sale of Ontario emission allowances, and in connection with a registered participant's cap and trade accounts.

Same

(2) If the regulations so provide, the Director may collect information, including a police records check, to confirm that a person satisfies the requirements of registration, recognition or designation on an ongoing basis.

Deemed confidentiality

(3) If the regulations so provide, such information as may be prescribed that is collected under this Act, other than personal information, is deemed to have been supplied in confidence.

Authorized disclosure

(4) Despite subsection (3), the Minister and the Director may disclose information obtained under this Act, including personal information, for the purpose of administering and enforcing this Act and the regulations, and for such other purposes as may be prescribed.

Data minimization

(5) Where the collection, use or disclosure of personal information is authorized under this Act or prescribed by regulation, no more personal information may be collected, used, or disclosed than is reasonably necessary to meet the purpose of the collection, use, or disclosure, as the case may be.

Prohibitions affecting administration

Obstruction

64 (1) No person shall hinder or obstruct the Minister, the Director, a provincial officer, a public servant or any agent of the Crown in the performance of his or her duties under this Act.

Same

(2) No person shall withhold from a provincial officer or conceal, alter or destroy anything relevant to an inspection under section 42 or an inquiry under section 43.

Same

(3) No person shall refuse to give information required for the purposes of this Act or the regulations to the Minister, the Director, a provincial officer, a public servant or any agent of the Crown.

False or misleading information

(4) No person shall give false or misleading information to the Minister, the Director, a provincial officer, a public servant or an agent of the Crown in respect of any matter related to this Act or the regulations.

Same

(5) No person shall include false or misleading information in any record required to be created, stored or submitted under this Act.

Matters of evidence

Certificate as evidence

65 (1) For all purposes in any proceeding, a statement purporting to be signed by the Director is, without proof of the office or signature of the Director, admissible as proof, in the absence of evidence to the contrary, of the facts stated in it in relation to the following matters:

1. The registration or non-registration, recognition or non-recognition or designation or non-designation of any person.
2. The provision or non-provision of any material required or permitted to be filed with the Director.
3. The time when facts upon which the proceedings are based first came to the knowledge of the Director.
4. Any other matter pertaining to the matters referred to in paragraph 1 or 2.
5. Such other matters as may be prescribed.

Proof of record

(2) Any record made under this Act that purports to be signed by any of the following persons or a certified copy of such a record is admissible in evidence in any proceeding as proof, in the absence of evidence to the contrary, that the document is signed by the person without proof of the office or signature of the person:

1. The Minister.
2. The Director.
3. A public servant, a provincial officer or an analyst appointed under section 73.
4. Such other persons as may be prescribed.

Not compellable

(3) No person shall be compelled to give testimony in a civil proceeding with regard to information obtained in the course of exercising a power or performing a duty under this Act, other than,

(a) in a proceeding under this Act; or

(b) an appeal or a judicial review relating to a proceeding described in clause (a).

Verification by affidavit, etc.

66 The Director may require a person to verify by affidavit or statutory declaration any record given under this Act to the Director or to a provincial officer.

Service of documents, etc.

67 (1) Any document given or served under this Act is sufficiently given or served if it is,

(a) delivered personally;

(b) sent by mail addressed to the person to whom delivery or service is required to be made at the latest address for the person appearing on the records of the Ministry; or

(c) given or served in accordance with regulations respecting service.

When service deemed made

(2) If service is made by mail, the service shall be deemed to be made on the fifth day after the day of mailing unless the person on whom service is being made establishes that the person did not, acting in good faith, through absence, accident, illness, disability or other cause beyond the person's control receive the notice or order until a later date.

Same

(3) If service is made by a method other than personal delivery or mail, the service is deemed to have been made on the day, if any, specified by regulation.

Debts due to the Crown

68 An amount payable to the Crown under this Act is a debt due to the Crown and may be recovered by any remedy or procedure available to the Crown by law.

Immunity of the Crown

69 (1) No cause of action arises against the Crown as a direct or indirect result of any act or omission that a person who is not an employee or agent of the Crown takes or makes in the execution or intended execution of any of the person's powers or duties under this Act.

No proceeding against the Crown

(2) No action or other proceeding for damages, including but not limited to a proceeding for a remedy in contract, restitution, tort or trust, shall be instituted against the Crown in connection with any cause of action described in subsection (1).

No liability of Crown employee

(3) No action or other proceeding shall be instituted against an employee or agent of the Crown for an act done in good faith in the execution or intended execution of a duty under this Act or for an alleged neglect or default in the execution in good faith of the duty.

Tort by Crown employee

(4) Despite subsections 5 (2) and (4) of the *Proceedings Against the Crown Act*, subsection (3) does not relieve the Crown of liability in respect of a tort committed by an employee or agent of the Crown to which it would otherwise be subject.

No right to compensation

70 (1) Despite any other Act or law, no person is entitled to be compensated for any loss or damages, including loss of revenues, loss of profit or loss of expected earnings that would otherwise have been payable to any person in respect of any action taken by the Minister or the Director under this Act, or by any person acting on their behalf, including any action relating to the removal of emission allowances and credits from a participant's cap and trade accounts.

No expropriation, etc.

(2) Nothing done or not done in accordance with this Act or the regulations constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.

No payment

(3) No amount is payable by the Crown with respect to any action taken by the Minister or the Director under this Act, or by any person acting on their behalf, including any action relating to the removal of emission allowances and credits from a participant's cap and trade accounts.

GENERAL

Greenhouse Gas Reduction Account

71 (1) An account shall be established in the Public Accounts to be known as the Greenhouse Gas Reduction Account in English and Compte de réduction des gaz à effet de serre in French in which shall be recorded the following amounts:

1. The amount of the proceeds from the distribution of Ontario emission allowances created under section 30.
2. Any amounts payable to the Crown by a participant under section 14.
3. The amount of any administrative penalties that are paid under section 57.
4. The amount of any fees payable to the Crown under this Act.
5. All expenditures of public money incurred under subsection (2).

Authorized expenditures

(2) Amounts not exceeding the balance in the account may be charged to the Greenhouse Gas Reduction Account and paid out of the Consolidated Revenue Fund for the following purposes:

1. To fund costs incurred by the Crown, directly or indirectly, in connection with the administration and enforcement of this Act and the regulations or to reimburse the Crown for expenditures incurred by the Crown, directly or indirectly, for any such purpose.
2. To fund, directly or indirectly, costs relating to initiatives described in Schedule 1 to this Act that are reasonably likely to reduce, or support the reduction of, greenhouse gas and costs relating to any other initiatives that are reasonably likely to do so.
3. To reimburse the Crown for expenditures incurred by the Crown, directly or indirectly, for any purpose described in paragraph 2.

Restriction

(3) No amount is payable under paragraph 2 or 3 of subsection (2) during a year in respect of any initiative unless the Minister reviews and provides an evaluation of the initiative to Treasury Board. The Minister's review shall consider,

(a) the potential greenhouse gas reductions of the initiative;

(b) the relationship of the initiative to the achievement of the greenhouse gas emission reduction targets established under section 6;

(c) the relationship of the initiative to other potential, planned and funded initiatives to reduce greenhouse gas;

(d) the relationship of the initiative to the climate change action plan prepared under section 7;

(e) whether the initiative is also likely to assist low-income households and vulnerable communities with their transition to a low-carbon economy; and

(f) such other matters as the Minister considers appropriate.

Public notice re: evaluations

(4) At least once during each fiscal year, the Minister shall make a report available to the public about the evaluations provided under subsection (3) to Treasury Board during the year with respect to initiatives that are funded from the Greenhouse Gas Reduction Account.

Reimbursement of expenditures

(5) A reimbursement described in paragraph 3 of subsection (2) for an expenditure incurred by the Crown shall not be made after the books of the Government of Ontario are closed for the fiscal year in which the expenditure is incurred. 2018, c. 8, Sched. 3, s. 1 (1).

Specified expenditures

(6) Despite subsection (5), $366,445,123 is deemed, as of March 31, 2018, to be charged to the Greenhouse Gas Reduction Account as reimbursement for expenditures described in paragraph 3 of subsection (2) that were incurred by the Crown on or after November 1, 2015 and on or before March 31, 2017 but were not reimbursed from the Account before the books of the Government of Ontario were closed for the fiscal year in which the expenditures were incurred. 2018, c. 8, Sched. 3, s. 1 (1).

Note: On January 1, 2019, subsection 71 (6) of the Act is repealed. (See: 2018, c. 8, Sched. 3, s. 1 (2))

Annual report

(7) Every year, the Minister shall prepare a report about the Greenhouse Gas Reduction Account setting out the following:

1. A description of each of the amounts credited and charged to the Account during the year.
2. A description of each of the initiatives with respect to which amounts were charged to the Account during the year, identifying any of those initiatives that were contemplated in the climate change action plan prepared in respect of the year.
3. A description of amounts charged to the Account to reimburse the Crown for expenditures incurred by the Crown, directly or indirectly, in connection with the administration and enforcement of this Act and the regulations.
4. Such other information as may be required by regulation.

Same

(8) The Minister shall lay the report before the Assembly when the Public Accounts for the year are laid before the Assembly in accordance with the *Financial Administration Act.*

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

2018, c. 8, Sched. 3, s. 1 (1) - 08/05/2018; 2018, c. 8, Sched. 3, s. 1 (2) - 01/01/2019

Appointment of Directors

72 (1) The Minister may appoint one or more public servants as Directors to exercise such powers and perform such duties and functions under this Act as the Minister specifies.

Same, restriction

(2) When making the appointment, the Minister may limit the authority of a Director in the manner that the Minister considers necessary or advisable.

Delegation by Director

(3) A Director may delegate any of the Director's powers or duties under this Act to a public servant, and may impose restrictions with respect to the delegation.

Designation of provincial officers, analysts

73 (1) The Minister may designate one or more public servants or other persons as provincial officers to exercise such powers and perform such duties and functions under this Act as the Minister specifies.

Appointment of analysts

(2) The Minister may appoint one or more public servants or other persons as analysts to exercise such powers and perform such duties and functions under this Act as the Minister specifies.

Same, restriction

(3) When making the designation or appointment, the Minister may limit the authority of a provincial officer or an analyst in the manner that the Minister considers necessary or advisable.

Status

(4) A provincial officer is a peace officer for the purpose of enforcing this Act.

Delegation by Minister

74 (1) The Minister may delegate any of the Minister's powers or duties under this Act to a public servant or other person and may impose restrictions with respect to the delegation.

Restriction

(2) The Minister cannot delegate such powers and duties as may be prescribed to a person who is not a public servant.

Minister's financial authority

75 Despite Part I of the *Financial Administration Act*, the Minister may do the following:

1. Receive funds that are not public money within the meaning of subsection 1 (3) of the *Financial Administration Act*, if the Minister receives the funds for selling emission allowances or credits on behalf of a registrant or former registrant, or in such other circumstances as may be prescribed.
2. Exercise control over funds that are not public money within the meaning of subsection 1 (3) of the *Financial Administration Act* and that are held in an account that is not in the name of the Crown, if the Minister obtains control over the funds in such circumstances as may be prescribed.
3. Establish accounts in the name of the Minister with an entity referred to in subsection 2 (2) of the *Financial Administration Act*.
4. Deposit funds referred to in paragraph 1 or 2 into accounts established under paragraph 3.
5. Pay out the funds referred to in paragraph 1 or 2 and the income earned on those funds in accordance with the regulations.

Agreements with other jurisdictions

76 (1) The Minister may enter into one or more agreements with representatives of other jurisdictions for the harmonization and integration of the cap and trade program under this Act with corresponding programs of those jurisdictions.

Exchange of information

(2) Without limiting the generality of subsection (1), an agreement may provide for the exchange of information, including personal information**,** between the Director and a person who has supervisory or regulatory powers under corresponding legislation of the other jurisdiction, if the information is necessary for the purposes of,

(a) complying with, implementing or enforcing the agreement; or

(b) the administration and enforcement of this Act and the regulations and the corresponding legislation of the other jurisdiction.

Confidentiality

(3) Information received by the Minister or the Director pursuant to an agreement is deemed to have been supplied in confidence if the agreement provides for confidentiality.

Agreements re: administration, etc.

77 (1) The Minister may enter into one or more agreements with persons to provide for such matters relating to the administration and enforcement of this Act and the regulations as the Minister considers appropriate.

Same

(2) The regulations may impose requirements and restrictions with respect to the Minister's authority under subsection (1) and, without limiting the generality of subsection (1), may authorize an agreement to provide for the following matters:

1. The delegation of specified powers and duties of the Minister under this Act, and the subdelegation of those powers and duties.
2. Authorization for a person to exercise such powers and perform such duties of the Director under this Act as may be prescribed.
3. Submission of the Crown to the jurisdiction of a foreign court.
4. Conflicts of law.
5. Such other matters as may be prescribed.

Status as Crown agent

(3) A person with whom the Minister enters into an agreement is not a Crown agent for any purpose unless a regulation, and the agreement, specifies otherwise.

Regulations

78 (1) The Lieutenant Governor in Council may make regulations in respect of the following matters:

1. Governing anything that is required or permitted to be prescribed or that is required or permitted to be done by, or in accordance with, the regulations or as authorized, specified or provided in the regulations. This does not apply with respect to section 57 (administrative penalties).
2. Defining, for the purposes of a regulation, words and expressions used in this Act that are not defined in the Act.
3. Governing the quantification and calculation of amounts of greenhouse gas emissions and governing the attribution of emissions.
4. Governing the registration of persons, including the suspension and cancellation of a registration, and governing the conditions applicable to registrants.
5. Governing the recognition and designation of account agents, including the suspension and cancellation of a recognition, and governing the conditions applicable to designated account agents.
6. Governing the purchase, sale, trade and other dealings with emission allowances and credits by registered participants, and prescribing jurisdictions other than Ontario for the purposes of subsection 21 (4).
7. Governing cap and trade accounts, including the closing of accounts, and governing transfers between accounts and the removal of emission allowances and credits from accounts.
8. Governing the creation, distribution, retirement from circulation and cancellation of Ontario emission allowances and the retirement of other emission allowances from circulation.
9. Governing the creation, issuance, retirement from circulation and cancellation of Ontario credits and the retirement of other credits from circulation.
10. Governing the registration of offset initiatives, including the imposition of requirements on sponsors of offset initiatives.
11. Governing monitoring, reporting and verification requirements under this Act and imposing duties on persons who are authorized under this Act to conduct verifications.
12. Governing the retention of records in the possession of persons who prepare or submit or who are required to prepare or submit records for the purposes of this Act.
13. Authorizing the Director to extend any deadline or period of time established under this Act in such circumstances as may be prescribed or in such circumstances as the Director considers appropriate, whether or not the deadline has passed or the period has expired.

14. Providing for such other matters as the Lieutenant Governor in Council considers advisable to carry out the purpose of this Act.

Exemptions

(2) A regulation may exempt a person or class of persons from a specified requirement imposed by this Act or a regulation made under this section in such circumstances as may be prescribed and subject to such conditions as may be prescribed or may provide that a specified provision of this Act or a regulation made under this section does not apply to the person or class in such circumstances as may be prescribed and subject to such conditions as may be prescribed.

Incorporation by reference

(3) A regulation may incorporate, in whole or in part and with such changes as the Lieutenant Governor in Council considers necessary, a document, including a code, formula, standard, protocol, procedure or guideline, as the document may be amended or remade.

Same

(4) An amendment to a document referred to in subsection (3), or a document referred to in subsection (3) as remade, comes into effect upon the Ministry publishing notice of the amendment or remade document in *The Ontario Gazette* or in the registry under the *Environmental Bill of Rights, 1993*.

Conflict with *Statutory Powers Procedure Act*

(5) A regulation may provide that it prevails over a provision of the *Statutory Powers Procedure Act*, despite anything in that Act.

Regulations made by Minister

79 (1) The Minister may make regulations in respect of the following matters:

1. Imposing fees for anything done or requested to be done under this Act, prescribing the manner in which and the period within which fees must be paid, and authorizing the refund of fees in prescribed circumstances.

Exemptions

(2) A regulation made under subsection (1) may exempt a person or class of persons from a specified requirement imposed by the regulation in such circumstances as may be prescribed or provide that a specified requirement does not apply to the person or class in such circumstances as may be prescribed.

80 OMITTED (AMENDS OTHER LEGISLATION).

81 OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT).

82 OMITTED (ENACTS SHORT TITLE OF THIS ACT).

SCHEDULE 1
GREENHOUSE GAS REDUCTION ACCOUNT

Initiatives

1 (1) Any of the following types of initiatives may be funded, in whole or in part, from the Greenhouse Gas Reduction Account in accordance with section 71 of the Act, but only, for any particular initiative, if the particular initiative is reasonably likely to reduce, or support the reduction of, greenhouse gas:

1. Initiatives relating to the reduction of greenhouse gas from energy sources and uses through the use of renewable and alternative energy sources and uses including the following:
    i. The production or installation of renewable, low-carbon, carbon-free and net zero alternative energy.
    ii. The research, development or deployment of technologies that eliminate or reduce the need to use fuels that emit greenhouse gasses.
    iii. Distributed renewable energy generation and energy management technologies to support load-shifting, energy storage, net metering and other measures to eliminate the need for grid-based electricity during natural gas peaking.
    iv. Carbon capture and storage technology for greenhouse gas emitting energy sources.
2. Initiatives relating to the reduction of greenhouse gas from land use and buildings including the following:
    i. Geothermal solutions, insulation, and other technologies that will reduce greenhouse gas emissions from buildings and neighbourhoods.
    ii. Support for increasing consumer demand for near-net-zero and net zero buildings, structures and communities.

iii. Infrastructure to support adoption and use of zero emission and plug-in hybrid vehicles, and low-carbon alternative fuels.

iv. The design, construction and retrofitting of buildings and structures to reduce greenhouse gas emitting energy sources related to space and water cooling and heating.

3. Initiatives relating to the reduction of greenhouse gas from transportation including the following:

   i. Support for increasing consumer demand for zero emission and plug-in hybrid vehicles.

   ii. Active transportation infrastructure that will reduce greenhouse gas.

   iii. Public transit vehicles and infrastructure that reduce greenhouse gas emissions.

   iv. Technologies, infrastructure, vehicles, buildings and structures that reduce greenhouse gas emissions associated with the movement of goods.

4. Initiatives relating to the reduction of greenhouse gas from industry including the following:

   i. Technologies that reduce greenhouse gas emissions.

   ii. Switching from higher greenhouse gas emitting sources of energy, carbon capture, sequestration and storage and changes to processes, including changes to the inputs to those processes that reduce greenhouse gas emissions.

5. Initiatives relating to the reduction of greenhouse gas from agriculture, forestry and natural systems including the following:

   i. Support for agriculture, soil and forestry approaches that are intended to reduce or remove greenhouse gas.

   ii. Treatment or destruction of by-products that produce greenhouse gas.

   iii. Carbon capture, sequestration and storage.

6. Initiatives relating to the reduction of greenhouse gas from the waste system including the following:

   i. Reducing the waste that produces greenhouse gas.

   ii. The management and use of waste to reduce greenhouse gas.

   iii. The use and destruction of by-products of waste management that produce greenhouse gas such as landfill gas.

7. Initiatives relating to the reduction of greenhouse gas through the use of financial models and services including the following:

   i. Support for organizations that develop and deliver financing tools, project aggregation, and professional services for initiatives that reduce greenhouse gas emissions.

   ii. The use of risk capital funds to invest in clean technologies that reduce greenhouse gas emissions.

(2) Without limiting the generality of subsection (1), any initiative described in subsection (1) may include any of the following actions:

1. Researching, developing and deploying technology, equipment and scientific processes.
2. Developing and delivering education and training.
3. Providing information to the public.
4. Activities related to innovation.
5. Other actions.

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TAB 2

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CHAPTER 13

An Act respecting the preparation of a climate change plan, providing for the wind down of the cap and trade program and repealing the Climate Change Mitigation and Low-carbon Economy Act, 2016

Assented to October 31, 2018

CONTENTS

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

GENERAL

Interpretation

1 (1) In this Act,

"cap and trade accounts" means, in relation to a participant, the cap and trade accounts that were established under the *Climate Change Mitigation and Low-carbon Economy Act, 2016* for the participant; ("comptes du programme de plafonnement et d'échange")

"cap and trade instrument" means an instrument described in subsection (2); ("instrument du programme de plafonnement et d'échange")

"CO_2e" means, when used in reference to a quantity of greenhouse gas, the equivalent quantity of carbon dioxide, calculated in accordance with the regulations; ("éq. CO_2")

"greenhouse gas" means a prescribed greenhouse gas; ("gaz à effet de serre")

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

"participant" means a person who was registered as a mandatory participant, a voluntary participant or a market participant under the *Climate Change Mitigation and Low-carbon Economy Act, 2016* on July 3, 2018; ("participant")

"person" includes an individual, corporation, partnership, sole proprietorship, association or any other organization or entity; ("personne")

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

Cap and trade instrument

(2) For the purposes of the definition of "cap and trade instrument" in subsection (1), a cap and trade instrument means one of the following:

1. An Ontario emission allowance within the meaning of subsection 1 (1) of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* as that provision read immediately before the repeal of that Act.
2. An Ontario credit within the meaning of subsection 1 (1) of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* as that provision read immediately before the repeal of that Act.
3. An instrument that was, on July 2, 2018, set out in Column 1 of the Table to section 10.1 of Ontario Regulation 144/16 (The Cap and Trade Program) made under the *Climate Change Mitigation and Low-carbon Economy Act, 2016*.

Attribution of emissions

2 (1) For the purposes of this Act, the amount of all greenhouse gas emissions attributed to a participant is the amount prescribed by the regulations or determined in accordance with the regulations.

Same

(2) Despite subsection (1), in prescribed circumstances the amount of greenhouse gas emissions shall be determined by the Minister in accordance with the regulations.

Opportunity to be heard

(3) If the Minister proposes to determine the amount of greenhouse gas emissions to be attributed to a participant, the Minister shall give the participant notice of the proposal in accordance with the regulations and shall, in accordance with the regulations, give the participant an opportunity to be heard.

Equivalence in CO_2e

(4) Each cap and trade instrument is equivalent to one tonne of CO_2e or such other amount of CO_2e as may be prescribed.

TARGETS, PLAN AND PROGRESS REPORTS

Targets

3 (1) The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time.

Public notice

(2) The Government shall make the targets and any revisions to them available to the public on a website of the Government or in such other manner as may be prescribed.

Climate change plan

4 (1) The Minister, with the approval of the Lieutenant Governor in Council, shall prepare a climate change plan and may revise the plan from time to time.

Advisory panel

(2) The Minister may, for the purpose of taking any steps with respect to the climate change plan, appoint panels to perform such advisory functions as the Minister considers advisable.

Public notice

(3) The Minister shall make the plan and any revisions to it available to the public on a website of the Government or in such other manner as may be prescribed.

Status

(4) For greater certainty, the plan and any revisions to it are not undertakings within the meaning of the *Environmental Assessment Act*.

Minister's progress reports

5 (1) The Minister shall, on a regular basis, prepare reports in respect of the climate change plan.

Public notice

(2) The Minister shall make each report available to the public on a website of the Government or in such other manner as may be prescribed.

CAP AND TRADE INSTRUMENTS

Retirement of eligible instruments

Eligible instrument

6 (1) In this section,

"eligible instrument" means a cap and trade instrument that,

(a) was held in the cap and trade accounts of a participant on July 3, 2018, and

(b) is not classified with or assigned a vintage year of 2021.

Retirement

(2) Eligible instruments of a participant are retired as follows:

1. If the number of eligible instruments of the participant is equal to or greater than that aggregate amount of all greenhouse gas emissions attributed to the participant in respect of the prescribed time period, the number of eligible instruments equivalent to that aggregate amount shall be retired.
2. If the number of eligible instruments of the participant is less than the aggregate amount of all greenhouse gas emissions attributed to the participant in respect of the prescribed time period, all of the eligible instruments shall be retired.

Cancellation of instruments

7 The following cap and trade instruments are cancelled:

1. All cap and trade instruments held in the cap and trade accounts of participants on July 3, 2018, other than any number of cap and trade instruments in the accounts that are retired under section 6.
2. All cap and trade instruments that were created under the *Climate Change Mitigation and Low-carbon Economy Act, 2016* and were never distributed.

COMPENSATION IN RESPECT OF CAP AND TRADE INSTRUMENTS

Compensation to participant

8 (1) The Crown shall pay compensation, out of money appropriated under section 11 or money otherwise appropriated for such purposes by the Legislature, to a participant in accordance with this section and the regulations.

Emissions to be expressed as equivalent number of cap and trade instruments

(2) For the purposes of applying this section, the number of tonnes of greenhouse gas emissions shall be expressed as the equivalent number of cap and trade instruments, as determined in accordance with subsection 2 (4).

If instruments distributed free of charge do not exceed aggregate emissions

(3) If the number of instruments that were distributed free of charge to the participant under the *Climate Change Mitigation and Low-carbon Economy Act, 2016 is equal to or less than the* aggregate amount of all greenhouse gas emissions attributed to the participant in respect of the prescribed time period, the maximum number of cap and trade instruments in respect of which compensation may be paid to a participant shall be determined by applying the following formula:

$$A = B - C$$

where,

A = the maximum number of cap and trade instruments in respect of which compensation may be paid to the participant,

B = the number of cap and trade instruments held in the participant's cap and trade accounts that are cancelled under paragraph 1 of section 7, and

C = the number of the participant's cap and trade instruments referred to in "B" that are classified with or assigned a vintage year of 2021.

If instruments distributed free of charge exceed aggregate emissions

(4) If the number of instruments that were distributed free of charge to the participant under the *Climate Change Mitigation and Low-carbon Economy Act, 2016 is greater than the* aggregate amount of all greenhouse gas emissions attributed to the participant in respect of the prescribed time period, the maximum number of cap and trade instruments in respect of which compensation may be paid to a participant shall be determined by applying the following formula:

$$A = (B - C) - (D - E)$$

where,

A = the maximum number of cap and trade instruments in respect of which compensation may be paid to the participant,

B = the number of cap and trade instruments held in the participant's cap and trade accounts that are cancelled under paragraph 1 of section 7,

C = the number of the participant's cap and trade instruments referred to in "B" that are classified with or assigned a vintage year of 2021,

D = the number of cap and trade instruments that were distributed free of charge to the participant, and

E = the aggregate amount of all greenhouse gas emissions attributed to the participant in respect of the prescribed time period.

No compensation, specified participants

(5) Unless otherwise provided by a regulation made under paragraph 5 of subsection 15 (2), no compensation shall be paid to the following participants:

1. A participant that was registered as a market participant within the meaning of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*.
2. A participant that was registered as a participant with respect to the importation of electricity into Ontario for consumption in Ontario.
3. A participant that was registered as a participant with respect to the distribution of natural gas in Ontario.
4. A participant that was registered as a participant with respect to the operation of equipment related to the transmission, storage or transportation of natural gas in Ontario.
5. A participant that was registered as a participant with respect to the supply of petroleum products for consumption in Ontario.
6. A participant that was registered as a participant with respect to the operation of equipment for a transmission system within the meaning of subsection 2 (1) of the *Electricity Act, 1998* and that has been issued an order under subsection 78 (3) of the *Ontario Energy Board Act, 1998*.
7. A participant that was registered as a participant with respect to electricity generation in Ontario at a facility at which the primary activity was electricity generation and at which no products were produced other than electricity and any heat, steam or by-product gas.

GENERAL

No compensation

9 Except as set out in section 8, no person is entitled to any compensation or damages in respect of the value of cap and trade instruments retired or cancelled under this Act or for any other loss, including loss of revenues or loss of profits, related, directly or indirectly, to the enactment of this Act, the making or revocation of any regulation under this Act, the repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* or the making or revocation of any regulation under that Act.

No cause of action

10 (1) No cause of action arises against the Crown or any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown as a direct or indirect result of,

(a) the enactment, operation, administration or repeal of any provision of this Act or the enactment, operation, administration or repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*;

(b) the making or revocation of any provision of a regulation made under this Act or made under the *Climate Change Mitigation and Low-carbon Economy Act, 2016*;

(c) anything done in accordance with or under this Act or a regulation made under this Act or anything not done in accordance with this Act or a regulation made under this Act, including any decision related to participants' eligibility to receive compensation or the amount of such compensation;

(d) the retirement or cancellation of any cap and trade instrument in accordance with this Act; or

(e) any act or omission related to the wind down of the cap and trade program established under the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, including the decision to have no further distribution of cap and trade instruments by auction.

Proceedings barred

(2) No proceeding, including but not limited to any proceeding for a remedy in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, and any remedy under any statute, that is directly or indirectly based on or related to anything referred to in subsection (1) may be brought or maintained against the Crown or any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown.

Application

(3) Subsection (2) applies to any action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, or any other remedy or relief, and includes a proceeding to enforce a judgment or order made by a court or tribunal outside of Canada.

Retrospective effect

(4) Subsections (2) and (3) apply regardless of whether the cause of action on which the proceeding is purportedly based arose before, on or after the day this subsection comes into force.

Proceedings set aside

(5) Any proceeding referred to in subsection (2) or (3) commenced before the day this subsection comes into force shall be deemed to have been dismissed, without costs, on the day this subsection comes into force.

No expropriation or injurious affection

(6) Nothing done or not done in accordance with this Act or the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, or any regulation under this Act or the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.

Continuation of account

11 (1) The account established in the Public Accounts under subsection 71 (1) of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* is continued, to be known as the Cap and Trade Wind Down Account in English and compte de liquidation du programme de plafonnement et d'échange in French, in which shall be recorded the following amounts:

1. The amount of the balance in the account immediately before this subsection comes into force.
2. All expenditures of public money incurred under subsection (2).

Authorized expenditures

(2) Amounts not exceeding the balance in the account may be charged to the Cap and Trade Wind Down Account and paid out of the Consolidated Revenue Fund for the following purposes:

1. To fund costs incurred by the Crown, directly or indirectly, in connection with the administration of this Act and the regulations.
2. To fund costs incurred by the Crown, directly or indirectly, in connection with the administration and enforcement of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* and the regulations made under that Act.
3. To fund costs incurred by the Crown, directly or indirectly, in connection with the repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* or the revocation of regulations made under that Act.
4. To fund costs incurred by the Crown, directly or indirectly, in connection with the winding down of the administration and enforcement of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*.
5. To fund costs incurred by the Crown, directly or indirectly, in connection with any purpose described in paragraph 2 of subsection 71 (2) of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* related to an initiative, if the initiative was reviewed and evaluated under subsection 71 (3) of that Act.
6. To fund costs incurred by the Crown, directly or indirectly, in connection with the wind down of initiatives referred to in paragraph 5 or any initiative funded under the *Climate Change Mitigation and Low-carbon Economy Act, 2016.*
7. To fund compensation under section 8 and related costs incurred by the Crown, directly or indirectly.
8. To reimburse the Crown for expenditures incurred by the Crown, directly or indirectly, for any purpose described in paragraphs 1 to 7.

Same

(3) The funding of a cost described in paragraph 3, 4 or 6 of subsection (2) may be provided for a cost incurred by the Crown before the day this subsection comes into force.

Repeal

(4) On the day this subsection comes into force, this section is repealed.

Non-application of *Financial Administration Act*

12 Subsection 16.0.1 (3) of the *Financial Administration Act* does not apply in respect of a refund or repayment of an expenditure or advance charged to a statutory appropriation in,

(a) subsection 11 (2); or

(b) subsection 71 (2) of the *Climate Change Mitigation and Low-carbon Economy Act, 2016.*

Existing aboriginal or treaty rights

13 For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*.

Delegation by Minister

14 The Minister may delegate any of the Minister's powers or duties under this Act to a public servant appointed under Part III of the *Public Service of Ontario Act, 2006*, and may impose restrictions with respect to the delegation.

Regulations, general

15 (1) The Lieutenant Governor in Council may make regulations,

(a) governing anything that is required or permitted to be prescribed or that is required or permitted to be done by, or in accordance with, the regulations or as authorized, specified or provided in the regulations;

(b) defining, for the purposes of a regulation, words and expressions used in this Act that are not defined in the Act;

(c) providing for such other matters as the Lieutenant Governor in Council considers advisable to carry out the purpose of this Act.

Regulations, compensation

(2) The Lieutenant Governor in Council may make regulations governing compensation required to be paid to participants under section 8, including but not limited to the following:

1. Prescribing the amount of compensation to be paid to a participant or class of participants in respect of each cap and trade instrument, which may include prescribing different amounts for different types of cap and trade instruments, or prescribing a procedure for determining such amounts.
2. Prescribing criteria that must be met or circumstances that must apply in order for compensation to be paid.
3. Prescribing the circumstances in which the Minister is required to make adjustments to the amount of compensation that would otherwise be required to be paid to a participant or class of participants, which may include requiring the Minister to decrease the amount or prohibiting the Minister from paying any amount.
4. Governing adjustments mentioned in paragraph 3.
5. Authorizing, despite subsection 8 (5), compensation to be paid to a prescribed participant or class of participants.
6. Limiting the compensation authorized to be paid under paragraph 5, which may include,
    i. limits that apply in prescribed circumstances, and
    ii. limits in respect of a prescribed number of cap and trade instruments or a number of cap and trade instruments determined in accordance with a prescribed method.

Incorporation by reference

(3) A regulation may incorporate, in whole or in part and with such changes as the Lieutenant Governor in Council considers necessary, a document, including a code, formula, standard, protocol, procedure or guideline, as the document may be amended or remade.

Same

(4) An amendment to a document referred to in subsection (3), or a document referred to in subsection (3) as remade, comes into effect upon the Ministry publishing notice of the amendment or remade document in *The Ontario Gazette* or in the registry under the *Environmental Bill of Rights, 1993*.

Conflict with *Statutory Powers Procedure Act*

(5) A regulation may provide that it prevails over a provision of the *Statutory Powers Procedure Act*, despite anything in that Act.

REPEAL, COMMENCEMENT AND SHORT TITLE

Repeal

16 The *Climate Change Mitigation and Low-carbon Economy Act, 2016* is repealed.

Commencement

17 This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

18 The short title of this Act is the *Cap and Trade Cancellation Act, 2018*.

TAB 3

Ontario Energy Board

Report of the Board

Regulatory Framework for the Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities

EB-2015-0363

September 26, 2016

Table of Contents

1 Introduction

On May 18, 2016, the *Climate Change Mitigation and Low-carbon Economy Act, 2016* (*Climate Change Act*) received Royal Assent. On May 19, 2016, *Ontario* Regulation 144/16*, The Cap and Trade Program* (*Cap and Trade Regulation*), was issued, which provides details about the Cap and Trade program. The *Climate Change Act* and the *Cap and Trade Regulation* establish the details of a Cap and Trade program for the purposes of reducing greenhouse gas (GHG) emissions in Ontario. The *Climate Change Act* establishes that the first compliance period for the Cap and Trade program will run from January 1, 2017 until December 31, 2020, with subsequent three-year compliance periods.

Under the *Climate Change Act*, Enbridge Gas Distribution Inc., Union Gas Limited and Natural Resource Gas Ltd. (the Utilities) as natural gas distributors have the following compliance obligations:

- Facility-related obligations for facilities they own or operate; and,
- Customer-related obligations for natural gas-fired generators, and residential, commercial and industrial customers who are not Large Final Emitters (LFEs) or voluntary participants.

The Utilities will need to develop strategies to meet their *Climate Change Act* compliance obligations. New costs will be incurred by the Utilities to comply with the *Climate Change Act* and these costs will have to be recovered from customers. Natural gas utility rates are regulated by the Ontario Energy Board (OEB). The OEB will need to assess the cost consequences of the Utilities' plans for complying with their obligations for the purpose of approving cost recovery in rates.

The Utilities' Compliance Plans are expected to support the government's effort to reduce GHG emissions in Ontario. For the purposes of reviewing and approving cost consequences associated with the Utilities' obligations, the OEB expects each Utility to develop Compliance Plans which provide robust information describing how it will meet its obligations.

The OEB will assess the Utilities' Compliance Plans for cost-effectiveness, reasonableness and optimization, and ultimately to determine whether to approve the associated cap and trade costs for recovery from customers. The OEB has developed this Regulatory Framework for the Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities (the "Regulatory Framework") to outline the approach it will take

in assessing the cost consequences of the Utilities' plans for complying with the Cap and Trade program.

The Cap and Trade program and its associated carbon market are new to Ontario. The OEB expects that significant experience will be gained as the program and markets mature. In order to benefit from this experience, the OEB will undertake a review of the effectiveness of the Regulatory Framework before the end of the first compliance period (i.e., before December 2020).

1.1 The Process

In order to develop a framework for assessing the cost consequences of rate-regulated natural gas utilities' cap and trade activities, OEB staff, assisted by expert consultants, undertook research into the experience of other jurisdictions (specifically Québec and California) in addressing the regulatory issues related to cap and trade programs.

OEB staff then engaged in discussions with stakeholders representing customers and industry. A series of meetings with stakeholders were held during the month of April 2016 to discuss the key elements to be addressed by the Regulatory Framework and the issues, considerations and options for each of these elements. The staff presentation and summary notes of these meetings have been posted on the OEB's website.

On May 25, 2016, the OEB issued a Staff Discussion Paper (the Discussion Paper) which outlined OEB staff's proposals on the key elements, issues, options and proposals for addressing issues to be included in the Regulatory Framework. The OEB invited stakeholders to submit their written comments by June 22, 2016. Comments on the issues and proposals set out in the Discussion Paper were received from over 40 stakeholders, including natural gas utilities, consumer groups representing residential, commercial and industrial natural gas users as well as environmental organizations. While all comments were considered, not all have been summarized in this Report. All comments received are posted on the OEB's website here.

4 Confidentiality of Cap and Trade Information

The OEB deals with various categories of material over which confidentiality is claimed from time to time, and has had *Rules of Practice and Procedure* (Rules) and a *Practice Direction on Confidential Filings* (Practice Direction) in place for many years.

As a general rule, the OEB places materials it receives in the course of the exercise of its authority under the *Ontario Energy Board Act, 1998* and other legislation on the public record so that all interested parties can have equal access to those materials. The approach that underlies the Rules and the Practice Direction on the treatment of confidential information is that the placing of materials on the public record is the rule, and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the OEB that confidential treatment is warranted in any given case.

The *Climate Change Act* includes limitations on the disclosure of certain information, that must be respected despite the OEB's general approach to confidentiality. These limitations are reflected in this Regulatory Framework.

Utilities are expected to file Cap and Trade information in a number of OEB proceedings, including:

- Proceedings to review the costs associated with the Utilities' Compliance Plans and approve the costs for recovery through rates;
- Monitoring reports filed annually by the Utilities;
- Recalibration and true-up process for OEB approval of recovery of Cap and Trade costs; and
- Other OEB proceedings in which Cap and Trade information may be disclosed to the OEB, including the Utilities' cost of service applications.

The OEB recognizes that the Ontario Cap and Trade market is still nascent, and that the protocols and procedures surrounding confidential information must evolve as the market matures. The OEB believes that, in the early stages of the market's development, the appropriate approach must not only comply with the *Climate Change Act* and associated regulations, it should also be cautious and have regard to market integrity in order to protect customers from undue costs while still making appropriate information publicly available where possible.

The OEB has determined that, with the exception of the Auction Confidential, Market Sensitive and some commercial information (as described below), other information

pertaining to a Utility's Cap and Trade costs should be provided in public filings, in aggregated form where appropriate.

There will be two (2) categories of strictly confidential Cap and Trade information as follows:

Classification of Confidential Information	Specifics and Examples of Confidential Protocols for Disclosure	Protocols for Confidential Treatment and Disclosure
Auction Confidential	Information related to participation at auctions for emissions allowances that is prohibited from disclosure by s. 32 of the *Climate Change Act* (except to 'prescribed persons'), i.e., information relating to a person's participation in an auction, including the person's identity, bidding strategy, the amount of the bids for a specified quantity of emissions allowances and the financial information provided to the (MOECC) Director in connection with the auction.	OEB Filing Guidelines will provide that Auction Confidential Information will be treated as strictly confidential and only be reviewed by the OEB. The OEB will provide a non-confidential summary report of the information for the public record. TheUtility must identify in its filing with the OEB information that is Auction Confidential and file redacted versions of such documents for the public record.
Market Sensitive	Information relating to transactions of emissions units on secondary or tertiary markets or offset credits. Information relating to compliance instruments used by a Utility to meet its GHG obligations.	OEB Filing Guidelines will provide that Market Sensitive Information will be treated as strictly confidential and only be reviewed by the OEB. The OEB will provide a non-confidential summary report of the information for the public record. The Utility must identify in its filing with the OEB information that is Market Sensitive and file redacted versions of such documents for the public record.

The OEB's Filing Guidelines for Cap and Trade (set out in Appendix A) indicates certain Auction Confidential and Market Sensitive information that will be treated as strictly confidential. Utilities should be guided by thedescription of those two categories of information when fling their Plans and associated applications to identify other strictly confidential information. Although the Practice Direction does not require a party to request confidential treatment of information designated as confidential in filing guidelines or forms, for greater certainty the OEB will require Utilities to clearly identify information for which theyseek strictly confidential designation.[i3]

[3] Citations and supplementary information have been included as endnotes in Appendix C.

In addition, there may be some types of commercial information for which a Utility may wish to claim confidentiality which will be examined on a case-by-case basis. The OEB will determine whether access to such information may be allowed to third parties in accordance with the provisions of the Rules and Practice Direction.

The OEB will review the effectiveness of the rules respecting confidentiality of filings related to the Utilities' Compliance Plans and Cap and Trade activity as part of its planned review of the Regulatory Framework, prior to the end of the first compliance period.

4.1 Auction Confidential Information

The OEB has decided that Auction Confidential Information will remain strictly confidential even after the auction or sale is concluded.

The *Climate Change Act* prohibits a person from disclosing whether or not the person is participating in an auction or "any other information relating to the person's participation in an auction, including the person's identity, bidding strategy, the amount of the person's bids for a specified quantity of emissions allowances and the financial information provided to the Director in connection with the auction". Disclosure of this information may only be made as 'prescribed'.[ii] Section 65 of the *Cap and Trade Regulation* specifies that the OEB is a 'prescribed' person to whom Auction Confidential Information may be disclosed.

In the Discussion Paper, staff proposed that the OEB adopt a procedure where Auction Confidential Information is only reviewed by OEB staff and the OEB panel in a proceeding, all of whom are subject to a statutory duty of confidentiality, both during and after employment as Ontario public servants.[iii]

The Discussion Paper outlined a process for reviewing Auction Confidential Information which is akin to the OEB's inspection / audit process under Part VII of the *Ontario Energy Board Act, 1998* (OEB Act) whereby OEB staff would review the Auction Confidential Information and provide a non-confidential report as to the reasonableness of the Cap and Trade costs incurred by a Utility. That report would be placed on the public record.[iv] Unlike the potential exceptions to confidentiality provided for in the inspection / audit process, there would be no exceptions with respect to Auction Confidential Information unless provided for in the *Climate Change Act* or the *Cap and Trade Regulation*.

Some stakeholders commented that the statutory prohibition on disclosure of Auction Confidential Information only pertains to future-looking information about a specific auction and that there are no restrictions on disclosure when the auction is over. Utilities commented that disclosure of Auction Confidential Information, even after conclusion of an auction, could negatively impact the Utilities and their customers. Utility comments highlighted the need for strictly confidential treatment of any information that could reveal the Utilities' purchasing strategies since even inadvertent disclosure to other carbon procurement parties can negatively impact a Utility and its customers. Utilities pointed out that they will be competing for compliance instruments with unregulated entities and parties that are in the market purely for profit and that the Utilities' procurement strategies should remain confidential.

The OEB notes that following an auction, the Minister of Environment and Climate Change will make publicly available a summary of each auction or sale.[v] There is no indication in the legislative framework that disclosure of specific auction information is permitted even after conclusion of the auction. Accordingly, Auction Confidential Information will remain strictly confidential even after the auction or sale is concluded. Auction Confidential Information will be reviewed only by the OEB in a particular proceeding and the OEB will provide a non-confidential summary of the Auction Confidential Information for the public record.

The non-confidential summary and opinion, combined with the Minister's auction summary report as well as the non-confidential aggregated information filed by Utilities in support of their Cap and Trade costs will provide sufficient transparency and protection of the public interest. As the market matures and better understanding is developed of public and non-public information, the OEB's approach may be revised to allow access to parties beyond the OEB.

4.2 Market Sensitive Information

The OEB has decided that Market Sensitive Information should not be disclosed in OEB proceedings to anyone other than OEB staff and OEB panels if that information is not publicly available and could result in 'selective disclosure', tipping and trading on non-public information, which is prohibited in financial markets, or have an impact on a Utility's future market activities.

The Discussion Paper considered the treatment of information that may be filed with the OEB related to a Utility's Compliance Plans involving primary market activity, other than auctions, as well as secondary and tertiary market activity (including bilateral agreements and other transactions and instruments). In the Discussion Paper, it was

proposed that such Market Sensitive information should be treated as confidential as it could have an impact on cap and trade markets if disclosed and such disclosure could be contrary to sections 28(5) and (6) of the *Climate Change Act* which prohibit trading and 'tipping' of generally non-disclosed information.[vi] Staff also proposed that Market Sensitive Information follow the same protocol as Auction Confidential Information and that it be reviewed only by OEB staff and OEB panels in proceedings relating to Cap and Trade costs.

Some stakeholders commented that the legislation prohibits disclosure of information in secondary and tertiary markets that is not otherwise available in order to prevent market manipulation, 'tipping' or gaming, but that there is no legislative prohibition on the *public* disclosure of such information. Some comments argued that any protocols for non-disclosure are warranted only for information that is legitimately commercially or strategically sensitive. Some stakeholders argued that as carbon markets are financial markets, it may be appropriate for the OEB to consider rules and policies applicable to confidential information in the financial markets.

The OEB takes note of the stakeholder comments and has decided that Market Sensitive Information should not be disclosed in OEB proceedings to anyone outside the OEB if that information is not publicly available. The OEB notes that certain information about a utility's past market activities which would have been Auction Confidential and/or Market Sensitive Information at the time that the transactions were carried out could, even after the transactions are concluded, have an impact on future activities in carbon markets. Hence, information about past trading activities which could reveal bidding strategies in future market activities and compromise the integrity of the markets contrary to the provisions of the *Climate Change Act* will be treated as Market Sensitive Information. The OEB considers this approach consistent with the long-term perspective that Utilities are encouraged to take when preparing their Compliance Plans and, given that the Cap and Trade market can be expected to involve ongoing and repeat transactions, information pertaining to past transactions can have impacts on future market activities and should therefore be treated as strictly confidential.

4.3 Other Confidential Commercial Information

The OEB notes that there may be other types of Cap and Trade information which does not fall within the Auction Confidential or Market Sensitive categories which could in appropriate circumstances be considered to be commercially and strategically sensitive, the disclosure of which could potentially negatively impact a Utility's

competitive position and its customers. If a Utility seeks confidential treatment for information which it views as sensitive or strategic commercial information, it should make the request in accordance with the OEB's existing Rules and Practice Direction.[vii]

4.4 Public Information

A considerable amount of information will be publicly available, including the aggregated information filed by the Utilities on their Cap and Trade activities, the Minister's report on conclusion of an auction, as well as carbon price forecasts which will be derived from a public exchange for short-term pricing and the longer-term pricing which will be provided by the OEB.

With the exception of the Auction Confidential and Market Sensitive and any commercial information that is determined to be confidential, as discussed above, other information pertaining to the Utilities' Cap and Trade costs should be provided in public filings, in aggregated form where appropriate. Such information would include, for example:

- Volume forecasts for facility-related obligations, customer-related obligations, LFEs and voluntary participants;
- Forecasts of GHG emissions;
- Forecasted costs per tonne of GHG;
- Total cost of the compliance portfolio over the compliance period and cost per year;
- Administrative costs over the compliance period and cost per year;
- Financing costs;
- Cost of abatement activities, per customer and / or per tonne of GHG;
- Proposed capital investments; and
- Information that is otherwise publicly available and reported by the Utilities in a non-confidential context.

TAB 4

Bill 4, Cap and Trade Cancellation Act, 2018

Phillips, Hon. Rod (www.ola.org/members/all/rod-phillips) *Minister of the Environment, Conservation and Parks*

Current status: Royal Assent received Chapter Number: S.O. 2018 C.13

(www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-4)

Date	Bill stage	Activity	Committee
October 31, 2018	Royal Assent	Royal Assent received	-
October 31, 2018	Third Reading	Carried on division	-
October 31, 2018	Third Reading	Deferred vote	-
October 31, 2018	Third Reading	Debate	-
October 30, 2018	Third Reading	Debate	-
October 23, 2018	-	Ordered for Third Reading pursuant to the Order of the House	-
October 23, 2018	-	Reported as amended	-
October 22, 2018	-	Consideration of a Bill	Standing Committee on General Government
October 17, 2018	-	Consideration of a Bill	Standing Committee on General Government
October 15, 2018	-	Consideration of a Bill	Standing Committee on General Government
October 3, 2018	-	Ordered referred to Standing Committee pursuant to the Order of the House	Standing Committee on General Government
October 3, 2018	Second Reading	Carried	-
October 3, 2018	Second Reading	Question put	-
October 3, 2018	-	Time allocated	-
September 13, 2018	Second Reading	Debate	-
September 12, 2018	Second Reading	Debate	-
August 8, 2018	Second Reading	Debate	-
August 7, 2018	Second Reading	Debate	-
August 2, 2018	Second Reading	Debate	-
August 1, 2018	Second Reading	Debate	-
July 31, 2018	Second Reading	Debate	-
July 25, 2018	First Reading	Carried on division	-

TAB 5

CITATION: Re: Estate of Joseph Paul Grieco, deceased, 2013 ONSC 2465
OSHAWA COURT FILE NO.: 51424/07
DATE: 2013-04-25

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

DOROTHY ANN GRIECO

Applicant

— and —

TONY VANVARI, Estate trustee of the estate of Joseph Paul Grieco, deceased, NICOLE JANINE GRIECO, MASON PAUL GRIECO and DONNA THORNE

Respondents

— and —

OSHAWA COURT FILE NO. 50829/07

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

DONNA THORNE

Applicant

— and —

TONY VANVARI, Estate trustee of the estate of Joseph Paul Grieco

Respondent

COUNSEL:
B. Batist for Tony Vanvari, moving party
S. Woodley for Dorothy Grieco, responding party
P. Trudelle for Donna Thorne, responding party
Nicole Grieco, responding party, in person and as agent for Mason Paul Grieco
F. McCague for Corporate Aircraft Restoration Inc. and Maurice Nesbitt, parties in related aviation actions
K. Charlebois for Teledyne Continental Motors Inc. and Teledyne Technologies Incorporated, parties in related aviation actions
N. Kolos, for Hudson Estate and 1419937 Ontario Inc., parties in related aviation actions

HEARD: December 6, 2012

Salmers J.

ENDORSEMENT

Nature of the Motion

[1] The background facts of this motion were detailed in my August 10, 2012 endorsement. There is no need to again set out those facts in this endorsement. The motion was first heard by me in April 2012. In a motion for directions, Tony Vanvari, the estate trustee, requested permission to distribute the estate's assets in accordance with a final order that was made on consent of all of the deceased's dependants whom I referred to as the family claimants.

[2] In response to the estate trustee's motion, persons or entities who are involved in other actions or claims against the estate, (hereafter referred to as the aviation claimants) brought cross-motions, and/or filed affidavits, and/or attended in court and made submissions. Essentially, the aviation claimants want to delay distribution of the estate's assets. The aviation claimants submitted that if the estate is distributed in accordance with the consent order, the estate will have insufficient assets to satisfy any judgment that the aviation claimants or others may obtain against the estate.

[3] For reasons stated in the August 10, 2012 endorsement, I ruled that the support claims of the family claimants had priority over the claims of the aviation claimants. However, the aviation claimants had submitted that the amounts of each family claimant's entitlement pursuant to the consent judgment were excessive and could not reasonably be viewed as support. Therefore, to finally determine if the consent judgment entitlements had priority over the aviation claims, in the August 10, 2012 endorsement, I also directed that there be a further hearing. The purpose of the further hearing was to

receive evidence and hear submissions on the issue of whether each family claimant's entitlement under the consent judgment could reasonably and likely be viewed as support, both in nature and in amount. Additionally, as confirmed in my August 24, 2012 endorsement, at the further hearing, Dorothy Grieco was also to provide evidence of her equalization claim for which she also claimed priority over the aviation claimants.

[4] Accordingly, in December 2012, the parties re-attended before me to make submissions as I had directed in August 2012. Having heard full argument, the following are my reasons and final ruling on the priority of the consent judgment over the aviation claims.

Analysis

The Priority of Support Payments

[5] My August 10, 2012 endorsement was based on s. 4(1) of the *Creditors' Relief Act*, R.S.O. 1990, c. C.45, as amended. That act was repealed in its entirety on October 25, 2010. On that same day, a new *Creditors' Relief Act* was enacted as S.O. 2010, c.16, Sched. 4. The new act maintained the priority of support claims over virtually all other claims. In the sections that give priority to support payments, the wording is very similar; there is no substantive difference between s. 4(1) of the old act and s. 2(3) of the new act. Accordingly, no matter whether the old act or the new act governs this ruling, there is no difference in my reasoning or my ruling. I chose to use s. 4(1) of the old act because of the strong presumption that legislation is not intended to be retroactive unless such a construction is expressly or necessarily implied by the language of the act[1]. There is nothing in the new act to displace this presumption. Further, the *Legislation Act, 2006*[2] provides for the continued application of repealed legislation to facts that occurred prior to repeal. However, for the purposes of this case, while it does not matter whether the support payment priority is under the old or new act, for the reasons stated in the August 10, 2012 endorsement, the claims for support of the family claimants are entitled to priority under s. 4(1) of the old act which reads as follows:

> **4.** (1) A support or maintenance order has priority over other judgment debts regardless of when an enforcement process is issued or served,
>
> (a) if the order is for periodic payments, in the amount of the arrears owing under the order at the time of seizure or attachment;
>
> (b) if the order is for a lump sum payment, in the amount of the lump sum.

[1] *Halsbury's Laws of Canada – Legislation*, 1st ed. (Markham, Ont: LexisNexis Inc., 2012) "Retroactivity," at para. HLG-31, citing *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271 at p. 279

[2] See s. 51(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F.

[6] I will now consider the priority of the entitlement of each family law claimant pursuant to the consent judgment of March 9, 2012 in the context of the *Creditors' Relief Act* and other relevant legislation.

Dorothy Ann Grieco

[7] The consent judgment arose from a mediated settlement. Pursuant to that settlement and the consent judgment, Dorothy Ann Grieco was entitled to $1,077,671.50. According to the wording of the consent judgment, the entire amount of her entitlement was for "satisfaction of all sums due and owing to her on account of her net family property equalization payment due to her by the Estate."

[8] Section 6(12) of the *Family Law Act* (*FLA*)[3] provides that a spouse's equalization payment has priority over dependants' support claims under the *SLRA* unless the dependant is a child. Therefore, it follows that Dorothy's equalization payment has priority over the aviation claims because the aviation claims are subordinate to the *SLRA* support claims. Two of the aviation claimants, Corporate Aircraft Restoration and Maurice Nesbitt agreed that Dorothy's equalization claim had priority over their claims. Other aviation claimants did not acknowledge the priority of Dorothy's equalization claim. During argument, the basis of their opposition was unclear.

[9] There is case law that deals with this priorities issue. In *Thibodeau v. Thibodeau*[4], the court stated that all unsecured creditors in a bankruptcy rank equally which in this case would include both Dorothy's equalization payment and the aviation claims. The Supreme Court of Canada case of *Schreyer v. Schreyer*[5] would also appear to support the equalization claim ranking equally with the aviation claims in the event of a bankruptcy.

[10] However, both *Thibodeau* and *Schreyer* are distinguishable from this case because both of those cases dealt with provable claims in a bankruptcy. Joe's estate is not bankrupt. In Ontario, the priorities of claims against a non-bankrupt debtor are primarily determined by the *Creditors' Relief Act*. Accordingly, I am of the view that, in this case, the *Creditors' Relief Act* governs and, when considered with s. 6(12) of the *FLA*, Dorothy's equalization payment has priority over the aviation claims. It was undisputed that Dorothy's equalization claim was between $800,000 and $1,800,000. With accrued interest, Dorothy's equalization claim would easily exceed the $1,077,671.50 awarded to her in the consent judgment. Accordingly, as an equalization payment on its own, Dorothy's entitlement under the consent judgment has priority over the aviation claims.

[3] R.S.O. 1990, c. F.3, as amended.
[4] 2011 ONCA 110
[5] 2011 SCC 35

[11] However, in the event that I am wrong in the above analysis and determining that as an equalization payment Dorothy's entitlement under the consent judgment has priority over the aviation claims, for the reasons that follow, I am satisfied that Dorothy's entitlement in the consent judgment has priority over the aviation claims.

[12] Dorothy's application included a claim for support under the provisions of the *Succession Law Reform Act*[6] (*SLRA*). The consent judgment also provided that upon payment of the $1,077,671.50, all of Dorothy's claims against the estate, including her claims for support, were also satisfied. Effectively, the $1,077,671.50 included a lump sum payment for all previous support payments owing to Dorothy and also for all support payments that might be owing to Dorothy in the future.

[13] There was no dispute over the relevant facts.

[14] Dorothy married the now-deceased Joseph Paul Grieco (Joe) on May 19, 1973. After marriage, Dorothy left her family and home in New Zealand to live in Canada with Joe. Neither of them had any assets when they married.

[15] Dorothy worked as a medical technologist until the births of the couple's children in 1979 and 1980. Thereafter, at Joe's request, she gave up her career and was a stay-at-home mother. She spent a great deal of time assisting in the building of Joe's business and significantly contributed to Joe's financial success. She was totally financially dependent upon Joe after the birth of their children.

[16] The couple separated in 1989 at Joe's request.

[17] In 1995, Dorothy started court proceedings claiming custody, equalization of property, and support. Although the parties signed a separation agreement in 1997 and a divorce was granted in 1998, the claims for corollary relief were not resolved until the 2012 mediated settlement.

[18] Joe voluntarily paid Dorothy support in the amount of $2,000 per month from the date of their separation until his death. Following separation, the couple's children resided with Dorothy until the children left home to go to university. Pursuant to their 1997 separation agreement, the $2,000 per month was for child support and was to be reduced to $1,500 if only one child remained eligible for child support. However, Joe continued to pay $2,000 per month until both children had left home. Thereafter, there were negotiations about spousal support and Joe continued to pay spousal support to Dorothy although they had not agreed on amount, duration, or other terms. Joe obviously recognized his obligation to pay support for Dorothy.

[6] R.S.O. 1990, c. S. 26

[19] Following Joe's death, by consent interim order, Dorothy has received $2,000 per month for her own support.

[20] Although Dorothy worked after returning to Australia in 1996, her income was insufficient to meet her expenses and she required Joe's monthly support in order to live. She was dependent on Joe until he died. On Joe's death, Dorothy was a dependant of Joe as defined by s. 57 of the *SLRA*.

[21] Joe and Dorothy separated in 1989. Also, Joe failed to provide accurate information about his income in 1989 and thereafter. Accordingly, it is impossible to meaningfully consider the range and duration of support that would be recommended by the current *Spousal Support Advisory Guidelines (SSAG's)*[7].

[22] Dorothy continued to pursue her claims for corollary relief, including support for herself, until Joe's death. The parties had continued to exchange Financial Statements and Net Family Property Statements. They had scheduled a mediation to take place in September 2007, hoping to resolve the outstanding issues. Unfortunately, Joe died on May 17, 2007, before their outstanding issues were resolved. Joe's Will and Codicil made no provision for Dorothy's support. She was a dependant. He had not made adequate provision for her support. The prerequisites were met for a dependant's support application under s. 58(1) of the *SLRA*.

[23] On the evidence before me, I find that from the date of the couple's separation until his death, Joe dragged his feet and delayed in providing the necessary disclosure of documents and information that were required to enable the couple to resolve the outstanding corollary relief issues. The reasonable inference to draw is that Joe delayed in making disclosure and made inaccurate disclosure because he had something to hide, namely that his income and/or assets were both greater than indicated by his insufficient disclosure. From this I draw an adverse inference and I find that Joe's income and assets at separation were greater than disclosed. I further find that there was an increase in both Joe's income and net worth after the date of separation. His income was at least partially derived from the business that Dorothy had assisted in building. If Joe had not delayed in providing proper disclosure, then in all likelihood Dorothy would have received a greater amount in monthly support. Therefore, the delay was to Joe's benefit and Dorothy's detriment, not only because of Dorothy being delayed in receiving her equalization payment, but also because Dorothy received less support than she ought to have received. Further, in all of the circumstances, Dorothy not only probably received less spousal support than she ought to have received, she likely also received less child support than she ought to have received.

[7] Prof. Carol Rogerson and Prof. Rollie Thompson, *Spousal Support Advisory Guidelines* University of Toronto, Faculty of Law; and Dalhousie Law School July 2008.

[24] Dorothy was born on February 8, 1947. At the time of the consent judgment, she was 65 years old. She is now 66 years old. Although recently employed, considering her age, it is likely that she will retire soon if she has not already done so. Her monthly expenses are $5,446.96. I find that amount is not unreasonable as it is in accordance with the pattern to date of her expenses and the amount is not so large that it would cause one to automatically question its reasonableness. Dorothy has no pension or savings. If Dorothy lives to the typical life expectancy of approximately 81 years, then virtually the entire amount of $1,077,671.50 will be used for her living expenses following the date of the consent judgment. If there is inflation, then even with interest that might be generated, the entire amount of $1,077,671.50 would likely be used for Dorothy's living expenses following the date of the consent judgment.

[25] It is also of note that Joe's delay in providing disclosure and information resulted in Dorothy never receiving a significant property equalization payment to which she was entitled.

[26] Dorothy commenced her family law claim for property equalization in 1995, approximately six years after the parties separated. Both before and after the commencement of the family law claim, there is evidence that Joe delayed in providing the disclosure of documents and information that were necessary to resolve that claim. There is also evidence that from separation until Joe's death, Dorothy made efforts to pursue her family law claims. Her efforts may have been sporadic, however, that may be explained by Joe's efforts to delay resolution of the claims. There were insufficient evidence and submissions before me to enable me to find any impediment that prevents Dorothy from pursuing her family law claims.

[27] Based on the evidence before me, I find that Joe owed Dorothy a property equalization payment of at least $800,000 and possibly more than $1,800,000. The amount would be much greater if interest from the date of separation were taken into account. The amount owing to Dorothy for equalization is far greater than the $1,077,671.50 awarded to her in the consent judgment.

[28] Obviously, Dorothy's lifestyle and that of her children would have benefitted for many years if, within a reasonable time following separation, she had received the property equalization to which she was entitled. Dorothy is now close to retirement, if not already retired. She has no pension or savings.

[29] Joe was providing support to Dorothy at the time of his death and had been doing so for many years. She was and remains a dependant as defined in s. 57 of the *SLRA*.

[30] Joe made no provision for Dorothy in his Will and Codicil. Also, based on the evidence before me and the findings that I have made about Joe's increasing income and

assets since separation, I find that an ongoing monthly payment of $2,000 to Dorothy is not adequate provision of support for her. As inadequate provision has been made for Dorothy, a dependant, she is entitled to support under s. 58 of the *SLRA*.

[31] I have already discussed above the evidence and made findings where necessary with respect to the factors set out in s. 62 of the *SLRA* to be considered when determining the appropriate amount of support for Dorothy.

[32] Lump sum support orders cannot be made in the guise of support for the purpose of redistributing assets. However, a lump sum order can be made to relieve against financial hardship, if that has not been done by orders on Parts I (Family Property) and II (Matrimonial Home) of the *FLA*. Every lump sum order has the effect of transferring assets from one spouse to the other. The real question is the underlying purpose of the lump sum order in each case.[8]

[33] In *Cummings v. Cummings*[9], the Court of Appeal commented on and applied the Supreme Court of Canada decision in *Tataryn v. Tataryn Estate*[10], and stated in paragraph 48,

> The view of dependants' relief legislation as a vehicle to provide not only for the needs of dependants (thus preventing them from becoming a charge on the state) but also to ensure that spouses and children receive a fair share of family wealth, was also important to the Court's analysis in that case.

And, later in the same paragraph,

> ...spouses are entitled not only to proper support but also to a share in each other's estate when a marriage is over.

[34] In paragraphs 50 and 51 of *Cummings*, the court said,

> **50** In short, when examining all of the circumstances of an application for dependants' relief, the court must consider,
>
> a) what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and,
>
> b) what moral obligations arise between the deceased and his or her dependants as a result of society's expectations of what a judicious person would do in the circumstances.

[8] *Davis v. Crawford*, 2011 ONCA 294, 106 O.R. (3d) 221
[9] [2004] CanLII (ON CA), (2004) 69 O.R. (3d) 398 (C.A.), leave to appeal refused [2004] S.C.C.A. No. 93.
[10] [1994] 2 S.C.R. 807, [1994] S.C.J. No 65

> **51** Either or both of these types of obligations fit nicely into the lengthy list of factors already articulated in subsection 62(1), as I have mentioned.

[35] The relevant factors in this case include, but are not restricted to the following:

- the couple had no assets when they married;
- Dorothy gave up her home country and family to move to Canada after marrying Joe;
- during their marriage and after separation, Joe's income increased at least partially due to his business which Dorothy assisted in building and which business was an asset to be considered in their property equalization;
- Joe's likely underpaid child and spousal support for a lengthy period, resulting in probable arrears of both child and spousal support;
- non-payment of a significant equalization payment for many years;
- both the underpayment of support and the delay in property equalization were for a significant period and were caused by Joe's delay (and sometimes deceit) in providing the disclosure of documents and information that were required to enable resolution of the support and property issues; and
- if Dorothy lives a typical life expectancy of 81 years, all or almost all of the consent judgment amount of $1,077,671.50 would likely be used for Dorothy's living expenses following the date of the consent judgment to the end of her life.

[36] Dorothy has an immediate need for support. There are undoubtedly monies owed to her for underpayment of child and spousal support, property equalization, and interest on outstanding support and equalization. She has incurred significant legal costs over the years trying to enforce her rights for support and property equalization. She lives in Australia and it would be extremely difficult in the future, as it has been for her to date, to pursue her legal remedies including variation and non-payment. The success of the aviation claims is uncertain. The amount required from the estate to pay the aviation claims, if successful, is also uncertain. The trial dates of the aviation claims are uncertain. All of these factors support the making of a lump sum support order for Dorothy as was agreed to in the mediated settlement and the consent judgment.

[37] As stated earlier, the consent judgment states that Dorothy's entitlement in that judgment is for property equalization. However, considering the entirety of the

consent judgment and all of the circumstances of this case, I am satisfied that the pith and substance of Dorothy's entitlement in that judgment is a global settlement of all of her claims, including her claims for both retroactive child and spousal support and for ongoing spousal support. Further, for all of these reasons, after considering all of the circumstances of this case, including both Joe's legal and moral obligations towards Dorothy, I am satisfied that society would expect a judicious person to consider that the lump sum amount of $1,077,671.50 as adequate, just, and equitable support for Dorothy as contemplated in the *SLRA*. Accordingly, Dorothy's entitlement under the consent judgment would have priority over the aviation claims.

[38] In summary, it was reasonable and in accordance with the law for the parties to the mediated settlement to agree to Dorothy's entitlement as they did. The pith and substance of Dorothy's entitlement in that judgment is a global settlement of all of her claims, including her claims for both retroactive child and spousal support and for ongoing spousal support. In my view, Dorothy's equalization claim and her support claims were both meritorious. As an equalization payment, Dorothy's entitlement under the consent judgment has priority over the aviation claims. Secondly, if that is not the case, then as a support payment Dorothy's entitlement under the consent judgment also has priority over the aviation claims. Thirdly, if the reasonable and legal amount for either or both Dorothy's equalization payment or support claim were less than her entitlement pursuant to the mediated settlement and consent judgment, then, in combination, the total amount owed to Dorothy for support and equalization far exceeds the amount of $1,077,671.50. Accordingly, no matter which of these three approaches is applicable, Dorothy's entire entitlement under the consent judgment has priority over the aviation claims.

[39] For all of these reasons, with respect to the estate trustee's motion for directions, I am satisfied that the estate trustee may pay Dorothy her entitlement of $1,077,671.50 under the consent judgment in priority to the aviation claims.

Donna Thorne

[40] Pursuant to the mediated settlement and consent judgment, Donna Thorne was entitled to $550,000 for all sums owing to her. Her claims included claims for property and her support. Her property claim was in the nature of a resulting and/or constructive trust claim. At the mediation that resulted in the consent judgment, Donna abandoned her property claim.

[41] In my analysis of Dorothy Grieco's support claim, I discussed the relevant law that applies to dependants' support claims. That same law applies to Donna Thorne's

support claim. I will now discuss the evidence and factors that are relevant to Donna's support claim.

[42] The relationship of Donna Thorne and Joe commenced in 1989. They commenced living together in 1993 and Donna was Joe's common-law spouse from 1993 until his death in 2007. He was assisting her financially throughout that period. Although she worked and earned income during this period, she would not have been able to meet her expenses and maintain the lifestyle that they enjoyed without Joe's financial assistance. Following Joe's death, she was unable to meet her expenses. She was financially dependent on him before and at the time of his death. She is a dependant as defined in s. 57 of the *SLRA*.

[43] Pursuant to Joe's Will and its Codicil, Donna received some personal property. No other provision was made for her. She was a dependant of Joe. The prerequisites were met for a dependant's support application under s. 58(1) of the *SLRA*.

[44] Donna was 52 years old when Joe died. The undisputed evidence is that prior to Joe's death, they had agreed that she would not work following the end of her employment contract in December 2007 and that Joe would support her thereafter. It was also undisputed that due to a medical condition, Donna has been unable to work since 2007.

[45] Considering the length and nature of their relationship, all of the other evidence, and the *Spousal Support Guidelines* based on Joe having an income of $100,000 to $150,000, if Joe and Donna had separated in 2007, Donna would have been entitled to spousal support from Joe in the range of $22,500 to $45,000 per year for an indefinite period of time. The amount of spousal support may have been much larger considering that Joe was very intent on concealing his actual income from Dorothy and may have also concealed his true income from Donna. If his income was larger than $150,000 per year, the range of spousal support payable may have been much greater. Further, prior to, or at the same time, that a court would determine the spousal support payable to Donna, Joe's obligation to Dorothy would also have to be considered.

[46] Following Joe's death, Donna arranged Joe's funeral and ensured that the expenses were paid from Joe's bank account.

[47] Pursuant to the mediated settlement and consent judgment, Donna relieved Joe's estate of any legal liability for the mortgage on the home of Joe and Donna.

[48] In the course of the litigation, Donna's financial statements showed that she has a minimum monthly deficit of expenses over income of $3,400 and possibly a deficit as high as $5,500 per month. I have examined her financial statements and do not find her expenses to be unreasonable or excessive. There is no evidence that would suggest

her expenses have increased due to her adopting a more expensive lifestyle since Joe's death.

[49] Donna is currently 57 years old. On all of the evidence, she has a claim for indefinite spousal support from the estate. Based on her age and a typical life expectancy of 81 years, if one considers the present value of her entitlement, possible income generated, and inflation, then the amount of her entitlement pursuant to the consent judgment will not cover even the minimum monthly deficit caused by her expenses over the course of her life.

[50] The amount of Donna's entitlement in the consent judgment equates to spousal support in the low to mid-range pursuant to the *SSAG*'s based on Joe having an income of $100,000. As I discussed earlier, there is reason to believe that his income was higher, possibly considerably higher.

[51] Considering the appropriateness of a lump sum award, many of the factors relevant to Dorothy are also relevant to Donna. Based on the *SSAG*'s and Joe's underreported income, since Joe's death Donna has been receiving less support than she should have been receiving. There are monies owing to her in that regard. She has incurred significant legal costs over the years trying to enforce her rights for support. Her entitlement of $550,000 is not excessive, when considered as a present value of either her future expenses or periodic monthly support. In fact, the amount of her lump sum award may be a significant compromise in that regard. The success of the aviation claims is uncertain. The amount required from the estate to pay the aviation claims, if successful, is also uncertain. The trial dates of the aviation claims are uncertain. All of these factors support the making of a lump sum support order for Donna as was agreed in the mediated settlement and the consent judgment.

[52] Further, for all of these reasons, after considering all of the circumstances of this case, including both Joe's legal and moral obligations towards Donna, I am satisfied that society would expect a judicious person to consider that the lump sum amount of $550,000 as adequate, just, and equitable support for Donna as contemplated in the *SLRA*. Accordingly, Donna's entitlement under the consent judgment would have priority over the aviation claims.

[53] In summary, for all of these reasons, I am satisfied that it was reasonable and in accordance with the law for the parties to the mediated settlement to agree to Donna's entitlement as they did. As a support payment Donna's entitlement under the consent judgment has priority over the aviation claims. It was reasonable and in accordance with the law for her to receive a lump sum award. The amount of that lump sum award is also reasonable and an amount that society would expect a judicious person to consider as adequate, just, and equitable support for Donna as contemplated in the *SLRA*.

[54] With respect to the estate trustee's motion for directions, I am satisfied that the estate trustee may pay Donna her entitlement of $550,000 under the consent judgment in priority to the aviation claims.

Nicole Grieco and Mason Grieco

[55] Nicole and Mason are the children of Joe and Dorothy. Nicole was born in 1979 and Mason was born in 1980. Both children lived with Dorothy after the parents separated. When Dorothy moved to Australia in 1996, the children moved there with her.

[56] Both children have completed university. In 2005, Nicole returned to live in Canada. Mason has continued to live in Australia.

[57] Nicole and Mason are each entitled to $500,000 pursuant to the consent judgment. Their entitlement under the consent judgment is for support under the dependants' support provisions of the *SLRA*. They are the residuary beneficiaries of Joe's Will and Codicil.

[58] The evidence before me is that both Nicole and Mason have completed their university educations and that they have careers. Joe paid for or contributed to the cost of their university educations. Although it is not specifically in evidence, considering their ages, both Nicole and Mason would likely have completed university prior to their father's death.

[59] There is no evidence about either Nicole's or Mason's incomes prior to or after Joe's death. There is no evidence of either child's ability to contribute to their own expenses.

[60] There is no evidence that either child has any disability.

[61] Joe was always very generous with his children. He paid for or contributed to their education. He has paid for trips for both of them. He has bought them many gifts, including cars.

[62] However, there is little, if any, evidence that following each child completing university, Joe provided monies to either child with any regularity to assist with or pay for essential expenses such as accommodation, food, or clothing. I am not satisfied that Joe's generous moral support, encouragement, and sporadic gifts of non-essential items qualify as provision of support as contemplated and defined by s. 57 of the *SLRA*. Accordingly, on the evidence before me, I am not satisfied that either Nicole or Mason is a dependant as defined by s. 57 of the *SLRA*. Accordingly, neither Nicole nor Mason is entitled to bring a dependant's support application under s. 58 of the *SLRA*.

[63] Even if I am wrong in that determination, there is insufficient evidence before me to enable me to address the factors set out in s. 62 of the *SLRA* in order to determine what would be a proper amount of support for either of Nicole or Mason. There is little, if any, evidence about their incomes, lifestyles, assets, health, or need for a stable environment. Accordingly, the evidence is insufficient to enable me to determine whether each child's entitlement under the consent judgment, namely a lump sum award of $500,000, is reasonable and in accordance with the law for a lump sum award for dependant support. Therefore, I cannot say that either child should have priority over the aviation claimants for $500,000 as an award of lump sum dependant support under the *SLRA*.

[64] For these reasons, I am not satisfied that the estate trustee may pay either Nicole or Mason, their respective entitlements of $500,000 under the consent judgment in priority to the aviation claims.

Conclusion and Order

[65] For all of these reasons, with respect to the estate trustee's motion for directions and all other motions, cross-motions, and applications heard by me, an order shall go as follows:

1) the estate trustee may pay Dorothy Ann Grieco her entitlement of $1,077,671.50 under the consent judgment in priority to the aviation claims;

2) the estate trustee may pay Donna Thorne her entitlement of $550,000 under the consent judgment in priority to the aviation claims;

3) I am not satisfied that the estate trustee may pay to either Nicole Grieco or Mason Grieco their respective $500,000 entitlements under the consent judgment in priority to the aviation claims; and

4) if the parties cannot agree on costs, they are to schedule an appointment before me through the trial coordinator to make costs submissions.

Order to go accordingly.

The Honourable Mr. Justice Salmers

DATE RELEASED: April 25, 2013

TAB 6

Gustavson Drilling (1964) Limited
Appellant;

and

The Minister of National Revenue
Respondent.

1974: November 1, 5; 1975: December 4.

Present: Martland, Judson, Pigeon, Dickson and de Grandpré JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation—Income tax—Oil companies—Deductions—Drilling and exploration expenses—Transferability of right to deduct to successor corporation—Income Tax Act, R.S.C. 1952, c. 148, as amended, s. 83A(8a), now 1970-71-72, (Can.) c. 63, s. 66(6).

Since 1949 the exploration for petroleum and natural gas has been encouraged by the provision in the *Income Tax Act*, R.S.C. 1952, c. 148 as amended 1970-71-72, c. 63, that oil companies could deduct drilling and exploration expenses from income earned in subsequent years. In 1956 the right was extended to successor corporations by legislation which provided that an oil company which acquired all or substantially all of the property of another oil company could deduct drilling and exploration expenses incurred by the predecessor corporation. The acquisition had however to be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor on the winding up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed. The appellant oil company incurred drilling and exploration expenses in excess of its income prior to 1960 when its parent company acquired substantially all of its property in consideration of the cancellation of a debt due. Entitlement to claim the undeducted drilling and exploration expenses did not accrue to the parent company as the transaction was not carried out as required by the 1956 Act. The appellant remained inactive until 1964 when its shares were acquired by another corporation following the liquidation of its previous parent company. After a change of name it recommenced business with newly acquired assets, none of which had been used or owned by it prior to June 1964. It sought to deduct the accumulated drilling and exploration expenses for the ensuing taxation years. The Minister re-assessed and disallowed the deductions. The appellant successfully appealed to the

Gustavson Drilling (1964) Limited
Appelante;

et

Le ministre du Revenu national *Intimé.*

1974: le 1er et 5 novembre; 1975: le 4 décembre.

Présents: Les juges Martland, Judson, Pigeon, Dickson et de Grandpré.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Revenu—Impôt sur le revenu—Compagnies pétrolières—Déductions—Dépenses d'exploration et de forage—Transmissibilité du droit de déduire ces dépenses à la compagnie remplaçante—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, avec modifications, art. 83A(8a), maintenant 1970-71-72 (Can.), c. 63, art. 66(6).

Depuis 1949, la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, modifié par 1970-71-72, c. 63, encourage la recherche du pétrole et du gaz naturel en autorisant les compagnies pétrolières à déduire les dépenses de forage et d'exploration du revenu des années subséquentes. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi prévoyant qu'une compagnie pétrolière qui acquérait tous ou presque tous les biens d'une autre compagnie pétrolière pouvait déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Cependant, il fallait que l'acquisition résulte a) d'un échange d'actions du capital social de la remplaçante, ou b) de la distribution des biens à la compagnie remplaçante lors de la liquidation de la compagnie remplacée, postérieurement à l'achat des actions de la compagnie remplacée, par la compagnie remplaçante, moyennant les actions de cette dernière. En 1962, on a retiré ces conditions. La compagnie pétrolière appelante a engagé des dépenses de forage et d'exploration d'un montant supérieur à son revenu avant 1960, année durant laquelle la compagnie-mère a acquis presque tous ses biens en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. La compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que l'opération ne s'est pas faite selon les conditions énoncées dans la Loi de 1956. L'appelante est restée inactive jusqu'en 1964, date à laquelle une autre compagnie a acheté, à la suite de la liquidation de la compagnie-mère, l'ensemble de ses actions. Après un changement de nom, l'appelante a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été pos-

Tax Appeal Board but on a Special Case stated by consent, the Minister was successful in the Federal Court before Cattanach J. and on appeal.

Held (Pigeon and de Grandpré JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Dickson JJ.: The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. On a literal construction of the legislation the appellant was in the category of a predecessor company and had thereby lost the right to deduct. As the language of the statute was unambiguous and clear, there was no need to have recourse to rules of construction to establish legislative intent. It could not be said that the 1962 legislation was retrospective or that any vested right acquired by the appellant by the repealed paragraphs was affected by their repeal.

Per Pigeon and de Grandpré JJ. *dissenting*: The legislative change effected in 1962 was not an alteration in the scheme of deductions for drilling and exploration expenses. It was a modification in the transferability of the entitlement to those deductions. While the rule against retrospective operation of statutes is no more than a rule of construction which operates more or less strongly according to the nature of the enactment, it operates nowhere more strongly than when any other construction would result in altering the effect of contracts previously entered into. The effect of the 1962 change was to facilitate the transfer of the right to deductions not to alter the result of past contracts so as to effect a forfeiture of the rights of oil companies that had previously transferred their properties under conditions that did not involve the transfer of the valuable right of entitlement to deduct to the transferee.

[*Assessment Commissioner of The Corporation of the Village of Stouffville v. Mennonite Home Association*, [1973] S.C.R. 189; *Acme Village School District v. Steele-Smith*, [1933] S.C.R. 47; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] S.C.R. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961] C.T.C. 490 (Exch.); *Director of*

sédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu des années subséquentes, l'appelante a cherché à déduire les dépenses accumulées de forage et d'exploration. Le Ministre a établi une nouvelle cotisation et rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante mais, par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattanach dont le jugement a été confirmé en appel.

Arrêt (les juges Pigeon et de Grandpré étant dissidents): Le pourvoi doit être rejeté.

Les juges Martland, Judson et Dickson: Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Interprétée littéralement, la Loi attribue nettement à l'appelante la qualité de compagnie remplacée; cette dernière perd donc le droit aux déductions. En présence d'un texte de loi clair et précis il n'est pas nécessaire de recourir aux règles d'interprétation pour déterminer quelle était l'intention du législateur. On ne peut soutenir que la Loi de 1962 avait un effet rétroactif ou que l'abrogation des paragraphes en question a eu un effet sur quelque droit acquis par l'appelante sous leur régime.

Les juges Pigeon et de Grandpré, *dissidents*: La modification législative de 1962 n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration. Elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation et sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. L'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire.

[Arrêts mentionnés: *Assessment Commissioner of The Corporation of the Village of Stouffville c. Mennonite Home Association*, [1973] R.C.S. 189; *Acme Village School District c. Steele-Smith*, [1933] R.C.S. 47; *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] R.C.S. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961]

Public Works v. Ho Po Sang, [1961] 2 All E.R. 721 (P.C.); *Hargal Oils Ltd. v. Minister of National Revenue*, [1965] S.C.R. 291 referred to].

APPEAL from a judgment of the Federal Court of Appeal[1] affirming the judgment of Cattanach J. allowing an appeal by way of special case stated from a decision of the Tax Appeal Board allowing an appeal by the appellant from an income tax assessment. Appeal dismissed, Pigeon and de Grandpré JJ. dissenting.

John McDonald, Q.C., F. R. Matthews, Q.C., and *D. C. Nathanson*, for the appellant.

G. W. Ainslie, Q.C., and *L. P. Chambers*, for the respondent.

The judgment of Martland, Judson and Dickson JJ. was delivered by

DICKSON J.—This is an income tax case concerning the right of the appellant Gustavson Drilling (1964) Limited to deduct in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years drilling and exploration expenses incurred by it from 1949 to 1960.

Parliament since 1949 has encouraged the exploration for petroleum and natural gas by permitting corporations "whose principal business is production, refining or marketing of petroleum, petroleum products or natural gas or exploring or drilling for petroleum or natural gas" (hereafter referred to as "oil companies") to deduct their drilling and exploration expenses in computing income for the purpose of the *Income Tax Act*. In 1956 the right was extended to successor corporations by legislation which provided that a corporation whose principal business was exploring and drilling for petroleum or natural gas and which acquired all or substantially all of the property of another corporation in the same type of business could deduct drilling and exploration expenses incurred by the predecessor corporation. In the absence of this legislation neither the successor corporation nor the predecessor corporation could have availed itself of such drilling and exploration

[1] [1972] F.C. 1193.

C.T.C. 490 (Ech.); *Director of Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721 (C.P.); *Hargal Oils Ltd. c. Le ministre du Revenu national*, [1965] R.C.S. 291].

POURVOI interjeté d'un arrêt de la Cour d'appel fédérale[1] confirmant le jugement du juge Cattanach accueillant un appel exposé dans un mémoire spécial à l'encontre d'une décision de la Commission d'appel de l'impôt qui avait accueilli un appel interjeté par l'appelante d'une cotisation à l'impôt sur le revenu. Pourvoi rejeté, le juge Pigeon et de Grandpré étant dissidents.

John McDonald, c.r., F. R. Matthews, c.r., et *D. C. Nathanson*, pour l'appelante.

G. W. Ainslie, c.r., et *L. P. Chambers*, pour l'intimé.

Le jugement des juges Martland, Judson et Dickson a été rendu par

LE JUGE DICKSON—Il s'agit d'une question d'impôt sur le revenu portant sur le droit de l'appelante Gustavson Drilling (1964) Limited de déduire dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, les dépenses de forage et d'exploration qu'elle a faites de 1949 à 1960.

Depuis 1949, le Parlement encourage la recherche du pétrole et de gaz naturel en autorisant les compagnies dont «l'entreprise principale est la production, le raffinage ou la mise en vente du pétrole, des produits du pétrole ou du gaz naturel, ou l'exploration ou le forage en vue de découvrir du pétrole ou du gaz naturel» (ci-après appelées «compagnies pétrolières») à déduire leurs dépenses de forage et d'exploration, dans le calcul de leur revenu aux fins de la *Loi de l'impôt sur le revenu*. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi qui prévoyait qu'une corporation dont l'entreprise principale est l'exploration et le forage en vue de découvrir du pétrole ou du gaz naturel et qui acquiert tous les biens ou sensiblement tous les biens d'une autre corporation dont l'entreprise principale est la même, peut déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. En l'absence de cette loi, ni la

[1] [1972] C.F. 1193.

expenses for tax purposes. The 1956 legislation contained qualifications, however. In order to entitle the successor corporation to the deduction it was imperative that the acquisition of the property of the predecessor by the successor be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor upon the winding-up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed; thereafter the legislation simply provided that every oil company which at any time after 1954 acquired all or substantially all of the property of another oil company could claim a deduction in respect of drilling and exploration expenses incurred by the predecessor company and the predecessor company was denied the right to make any such claim. Within this context the present case arises.

The appellant was incorporated in 1949 under the name of Sharples Oil (Canada) Ltd., as a wholly owned subsidiary of Sharples Oil Corporation, an American corporation, and until 1960 it carried on the business of an oil company in Canada, incurring during that period drilling and exploration expenses of $1,987,547.19 in excess of its income from the production of petroleum and natural gas. On November 30, 1960, the parent company, Sharples Oil Corporation, acquired substantially all of the property of the appellant in consideration for the cancellation of a debt owing to it by the appellant. The parties agree that at this time entitlement to claim the theretofore undeducted drilling and exploration expenses did not accrue to the parent company because the transaction was not carried out in either manner prescribed by the Act.

After disposal of its property the appellant discontinued business and remained inactive until 1964. In June 1964, however, Mikas Oil Co. Ltd. purchased all of the issued and outstanding shares in the capital stock of the appellant from the shareholders of Sharples Oil Corporation following the liquidation of that corporation. The appellant's

corporation remplaçante ni la corporation remplacée n'aurait pu se prévaloir pour des fins fiscales des dépenses de forage et d'exploration. Toutefois, cette loi de 1956 comporte certaines réserves. La corporation remplaçante n'a droit à cette déduction que si elle acquiert les biens de la corporation remplacée (a) en échange d'actions de son propre capital social, ou (b) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat des actions de la corporation remplacée, par la corporation remplaçante, moyennant des actions de cette dernière. En 1962, on a retiré ces conditions; dans la suite, la loi prévoyait simplement que toute compagnie pétrolière qui, en tout temps après 1954, avait acquis tous les biens ou sensiblement tous les biens d'une autre compagnie pétrolière, pouvait réclamer une déduction à titre de dépenses de forage et d'exploration faites par la corporation remplacée alors que cette dernière ne pouvait, elle, se prévaloir de ce droit. Le présent litige tire son origine de ce contexte.

En 1949, l'appelante a été constituée en corporation sous le nom de Sharples Oil (Canada) Ltd., en tant que filiale exclusive de la corporation américaine Sharples Oil Corporation, et jusqu'en 1960, elle était une compagnie pétrolière au Canada qui a engagé, durant cette période, des dépenses de forage et d'exploration d'un montant de $1,987,-547.19 supérieur au revenu que lui a procuré la production de pétrole et de gaz naturel. Le 30 novembre 1960, la compagnie-mère Sharples Oil Corporation, a acquis presque tous les biens de l'appelante en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. Les parties conviennent qu'à cette époque-là la compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que la transaction ne s'est pas opérée aux termes de l'une ou l'autre des conditions énoncées dans la Loi.

A la suite du transfert de ses biens, l'appelante a interrompu ses opérations et est restée inactive jusqu'en 1964. Cependant, en juin 1964, Mikas Oil Co. Ltd. a acheté des actionnaires de Sharples Oil Corporation, à la suite de la liquidation de cette dernière, l'ensemble des actions émises du capital social de l'appelante. En octobre 1964, l'appelante

name was changed to Gustavson Drilling (1964) Limited, in October 1964; thereafter the appellant recommenced business as an oil company with newly acquired assets, none of which had been used or owned by the appellant prior to June 1964. In computing its income for the 1965, 1966, 1967 and 1968 taxation years the appellant claimed deductions of $119,290.49; $447,369.99; $888,-084.10; and $31,179.00 respectively as part of the accumulated drilling and exploration expenses of $1,987,547.19. The Minister re-assessed and disallowed the claimed deductions. The appellant successfully appealed to the Tax Appeal Board but a Special Case was stated by consent, pursuant to Rule 475 of the Federal Court, and the appeal of the Minister was successful before Cattanach J. whose judgment in the Federal Court was upheld by the Federal Court of Appeal. The question on which the opinion of the Court was sought in the Special Case reads:

a adopté le nom de Gustavson Drilling (1964) Limited; par la suite, elle a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été possédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, l'appelante a déduit des sommes de $119,290.49, $447,369.99, $888,084.10 et $31,179.00 respectivement, qu'elle a réclamées comme partie des dépenses accumulées de forage et d'exploration chiffrées à $1,987,547.19. Le Ministre lui a imposé une nouvelle cotisation et a rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante; par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial, conformément à la règle 475 de la Cour fédérale, et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattanach dont le jugement a été confirmé par la Cour d'appel fédérale. Voici le libellé de la question litigieuse exposée dans le mémoire spécial:

> The question for the opinion of the Court is whether subsection (8a) of section 83A of the *Income Tax Act* as amended by the repeal of paragraphs (c) and (d) thereof by Statutes of Canada, 1962-63, c. 8, section 19, subsections (11) and (15), precludes the Respondent from deducting in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years amounts on account of the drilling and exploration expenses mentioned in paragraph 4 hereof, which but for the repeal would have been deductible by the Respondent under subsections (1) and (3) of section 83A of the Act.

> [TRADUCTION] La question soumise à la Cour est celle de savoir si le paragraphe (8a) de l'article 83A de la *Loi de l'impôt sur le revenu* tel que modifié par l'abrogation des alinéas *c*) et *d*) dudit article par les statuts du Canada, 1962-63, c. 8, article 19, paragraphes (11) et (15), interdit à l'intimée de déduire, dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968 les sommes représentant les dépenses de forage et d'exploration mentionnées au paragraphe 4 des présentes que, n'eût été l'abrogation, l'intimée aurait pu déduire en vertu des paragraphes (1) et (3) de l'article 83A de la Loi.

Subsections (1) and (3) of s. 83A of the *Income Tax Act*, under which the appellant claims the right to deductions, read as follows as applied to the 1965 to 1968 taxation years:

Les paragraphes (1) et (3) de l'art. 83A de la *Loi de l'impôt sur le revenu*, en vertu desquels l'appelante prétend avoir droit aux déductions, se lisent comme suit, tels qu'ils s'appliquaient aux années d'imposition 1965 à 1968:

> **83A.** (1) A corporation . . . may deduct, in computing its income under this Part for a taxation year, the lesser of
>
> (*a*) the aggregate of such of the drilling and exploration expenses . . . as were incurred during the calendar years 1949 to 1952, to the extent that they were not deductible in computing income for a previous taxation year, or
>
> (*b*) of that aggregate, an amount equal to its income for the taxation year

> **83A.** (1) Une corporation . . . peut déduire, dans le calcul de son revenu, aux fins de la présente Partie, pour une année d'imposition, le moindre de
>
> *a*) l'ensemble des dépenses de forage et d'exploration . . . qui ont été faites au cours des années civiles 1949 à 1952, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou
>
> *b*) de cet ensemble, un montant égal à son revenu pour l'année d'imposition

. . .

minus the deductions allowed for the year by subsections (8a) and (8d) of this section . . .

. . .

(3) A corporation . . . may deduct, in computing its income under this Part for a taxation year, the lesser of

(*c*) the aggregate of such of

(i) the drilling and exploration expenses . . .

. . .

as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year, or

(*d*) of that aggregate, an amount equal to its income for the taxation year

. . .

minus the deductions allowed for the year by subsections (1), (2), (8a) and (8d) of this section . . .

There can be no doubt that in the absence of subs. (8a) of s. 83A the drilling and exploration expenses claimed by the appellant would have been deductible by it. One must, then, turn to subs. (8a) upon the construction of which this case falls to be decided. In 1960, when the property of the appellant was acquired by Sharples Oil Corporation, the pertinent parts of subs. (8a) read:

83A. (8a) Notwithstanding subsection (8), where a corporation (hereinafter in this subsection referred to as the "successor corporation") . . .

. . .

has, at any time after 1954, acquired from a corporation (hereinafter in this subsection referred to as the "predecessor corporation") . . . all or substantially all of the property of the predecessor corporation used by it in carrying on that business in Canada,

(*c*) pursuant to the purchase of such property by the successor corporation in consideration of shares of the capital stock of the successor corporation, or

(*d*) as a result of the distribution of such property to the successor corporation upon the winding-up of the predecessor corporation subsequently to the purchase of all or substantially all of the shares of the capital stock of the predecessor corporation by the successor corporation in consideration of shares of the capital stock of the successor corporation,

. . .

moins les déductions allouées pour l'année par les paragraphes (8a) et (8d) du présent article . . .

. . .

(3) Une corporation . . . peut déduire, dans le calcul de son revenu aux fins de la présente Partie, pour une année d'imposition, le moindre de

c) l'ensemble

(i) des dépenses de forage et d'exploration . . .

. . .

qui ont été faites après l'année civile 1952 et avant le 11 avril 1962, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou

d) dudit ensemble, un montant égal à son revenu pour l'année d'imposition

. . .

moins les déductions allouées pour l'année par les paragraphes (1), (2), (8a) et (8d) du présent article . . .

Il n'y a aucun doute qu'en l'absence du par. (8a) de l'art. 83A, l'appelante aurait pu déduire les dépenses de forage et d'exploration qu'elle réclame. Il faut donc examiner ce par. (8a) dont l'interprétation sera déterminante du sort de cette affaire. En 1960, lorsque Sharples Oil Corporation a acquis les biens de l'appelante, les dispositions pertinentes du par. (8a) se lisaient comme suit:

83A. (8a) Nonobstant le paragraphe (8), lorsqu'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplaçante»). . .

. . .

a, en tout temps après 1954, acquis d'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplacée»). . .tous les biens ou sensiblement tous les biens de la corporation remplacée, utilisés par elle dans l'exercice de ladite entreprise au Canada,

c) en vertu de l'achat desdits biens par la corporation remplaçante moyennant des actions du capital social de la corporation remplaçante, ou

d) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat de toutes les actions ou sensiblement toutes les actions du capital social de la corporation remplacée, par la corporation remplaçante, moyennant des actions du capital social de la corporation remplaçante,

there may be deducted by the successor corporation, in computing its income under this Part for a taxation year, the lesser of

(*e*) the aggregate of

(i) the drilling and exploration expenses ... incurred by the predecessor corporation ...

. . .

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

Paragraphs (*c*) and (*d*) of subs. (8a) were repealed by c. 8, 1962-63 (Can.), s. 19, subs. (11), and the repeal was made applicable to the 1962 and subsequent taxation years.

In summary, therefore: Company A incurred drilling and exploration expenses; Company B acquired the property of Company A in 1960 but because of the manner in which the transaction was carried out Company B did not at that time qualify as a successor company and did not become entitled to deduct from its income the undeducted drilling and exploration expenses of Company A; in 1962 and thereafter, if the contentions of the Minister prevail, Company B qualified as a successor company and as such became entitled to claim such expenses as a deduction; Company A was denied such right by the concluding words of subs. (8a).

Before examining the rival contentions, several observations might be made. The first is with regard to the onus on a taxpayer who claims the benefit of an exemption. He must bring himself clearly within the language in which the exemption is expressed: *The Assessment Commissioner of the Corporation of the Village of Stouffville v. The Mennonite Home Association of York County and The Corporation of the Village of Stouffville*[2], at p. 194.

[2] [1973] S.C.R. 189.

cette dernière peut déduire, dans le calcul de son revenu selon la présente Partie pour une année d'imposition, le moindre

e) de l'ensemble

(i) des dépenses de forage et d'exploitation. . .faites par la corporation remplacée. . .

. . .

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

Le paragraphe (11) de l'art. 19 du c. 8 des Statuts du Canada 1962-63 a abrogé les al. *c*) et *d*) du par. (8a), et cette abrogation est entrée en vigueur à compter de l'année d'imposition 1962 et suivantes.

En résumé: la compagnie A a fait des dépenses de forage et d'exploration; la compagnie B a acquis les biens de la compagnie A en 1960, mais à cause de la façon dont s'est opérée la transaction, la compagnie B ne pouvait pas être considérée à cette époque-là comme une compagnie remplaçante de sorte qu'elle n'a pu acquérir le droit de déduire de son revenu les dépenses non déduites de forage et d'exploration engagées par la compagnie A; en 1962 et par la suite, si l'on s'en tient aux prétentions du Ministre, la compagnie B a acquis la qualité de compagnie remplaçante et à ce titre, elle était dorénavant autorisé à déduire les dépenses en question; la fin du par. (8a) empêchait la compagnie A de se prévaloir de ce droit.

Avant d'examiner les prétentions rivales, il convient de formuler quelques remarques. La première porte sur le fardeau incombant au contribuable qui se prévaut d'une exemption. Il doit établir clairement que son cas s'insère dans l'exemption réclamée: *The Assessment Commissioner of the Corporation of the Village of Stouffville c. The Mennonite Home Association of York County et The Corporation of the Village of Stouffville*[2], à la p. 194.

[2] [1973] R.C.S. 189.

Secondly, the concept of a deduction being made by a taxpayer other than the one who incurred the expenditure is not unknown to the *Income Tax Act*. Section 85I(3) of the Act permits a new corporation formed on the amalgamation of two or more corporations after 1957 to deduct drilling and exploration expenses incurred by the predecessor corporation. Section 83A(3c) permits a joint exploration corporation to elect to renounce in favour of another corporation an agreed portion of the aggregate of the drilling and exploration expenses incurred by the joint exploration corporation.

Thirdly, by deleting paras. (*c*) and (*d*) of subs. (8a), Parliament liberalized the provision by making available to an expanded number of successor corporations a right to deduct. I do not think Parliament ever contemplated that a company which had sold or otherwise disposed of its assets could later have recourse to s. 83A. Parliament chose to grant a successor company the right to deduct drilling and exploration expenses incurred by a predecessor and the only problem in implementing its policy was with respect to the company which would have the right to deduct in the year of acquisition. The successor was accorded that right by the statute. The result of the amendment to the legislation in 1962 was to confer a right to claim deductions upon certain successor companies. This was a new right, coming from Parliament, not one acquired from a company's predecessor. At no time during the currency of the legislation has a predecessor company been able to transfer to a successor company entitlement to claim deductions in respect of drilling and exploration expenses.

It will be convenient now to consider in more detail the submissions of the appellant and of the Minister. Those of the Minister may be shortly put, resting on the language of the Act which, the Minister submits, is precise and unambiguous when read in the context of the whole statute and the general intendment of the Act. It is argued that there is no need to have recourse to presumptions of legislative intent, for such rules of construction are only useful in ascertaining the true

Deuxièmement, le principe selon lequel une déduction peut être effectuée par un contribuable autre que celui qui a encouru la dépense n'est pas étranger à la *Loi de l'impôt sur le revenu*. Le paragraphe (3) de l'art. 85I de la Loi autorise la nouvelle corporation, issue de la fusion de deux ou plusieurs corporations après 1957, à déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Le paragraphe (3c) de l'art. 83A permet à une corporation d'exploration en commun de renoncer en faveur d'une autre corporation à une partie convenue de ses dépenses de forage et d'exploration.

Troisièmement, en abrogeant les al. *c*) et *d*) du par. (8a), le Parlement a élargi les cadres de la disposition en permettant à un plus grand nombre de corporations remplaçantes de s'en prévaloir. Je crois que le Parlement n'a jamais envisagé la possibilité qu'une compagnie qui a vendu ses biens ou en a autrement disposé puisse plus tard se prévaloir de l'art. 83A. Le Parlement a choisi d'accorder à la compagnie remplaçante le droit de déduire les dépenses de forage et d'exploration engagées par la compagnie remplacée et, la seule difficulté dans la mise en œuvre de cette politique consistait à déterminer quelle compagnie serait autorisée à se prévaloir de la déduction pour l'année de l'acquisition. La loi a accordé ce droit au remplaçant. Les dispositions modificatrices de 1962 ont conféré à certaines compagnies remplaçantes le droit de se prévaloir des déductions en question. C'était donc un droit nouveau accordé par le Parlement et non par la compagnie remplacée. Jamais la loi n'a permis à une compagnie remplacée de céder à une compagnie remplaçante le droit de se prévaloir des déductions relatives aux dépenses de forage et d'exploration.

Il convient maintenant d'examiner de plus près les allégations de l'appelante et du Ministre. Les allégations de ce dernier se résument en quelques mots et reposent sur le texte de la Loi qui, selon lui, est clair et précis lorsque son lecteur tient compte de l'ensemble et de l'esprit général de la Loi. On allègue qu'il n'est pas nécessaire d'avoir recours aux présomptions portant sur l'intention du législateur puisque ces règles d'interprétation ne sont utiles dans la détermination du sens vérita-

meaning where the language of the statute is not clear and plain: per Lamont J. in *Acme Village School District v. Steele-Smith*[3], at p. 51. There is much to this submission. I do not think that the appellant can sustain its position on a literal reading of subs. (8a), the language of which places appellant fairly and squarely in the category of a predecessor company. The appellant, however, seeks to avoid a literal construction of the subsection with a three-pronged argument, which must fairly be considered, based upon (a) the presumption against retrospective operation of statutes; (b) the presumption against interference with vested rights; (c) the meaning to be given to the word "aggregate" in subs. (8a). With regard to points (a) and (b) it would not be sufficient for the appellant to establish that the legislation had retrospective effect; it must also show it had an accrued right which was adversely affected by the legislation.

First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of

[3] [1933] S.C.R. 47.

ble que lorsque le texte est obscur et ambigu: voir les propos du juge Lamont dans *Acme Village School District c. Steele-Smith*[3], à la p. 51. Cette allégation est fort pertinente. Je ne crois pas que l'appelante puisse obtenir gain de cause en s'en tenant au sens littéral du par. (8a) puisque sa rédaction attribue nettement à l'appelante la qualité de compagnie remplacée. Toutefois, elle cherche à éviter une interprétation littérale de ce paragraphe et soumet à cet effet une triple argumentation qu'il convient d'examiner équitablement et qui se fonde sur a) la présomption à l'encontre de la rétroactivité des lois; b) la présomption voulant qu'on ne puisse porter atteinte aux droits acquis; c) la signification à donner au mot «ensemble» du par. (8a). Concernant les points a) et b), l'appelante doit faire plus que démontrer la portée rétroactive de la loi; elle doit également établir qu'elle possédait un droit acquis auquel la loi a porté atteinte.

Premièrement, la rétroactivité. Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Une disposition modificatrice peut prévoir qu'elle est censée être entrée en vigueur à une date antérieure à son adoption, ou qu'elle porte uniquement sur les transactions conclues avant son adoption. Dans ces deux cas, elle a un effet rétroactif. A première vue, la présente affaire peut s'apparenter au deuxième cas, mais je suis d'avis que l'analyse de la disposition abrogative démontre qu'elle n'a aucune portée rétroactive dans le sens qu'elle modifie des droits acquis, bien qu'elle porte incontestablement atteinte aux transactions passées. L'article, tel que modifié par la disposition abrogative, ne vise pas les années d'imposition antérieures à la date de la modification; il ne cherche pas à s'immiscer dans le passé et ne prétend pas signifier qu'à une date antérieure, il faille considérer que le droit ou les droits des parties étaient ce qu'ils n'étaient pas alors. Pour autant que l'appelante soit concernée, cet article ne vise qu'à retirer pour l'avenir le droit de faire certaines déductions dont il était aupara-

[3] [1933] R.C.S. 47.

the amending statute.

The appellant maintains that in 1960, at the time of the relevant transaction, it had the status of a non-predecessor company under s. 83A(8a), as it then read, and the right to carry over deductions to subsequent tax years; that the 1962 amendment could not operate retrospectively to change its status from non-predecessor company under s. 83A(8a) with the consequence that the drilling and exploration expenses became thereafter deductible only by Sharples Oil Corporation, the successor company. The appellant concludes that the right to deduct the said expenses remains with it in perpetuity. I cannot agree. It is immaterial that the appellant company had a particular status as the result of previous legislation. Parliament, acting within its competence, has said that as of 1962 and for the purposes of calculating taxable income in future years, the appellant has a different status.

The contention of appellant that the repeal has application only in respect of acquisitions carried out subsequent to the passage of the repealing enactment would introduce a limitation upon the amplitude of subs. (8a), as amended, which is not supported by the language of the subsection. It would also deny successor corporations rights which s. 83A would seem to accord them. The interpretation pressed by appellant tends also to ignore the words "at any time after 1954". Appellant submits that these words may, and should, have application to the extent of preserving the rights of a successor corporation which, prior to the repealing enactment, carried out an acquisition in one or other of the manners set out in subs. (*c*) and (*d*) and therefore prior to repeal enjoyed the benefit of subs. (8a) but they should not have further force or effect. The difficulty with this submission is that one can find nothing in the legislation as it read in respect of the 1965 and subsequent taxation years which would support a distinction between those corporations which

vant possible de tirer avantage; l'article n'a aucune incidence sur ce droit dans la mesure où il a été exercé à une date antérieure à l'adoption de la loi modificatrice.

L'appelante prétend qu'elle avait en 1960, à l'époque de la transaction en question, la qualité d'une compagnie non remplacée aux termes du par. (8a) de l'art. 83A, tel qu'alors libellé, ainsi que le droit de reporter des déductions au cours des années d'imposition subséquentes; elle soutient également que la modification de 1962 ne peut avoir d'effet rétroactif de façon à lui conférer maintenant la qualité de compagnie remplacée aux termes du par. (8a) de l'art. 83A, de sorte que les dépenses de forage et d'exploration pouvaient être déduites, par la suite, uniquement par Sharples Oil Corporation, la compagnie remplaçante. Finalement, l'appelante conclut qu'elle conserve à perpétuité le droit de déduire les dépenses en question. Je ne peux partager cette prétention. Il importe peu que la compagnie appelante ait eu une qualité particulière sous l'ancienne loi. Sans outrepasser sa compétence, le Parlement a statué qu'à compter des années d'imposition 1962 et suivantes, pour les fins du calcul du revenu imposable, l'appelante aurait une qualité différente.

La prétention de l'appelante selon laquelle l'abrogation agit seulement sur les acquisitions faites ultérieurement à l'adoption de la loi abrogative, a pour effet de restreindre la portée du par. (8a) dans sa forme modifiée, ce que le texte du paragraphe en question ne démontre aucunement. Cette prétention a également pour effet d'empêcher les corporations remplaçantes de se prévaloir des droits que leur accorde semble-t-il, l'art. 83A. L'interprétation mise de l'avant par l'appelante tend également à ignorer les mots «en tout temps après 1954». Cette dernière prétend que ces mots peuvent et doivent agir uniquement dans la mesure où ils permettent de garantir les droits d'une corporation remplaçante qui, antérieurement à la loi abrogative, a fait une acquisition suivant l'une ou l'autre des méthodes décrites aux al. *c*) et *d*) et qui, par conséquent, tirait avantage du par. (8a) avant l'abrogation. Ce qui fait obstacle à cette prétention est l'impossibilité de trouver dans cette partie de la loi portant sur les années d'imposition 1965 et suivantes, un indice qui étayerait une

acquired the property of other corporations prior to the 1962 amendment, in accordance with subs. (*c*) and (*d*), and those which acquired the property of other corporations following the amendment.

The *Income Tax Act* contains a series of very complicated rules which change frequently, for the annual computation of world income. The statute in force in the particular taxation year must be applied to determine the taxpayer's taxable income for that year. The effect of the repealing enactment of 1962 was merely to provide that in future years certain new rules should apply affecting deductions from income of exploration and development expenses. Although the effect of the repealing enactment may appear to have been to divest the appellant of a right to deduct which it had earlier enjoyed and in some manner have caused a transmutation of an antecedent transaction, I do not think that, when the matter is closely examined, such is the true effect. In each of the years 1949 to 1960 the appellant had a right to deduct. The Act in each of those years conferred the right. In 1960 the appellant transferred its assets. The contract of sale, if any, forms no part of the record. So far as the record discloses, no mention was made of drilling and exploration espenses at the time. After disposing of its property, it was no longer a corporation whose principal business was that of exploring or drilling for petroleum or natural gas nor did it have income. It, therefore, no longer had a right to deduct. No claim was made by it in the 1961, 1962, 1963 or 1964 taxation years. By the time the appellant resumed business it had no right under the then legislative scheme to claim for drilling and exploration expenses incurred in earlier years. Any claim which it might make for exploration and drilling expenses could only be in respect of expenses incurred following resumption of business. It may seem unfortunate that an amendment which was intended to liberalize the legislation by removing a barrier to the inheritance of drilling and exploration expenses should have the effect of denying a predecessor company such as the appellant from enjoying a right which it would have enjoyed in the absence of the repeal but the legis-

distinction entre les corporations qui ont fait l'acquisition des biens d'autres corporations avant la modification de 1962, en conformité avec les al. *c*) et *d*), et celles qui ont fait l'acquisition des biens d'autres corporations postérieurement à la modification.

La *Loi de l'impôt sur le revenu* contient une série de règles très complexes modifiées fréquemment qui servent au calcul annuel du revenu global. Pour déterminer le revenu imposable d'un contribuable pour une année particulière, il faut appliquer la loi qui était alors en vigueur. La disposition abrogative de 1962 a simplement pour effet d'introduire pour les années subséquentes de nouvelles règles touchant la déductibilité des dépenses d'exploration et de mise en valeur. Bien que la disposition abrogative puisse paraître avoir pour effet de dépouiller l'appelante du droit dont elle jouissait auparavant de faire certaines déductions et d'une certaine façon causé la transmutation d'une transaction antérieure, je suis d'avis qu'un examen attentif de la question démontre qu'il n'en est pas ainsi. De 1949 à 1960, la Loi en vigueur au cours de chacune de ces années autorisait l'appelante à se prévaloir de la déduction. En 1960, l'appelante a transféré son actif. Le contrat de vente, s'il en existe un, n'apparaît pas au dossier et dans la mesure des révélations qui y sont contenues, il n'a pas été question à l'époque des dépenses de forage et d'exploration. Après avoir disposé de ses biens, l'appelante n'était plus une corporation s'occupant principalement de faire de l'exploration ou forage pour la découverte de pétrole ou de gaz naturel, et elle n'avait plus de revenu. Elle ne pouvait donc plus se prévaloir de la déduction en question. Au cours des années d'imposition 1961, 1962, 1963 et 1964, elle n'a fait aucune réclamation. A l'époque où l'appelante a repris ses activités, elle n'avait plus le droit, en vertu de la loi alors en vigueur, de réclamer les dépenses de forage et d'exploration engagées antérieurement. Il lui était possible de réclamer uniquement les dépenses de forage et d'exploration engagées après qu'elle eut repris ses activités. Il est peut-être malheureux qu'une modification dont le but est de libéraliser la loi en facilitant la transmission des dépenses de forage et d'exploration, ait pour effet de priver une compagnie remplacée comme l'appe-

lation as amended is unambiguous and clear. After the repeal of paras. (*c*) and (*d*) of subs. (8a) in 1962 and for the purpose of paying income tax in the years following 1962, the appellant company is a predecessor company within the meaning of subs. (8a) and precluded from deducting the drilling and exploration expenses incurred by it prior to November 10, 1960.

Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*[4], at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception. The only rights which a taxpayer in any taxation year can be said to enjoy with respect to claims for exemption are those which the *Income Tax Act* of that year give him. The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the Income Tax Acts of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation years. One may fall into error by looking upon drilling and exploration expenses as if they were a bank account from which one can make withdrawals indefinitely or at least until the balance is exhausted. No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmen-

[4] [1933] S.C.R. 629.

lante d'un droit dont elle aurait pu se prévaloir en l'absence de l'abrogation, mais il n'en demeure pas moins que la loi dans sa forme modifiée est claire et précise. Après l'abrogation des al. *c*) et *d*) du par. (8a) en 1962 et aux fins du calcul de l'impôt à payer pour les années postérieures à 1962, la compagnie appelante est une compagnie remplacée au sens du par. (8a) et de ce fait, il lui est impossible de déduire les dépenses de forage et d'exploration engagées par elle avant le 10 novembre 1960.

Deuxièmement, l'interférence avec des droits acquis. Selon la règle, une loi ne doit pas être interprétée de façon à porter atteinte aux droits existants relatifs aux personnes ou aux biens, sauf si le texte de cette loi exige une telle interprétation: *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board*[4], à la p. 638. La présomption selon laquelle une loi ne porte pas atteinte aux droits acquis à moins que la législature ait clairement manifesté l'intention contraire, s'applique sans discrimination, que la loi ait une portée rétroactive ou qu'elle produise son effet dans l'avenir. Ce dernier type de loi peut être mauvais s'il porte atteinte à des droits acquis sans l'exprimer clairement. Toutefois, cette présomption s'applique seulement lorsque la loi est d'une quelconque façon ambiguë et logiquement susceptible de deux interprétations. Il est évident que la plupart des lois modifient des droits existants ou y portent atteinte d'une façon ou d'une autre, et les lois fiscales ne font pas exception. Les seuls droits dont un contribuable peut se prévaloir au cours d'une année d'imposition au regard de réclamations d'exemptions sont ceux que lui accordent la *Loi de l'impôt sur le revenu* alors en vigueur. L'appelante fonde son argumentation sur le fait qu'elle possède un droit acquis et continu de déduire dans le calcul de son revenu les dépenses de forage et d'exploration engagées par elle, alors qu'il est clair que la *Loi de l'impôt sur le revenu* de 1960 et des années antérieures n'accorde aucun droit à l'égard des années d'imposition 1965 et suivantes. C'est une erreur que de considérer les dépenses de forage et d'exploration comme un compte en banque duquel il est possible d'effectuer des retraits indéfiniment ou, du moins,

[4] [1933] R.C.S. 629.

tal policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.

The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued: *Abbott v. Minister of Lands*[5], at p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*[6]; *Director of Public Works v. Ho Po Sang*[7].

Section 35 of the *Interpretation Act*, R.S.C. 1970, c. I-23 is cited in support of the appellant. It reads:

35. Where an enactment is repealed in whole or in part, the repeal does not

. . .

(*b*) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;

(*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

I agree with Mr. Justice Thurlow of the Federal Court of Appeal that it cannot be said that the repeal of paras. (*c*) and (*d*) affected their previous operation or anything done or suffered by appellant thereunder since paras. (*c*) and (*d*) never had any operation upon or application to anything done or suffered by appellant. I am also in agreement with Mr. Justice Thurlow that it cannot be said that any right acquired by appellant under paras. (*c*) or (*d*) was affected by their repeal, since no right was ever acquired by appellant under either of them. This section is merely the statutory embodiment of the common law presumption in respect of vested rights as it applies to the repeal of legislative enactments and in my opinion the sec-

[5] [1895] A.C. 425.
[6] [1961] C.T.C. 490 (Exch.).
[7] [1961] 2 All E.R. 721 (P.C.).

jusqu'à l'épuisement du solde. Personne n'a le droit acquis de se prévaloir de la loi telle qu'elle existait par le passé; en droit fiscal, il est impérieux que la législation reflète l'évolution des besoins sociaux et de l'attitude du gouvernement. Un contribuable est libre de planifier sa vie financière en se fondant sur l'espoir que le droit fiscal demeure statique; il prend alors le risque d'une modification à la législation.

Le simple droit de se prévaloir d'un texte législatif abrogé, dont jouissent les membres de la communauté ou une catégorie d'entre eux à la date de l'abrogation d'une loi, ne peut être considéré comme un droit acquis: *Abbott v. Minister of Lands*[5], à la p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*[6], *Director of Public Works v. Ho Po Sang*[7].

L'article 35 de la *Loi d'interprétation*, S.R.C. 1970, c. I-23 est cité en appui de la thèse de l'appelante. En voici le texte:

35. Lorsqu'un texte législatif est abrogé en tout ou en partie, l'abrogation

. . .

b) n'atteint ni l'application antérieure du texte législatif ainsi abrogé ni une chose dûment faite ou subie sous son régime;

c) n'a pas d'effet sur quelque droit, privilège, obligation ou responsabilité acquis, né, naissant ou encouru sous le régime du texte législatif ainsi abrogé.

Je partage l'avis du juge Thurlow de la Cour d'appel fédérale selon lequel il ne peut être dit que l'abrogation des al. *c*) et *d*) atteint leur application antérieure ni une chose dûment faite ou subie sous leur régime par l'appelante, puisque les al. *c*) et *d*) ne se sont jamais appliqués à l'appelante ni à une chose dûment faite ou subie par elle. Je souscris encore une fois à l'avis du juge Thurlow lorsqu'il affirme que l'on ne peut pas dire que l'abrogation des al. *c*) et *d*) a eu un effet sur quelque droit acquis par l'appelante sous leur régime, puisque cette dernière n'a jamais acquis de droits sous le régime de l'un quelconque d'entre eux. Cet article représente simplement la consécration législative de la présomption de droit commun relative aux

[5] [1895] A.C. 425.
[6] [1961] C.T.C. 490 (Exch.).
[7] [1961] 2 All. E.R. 721 (P.C.).

tion does nothing to advance appellant's case. Appellant must still establish a right or privilege acquired or accrued under the enactment prior to repeal, and this it cannot do.

Third, "aggregate". The somewhat tortuous argument on this point is largely a mere embellishment of the retrospectivity argument. It runs as follows. Even if the appellant is regarded as a predecessor corporation, the accumulated drilling and exploration expenses may nevertheless be deducted by the appellant because (1) the prohibition expressed in the concluding paragraph of subs. (8a) extends only to "the aggregate determined under paragraph (*e*)"; (2) such aggregate in each of the years 1965 to 1968 is *nil* by reason of the necessity under subparas. (iii) and (iv) thereof of determining such aggregate in the first instance "for the taxation year in which the property so acquired was acquired by the successor corporation", *i.e.*, 1960; (3) subparas. (iii) and (iv) of subs. (8a)(*e*) have been construed by this Court in *Hargal Oils Ltd. v. Minister of National Revenue*[8], at pp. 295-6, where it was held that the "aggregate" is to:

> . . . consist of expenses not deductible by the predecessor corporation in the taxation year in which the property was acquired by the successor corporation, but which would have been deductible by the predecessor corporation in that taxation year, "but for the provisions of . . . this subsection."

(4) this passage presupposes the existence of the qualified predecessor and a qualified successor corporation in the taxation year in which the transfer of property took place and the amount to be included in the aggregate can only be determined in the taxation year in which the transaction occurred; (5) in the 1960 taxation year subs. (8a) was not applicable to appellant and there cannot be in that taxation year either a successor corporation or a predecessor corporation nor any "aggregate" to which the concluding paragraph of

[8] [1965] S.C.R. 291.

droits acquis telle qu'elle existe à l'égard de l'abrogation des dispositions législatives et, selon moi, cet article n'ajoute rien à l'argumentation de l'appelante. Cette dernière doit toujours démontrer qu'elle possède un droit ou un privilège né ou acquis sous le régime du texte législatif avant son abrogation, ce qu'elle ne peut faire.

Troisièmement, le mot «ensemble». Cet argument quelque peu tortueux reprend en grande partie, sous un jour plus favorable, l'argument de la rétroactivité. En voici l'essentiel: même si l'appelante est considérée comme une corporation remplacée, elle peut néanmoins déduire les dépenses accumulées de forage et d'exploration parce que (1) l'interdiction spécifiée dans le dernier alinéa du par. (8a) porte uniquement sur «l'ensemble déterminé selon l'al. *e*)»; (2) cet ensemble pour chacune des années d'imposition 1965 à 1968 est nul, vu la nécessité, aux termes des sous-al. (iii) et (iv) de l'al. *e*), de déterminer d'abord cet ensemble «pour l'année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante», c.-à-d. 1960; (3) les sous-al. (iii) et (iv) de l'al. *e*) du par. (8a) ont été interprétés par cette Cour dans *Hargal Oils Ltd. c. Le ministre du Revenu national*[8], aux pp. 295 et 296, où cette dernière a statué que le mot «ensemble»:

> [TRADUCTION] . . . comprend les dépenses qui n'étaient pas déductibles par la compagnie remplacée dans le calcul de son revenu pour l'année d'imposition où ses biens ont été acquis par la compagnie remplaçante, mais qui auraient été déductibles par la compagnie remplacée dans le calcul de son revenu pour cette année d'imposition-là «en l'absence des dispositions ... du présent paragraphe».

(4) cet extrait présuppose l'existence de corporations remplacées et remplaçantes autorisées à l'époque du transfert des biens, et il est possible de déterminer le montant à inclure dans l'ensemble uniquement au cours de l'année d'imposition où s'est effectuée la transaction; (5) au cours de l'année d'imposition 1960, le par. (8a) n'était pas applicable à l'appelante, et il ne pouvait y avoir à cette époque soit une corporation remplacée ou une corporation remplaçante, ni aucun «ensemble» auquel pourrait se rattacher dans les années d'im-

[8] [1965] R.C.S. 291.

subs. (8a) can be related in subsequent taxation years; (6) the repealing enactment is made applicable to the 1962 and subsequent taxation years and cannot be given earlier effect in determining what is to be included in the "aggregate".

I do not think that the language of subs. (8a) or the gloss which it is suggested was put upon that language in the quoted passage from *Hargal's* case leads to the conclusion for which appellant contends. The quoted passage from *Hargal's* case merely compresses the words of subs. (8a). As applied to the facts of the case now before us, subs. (8a) provides that there may be deducted by the successor corporation the "aggregate" of the drilling and exploration expenses incurred by the appellant (*i.e.* approximately $2,000,000) to the extent that such expenses (a) were not deductible by the appellant in 1960 or earlier; and (b) would but for subs. (8a) have been deductible by the appellant in 1960. The subsection does not postulate the existence of a successor corporation and a predecessor corporation in the year of acquisition. The amount of the aggregate must be determined each year in which the deduction is sought, not for the taxation year of acquisition. The starting point in computing the aggregate is to total the expenditures on drilling and exploration; this amount must then be reduced to the extent that the expenses were deductible by the predecessor corporation in the year of acquisition or in earlier years; the amount which the successor corporation may deduct must not exceed the amount which would have been deductible by the predecessor in the year of acquisition in the absence of subs. (8a). It will be observed that the appellant is claiming to be entitled to a deduction under s. 83A(1) and (3), both of which subsections speak of the "aggregate" of drilling and exploration expenses to the extent that they were not deductible in computing income for a previous taxation year. It would be strange if the "aggregate" computed in accordance with the wording of s. 83A(1) and (3) would amount to $2,000,000 but computed in accordance with the analogous wording of s. 83A(8a) would be nil. In my opinion the "aggregate" is the same whether computed under s. 83A(1) and (3) or under s. 83A(8a). There is no difficulty in applying the words of s. 83A(8a) in this case. The

position subséquentes, le dernier alinéa du par. (8a); (6) le texte législatif abrogatif est applicable aux années d'imposition 1962 et suivantes et ne peut rétroagir de façon à déterminer ce qu'il faut inclure dans l'«ensemble».

Je ne suis pas d'avis que le texte du par. (8a) et l'interprétation spécieuse qui, prétend-on, en a été donnée dans l'extrait cité de l'arrêt *Hargal* mènent à la conclusion recherchée par l'appelante. L'extrait cité de l'arrêt *Hargal* ne fait que condenser le texte du par. (8a). Tel qu'appliqué aux faits de la présente affaire, le par. (8a) dispose que la corporation remplaçante peut déduire l'«ensemble» des dépenses de forage et d'exploration engagées par l'appelante (c.-à-d. approximativement $2,000,000) dans la mesure où lesdites dépenses a) n'étaient pas déductibles par l'appelante en 1960 ou avant cette date; et b) auraient été déductibles par l'appelante en 1960 en l'absence des dispositions du par. (8a). Ce paragraphe ne présuppose pas l'existence, au cours de l'année d'acquisition, de corporations remplaçantes et remplacées. Le montant de l'ensemble doit être déterminé chaque année où l'on se prévaut de la déduction, et non pour l'année d'imposition où s'est fait l'acquisition. Pour déterminer le montant de l'ensemble, il faut d'abord établir le total des dépenses de forage et d'exploration; ce montant doit ensuite être réduit dans la mesure où les dépenses étaient déductibles par la corporation remplacée dans le calcul de son revenu pour l'année d'acquisition ou pour toute l'année antérieure; le montant déductible par la corporation remplaçante ne doit pas dépasser celui que la compagnie remplacée aurait pu déduire du calcul de son revenu pour l'année de l'acquisition en absence du par. (8a). Il convient de souligner que l'appelante prétend avoir droit à une déduction en vertu des par. (1) et (3) de l'art. 83A, qui traitent de l'«ensemble» des dépenses de forage et d'exploration, dans le mesure où elles n'étaient pas déductibles du revenu d'une année d'imposition antérieure. Il serait plutôt étrange que l'«ensemble» calculé en conformité du texte des par. (1) et (3) de l'art. 83A totalise un montant de $2,000,000, tandis qu'il serait nul lorsque calculé en conformité du texte analogue du par. (8a) de l'art. 83A. A mon avis, l'«ensemble» est le même, qu'il soit calculé selon les par. (1) et (3) de l'art. 83A ou selon

aggregate of the drilling and exploration expenses deductible by the appellant prior to the repealing enactment and since that time deductible by the successor corporation is readily identifiable and has been quantified.

I would dismiss the appeal with costs.

The judgment of Pigeon and de Grandpré JJ. was delivered by

PIGEON J. (*dissenting*)—The appellant is an oil producing company. It was incorporated under the laws of Canada on May 26, 1949, under the name of Sharples Oil (Canada) Ltd. It was a wholly owned subsidiary of Sharples Oil Corporation, a U.S. company. It did incur drilling and exploration expenses for which it would, in later years, be entitled to claim a deduction from income for taxation purposes. As of November 30, 1960, the amount of such expenditures that could be carried forward was nearly $2,000,000 (the exact amount was agreed to be $1,987,547.19). Preliminary to the winding-up of the parent company, the appellant transferred to it on that date substantially all its assets. Under subs. (8a) of s. 83A of the *Income Tax Act* as it then read (that is as enacted by 1956 c. 39, s. 23 with some immaterial amendments), this conveyance did not transfer to the parent company appellant's entitlement to future deductions because it did not meet the requirements of subparas, (*c*) and (*d*). Therefore, the conveyance did not have the effect of depriving the appellant from its entitlement to deductions in the future on that account by virtue of the concluding paragraph of subs. (8a):

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

In the winding-up of the parent company, the appellant's shares were distributed to the parent's

le par (8a) de l'art. 83A. L'application des termes du par. (8a) de l'art. 83A ne soulève aucune difficulté en l'espèce. L'ensemble des dépenses de forage et d'exploration déductibles par l'appelante avant le texte législatif abrogatif, et depuis lors déductible par la corporation remplaçante, est facilement identifiable et a été déterminé.

Je suis d'avis de rejeter le pourvoi avec dépens.

Le jugement des juges Pigeon et de Grandpré a été rendu par

LE JUGE PIGEON (*dissident*)—L'appelante est une compagnie pétrolière. Elle a été constituée par charte fédérale le 26 mai 1949 sous le nom de Sharples Oil (Canada) Ltd. Elle était une filiale exclusive de Sharples Oil Corporation, une compagnie américaine. Elle a engagé des dépenses de forage et d'exploration pour lesquelles il lui était possible, dans les années à venir, de réclamer une déduction dans le calcul de son revenu imposable. Le 30 novembre 1960, le montant de ces dépenses susceptibles d'être reportées totalisait presque $2,000,000 (les parties ayant convenu d'un montant exact de $1,987,547.19). Antérieurement à la liquidation de la compagnie-mère, l'appelante lui a transféré, à cette date-là, presque tout son actif. En vertu du par. (8a) de l'art. 83A de la *Loi de l'impôt sur le revenu*, tel qu'alors libellé (c'est-à-dire, tel que mis en vigueur par 1956 c. 39, art. 23 avec quelques modifications non pertinentes), ce transfert de l'actif n'a pas entraîné le transfert à la compagnie-mère du droit de l'appelante à des déductions futures parce que l'actif n'a pas été acquis conformément aux dispositions des al. *c*) et *d*). Par conséquent, en vertu du dernier alinéa du par. (8a) que voici, ce transfert n'a pas eu pour effet de retirer à l'appelante le droit de réclamer, pour les années d'imposition à venir, des déductions relatives aux dépenses engagées:

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

Au cours des procédures de liquidation de la compagnie-mère, ses actionnaires ont acquis les

shareholders who, as of June 18, 1964, sold all those shares to Mikas Oil Co. Ltd. for $280,000. The appellant's name was then changed to Gustavson Drilling (1964) Limited and it resumed operations as an oil producing company. Having made profits, it claimed deductions from income on account of the previously incurred drilling and exploration expenses above mentioned. These deductions totalling over $1,500,000 for 1965-68 were disallowed by reassessments. They were restored by the Tax Appeal Board but, on appeal, they were denied by the Federal Court at trial and on appeal.

The reason for which the deductions were denied was that in 1962, some two years after the transfer of appellant's assets to its parent, subparas. (*c*) and (*d*) of ss. (8a) had been repealed by statute applicable to 1962 and following taxation years. It was said in effect that by virtue of this amendment, the entitlement to the future deductions had gone with the assets to the parent company as a "successor corporation". Of course, as the latter had been wound-up, it could not take advantage of the provision but it was said that this had destroyed, as of 1962, any right which the appellant had to claim deductions on account of drilling and exploration expenditures incurred before November 30, 1960, by virtue of the concluding paragraph of ss. (8a) amended by the 1962 statute to read:

> and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for a taxation year subsequent to its taxation year in which the property so acquired was acquired by the successor corporation.

In my view, the legislative change effected in 1962 by the repeal of paras. (*c*) and (*d*) of subs. (8a) was not an alteration in the scheme of deductions for drilling and exploration expenses, but a modification in the transferability of the entitlement to those deductions. In essence, the Minister's contention which prevailed in the court below against the Tax Appeal Board's conclusion was that, although the transfer of appellant's property

actions de l'appelante et, le 18 juin 1964, ils les ont vendues à Mikas Oil Co. Ltd. pour la somme de $280,000. L'appelante a alors adopté le nom de Gustavson Drilling (1964) Limited et elle a repris ses activités comme compagnie pétrolière. Ayant réalisé des profits, l'appelante a réclamé, dans le calcul de son revenu, la déduction de certaines sommes au regard de ses dépenses de forage et d'exploration engagées antérieurement. Ces déductions, qui totalisaient plus de $1,500,000 pour les années 1965 à 1968, ont été refusées à l'occasion de nouvelles cotisations. La Commission d'appel de l'impôt les a rétablies mais elles ont ensuite été refusées par la Cour fédérale en première instance et en appel.

Les déductions ont été refusées en raison de l'abrogation, en 1962, soit deux ans après le transfert de l'actif de l'appelante à la compagnie-mère, des sous-alinéas *c*) et *d*) du par. (8a) par une loi applicable aux années d'imposition 1962 et suivantes. En fait, on a statué qu'en vertu de cette modification, la compagnie-mère en tant que «corporation remplaçante» avait acquis, en même temps que l'actif, le droit aux déductions futures. Naturellement, vu la liquidation de cette dernière, elle n'a pu tirer profit de cette disposition, mais on a statué, en vertu du dernier alinéa du par. (8a), tel que modifié en 1962 et reproduit ci-après, que cela avait retiré à l'appelante, à compter de 1962, le droit de se prévaloir d'une déduction à titre de dépenses de forage et d'exploration engagées avant le 30 novembre 1960:

> et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

A mon avis, la modification législative apportée en 1962 par l'abrogation des al. *c*) et *d*) du par. (8a) n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration; elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Selon le Ministre, bien que le transfert des biens de l'appelante à Sharples Oil Corporation effectué le 13 novembre 1960 ne s'étendait pas au droit à ces

to Sharples Oil Corporation made on November 13, 1960, did not include the entitlement to the deductions in question, this right became included in this transfer when, in 1962, an amendment to the *Income Tax Act* repealed the provisions that had prevented it from going to the transferee with the property transferred.

The rule against retrospective operation of statutes is, of course, no more than a rule of construction. It operates more or less strongly according to the nature of the enactment. However, nowhere does it operate more strongly than when any other construction would result in altering the effect of contracts previously entered into. In *Reid v. Reid*[9], Bowen L.J. said (at pp. 408-9):

> Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis,* that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a large retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.
>
> Now as to sect. 5, it applies in express terms to marriages contracted before the commencement of the Act. Then are we to take the view which Mr. *Barber* puts forward, ... this construction may displace or disturb previous dispositions of property, and therefore unless we can read in plain language that the Legislature intended what Mr. *Barber* contends for, the principle of construction with which I set out forbids us to adopt that construction.

Here, the effect of the contract was to leave the entitlement to the deductions intact in the hands of the transferor but, if the legislative change is read as applicable to that contract, the result is an outright forfeiture or confiscation of this valuable

[9] (1886), 31 Ch.D. 402.

déductions, ce droit a été incorporé au transfert en question lorsqu'en 1962 une modification à la *Loi de l'impôt sur le revenu* a abrogé les dispositions qui consacraient l'intransmissibilité de ce droit à la personne à qui les biens avaient été transférés. Cette prétention du Ministre a prévalu devant le tribunal d'instance inférieure à l'encontre de la conclusion de la Commission d'appel de l'impôt.

Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation. Sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. Dans *Reid v. Reid*[9], le lord juge Bowen tient les propos suivants (aux pp. 408 et 409):

> [TRADUCTION] Or, la règle particulière d'interprétation dont on a fait mention, mais qui est utile uniquement lorsque le texte d'une loi du Parlement est obscur, se rattache à la célèbre maxime *omnis nova constitutio futuris formam imponere debet non praeteritis,* c'est-à-dire que sauf exception, la nouvelle loi doit être interprétée de façon à minimiser au possible l'interférence avec des droits acquis. Selon moi, même lorsque nous interprétons une loi ou un article qui ont une portée rétroactive, nous devons toujours avoir à l'esprit que cette maxime entre en jeu dès que le texte cesse d'être clair. Il s'agit là d'un corollaire nécessaire et naturel de la règle générale selon laquelle il ne faut pas donner à un article une portée rétroactive plus considérable que celle que la législature a manifestement voulu lui donner, même si cette loi a, dans une certaine mesure, un effet rétroactif.
>
> Or, quant à l'art. 5, il s'applique expressément aux mariages contractés avant l'entrée en vigueur de la Loi. Allons-nous donc adopter l'opinion émise par M. *Barber*, ... cette interprétation peut toucher ou porter atteinte à des actes antérieurs, elle est donc inadmissible selon le principe énoncé au début de mes motifs, à moins qu'il nous apparaisse clairement que la prétention de M. *Barber* est conforme à l'intention du législateur.

En l'espèce, le contrat avait pour effet de laisser intact entre les mains du cédant le droit aux déductions, mais, si la modification législative est jugée applicable, il y a alors déchéance complète de ce droit précieux à cause de la liquidation du

[9] (1886), 31 Ch.D. 402.

right, the transferee having been wound-up. On that construction, if the transferee was a subsisting oil company it would, without any consideration therefor, obtain this valuable right in addition to the properties conveyed. In the instant case, the appellant's shares were sold after the 1962 amendment but, on the Minister's submission, it would make no difference if they had been bought before the amendment, the purchasers would have lost what they paid for. Bearing in mind the presumption against retrospective operation, can the statute be read so as to avoid this unjust result?

The application provision of the 1962 amending act enacts that the relevant subsection is applicable to the 1962 and subsequent taxation years. The Minister says this means that assessments for those years are to be made in accordance with the law as changed by the new statute. I do not deny that such is ordinarily the effect of an enactment in those terms. However, I cannot see why, in view of the nature of the substantive enactment, it would not be read differently with respect to the provisions with which we are concerned, namely, provisions which concern the legal effect of contracts in relation to a scheme of entitlement to deductions intended to be available for many years in the future. Because of the special risk involved in exploring and drilling for oil Parliament has departed from the principle of yearly deductions of expenses, deductions for drilling and exploration expenses are available to oil companies in subsequent years.

While after the sale of its assets the appellant was no longer in a situation in which it could claim deductions for drilling and exploration expenses, it had a perfect right to resume active operations and claim in later years. It had not lost its entitlement to such deductions in appropriate circumstances, such entitlement was a valuable asset of enduring value involving substantial potential benefits just as some other kinds of tax losses. While the realization of actual benefits from such assets is subject to restrictions and conditions, they are commonly bought and sold through the acquisition of the shares of the company holding them. This is some-

cessionnaire. Selon cette interprétation, si le cessionnaire était une compagnie pétrolière existante il obtiendrait, sans contre-partie, ce droit précieux en plus des biens cédés. Dans la présente affaire, on a vendu les actions de l'appelante après l'entrée en vigueur de la modification de 1962 mais, de l'aveu même du Ministre, les acheteurs auraient perdu l'objet de leur achat même s'ils avaient acheté les actions avant l'entrée en vigueur de la modification. En ayant à l'esprit la présomption contre la rétroactivité, peut-on interpréter la loi présentement en cause de façon à éviter ce résultat injuste?

La disposition visant l'application de la loi modificatrice de 1962 prévoit que le paragraphe en question s'appliquera aux années d'imposition 1962 et suivantes. Selon le Ministre, cela signifie que les cotisations pour ces années-là doivent s'effectuer en conformité du droit modifié par la nouvelle loi. Je ne nie pas que ce soit ordinairement l'effet d'un texte législatif ainsi libellé. Toutefois, en raison de la nature du système de déductions dont il s'agit, je ne vois pas pourquoi on ne pourrait pas l'interpréter différemment à l'égard des dispositions en cause, c'est-à-dire celles qui portent sur l'effet juridique des contrats conclus en relation avec ce système de déductions à faire pendant plusieurs années à venir. A cause du risque particulier propre à l'exploration et au forage visant à découvrir du pétrole, le Parlement s'est écarté du principe de la déduction annuelle des dépenses en autorisant les compagnies pétrolières à déduire au cours des années subséquentes leurs dépenses de forage et d'exploration.

Bien qu'après la vente de son actif l'appelante ne fût plus en mesure de se prévaloir du droit de déduire ses dépenses de forage et d'exploration, elle conservait néanmoins le droit légitime de reprendre plus tard ses activités et de réclamer alors les déductions. Elle n'avait pas perdu le droit de faire ces déductions dans des circonstances appropriées, et ce droit était un bien précieux de valeur permanente qui comporte d'importants avantages éventuels à l'instar d'autres types de pertes admissibles pour fins fiscales. Bien que la réalisation profitable de semblables actifs soit soumise à des restrictions et conditions, ils sont régu-

thing which appears from the facts of the case and of which we should anyway take judicial notice. It is not something of which Parliament may be deemed to have been unaware in passing the legislation. Due to the nature of the entitlement to future deductions for drilling and exploration expenses, it should not be presumed that a company holding such an asset will not seek to realize its value in later years just because, at one point, it has sold or otherwise disposed of its properties. The 1962 amendment should not be looked upon purely as conferring the right to claim deductions upon the purchaser of the properties. There is a correlative withdrawing of this right from the vendor which Parliament's so-called liberality effected at the same time. Thus the true nature of the operation is a transfer of the entitlement to the deductions.

I cannot agree that our present income tax legislation should be construed on the basis of the special rules that were developed in the days when the taxation statutes were yearly drawn up in the Ways and Means Committee. Our *Income Tax Act* is permanent legislation and we are here dealing with incentive provisions, that is a system of deductions designed to encourage investment. It is true that it is within Parliament's power to breach the promises of special treatment on the faith of which investments have been made. There is however a strong presumption against any intention to do this. In the present case, there was clearly no such intention. The scheme of deductions was not repealed. Appellant would admittedly be entitled to the deductions were it not for the fact that, some years previously, it transferred its property to another corporation, as it could lawfully do without prejudicing its entitlement to the deductions. At that time, this transfer did not carry the right to the deductions although it would now do so. Under such circumstances, it does not appear to me that the application provision may properly be read as making the new law applicable to a contract previously executed so as to change its effect especially when such change is nothing but an entirely unjustified forfeiture or confiscation of valuable rights.

lièrement achetés et vendus par l'acquisition des actions de la compagnie qui les possède. Les faits de l'espèce le démontrent et, de toute façon, j'estime que nous devons en prendre connaissance d'office. Il ne s'agit pas d'une situation dont le Parlement pouvait ignorer l'existence lors de l'adoption du texte législatif. Vu le caractère du droit aux déductions futures pour dépenses de forage et d'exploration, on ne doit pas présumer qu'une compagnie qui possède un tel actif ne cherchera pas plus tard à le réaliser, uniquement parce qu'à une certaine époque, elle a vendu ses biens ou en a autrement disposé. On ne doit pas interpréter la modification de 1962 comme ayant pour seul effet de donner à l'acquéreur le droit aux déductions. La prétendue générosité du Parlement comporte également le retrait corrélatif de ce droit au vendeur. La disposition a donc pour but véritable d'effectuer le transfert du droit aux déductions.

Je ne peux partager l'avis selon lequel nos présentes lois fiscales doivent être interprétées suivant les règles spéciales établies à l'époque où le Comité des voies et moyens rédigeait annuellement les lois fiscales. Notre *Loi de l'impôt sur le revenu* est une loi permanente, et nous sommes aux prises ici en présence de dispositions visant à encourager les investissements par l'instauration d'un régime de déductions. Il est vrai que le Parlement a le pouvoir de briser les promesses de traitement privilégié sur la foi desquelles des investissements ont été faits. Toutefois, une forte présomption existe à l'encontre d'une intention semblable. En l'espèce, il n'y a trace d'aucune telle intention. Le régime de déduction n'a pas été abrogé. De toute évidence, l'appelante aurait droit aux déductions si elle n'avait, quelques années auparavant, transféré ses biens à une autre corporation comme elle pouvait légitimement le faire sans porter atteinte à son droit de se prévaloir des déductions. A cette époque-là, ce transfert n'emportait pas celui du droit aux déductions, bien qu'aujourd'hui il en soit autrement. Dans de telles circonstances, j'estime qu'on ne peut, à bon droit, interpréter la disposition visant l'application de la nouvelle loi comme signifiant qu'elle est applicable à un contrat déjà exécuté, de façon à en modifier l'effet, surtout lorsqu'une telle modification ne constitue rien de moins qu'une confiscation entièrement injustifiée de droits précieux.

Concerning the decision of this Court in *Acme Village School District v. Steele-Smith*[10], I would point out that the situation was quite different. The dispute was between a school teacher and a school board which was his employer. The agreement between them provided for termination by either party giving thirty days notice in writing to the other. Subsequent to the making of the agreement, the Legislature amended the section of the *School Act* contemplating the termination of teachers' engagements by such notice. The amendment provided that except in the month of June, no such notice shall be given by a Board without the approval of an inspector previously obtained. This Court held that the teacher was entitled to the benefit of the amendment. Lamont J. said, speaking for the majority (at p. 52):

> Considering the nature and scope of the Act and the control over the agreement between teacher and Board retained by the Minister, and considering also that the mischief for which the legislature was providing a remedy was a presently existing evil which the legislature proposed to cure by making the right of either party to terminate the agreement depend upon the consent of the inspector, I am of opinion that sufficient has been shewn to rebut the presumption that the section was intended only to be prospective in its operation.

With deference for those who hold a different view, it seems to me that if a similar reasoning is applied to the contract and legislation in question herein, the result ought to be that the intention of Parliament in effecting the legislative change in 1962 was to facilitate the transfer of the right to deductions, not to alter the result of past contracts so as to effect a forfeiture of the rights of those oil companies that had previously transferred their properties under conditions that did not involve a transfer of their entitlement to the transferee. In my view, the words used by Parliament do not compel us to reach the result contended for by the Minister. That this is a matter of taxation in which it is said no resort to equity can be had, makes in my view no difference.

I would allow the appeal with costs throughout to the appellant, reverse the judgments of the

[10] [1933] S.C.R. 47.

Quant à l'arrêt rendu par cette Cour dans *Acme Village School District c. Steele-Smith*[10], je tiens à souligner que la situation était très différente. Le litige était entre un enseignant et son employeur, une commission scolaire. La convention qui les liait stipulait que l'une ou l'autre des parties pouvait y mettre fin par préavis de trente jours. Après la conclusion de la convention, la législature a modifié l'article du *School Act* relatif à la cessation d'emploi d'un enseignant suite à un tel préavis. Selon la modification, le préavis ne pouvait plus être donné, sauf au mois de juin, sans l'accord préalable d'un inspecteur. Cette Cour a statué que l'enseignant était autorisé à se prévaloir de la modification. Le juge Lamont, au nom de la majorité, s'est exprimé ainsi (à la p. 52):

> [TRADUCTION] Compte tenu du caractère et de la portée de la Loi et du contrôle que le Ministre a conservé sur la convention liant l'enseignant et la Commission, et compte tenu également du fait que le redressement apporté par la Législature s'adresse à un problème actuel que cette dernière se propose de régler en subordonnant au consentement d'un inspecteur le droit de chacune des parties de mettre fin à la convention, j'estime qu'il y en a assez pour réfuter la présomption que l'article ne doit produire son effet que dans l'avenir.

Avec respect pour l'opinion contraire, je suis d'avis que l'application de ce raisonnement au contrat et à la Loi en question incite plutôt à conclure que l'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire. A mon avis, les mots employés par le Parlement ne nous obligent pas à conclure dans le sens que le voudrait le Ministre. Selon moi, il importe peu qu'il s'agisse en l'espèce d'une question de fiscalité à l'égard de laquelle aucun recours en *equity* ne peut être exercé.

J'accueillerais le pourvoi avec dépens dans toutes les cours en faveur de l'appelante, j'infirme-

[10] [1933] R.C.S. 47.

Federal Court at trial and on appeal, and restore the judgment of the Tax Appeal Board.

Appeal dismissed with costs, PIGEON *and* DE GRANDPRÉ JJ. *dissenting.*

Solicitors for the appellant: McDonald & Hayden, Toronto.

Solicitors for the respondent: D. S. Maxwell, Ottawa.

rais les jugements rendus par la Cour fédérale en première instance et en appel, et je rétablirais le jugement de la Commission d'appel de l'impôt.

Pourvoi rejeté avec dépens, les juges PIGEON *et* DE GRANDPRÉ *étant dissidents.*

Procureurs de l'appelante: McDonald & Hayden, Toronto.

Procureur de l'intimé: D. S. Maxwell, Ottawa.

TAB 7

SULLIVAN ON THE CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

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§24.29 When commencement is deemed to occur before it actually occurs, the legislature creates a legal fiction but does not change reality. In every such case the legislation in fact comes into force either upon enactment or upon some subsequent event and is then applied retroactively to acts or events occurring before that day. The same result could be achieved without fiction by declaring that the legislation applies to facts existing on or occurring before or after a designated day.

REPEAL

§24.30 ***Rules governing repeal.*** When legislation provides that it is to come to an end at a designated time, it is said to "expire".[30] When legislation is ended by an Act of the legislature, it is said to be "repealed". A statute is not repealed, nor does it expire, through the passage of time or by reason of non-use or obsolescence.[31] Unless the legislature has fixed a limit for the duration of legislation, it continues in force until it is repealed.

§24.31 Repeal is the key terminal event in the operation of legislation. At common law, when a repeal takes effect, the repealed legislation ceases to be law and ceases to be binding or to produce legal effects. This means that conduct that was formerly prohibited is now lawful. It also means that everything dependent on the repealed legislation for its existence or efficacy ceases to exist or to produce effects. Regulations lose the force of law and become mere pieces of paper; holders of office become ordinary citizens; corporate bodies cease to exist.[32]

§24.32 The basic principle underlying the common law effects of repeal was stated by Lord Tenterden in *Surtees v. Ellison*:

> ... when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) *as if it had never existed*.[33]
>
> [Author's emphasis]

This rule has some startling implications, both for the operation of legislation and for the temporal application of repeal. It implies, for example, that upon the repeal of legislation any previously existing law that was displaced by the repealed legislation is revived. In effect, the displacement that occurred when the repealed legislation first came into force is deemed never to have occurred. It also implies that repeals apply retroactively. Except for transactions already past

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30 Expiry is a form of repeal that is rarely used by legislatures. It is governed by the same rules as repeal. See *Moakes v. Blackwell Colliery Co.*, [1925] 2 K.B. 64, at 70 (C.A.).

31 For discussion of judicial responses to obsolete legislation, see Chapter 6, at §6.42*ff*.

32 See *Kay v. Goodwin* (1830), 6 Bing. 576, 130 E.R. 1403, at 1405 (C.P.); *Surtees v. Ellison* (1829), 9 B. & C. 750, 109 E.R. 278, at 279 (K.B.).

33 *Surtees*, *ibid.*, at 279. See also *R. v. A.D.*, [2005] S.J. No. 100, at para. 32 (Sask. C.A.); *Kay*, *ibid.*, at 1405.

and closed when the repeal took effect, the repealed law ceases to be applicable not only to facts occurring after the repeal but to pre-repeal facts as well.

§24.33 Neither of these implications has been allowed to stand. Canadian Interpretation Acts provide that repeal does not revive legislation or anything that was not in existence at the time of the repeal.[34] These Acts also provide for the survival or continued application of repealed legislation to facts arising in whole or in part prior to repeal. The rules governing survival are examined in Chapter 25 dealing with the temporal application of legislation.

§24.34 ***Repeal techniques.*** In principle, the legislature has a range of techniques available to effect a repeal. In practice, however, the usual method of repeal in Canadian jurisdictions is highly stylized. Using a standard form of words, the legislature enacts a provision that declares certain legislation to be repealed.[35] If an amendment is contemplated in addition to repeal, the provision declares that the following words or provisions are substituted for the repealed legislation. The repeal does not operate until the repealing or amending provision comes into force.

§24.35 Most Interpretation Acts define "repeal" to include "revoke or cancel".[36] This ensures that regulations are covered by the statutory provisions governing repeal. In addition, the federal *Interpretation Act* provides:

> 2.(2) For the purposes of this Act, an enactment that has been replaced is repealed and an enactment that has expired, lapsed or otherwise ceased to have effect is deemed to have been repealed.[37]

This section makes it clear that provisions replaced in the course of an amendment are effectively repealed and therefore are subject to the survival provisions of the Act. On their face, the words "ceased to have effect" appear to encompass inoperative legislation. However, such an interpretation would undermine the distinction between provisions that are genuinely repealed, that is, have ceased

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34 R.S.C. 1985, c. I-21, s. 43(a); R.S.A. 2000, c. I-8, s. 35(1)(a); R.S.B.C. 1996, c. 238, s. 35(a); C.C.S.M. c. I80, s. 46(1)(a); R.S.N.B. 1973, c. I-13, s. 8(1)(a); R.S.N.L. 1990, c. I-19, s. 29(1)(a); R.S.N.S. 1989, c. 235, s. 23(1)(a); S.O. 2006, c. 21, Sched. F, s. 51; R.S.P.E.I. 1988, c. I-8, s. 32(a); CQLR, c. I-16, s. 9 [rep. & sub. S.Q. 1982, c. 62, s. 153]; S.S. 1995, c. I-11.2, s. 34(1)(a); R.S.N.W.T. 1988, c. I-8, s. 35(a); R.S.N.W.T. (Nu) 1988, c. I-8, s. 35(a); R.S.Y. 2002, c. 125, s. 23(1)(a).

35 But see *Canfield v. Prince Edward Island*, [1998] P.E.I.J. No. 21, at paras. 52-56 (P.E.I. C.A.), where the Court held that whether an enactment has been repealed is a matter of legislative intent; it is not necessary to use the word "repeal".

36 R.S.C. 1985, c. I-21, s. 2(1); R.S.A. 2000, c. I-8, s. 1(1); R.S.B.C. 1996, c. 238, s. 1; C.C.S.M. c. I80, s. 1; R.S.N.L. 1990, c. I-19, s. 2(1)(c); R.S.N.S. 1989, c. 235, s. 7(1)(y); R.S.P.E.I. 1988, c. I-8, s. 1(f); S.S. 1995, c. I-11.2, s. 2; R.S.N.W.T. 1988, c. I-8, s. 1; R.S.N.W.T. 1988, c. I-8, s. 1; R.S.Y. 2002, c. 125, s. 1(1).

37 R.S.C. 1985, c. I-21, s. 2(2) [rep. and sub. S.C. 1993, c. 34, s. 88; am. S.C. 2003, c. 22, s. 224(z.43) (E)]; see also R.S.A. 2000, c. I-8, s. 1(2); R.S.B.C. 1996, c. 238, s. 4(4); C.C.S.M. c. I80, s. 45; R.S.N.L. 1990, c. I-19, s. 2(2); R.S.P.E.I. 1988, c. I-8, s. 5(3); R.S.Y. 2002, c. 125, s. 1(2).

It is arguable that an analysis of this sort, based on the principles underlying transitional law, is superior to an analysis based on situating facts in time – at least in those cases where the legal situation (the facts and their legal effect) can be characterized in more than one way.

THE RETROACTIVE APPLICATION OF LEGISLATION

§25.50 ***Retroactivity.*** Legislation receives a retroactive application when the effect of applying it to particular facts is to deem the law to have been different from what it actually was when the facts occurred. This is the standard definition of retroactivity in current Canadian law, as explained in the *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*.[51] The Supreme Court of Canada there ruled that applying an amended provision of the *Income Tax Act* to the facts in question was not retroactive because it did not change the past. Dickson J. wrote:

> ... [the] enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively [in the terminology of this text, retroactively]...; [it] does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date.[52]

It is obvious that reaching into the past and declaring the law to be different from what it was is a serious violation of rule of law. As Raz points out, the fundamental principle on which rule of law is built is advance knowledge of the law.[53] No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is unfair as well as arbitrary. Even for persons who are not directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retroactive legislation.

§25.51 For these reasons it is strongly presumed that legislation is not intended to be retroactive. As stated by Dickson J. in *Gustavson Drilling*:

> The general rule is that statutes are not to be construed as having retrospective [i.e. retroactive] operation unless such a construction is expressly or by necessary implication required by the language of the Act.[54]

Later, in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (Man.), he wrote:

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51 [1975] S.C.J. No. 116, [1977] 1 S.C.R. 271 (S.C.C.).

52 *Ibid.*, at 279.

53 J. Raz, "The Rule of Law and its Virtue" in *The Authority of Law* (New York: Oxford University Press, 1979).

54 *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1975] S.C.J. No. 116, [1977] 1 S.C.R. 271, at 279 (S.C.C.).

> It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid...This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law.[55]

Even where it is clear that legislation is meant to have a retroactive application, the extent of the retroactivity should be minimized. This point was made by Goodman J.A. in *Joe Moretta Investments Ltd. v. Ontario (Minister of Housing)*:

> ... in interpreting legislation which has a retrospective [i.e. retroactive] effect, it is not to be construed to have a greater retrospective [i.e. retroactive] operation than its language required.[56]

§25.52 ***Rebutting the presumption.*** The presumption against the retroactive application of legislation can be rebutted by express words or by necessary implication.[57] All that is required is some sufficient indication that the legislation is meant to change the law for the past as well as the future.

§25.53 Retroactive legislation often states that it is deemed to have come into force or effect on a day before the day of enactment. Or it may state that it applies to designated facts occurring from or before a particular date or time. The following provisions from legislation amending Ontario's (former) *Residential Rent Regulation Act* illustrate the latter approach:

> 99.2.-(1) ... this Part applies to every rent increase that takes effect on or after the 1st day of October, 1990.
>
> ...
>
> 99.14.-(1) This section applies to an order made ... under Part VI ... even if made before the 1st day of October, 1990.[58]

Because the presumption against the retroactive application of legislation is strong, express provisions of this sort often are included in legislation. They do not follow any fixed pattern.

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55 [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at para. 34. See also *Dell Computer Corp. v. Union des consommateurs*, [2007] S.C.J. No. 34, 2007 SCC 34, [2007] 2 S.C.R. 801, at para. 119 (S.C.C.).

56 [1992] O.J. No. 922, 8 O.R. (3d) 129, at 145 (Ont. C.A.). See also *Grand Rapids (Town) v. Graham*, [2004] M.J. No. 342, 2004 MBCA 138, at para. 14 (Man. C.A.); *CNG Producing Co. v. Alberta (Provincial Treasurer)*, [2002] A.J. No. 1108, 2002 ABCA 207, 218 D.L.R. (4th) 257, at paras. 26-36 (Alta. C.A.).

57 See, for example, *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.); *First Vancouver Finance v. M.N.R.*, [2002] S.C.J. No. 25, [2002] 2 S.C.R. 720 (S.C.C.); *Barbour v. University of British Columbia*, [2010] B.C.J. No. 219, 2010 BCCA 63 (B.C.C.A.); *Grand Rapids (Town) v. Graham*, [2004] M.J. No. 342, 2004 MBCA 138 (Man. C.A.).

58 S.O. 1991, c. 4, Vol. 2.

entailed rejection of that presumption. It remains to be seen where the courts will go next.

§25.105 Arguably the better view is that, outside the context of the *Civil Code of Quebec*, legislation may be applied to facts in progress, or to an ongoing legal situation such as a contract, provided the application does not interfere with vested rights or the legislature has adequately indicated an intention to interfere with the rights in question.

§25.106 In any case, in the interests of clarity, it is hoped that courts will move away from labels and fine distinctions. The distinction that matters is the one between retroactive legislation (as defined by Driedger and Roubier – legislation that changes past legal effects) and legislation that changes future legal effects only (which Driedger labels retrospective and Roubier labels immediate and which might simply be called prospective). The presumption against the former is heavily weighted because retroactive legislation or retroactive applications in most circumstances amount to a serious violation of the rule of law that legislatures are unlikely to have intended. The same cannot be said of legislation or applications that change future legal effects only. The degree of unfairness or unexpectedness resulting from such changes is variable and must be assessed on a case by case basis.

PROCEDURAL LEGISLATION

§25.107 ***Procedural legislation is presumed to have immediate application.*** There is a common law presumption that procedural legislation applies immediately to both pending and future facts. This presumption is formulated in a variety of ways: (1) persons do not have a vested right in procedure; (2) the effect of a procedural change is deemed to be beneficial for all; (3) procedural provisions are an exception to the presumption against retrospectivity; and (4) procedural provisions are ordinarily intended to have an immediate effect. Baron Wilde's formulation of the rule in *Wright v. Hale* is precise and is frequently cited:

> ... where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.[168]

Cromwell J. in *R. v. Dineley*, is similarly precise:

> [I]n the absence of legislative indication to the contrary, procedural law is presumed to operate from the moment of its enactment, regardless of the timing of the facts underlying a particular case.[169]

§25.108 Procedural legislation is about the conduct of actions. It indicates how actions will be prosecuted, how proof will be made and how rights will be en-

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168 (1860), 6 H. & N. 227, at 232, 158 E.R. 94. Quoted with approval in *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at para. 62 (S.C.C.).

169 [2012] S.C.J. No. 58, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 47 (S.C.C.).

forced in the context of a legal proceeding. Such legislation is presumed to apply immediately to on-going proceedings. This is a prospective application, even if proceedings have already commenced, because the new legislation applies only to stages in the proceedings or to procedural events that occur after its coming into force.[170]

§25.109 Although the application of procedural legislation is properly characterized as immediate and prospective, courts often say its application is retrospective. *Re Application under s. 83.28 of the Criminal Code*[171] offers a good example. Section 83.28 was introduced into the Code by the *Anti-Terrorism Act* of 2001. It authorized a judge to order a person with information concerning a terrorism offence to attend an investigative hearing and submit to questioning by the Attorney General or an agent of the Attorney General and it set out a series of rules governing the conduct of the hearing. In 2003, the appellant was served with an investigative hearing order because it was believed she had information relating to a terrorism offence that occurred in 1985. She contended that the order against her amounted to a retrospective application of the section because the offence to be investigated occurred before s. 83.28 came into force. Since Parliament would not have intended the section to apply retrospectively, the order was invalid.

§25.110 A majority of the Court rejected this argument on the grounds that the law introduced by the section was purely procedural. Iacobucci and Arbour JJ. concluded:

> ....s. 83.28 does not interfere with the substantive rights of the appellant, and is, accordingly, strictly procedural. The appellant has not rebutted the presumption of immediate application. *As such, s. 83.28 has immediate effect, and applies retrospectively to the effects of past events.*[172]
>
> [Author's emphasis]

In other words, although applying s. 83.28 to the appellant has a retrospective effect, the section is applied immediately because it is purely procedural. It is hard to see how requiring the appellant to tell what she knows changes the legal effect of a past event. As the Court itself points out, the investigative hearing provided for in s. 83.28 is a "mechanism for the gathering information and evidence in *the ongoing investigation* of past, present, and future offences".[173] Traditionally, the rules governing investigations and proceedings have not been

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170 For a helpful summary of the law governing the application of procedural legislation, see *R. v. Dineley*, [2012] S.C.J. No. 58, 2012 SCC 58, [2012] 3 S.C.R. 272, at paras. 53*ff.* (S.C.C.). See also *Peel (Regional Municipality) Police v. Ontario (Director, Special Investigations Unit)*, [2012] O.J. No. 2008, 2012 ONCA 292, at paras. 77-87 (Ont. C.A.), where the Court held that legislation transferring responsibility for investigations into alleged police offences from the police force to a special investigation unit was procedural.

171 [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248 (S.C.C.).

172 *Ibid.*, at para. 66.

173 *Ibid.* Author's emphasis.

thought of as applying to the facts being investigated or the events that gave rise to the proceedings. They apply to the on-going investigation or proceedings, which is an immediate but not a retrospective application.[174] If they do more than that, they are not procedural.

§25.111 The presumption that procedural legislation in intended to have an immediate effect is partially codified in Canadian Interpretation Acts. The federal Act, which is used as a model here, has two relevant provisions. Section 44 provides:

> 44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;
>
> (d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto
>
> (i) in the recovery or enforcement of fines, penalties and forfeitures imposed under the former enactment,
>
> (ii) in the enforcement of rights, existing or accruing under the former enactment, and
>
> (iii) in a proceeding in relation to matters that have happened before the repeal.[175]

These provisions call for the immediate application of new procedural law to all actions, including those that were pending when the legislation came into force, unless there is some obstacle in the way. Section 44(c) applies to actions that are pending, while s. 44(d) applies to actions brought to enforce repealed law that has been continued under s. 43 or otherwise. Although the application of new substantive law is delayed by the survival of repealed law,[176] the application of new procedural law is not.

§25.112 ***Defining "pure" procedure.*** Procedural law may be defined as law that governs the methods by which facts are proven and legal consequences are

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174 See, for example, *Fabrikant c. Canada (Attorney General)*, [2014] Q.J. No. 892, 2014 QCCA 240, at para. 39 (Que. C.A.).

175 R.S.C. 1985, c. I-21, s. 44(c)(d); see also R.S.A. 2000, c. I-8, s. 36(1)(b)(c); R.S.B.C. 1996, c. 238, s. 36(1)(b)(c); C.C.S.M. c. I80, s. 47(3), (4); R.S.N.B. 1973, c. I-13, s. 8(2)(c)(d); R.S.N.L. 1990, c. I-19, s. 29(2)(c)(d); R.S.N.S. 1989, c. 235, s. 23(3)(c)(d); S.O. 2006, c. 21, s. 52(3)(4); R.S.P.E.I. 1988, c. I-8, s. 33(1)(b)(c); R.S.Q. c. I-16, s. 13 [am. S.Q. 1986, c. 22, s. 30]; S.S. 1995, c. I-11.2, s. 35(1)(d)(e)(f); R.S.N.W.T. 1988, c. I-8, s. 36(2)(b)(c); R.S.N.W.T. (Nu) 1988, c. I-8, s. 36(2)(b)(c); R.S.Y. 2002, c. 125, s. 23(2)(c)(d).

176 The effect of survival on substantive amendments to the law is explained below at §25.165*ff*.

established in any type of proceedings. This includes filings and applications to government offices as well as more formal actions before tribunals and courts.

§25.113 Whether a provision is procedural must be determined in the circumstances of each case. A provision may be procedural as applied to one set of facts but substantive as applied to another. To be considered procedural in the circumstances of a case, a provision must be exclusively procedural; that is, its application to the facts in question must not interfere with any substantive rights or liabilities of the parties or produce other unjust results. This point is emphasized repeatedly in the cases.[177]

§25.114 In *Angus v. Sun Alliance Insurance Co.*,[178] for example, the Supreme Court of Canada had to consider whether new legislation that removed certain bars to recovery in negligence was applicable to a pending action. The respondent was injured in an accident caused by the negligence of her husband who was driving her father's car. Under the legislation in force at the time, she could not recover from either her husband or her father's insurer. Spouses could not sue one another in tort and insurers were not liable for injury suffered by the children of the insured. A short while later, the *Family Law Reform Act, 1975* came into force and removed these bars to recovery. Hoping to take advantage of the new law, the respondent argued that it was procedural in character and therefore applied immediately to pending actions such as hers. This argument did not succeed. La Forest J. took the view that immunities from suit and defences are substantive matters and their removal is in effect an extinguishment of substantive rights. He wrote:

> Normally, rules of procedure do not affect the *content or existence* of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the *manner* of its enforcement or use.... Alteration of a "mode" of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely. The latter is in essence an interference with a vested right.[179]
>
> [Emphasis in original]

The existence and content of any right to bring an action, to bring an appeal or to seek judicial review, as well as the existence and content of defences and excuses, are considered substantive rather than procedural.[180] So are matters of

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177 See *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at para. 57 (S.C.C.).

178 [1988] S.C.J. No. 75, [1988] 2 S.C.R. 256 (S.C.C.).

179 *Ibid.*, at 265-66.

180 See, for example, *Re Royal Canadian Mounted Police Act*, [1990] F.C.J. No. 1133, 123 N.R. 120, at 141-42 (F.C.A.). For discussion and additional authorities, see P.-A. Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2010), at pp. 193-201.

jurisdiction[181] and determination of the standard of judicial review applicable to a decision.[182]

§25.115 In *R. v. Dineley*, the Court referred to another factor that may be relevant in determining whether amendments should apply immediately. "It is whether they [the amendments] require evidence that the accused had no reason to gather under the former legislation."[183] Dineley was concerned with amendments to the provisions governing reliance on breathalyzer evidence in charges of impaired driving. Under the former legislation, the presumption that the results of breathalyzer tests accurately reflect an accused's blood alcohol levels at the relevant time could be rebutted through expert opinion evidence that the amount of alcohol consumed was inconsistent with the test results. Under the amended legislation, an accused had to present evidence that the use or operation of the test apparatus was defective. In the view of the majority, under the previous law, an accused would have had little incentive to seek evidence concerning the use and operation of the test apparatus. To apply the new law would therefore be unfair.

§25.116 In determining whether a provision is "purely" procedural, the courts look to the substance of the provision and its practical impact on the parties. The important thing is not the label, but the effect. If the effect of a provision is to alter the legal significance of past facts, it is not purely procedural. This point was made by Lord Brightman in *Yew Bon Tew v. Kenderaan Bas Mara*, in a passage quoted with approval by the Supreme Court of Canada:

> ... the proper approach to the construction of the Act ... is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively [immediately] to a particular type of case, would impair existing rights and obligations.[184]

This point is emphasized by both the majority and the dissent in *R. v. Dineley*.[185] It is illustrated by the reasoning of the Saskatchewan Court of Appeal in *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp*.[186] In that case, the Union filed an application for certification with the Saskatchewan Labour Relations Board in 2004. Under *The Trade Union Act* in force at the

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181 *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.J. No. 80, [1971] S.C.R. 1038, at 1040 (S.C.C.).

182 *British Columbia v. Bolster*, [2007] B.C.J. No. 192, 2007 BCCA 65, at para. 108 (B.C.C.A.).

183 [2012] S.C.J. No. 58, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 12 (S.C.C.).

184 [1983] 1 A.C. 553, at 563 (P.C.); approved in *Martin v. Perrie*, [1986] S.C.J. No. 1, [1986] 1 S.C.R. 41 (S.C.C.). Lord Brightman refers to the application of procedural legislation as retrospective, but under the analysis adopted in this text, if legislation is purely procedural, its application is immediate rather than retrospective. See also *R. v. Dineley*, [2012] S.C.J. No. 58, 2012 SCC 58, [2012] 3 S.C.R. 272, at paras. 55*ff.* (S.C.C.); *Upper Canada College v. Smith*, [1920] S.C.J. No. 72, 61 S.C.R. 413, at 424 (S.C.C.); *R. v. Ford*, [1993] O.J. No. 1936, 15 O.R. (3d) 173, at 185-86 (Ont. C.A.).

185 [2012] S.C.J. No. 58, 2012 SCC 58, [2012] 3 S.C.R. 272, at paras. 11, 55-59 (S.C.C.).

186 [2010] S.J. No. 590, 2010 SKCA 123 (Sask. C.A.).

time, in certain circumstances certification could be ordered, and in practice was ordered, on the basis of documentary evidence of employee support; a vote was not required. In the instant case, by late 2005 all the evidence concerning the certification had been tendered and the objections and arguments heard. The Board reserved its decision and in 2008 issued an order certifying the Union as bargaining agent for a unit of employees. Some months before this order was made, the Act was amended limiting the discretion of the Board. Henceforth, a vote was required in all circumstances and could be ordered only if a certain percentage of employees, established through documentary evidence and tendered within 90 days of the application, supported the Union. On its face, these amendments appear to be procedural in that they determine the manner in which employee support for a union is to be established. However, after considering the impact of the amendments on some hypothetical fact patterns, the Court concluded that applying the new provisions would change the legal significance of evidence tendered before the provisions came into force:

> [I]f the *New Section* applied to certification applications filed and argued under the *Old Section* but not decided as of the date the *New Section* came into force, there would be a change in the legal effect of the evidence brought forward by the union. Rather than putting in train a process that would inevitably lead to a vote, the evidence would have no effect at all.
>
> In the result, it seems very doubtful that the changes effected by the *New Section* in 2008 can be properly described as being purely procedural in nature.[187]

The Court pointed out that applying the new provisions to past stages of the proceedings so as to change their legal effect would be a retroactive rather than an immediate application.[188]

§25.117 ***Limitation of actions.***[189] To determine the temporal application of limitation of action provisions, courts appropriately rely on the basic principle that purely procedural provisions do not affect substantive rights.[190] When a new limitation of action provision comes into force, it may extend or shorten the period within which an action must be commenced. If the provision comes into force before the period has lapsed, and if applying it would not have the effect of extinguishing the right of action, then its application to those facts is said to be purely procedural. In such a case, for both parties, the only thing that is lost or

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187 *Ibid.*, at paras. 49-50.

188 *Ibid.*, at paras. 50-51.

189 The rules stated in the text apply where the period is extended or shortened directly or where this is done indirectly by redefining the starting point or the relevant cause of action. See *Martin v. Perrie*, [1986] S.C.J. No. 1, [1986] 1 S.C.R. 41, at 205-08 (S.C.C.).

190 The leading Canadian case is *Martin v. Perrie*, [1986] S.C.J. No. 1, [1986] 1 S.C.R. 41 (S.C.C.), which follows *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553 (P.C.), and *Maxwell v. Murphy* (1956-57), 96 C.L.R. 261 (H.C. Aus.). See also *R. v. Ford*, [1993] O.J. No. 1936, 15 O.R. (3d) 173 (Ont. C.A.), where the principle is applied in the context of a penal prosecution.

> ... when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.[283]

The effect of this rule was to preclude the application of repealed legislation to circumstances and events occurring prior to repeal. Anything that had not been dealt with definitively before repeal was effectively abandoned. Persons charged with offences were free to go, and persons entitled to benefits or privileges lost their entitlement. For obvious reasons, this rule proved unacceptable and has been displaced by statute.

§25.166 ***Statutory survival.*** Under the Interpretation Acts of all Canadian jurisdictions, provision is made for the continued application of repealed legislation to facts occurring prior to repeal. At the federal level, s. 43 provides:

> 43. Where an enactment is repealed in whole or in part, the repeal does not
>
> ...
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,
>
> (*d*) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or
>
> (*e*) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (*c*) or in respect of any punishment, penalty or forfeiture referred to in paragraph (*d*),
>
> and an investigation, legal proceeding or remedy as described in paragraph (*e*) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.[284]

In other words, the repeal of an enactment does not destroy any right, privilege, obligation, or liability arising under the repealed enactment, nor does it obliterate any contravention of the repealed law. Investigations and proceedings relating to pre-repeal events may be begun and continued under the old enactment despite its repeal. And the remedies and punishments provided for under the old enactment still apply as if the repeal had not occurred. In short, the repealed law continues to apply to pre-repeal facts for most purposes as if it were still good law.

§25.167 These general statutory rules may be supplemented or displaced by specific transitional rules set out in the repealing legislation. For example, s. 52 of Ontario's *Succession Law Reform Act, 1977* provided for the continued appli-

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283 (1829), 9 B. & C. 750, 109 E.R. 278, at 279 (K.B.).

284 R.S.C. 1985, c. I-21, s. 43. See also R.S.A. 2000, c. I-8, s. 35; R.S.B.C. 1996, c. 238, s. 35; C.C.S.M. c. I80, s. 46(1); R.S.N.B. 1973, c. I-13, s. 8 [am. S.N.B. 1982, c. 33; s. 21; R.S.N.L. 1990, c. I-19, s. 29; R.S.N.S. 1989, c. 235, s. 23; S.O. 2006, c. 21, s. 51(1)(b)-(d); R.S.P.E.I. 1988, c. I-8, s. 32; R.S.Q. c. I-16, s. 12; S.S. 1995, c. I-11.2, s. 34; R.S.N.W.T. 1988, c. I-8, s. 35; R.S.N.W.T. (Nu) 1988, c. I-8, s. 35; R.S.Y. 2002, c. 125, s. 23.

cation of the repealed *Wills Act* to the wills of persons dying before a certain date:

> 52. The enactments repealed or amended by sections 50 and 51 continue in force as if unrepealed or unamended in respect of a death occurring before the 31st day of March, 1978.[285]

To the extent repealed legislation continues to apply, the application of any new legislation is restricted. In this case, the new legislation was restricted to the wills of persons dying after the March 31 cut-off date.

§25.168 Unlike the retroactive application of legislation, the survival of legislation is an attempt to achieve coincidence between the time frame in which legislation operates and the time frame to which it is applied. In the case of retroactivity, legislation is applied after it begins to operate to facts that occurred before it was binding law. In the case of survival, legislation is applied after it has ceased to operate to facts that occurred while it was binding law.

§25.169 ***Survival of offences.*** The survival of legislation is strikingly illustrated in the judgment of the House of Lords in *R. v. West London Stipendiary Magistrate*.[286] In that case the accused was charged with loitering, contrary to s. 4 of the *Vagrancy Act 1824*. The loitering complained of occurred in June of 1981. The accused was charged on June 30 and came to trial in November of that year. Meanwhile, in July of 1981 the *Vagrancy Act 1824* was repealed. The accused argued that he should not be convicted under an Act that was no longer good law, especially one so archaic and vague.

§25.170 Although sympathetic, the House of Lords could see no way around the *Interpretation Act*, which contained a section similar to s. 43. It pointed out that in its Act to repeal the *Vagrancy Act* the legislature could have included a transitional provision making the repeal applicable to pending cases. In the absence of such a provision, or some other adequate expression of intent, the repealed legislation survived and continued to govern conduct occurring prior to its repeal.

§25.171 ***Survival of benefits.*** The survival provisions of the *Interpretation Act* preserve benefits as well as offences. In *Esso Resources Canada Ltd. v. Canada (Minister of National Revenue)*,[287] for example, s. 43 of the federal *Interpretation Act* was relied on to preserve entitlement to a refund under the *Excise Tax Act*. That Act imposed a tax on natural gas on its receipt by a processor but created an exemption for gas that met a certain description and was used for a designated purpose. Paragraph 68(1)(g) provided that processors who paid tax in respect of exempted gas were entitled to a refund. In 1985, the exemption and refund provisions were repealed, after Esso had received gas within the descrip-

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285 S.O. 1977, c. 40.
286 [1982] 3 W.L.R. 289 (H.L.).
287 [1990] F.C.J. No. 340, 109 N.R. 272 (F.C.A.).

tion, paid the tax, and used it for the designated purpose, but before it had applied to the Minister for a refund. Stone J.A. wrote:

> In this case that gas was purchased and was in fact used for an exempt purpose well before the repealing legislation was enacted. Upon such use being made of the gas, in my view, a right arose in favour of the respondent to a refund of the amounts paid in respect of these particular natural gas liquids. That right had "accrued" or was "accruing" at the time the repealing legislation was enacted.
>
> ...
>
> [Section 43(e) of *the Interpretation Act*] appears to preserve from extinguishment "any ... remedy in respect of any right ... referred to in paragraph (c)".
>
> The "remedy" here is to be found in the refund provisions of s. 68(1)(g). Accordingly, the repeal of that paragraph did not affect the remedy in respect of the accrued or accruing right to a refund.[288]

Under s. 43(c) of the *Interpretation Act*, the exemption provision continued to apply to facts occurring before repeal, while under s. 43(e) the means of securing the exemption remained available to the claimant.

§25.172 ***Repeal and replacement.*** The impact of s. 43 is modified somewhat by s. 44, which deals with the repeal and replacement of existing legislation. Section 44 provides for the continuation of appointments and regulations made under the repealed legislation, and for the continued use of records and forms, for the immediate application of procedures established in the new legislation and for the following:

> Where an enactment ... is repealed and another enactment ... is substituted therefore,
>
> ...
>
> (e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly.

This provision is in keeping with s. 11(g) of the Charter. In *R. v. Dunn*,[289] the Supreme Court of Canada held that an accused was entitled to the benefit of the lesser punishment even though the new enactment had not come into force until after the accused was convicted at trial and while his appeal against sentence was pending. In the view of the majority, the punishment was not "adjudged" until the appeals of the accused were exhausted.

§25.173 ***Relation of survival provisions to common law presumptions.*** The survival provisions of the *Interpretation Act* provide for the continued applica-

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288 *Esso Resources Canada Ltd. v. Canada (Minister of National Revenue)*, [1990] F.C.J. No. 340, 109 N.R. 272, at 275-76 (F.C.A.).

289 *R. v. Dunn*, [1995] S.C.J. No. 5, [1995] 1 S.C.R. 226 (S.C.C.). See also *R. v. R.A.R.*, [2000] S.C.J. No. 9, [2000] 1 S.C.R. 163 (S.C.C.).

TAB 8

1999 CarswellOnt 2697
Ontario Superior Court of Justice

Pyke v. Tri Gro Enterprises Ltd.

1999 CarswellOnt 2697, [1999] O.J. No. 3217

Craig Pyke et al, Plaintiffs and Tri Gro Enterprises Ltd., et al, Defendants

Ferguson J.

Judgment: August 23, 1999
Docket: 69190/95

Counsel: *Mr. Donald R. Good*, for Plaintiffs.
Mr. Raymond G. Colautti, for Defendants.

Headnote
Torts --- Nuisance — Factors giving rise to right of action — Character of neighbourhood
Torts --- Nuisance — Remedies — Statutory remedies
Environmental law --- Common law actions — Nuisance — Liability in particular cases — Odour, smoke and fumes

***Ferguson, J.*:**

1 The plaintiffs are suing the operators of a mushroom farm because they allege it produces odours which disrupt their lives and the use of their properties. The alleged source of the odours is the farm's composting operation.

Background of the Plaintiffs

2 The plaintiffs are property owners on or near Heron Road in the Town of Whitby in the Regional Municipality of Durham. All but one live on their properties. Most of them use their properties only for residential and recreational purposes although some lease part of their lands to farmers. Some of the plaintiffs actively farmed their lands in the past.

3 All but one of the plaintiffs owned their lands before the arrival of the defendants' mushroom farm.

4 The area is zoned agricultural and the operation of a mushroom farm is permitted by the zoning.

5 The evidence did not reveal the details of all the development in the area but did reveal some significant changes to this rural landscape. Mr. and Mrs. Davis originally owned 100 acres which they farmed. In the 1970's they obtained permission to sever eight 10 acre lots some of which are now occupied by other plaintiffs.

6 At some point the Town of Whitby granted a variance to a radar business which started an industrial operation near the end of Heron Road. It is this property which the defendants now own. Sometime around 1990 one of the plaintiffs wanted to register a plan of subdivision to create residential lots. The Town opposed this but permission was granted by the Ontario Municipal Board.

7 This history helps explain how the conflicts in land use evolved.

8 I shall outline more of the plaintiffs' background when I summarize their evidence about odours.

Background of the Defendants

9 The Greenwood Mushroom Farm is a partnership consisting of TRI GROW Enterprises Ltd. and a business called G.M.F. Part 2. G.M.F. Part 2 is also a partnership; its partners are Brent Taylor Holdings Ltd., Rick Campbell Holdings Ltd., and Snobelen Mushrooms Ltd.

10 The individual defendants are employees or officers and directors of the defendant corporations.

11 There are about 25 large mushroom farms and another few small ones in the province. The Greenwood Mushroom Farm is the six largest. I shall refer to it as GMF.

12 Mr. Snobelen is the "senior partner" of GMF. He testified that there were several managers of the partnership including himself and Clay Taylor. Mr. Taylor is responsible for purchasing the material for composting, establishing the composting procedures and formulas and supervising the composting operation. Mr. Snobelen describes himself as the senior partner and it is clear from all the testimony that he exercises a general supervisory role.

13 The lead hand working in the composting operation is Jack Kennedy who has about twenty years experience. He did not testify.

14 GMF purchased the present farm site on Heron Road in 1993. It had formerly been the site of a business which manufactured antennae and radar equipment and then of another business which manufactured car parts. There was an industrial building on the property

when it was purchased and GMF constructed others. The site now looks like a medium sized light industrial complex.

15 GMF bought the property for 1.1 million dollars and has invested another 3.1 million in capital improvements and brought to the site another million dollars worth of heavy equipment to move the compost.

16 Mr. Snobelen is an experienced mushroom farmer. He learned the business while an employee of another large operator and started his own farm in 1979. For fifteen years he has been on the board of directors of the Canadian Mushroom Growers' Association which is a national voluntary association of mushroom farmers. Mr. Snobelen has organized seminars for the mushroom growers including one on composting which was held at another mushroom farm he operated on Brock Road in the Town of Pickering.

17 Mr. Clay Taylor has had experience in composting at various farms going back to 1983.

18 The mushroom farm operates mostly indoors.

19 The composting operation starts outdoors as what is called phase one. During phase one they make compost or substrate to feed the mushrooms

20 During phase one composting the operation takes place outside on a cement slab measuring about 620 feet by 92 feet. To prevent run-off from escaping the slab is surrounded by an earth berm which is about 20 feet wide and 8 feet high.. When the compost leaves phase one it goes into a tunnel building which is 166 feet long and over 60 feet wide and from there to other buildings where different stages of the growing take place.

21 The phase one composting uses a number of ingredients: hay, straw, ground corn cob, stable bedding, chicken litter, agricultural gypsum, urea, dried grains and cocoa oils.

22 All the materials except gypsum are mixed in pre-wet piles for several days to initiate microbial action. Then the material is put through a compost turner which piles and shapes the material into ricks which are 7 feet wide, 7 feet high and 200-250 feet long. The photographs showed three such ricks. Every other day the material is turned and periodically it is wetted.

23 The goal of the phase one operation is to keep the process aerobic. If the process becomes anerobic then, as Mr. Snobelen explained, the process becomes like a sewer process and produces methane or sewer gas and also what is commonly known as rotten egg gas. Even when the process is aerobic it always has the potential of producing odours. One of the gases produced is ammonia.

24 Mr. Snobelen explained that an experienced operator can tell if the process is going anerobic by the odour and because the rick will change from a chocolate colour to an orange.

25 Mr. Snobelen said that odours should leave the site only very infrequently if the process is kept aerobic. He said that when the compost is ready to leave phase one it has an odour that the industry calls "flat and sweet" or like "a pond on a warm April night". He acknowledged that the descriptions the plaintiffs gave at trial were not consistent with that description.

26 GMF uses what is called the Pennsylvania formula to determine the amounts of the ingredients and it is Mr. Snobelen's experience that this formula is less likely to produce odours than other recipes.

27 Mr. Snobelen describes composting as both an art and a science. He said that the other large farms use generally the same process for phase one composting. Mr. Snobelen said he knew of no farm that did the phase one composting in a building.

28 He said GMF did use a different formula when it first started in 1994 when they used a formula slightly different from the Pennsylvania formula.

Evidence of the Defence About Odours

29 I have considered all the evidence but shall summarize only the evidence of the main defenses witnesses concerning the odours produced by GMF.

Mac Snobelen

30 He testified that GMF started its operations on Heron Road in about October 1994. Within a month it was receiving complaints. Mr. Snobelen and Mr. Clay Taylor discussed them and did some soul searching

31 Near the end of November 1994 a group of neighbours came to the plant complaining of odours.

32 On December 21, 1994 the neighbours called the fire department whose firefighters arrived wearing gas masks. Mr. Young called Mr. Snobelen at home complaining of a cloud of poisonous gas. Mr. Snobelen drove to the farm and saw many fog patches along the route but none on Heron Road.

33 On January 29 and 30, 1995 an employee of GMF recorded an odour. At about the same time Mr. Snobelen received a note of a complaint from Mr. Pyke. Mr. Snobelen drove along Heron Road and noticed an odour in some locations. Mr. Snobelen did not describe

this odour but it obviously caused him concern because he instructed Mr. Don Van Dusen to monitor for odours. GMF did not have a system of recording complaints until this point.

34 During his examination in chief Mr. Snobelen left me with the impression that he felt the complaints of the neighbours in December 1994 and January 1995 were unfounded; however, in cross-examination he was asked if he agreed that the farm had an odour problem during the start up period while they were experimenting with the formula and he said yes. He said the problem lasted until about the end of March 1995. He agreed that the complaints of the neighbours might well have been justified during that period.

35 Mr. Snobelen said they changed the formula between January and March 1995.

36 On two occasions Mr. Snobelen had his staff go to check out complaints and received back reports from Mr. Clay Taylor and Mr. Van Dusen that they had attended the areas of complaint and found no odours.

37 In the summer of 1995 GMF planted over 500 white cedar trees on the berm as a green screen. These were planted by Mr. Snobelen on the advice of an expert who thought they might reduce the odour complaints. They also installed a wall made of bales of straw to create a windbreak which Mr. Snobelen said he felt was very beneficial in reducing the distribution of odours. Mr. Snobelen also investigated the possibility of using gortex to trap odours.

38 Mr. Snobelen said that all the changes made by GMF in response to the odour complaints took place before 1996.

39 Mr. Snobelen said that he "recognized the problem we were having" and consulted Dr. Rinker for professional advice and then started a research project to develop a method of objectively measuring odours.

40 He said that he thought that by the end of March 1995 they had reduced the incidence of the odour problem by 80%. This is not consistent with the evidence of the plaintiffs.

41 Exhibit 35 is a very significant document. It is a memo signed by Mr. Snobelen and several of the defendants including Mr. Clay Taylor. It states that:

- they recognized that in November-December 1994 the odours were creating an annoyance for the neighbours.
- they decided to make aggressive changes to reduce the frequency, volume, duration and distribution of odours
- they changed the formula by eliminating 50,000 pounds of chicken litter each week

• their monitoring indicated that they had reduced the "annoyance factor" by 80-90% by May 1995

42 Mr. Snobelen said that if the composting operation is conducted properly odours would leave the farm property only occasionally and then only in pockets. He called them pockets to explain how at any particular time one person might smell them and another person down the road might not.

43 Mr. Snobelen also described the experience with odour complaints at his other two locations. At the Brock Road site he said he had two or three complaints in nine years. At the Paddock Road site he had two complaints. He said when he received a complaint at the other location he attended personally to investigate and never found a problem. He stopped the composting operation at Brock Road in 1994. He said there were about 6 or 7 homes within a kilometer downwind from the Brock Road site and about 13 or 14 at the Paddock site. I heard no evidence from any of those neighbours.

Mr. Clay Taylor

44 He said the farm uses 360-390,000 pounds of dried material a week for composting. The hay and straw comes from 4-5,000 acres of land elsewhere, poultry litter comes from a number of farms and the stable bedding comes from 15 stables. As I understood it, stable bedding refers to the straw and manure cleaned from horse stalls. All this material is trucked to the Heron Road site for composting.

45 Mr. Taylor described in some detail the changes made before 1996 in response to the complaints. One of them was to turn the piles more often. He acknowledged that the earlier procedures had allowed ricks to go anerobic and to produce a rotten egg smell. He also said the various changes they made did not affect the usefulness of the compost. He did not explain how the process compared to that used elsewhere including the other farms operated by Mr. Snobelen.

46 Despite this testimony he said the odour in December 1994 (which was before the changes) was a "wet hay smell" or like "walking into a freshly planted greenhouse".

47 He also explained that in the spring of 1996 the farm purchased a pre-wet machine which enabled them to reduce the length of time the compost remained outside. He did this to reduce odours. This took one third of the material off the concrete slab. There was no evidence as to whether such a machine was available before that time or whether such a machine was used by other operators in Canada.

48 Contrary to the testimony of Mr. Snobelen and Exhibit 35, in his testimony he denied that the composting formula had been changed "except slightly". He described

the composting formula as being the same since the opening of GMF except for "minor tinkering". Yet again in contrast, there was evidence that he wrote Mr. Snobelen a memo in February 1995 (Exhibit 38) stating that the amount of chicken litter had been reduced by 50,000 pounds a week. Again, in contrast, he wrote in Exhibit 40 that he had told Mr. Pyke that the farm had made "wholesale changes" to the composting formula.

49 Again in contrast to the gist of his testimony belittling the plaintiffs' complaints, he said on cross-examination that he felt there was some legitimacy to the plaintiffs' complaints in late 1994. Yet again in apparent contrast, he said that when the operation started up in 1994 he never noticed any smell and that his attention was only drawn to the issue when the neighbours complained.

50 He testified that he had never experienced any nausea or sickness while working around the slab. He denied he had ever smelled ammonia around the slab. This appeared to me to conflict with the evidence of Dr. Beyer and Dr. Rinker who said that ammonia was a common product of composting and could be detected by someone working on the rick. Mr. Taylor said there were no unpleasant smells associated with the ricks except the rotten egg smell when it turned anerobic and he said this odour quickly dissipated by which I understood him to mean that it would not leave the site. Again in contrast, he wrote in Exhibit 38 that the reduction in the amount of chicken manure had "significantly reduced the odour" and "will certainly reduce the odour problems our neighbours have been experiencing".

51 He testified that the operation had only produced anerobic smells on four occasions since 1994 and this was caused by excessive rain or snow.

52 He said the vapour given off by the ricks was quickly dissipated and he never noticed any odour from it.

53 He also wrote Exhibit 39 which acknowledges that in late February 1995 there was an unusual amount of turning which produced some anerobic odour. Interestingly, he noted that while Dr. Rinker had been on site that day the odour did not appear until about an hour after the visit.

54 He said that he had never had a complaint at the Brock Road site. He said the complaints by the plaintiffs here were out of the ordinary and were the first he had experienced in his farming work since 1978.

Mr. Brent Taylor

55 He purchased the home of the plaintiffs, Mr. and Mrs. Pyke, in the spring of 1997 and moved there in the fall. He testified that since he has lived there he has noticed an odour only very infrequently - once each one or two months. He described the odours as being like

wet hay. He denied ever smelling an odour which was nauseating, putrid or which he would describe as a stench or like ammonia. He never noticed an odour in the house.

56 He said the odours had never interfered with his enjoyment of the pool or the hot tub he had installed. In September 1998 he held a large garden party.

57 He also explained that he purchased the property with the help of GMF. He works at GMF and is the brother of Clay who is in charge of the composting. He said he spent many days working on the composting slab when the farm started up and he never smelled a pungent or rancid smell.

Dr. Rinker

58 He is an associate professor of agriculture at the University of Guelph and has done field work with mushroom farmers both as a professor and previously as an employee of the Ministry of Agriculture and Food. He has visited all the mushroom farms in Ontario.

59 He testified that when he attended at GMF in December 1994 he noticed normal composting odours at the farm gate. He described them as being sweet. He made a similar observation on a second visit.

60 On some occasions in February 1995 he noticed a sulphur smell when the rick was turned. He also noticed an unpleasant odour from the poultry litter. In February 1996 he noticed stable odours and a strong odour of ammonia. When he was recalled to give further testimony he testified that the ammonia smell from composting dissipates quickly and that it should not be a problem off site.

61 In October 1998 he noted the smell of poultry litter and also sulphur compounds the smell of which he likened to a sewage treatment plant but he also said the smell did not carry. He said that in March 1999 he was south of the railway tracks on Heron Road and smelled composting odours which smelled a bit off to him - he described them as a blend of prewet but also as having a sulphur odour.

Mr. Donald Van Dusen

62 He has been working at the site since 1994 and in 1995 began keeping a daily log. His basic method was to open his car windows on his way to and from the farm each day. He said he noticed a sharp or pungent odour on only a couple of occasions between 1995 and trial. He generally worked inside the farm buildings.

63 His log shows that on most days there was no odour detected.

Evidence of the Plaintiffs About Odours

Christopher and Christa Downes

Background

64 They live about a mile to the south on Myrtle Road. They cannot see the GMF from their property.

65 They purchased their property in 1981 or 1982 and own a house on just under an acre of land. They spent a considerable amount on renovations over several years before the GMF arrived. They have a deck and pool.

66 He is away at work during weekdays; she is at home with the children.

67 Before the GMF he only noticed odours when a farmer fertilized and this would only last a day or so; all she remembered was the smell from the hog farm which she said was also unpleasant but lasted only a day

Effect

68 He recalls he first noticed the GMF odour in January 1995.

69 He describes the odour as being like a septic tank and like ammonia. She describes it as being like urine. She said it takes her breath away and sometimes she has to hold her breath. She also says it burns her eyes.

70 He gave estimates of the frequency of the odour ranging from once or twice a week to four times a week. She estimated it occurred two or three times a week. They both said it tended to occur in the morning or at the end of the day. They said it lasted from thirty minutes to four days. It is not present all the time and sometimes a week goes by without any odours. The intensity varies. She thinks the smell is increasing. He says it is not as bad in winter.

71 They used to eat most of their meals outdoors in summer but now cannot use their deck and pool on some days. They find they have to close the windows and use their air-conditioning more. They used to walk north on Heron Road but the odours are worse there and so they have curtailed their walks. She has curtailed her gardening. She found it difficult to get the children to go outside.

72 They only started to keep a log in 1998. She made most of the entries and she said her entries were not consistent or accurate. The diary showed many fewer incidents than they described.

73 I generally accept their testimony and find they notice odours about two or three times a week on average.

Margaret Davis

Background

74 She is a widow and retired. She and her late husband bought their 100 acre property in 1957. It is roughly 4000 feet south of the GMF.

75 They operated the property as a farm for about 12 years and in the 1970's they sold off eight lots of 10 acres each and kept 20 acres and the stone farmhouse.

76 Before the GMF she noticed odours from cattle and horses on other farms and also odours from the hog farm but said they were not objectionable.

Effect

77 She said that in her 41 years on the property she has never smelled anything so dreadful, objectionable and repugnant as the odour from the GMF.

78 She described the odour as varying and described it as odour, rotten eggs, putrid, stink, rank, and nauseating. She said it did not smell like anything she had ever smelled before.

79 She said the odour occurred roughly every day or two and lasted from 15 minutes to several days. There were some conflicts between her testimony at trial and on discovery but I accept her explanation that this was because she did not review her diaries before her examination. She kept a log on almost a daily basis since July 1995. I found her logs to be more accurate than her independent recollection. They constitute past recollection recorded.

80 She said that the odour has caused her to curtail her gardening and said sometimes it is unbearable outside. She has curtailed the use of her glassed-in porch. She says the odour permeates her house. She has no air conditioning and has to close her windows. She walks her dog less. She stopped hanging out her laundry. She dreads holding the annual outdoor church service on her property because she receives many complaints about the odour. She does not plan outdoor activities with her friends because she can't predict when the odour will occur. Her guests sometimes complain of nausea.

81 She said there is occasionally a white haze or fog which she believes is from the GMF. At one point she said it did not smell and later said that it has the smell closest to ammonia.

82 She said her eyes are constantly sore and running and she feels nauseated on occasion.

83 Although there was some confusion in her diaries they are very detailed and I find them to be reasonably accurate. I find that she fairly described her experiences. Her length of residence and her former experience of living on a working farm make her evidence compelling. Her length of residence and exposure to local weather conditions make her observations, in conjunction with those of other plaintiffs and Dr. Rinker, compelling evidence that the GMF produces white haze on occasion which travels to the plaintiffs' properties.

84 Her evidence indicated that the odour has been much the same since the summer of 1995.

85 I generally accept her testimony.

Sally and Kenneth Giles

Background

86 In 1977 they purchased 99.8 acres and an old stone farmhouse on Heron Road. They are about 4000 feet south of the GMF.

87 They carried out ranovations which more than doubled the size of the house. They invested about $350,000 in improvements to the property before the arrival of GMF.

88 They originally intended to farm the property. They had horses and attempted to revive the 60 acre orchard but gave up after three years. They now lease most of the land to a farmer who grows soya beans and corn.

89 Mr. Giles works in Toronto in the daytime. Mrs. Giles is usually at home except when she works at the Thunderbird Golf Club in golf season.

90 They both said that before the GMF they were not bothered by any odours including those from neighbouring farms including the hog farm.

Effect

91 Mrs. Giles began keeping a log on almost a daily basis starting in January 1995. It is a very detailed document and because of it I give great weight to her testimony.

92 She said she started noticing the odours from the GMF in October 1994. She said initially they were extremely strong and lasted a long time. She said the odours have varied in frequency, intensity and duration. As with all the testimony on the subject of frequency it is difficult to summarize her evidence. Generally, she indicated the odours occurred several times a week although there were days and even periods of a week or more when she noticed

no odours. Sometimes the odours lasted all day and occasionally for several days. She associated them with a north wind. In contrast, Mr. Giles thought they were worse when there was no wind. She said she had smelled the odours as far away as Ashburn and the golf club.

93 Mr. Giles testified that he could not notice any change in the odours over the years. Mrs. Giles' logs generally support that observation.

94 She described the odours as: decaying animals, cow manure, musty, rancid, nauseating, sulphur smell, sickening, rotten shrimp or fish, putrid, rotten manure, overpowering, really obnoxious, sickeningly sweet, very offensive.

95 Mr. Giles grew up on a mixed farm where they kept livestock. He testified that he was familiar with farm smells. He said he does not find chicken or hog manure objectionable and has spread manure on fields on the family farm. More recently he has kept horses. He described the GMF odours as being nauseating and like rotten flesh. He said he has only smelled something as bad two or three times in his life.

96 Mrs. Giles had observed a haze which she associated with the GMF on two occasions. She had taken pictures of it. She said it had an ammonia odour. Mr. Giles said he had seen the haze many times and also said it had an ammonia smell. He said he traced it to the GMF.

97 They described no health effects other than temporary nausea and temporary difficulty breathing and stress.

98 They said that the odours permeated their house, vehicles and clothes and people had made remarks to Mr. Giles at work about the odour carried in his clothes. They had to install air conditioning. Mrs. Giles likes to garden and finds this difficult and sometimes sickening because of the odours. Because of the odours they stopped going for daily walks along Heron Road.

99 They stopped entertaining outside in the summer. They did not put in their planned patio. They stopped hosting parties for the sports teams that Mr. Giles sponsors. He stopped spending as much time outdoors playing sports with their sons. He stopped entertaining business clients. Their friends who were interested in astronomy stopped coming to look at the stars.

100 Mr. Giles said they felt like their lives were restricted to being indoors since the GMF came.

101 There was an incident when Mr. Giles made some heated remarks to Mr. Snobelen. He also contradicted some of his evidence on discovery where he said the haze had no smell. I find he tended to exaggerate especially about the frequency of the haze. I accept

his testimony about the comparison of the GMF odours to other farm odours. Where his testimony conflicts with that of Mrs. Giles I accept hers. I generally accept her testimony.

1094581 Ontario Limited

Background

102 This corporation purchased a number of lots in a subdivision from Mr. and Ms. Frankovich. They own the shares of the corporation.

103 The lots are located about 2600 feet northwest of the GMF off Townline Road. The couple purchased the land in 1987, had a plan of subdivision registered in 1990 and sold the land to the corporation in December 1994 which was after GMF arrived. The plan of subdivision was not approved by the Town of Whitby but was approved after an appeal to the Ontario Municipal Board.

Effect

104 The lots had been for sale before and after the transfer to the corporation but none sold. One offer was received in 1998 but was rejected as too low. Mr. Frankovich is not a professional developer but said he knew there was a downturn in the market in the period 1990-95. He was not in a position to say why the lots had not sold.

105 Mr. Frankovich lives in Whitby. He visited the lands only about five or six times a year. He had noticed an unusual smell once when he was driving in the area but has never noticed an odour while at the subdivision.

106 I generally accept his testimony but it did not establish the reason why the lots have not been selling. That, of course, is a matter relating to damages and on that issue the evidence is not closed.

Gordon and Karen Donnison

Background

107 They purchased 9.88 acres in 1987, built a house and moved to the property in June 1988. They are about 5200 feet south of the GMF on Myrtle Road.

108 Mr. Donnison worked as a firefighter until he retired about 6 months before trial. Mrs. Donnison has always worked as a dietician except for three months when she was home recuperating from an accident.

109 Their property is across the road from the Thunderbird Golf Club and adjacent to farms and a dog kennel. Before the GMF Mr. Donnison said the air was fresh which was one of the reasons they moved there. He said on about three occasions he had noticed a strong smell from the pig farm but it lasted less than a day.

Effect

110 He first noticed the GMF odour in January 1995. He identified it because he had previously smelled the GMF operation on Brock Road where his son had worked for a time.

111 They described the smell from the GMF on Heron Road as gross, rancid, ammonia, smelly feet and dead animals, sulphur, decaying animals. The degree of odour varied. Mr. Donnison said he had only once in his life smelled anything like it and she said the odour was ten times worse than anything she had smelled before.

112 They said it was sometimes associated with a north wind but sometimes came when there was no wind. They said the odours lasted as little as thirty minutes and as long as a day. They both kept some notes on calendars but these were not regularly kept, were not in consistent terminology and were sometimes based on hearsay. There were a great many more notations in some years than others. They were both away from home during the day on workdays. I find their logs were not very reliable. Based on their testimony and logs it is difficult to summarize the frequency of odours they experienced but I find it was generally about a few times a month from November to March and about one to three times a week from April to October.

113 In terms of physical effects they said the odours sometimes made them feel like puking, took their breath away, caused itchy and stinging eyes and running eyes and noses. Mr. Donnison also said he got headaches and periodically wore a face mask when he worked outside.

114 Because they were away at work in the daytime, the odours mainly bothered them at night and on week-ends and on holidays. Mr. Donnison is now at home in the daytime since he retired. They have no air-conditioning and were often hot because they had to keep their windows closed. When the windows were open they were occasionally awakened at night. They occasionally had to put their hands over their faces and run from their vehicles to the house. Mr. Donnison likes to garden and build projects outside and occasionally had to interrupt this activity or do it while wearing a mask. Mrs. Donnison said the odour interfered with doing barbecuing and that they couldn't entertain outside because they did not know when the odours would occur. Their children and grandchildren sometimes came in from play complaining of the odour. I note, however, that despite the odours Mr. Donnison personally installed an outdoor pool in the fall of 1998.

115 Mr. Donnison had observed a white haze on two occasions. He had also seen it when he drove by the GMF.

116 I generally accept their testimony.

Leslie and Donald Walker

Background

117 They bought their 10 acre property and house in June 1985. It is about 2700 feet south on Heron Road.

118 The both work as court reporters but do some of their work at home.

Effect

119 Before the GMF they noticed no unpleasant odour except once or twice a year there was a strong smell from the hog farm which lasted a day. He said some years it lasted four to five days.

120 They kept few notes of their observations.

121 She first noticed the odour in December 1994. They described the odours as pungent, acid tone, like an outhouse, ammonia, sour, putrid, rotten vegetables. The intensity varied.

122 The frequency also varied. Because of their being away at work and of having their windows closed in winter, it appears they noticed the odours each couple of weeks in winter and several times a week in summer. When Mrs. Walker was home toilet training a puppy one summer she said she noticed some odour each day.

123 The odours interfered with their gardening, and occasionally made them come in from their deck. They occasionally had to cancel a barbecue and on one occasion cancel their child's party. They have no air-conditioning and when they had to close their windows in summer their house became very hot. One day it reached 37 degrees. The odour would awaken them at night. The heat in the house interfered with their sleep and led to fatigue. Sometimes they had to go elsewhere to do their homework. Sometimes the odours permeated their house. Sometimes they would go for a drive to get away from the smell. They were frustrated because they could not predict when the odours would occur and would have to adjust their timetables to the odours.

124 Mrs. Walker experienced headaches, and burning eyes. He experienced irritation in his nose.

125 They had seen a haze a number of times. Mrs. Walker saw it come directly from GMF and envelop the Gardner property.

126 I generally accept their testimony.

Ronald Chapman

Background

127 He lives alone on his 10 acre property which is about 3000 feet south on Heron Road. He purchased the property in about 1990.

128 He drives a truck in the sand and gravel business and is away from home from about 3:30 am to 5 or 6 p.m. during the week.

129 Before the GMF the only unpleasant odour he noticed was when the pig farm put manure on the fields. This lasted a day or two. He said he had been around farms all his life and could distinguish different types of manure.

Effect

130 He described the odours as sickening, ammonia and like a mixture of urine, rotten hay and horse manure.

131 He kept very few notes. He said sometimes there was no odour for 3 or 4 days.

132 He said that because of the odours he did not sit outside much in summer, and restricted the use of his pool. It sometimes wakes him at night. He said his dogs bring the odour into the house. It bothers him when he cuts the grass.

133 He said that because of the odours sometimes he can't get his breath, he has to breathe through his mouth and his nose runs.

134 He said he had seen the haze from the GMF.

135 I generally accept his testimony.

Bernice and Jean Gardner

Background

136 Bernice Gardner and her husband purchased their 100 acre farm in 1940. It is about 1300 ft south on Heron Road and across the road. The GMF is within view. She is retired and it was apparent that time is taking its toll on her memory and concentration.

137 She and her family operated the farm for many years. They kept chickens, pigs, goats, horses and cattle. Her husband died in 1993.

138 Before the GMF she did not have any problems with odours except for a day or two a year when the farmers cleaned out their barns or occasionally when the pig farm cleaned out its tanks.

139 Jean Gardner is Bernice's daughter. She was born on the farm and has lived there for all of her 46 years. She has not worked since 1994 and so is home with her mother most of the time.

140 She said that before the GMF there were no odour problems. She said there were just odours from livestock manure and about two or three times a year odours from the pig farm. She had never complained about the operations of the industrial firms who had occupied the GMF site previously because they did not stink.

Effect

141 Bernice Gardner kept few notes and they did not appear to be too reliable.

142 She had worked on her farm and in her barn when they had livestock. She said the GMF odours were quite different from barn smells. She was asked how the GMF odours compared to the odours from the hog farm and said they were pretty hard to describe; they were both bad and both plain stinked.

143 Bernice Gardner said there were periods when there was no odour but that the odours generally came from the GMF about one to seven days a week. She associated them with a northwest wind.

144 She described the odours as being like ammonia or rotten meat and as bad, terrible and unbearable stenches.

145 Jean Gardner had previously worked in a factory with a variety of paints, solvents and other chemicals. She compared the odours from GMF to those chemicals. She said the GMF odours were worse than the pig farm odours. She described the GMF odours as putrid, raw sewage, foul, ammonia, rotten cabbage, like a house full of javex, obnoxious and horrific.

146 Bernice Gardner said the odours permeated her glassed sunporch, woke her up and caused her to curtail her walks.

147 Jean Gardner kept extensive logs but she changed her format and terminology from time to time. Sometimes she stopped making notes. Often she was only recording more intense odours and so the notes do not record all the occasions when there were odours. On the basis of her testimony and her logs I am satisfied that there have been periods when they have been exposed to offensive odours for many days at a time. While the frequency has varied significantly I find that they have been exposed to odours about half the days in each month.

148 Jean Gardner said that because of the odours she no longer liked to sit outside, she had to interrupt her gardening, she had stopped walking her dog, and had to keep the windows closed. She said that on several occasions they had to cancel or cut short campfire parties, corn roasts and a family reunion. She said her relatives used to come to camp on the farm for their holidays but had not done so since 1995. She said she felt like a prisoner in her own home. She said the odours permeated her house. The odours are unpredictable.

149 Before the arrival of GMF she had various allergies and was on a disability pension because of sensitivity to various industrial odours. She was allergic to the scent of perfume. Before the arrival of GMF she was being treated for depression.

150 She said because of the GMF odours she felt her depression and allergies had become worse. She said the GMF odours made her feel nauseated, burned her eyes, gave her a sore nose, gave her headaches, and a sore throat. She said she had trouble sleeping. She has a window air-conditioner in her bedroom but can't turn it on when there are odours.

151 Bernice Gardner said she had seen haze from the GMF.

152 Jean Gardner said she had seen and made notes of the haze on numerous occasions and twice taken photographs which are exhibits. She had observed it come from the GMF. On one occasion she said she saw the cloud start from the area of the compost heap and move slowly and then pick up speed and veer off in different directions and eventually dissipate. She described it as thick and white and said it occasionally obstructed her view and on occasion enveloped her house. She said she had no difficulty differentiating it from natural fog or mist and had never seen it before the GMF arrived. She also said it smelled like ammonia. She called it the ammonia cloud.

153 There was testimony about an incident involving Bernice and Jean Gardner and Mr. Clay Taylor. I find that evidence does not significantly weaken the credibility of Bernice and Jean Gardner whose testimony I generally accept.

154 I find that Jean Gardner tended to exaggerate the intensity of the odour and that she did so because she was becoming increasingly frustrated by its effect on her life. I find that the odours have substantially affected the lives of mother and daughter and that they are the most affected of all the plaintiffs.

155 I also find that Jean Gardner is unusually sensitive to odours. There is no medical evidence about the effect of the odours on her depression or allergies but I accept her testimony that the odours have substantially increased her feeling of unwellness from both. I accept her testimony about the haze.

Patricia and Craig Pyke

Background

156 They purchased their property in 1988. It is about 2000 feet immediately south of the GMF. Mrs. Pyke is a homemaker and Mr. Pyke is away during the daytime at work.

157 They sold their property and moved away in September 1997 because of the odours.

158 Before the GMF she said the only odour was that from the pig farm which occurred two or three times a year. He said on discovery that this odour occurred about monthly but this conflicts with all the other testimony of the various witnesses on the subject and I find that they noted the pig farm odour only about two or three times a year.

Effect

159 They first noticed the odours in about October 1994.

160 They described them as a terrible stench, sickening cheesy smell, nauseating, an outhouse, having one's face buried in feces, very pungent, very objectionable, worse than the pig farm, ammonia, unbelievably terrible. They varied in frequency, duration and intensity. Mrs. Pyke said they varied from tolerable to absolutely obnoxious.

161 Mrs. Pyke kept exceptionally good logs beginning in November 1994. Her format and terminology varied, there were gaps and as time passed her descriptions became exaggerated; however, I find her logs are generally very reliable.

162 There were days and sometimes whole weeks when there were no odours. Sometimes the odours came and went more than once in a day. Interestingly, she frequently noted that there were occasions when she detected the odour at some places on her property and not at others or that it was noticeable on a neighbour's property but not on hers. Her logs show a long span of very high frequency in the period from December 1994 to June 1995 when Mr.

Snobelen said he thought the neighbours' complaints were justified. There was no pattern to the occasions of odour. However, a common sequence was for a period of days of little or no odour followed by several days of intense odour. Sometimes there would be a week or two without odour. Sometimes the odour would last for four to seven days or more. It is difficult to summarize but generally I find on the basis of her testimony and logs that there were offensive odours on average more often than one day in three over the period to September 1997 when Mrs. Pyke stopped keeping logs. They were the second most affected after the Gardners.

163 Interestingly, Mr. Pyke said he visited the GMF on three occasions and on no visit did he notice any odour.

164 The odours had a dramatic impact on their lives. They were both very enamoured of their rural property. They were used to walking up the road four times a week and had to curtail this although they did not stop. They had to curtail their gardening and work outside, keep their windows closed more often, were awakened at night and kept awake. They restricted the times they sat outside or ate outside. The smell permeated their clothes. On bad days the smell permeated their house and some days they could not go outside at all. They were embarrassed when visiting tradesmen and guests complained; it spoiled their parties - sometimes their guests ran from the house to their cars. It caused them to stay inside during holidays and vacations. They cancelled their annual hockey game. She said they felt like prisoners in their home.

165 The following selection of quotations from her log conveys her perception of the impact of the odours. She refers to GMF as "Mac".

> July 22, 1995 - S. drift all day & night. First time I can remember when it did not smell all night & we had our windows open.
>
> September 14, 1995 - Terrible smell 7:30 am. Smell not terrible far too nice a word. Same smell if you were held upside down 1" away from excrement in an outhouse used by 400 people. Could not stay outside to garden for more than 1 minute. 8:27 am have sore throat now as smell permeates house. The smell at midday was pig farm as they were spreading. We have learned to tell the difference between mushroom & pig farm. Smell early morn and late evening - Mac.
>
> February 15, 1996 - calm a.m. to N. woke up with sore throat from smell - could smell Mac in every room in house. Outside the smell was unbelievable 6:30 am. Mac still smells 8:27 am. I went to plan some landscaping but feel I can't as long as the stink continues. Mac has truly taken the pleasure out of our property. Right now there is a gentle snowfall outside with the sun breaking through, but because of the smell I will not go out to walk in it. 4:30 p.m. Still smelled when I got home tonight. 9:30 p.m. still stunk.

March 12, 1996 - calm 5:00 am. The absolute worst smell in the house yet. All rooms smelled. ... 7:21 am took pictures of fog ... Could hardly breathe outside .... wind swung around to S. in the p.m. Took more pictures outside. Had my usual sore throat. Smell did not leave house until the afternoon. Calm to N drift. Had the Bridge group over in the evening. They could not believe the smell when they left. It was vile. When we went to bed the house was already smelling inside again. Craig and I feel embarrassed when we have people over and our home smells so badly.

April 18, 1996 - Calm. Smelled Mac in the night. Thought of getting up & reading but I could smell Mac in the family room. Had a sore throat when I woke up. Without thinking, I thought of going out with the cat this morning (it is the first beautiful spring day after 5 long months of winter) but when I went out I was hit by an incredible stench. I realized then that it had smelled all night and morning.

April 19, 1996- Calm. South drift. No smell. I stood outside this morning, it was pouring rain and I just drank in the smells of this beautiful spring morning. How precious smells can be. The smells of the earth, the rain, was indescribably wonderful. How wrong it is that Mac could just move in and take all this away from us.

July 1, 1996 - N drift. A spectacular Canada Day. Craig & I got our morning coffee & chairs together & went out on the deck to enjoy the beautiful morning 8:42 am. We had to turn around and come right back in & close all the windows because of the horrible stench.

July 17, 1996 - N Wed Start of Craig's week off. Smell brutal in the am. Had painter to house & he commented on smell.

July 19, 1996 - We are worried about tomorrow as we are having our family picnic and 30 people coming. Winds predicted to swing around from N tonight.

July 20, 1996 - Sat - Family Picnic - winds from N & smell brutal. 9:00 am terrible whiffs all day. Guests all noticed. My sister could not believe that invasive stinking industries like Mac were still able to exist in a residential area and offered to help us fight Mac in any way she could. July 21, 1996 - Sunday - Craig still on holidays - the broccoli is ready & he is sitting outside preparing it to be frozen in a horrible stink. It is definitely affecting him & his holiday thus far has been very negatively punctuated by Mac's stink - I think we will never get used to it - we will either win and Mac will compost off sight or we will have to sell.

July 23, 1996 - Awakened by stink at 1:04 am & had to get up to shut window (calm). It is a beautiful summer day - the last day of Craig's holiday. It has stunk most of the afternoon (that terrible cheese smell) I have finally come inside as I cannot stand the stink any longer on the deck. Both Craig & I are down and depressed. 9:01 p.m. going to

bed early - it stinks outside - it's basically stunk all day. Will have to leave our windows closed. It smelled 4 days out of 7 of Craig's holidays working around the house.

August 29, 1996 - Stench woke me up last night at 3:36 am. I was stupid enough to leave my window open as it was a full moon & and a beautiful night and I wanted to hear the crickets. I had to cover my nose with my sheet until the stink left the room (I was in the spare room) It stunk this morning when Craig left. Still smelled 8:20 am. Mom and Ethel are coming for tea so I'm just hoping. 9:16 am waiting to go out to garden but the stink is totally nauseating. 9:56 am still stinks but I have to go outside. It smelled all day. Mon and Ethel came for tea & we endured it as long as we could.

August 31, 1996 - Got home from wonderful evening at Paxton's with moon rising over the pond - Beautiful night. Stink unbelievable here.

166 The odours gave them sore throats and affected their breathing. Mrs. Pyke occasionally "had a good cry" and they both became depressed about the impact on their enjoyment of their home. Eventually they decided they could not tolerate the odours any more and sold their property in March 1997 and moved in September.

167 They had both seen haze on several occasions. She recorded it in her logs. They took photographs which are exhibits.

168 I generally accept their testimony.

Gary and Erlyne Young

Background

169 They purchased their 10 acres in 1973 and built their house. They are about 3300 feet south on Heron Road. He works away from the home and she works outside the home about two to four days a week.

170 Before GMF the odour they noticed was that from the pig farm which came a couple of times a year.

Effect

171 They first noticed the odours in the fall of 1994. They said they varied in intensity, frequency and duration. Sometimes there were none. They described them as sometimes mild like manure. When they were strong they were rancid, nauseating, pungent, ammonia. The odours were worse than those from the hog farm which never wakened them. Mr. Young said he had only smelled one other smell in his life which was as bad as GMF and that was when he visited the stockyards and smelled the container where they stored blood.

172 The odours caused them to keep their windows closed and they had to install air-conditioning. The odours wakened them and kept them awake. Mr. Young started to take sleeping pills. They interfered with their barbecues, gardening, and entertaining. They cancelled his annual staff picnic and she stopped hanging her laundry outside. At times they found it difficult to breathe and had to hold their breath and run to their car. They bought a mobile home to get away. Their dog brought the smell inside.

173 Mrs. Young said the odours burned her mouth, nose and eyes. He said the haze made it particularly hard to breathe.

174 He had seen haze on several occasions and took pictures which are exhibits. Once the haze was so pungent he called the fire department. He said he was able to distinguish the haze from natural fog.

175 Mr. Young kept occasional logs. They contained virtually no detail and did not always specify where the odour was observed. Generally, the logs were not reliable. While it is clear that the odours can appear in one place but not another at the same time, I find that his recordings exaggerated the frequency of significant odours.

176 I find that when they were home they experienced odours with about the same frequency and intensity as Mrs. Davis.

177 I generally accept their testimony.

Issues

1. Does the phase one composting on the mushroom farm produce offensive odours?

178 I find that there is no doubt that the composting process produces offensive odours. In addition to the testimony of the plaintiffs I rely heavily on the opinions of Dr. Rinker, an expert called by the defendants. He is now on the staff of the University of Guelph and was formerly an employee of the Ministry of Agriculture and Food. He visits every mushroom farm in Ontario. He was one of the most qualified academic and field experts called at trial.

179 He adopted as his opinions the following passages from his writings:

> Phase 1 compost preparation procedure and/or site is becoming a significant issue world-wide. Traditional compost preparation may generate odors that are offensive. This fact has prompted some countries and municipalities to legislate emission levels. Consequently, a new system of compost preparation is developing rapidly. Since the new procedure is not fully tested or adopted at the farm level, mushroom farms have had to relocate their composting areas up to 160 km from the production site. Thus, anyone

considering constructing or purchasing a mushroom farm must be especially cautious in choosing the site for compost preparation. Rinker, *Commercial Mushroom Production*, publication 350, Queen's Printer for Ontario, 1993 at p.8

Composting odours continue to present a problem for mushroom growers, especially those who compost in locations which are in proximity to areas zoned for residential purposes. Duns, Ripley, Kingsmill and Rinker, *The Analysis of Mushroom Composting Odours*, Mushroom World, June 1997, at p.58.

Offensive odours produced during Phase 1 composting continue to pose a problem for many mushroom growers. While remedial measures have been proposed for the reduction of composting odours, the lack of a universal solution to the problem remains a challenge to the industry. Duns, Ripley, and Rinker, *Off-site Detection of Odorous Compounds Produced by Phase 1 Composting*, Mushroom World, vol. 9, Issue 4, 1998 at p. 13

180 I accept his opinions on this issue except that I should add that the evidence of all the witnesses in this trial shows that there is no "new system" in view which will solve the problem. The evidence establishes that GMF uses the most modern and customary procedure and still produces offensive odours on a regular basis.

181 I also accept Dr. Rinker's opinions as to the cause and nature of the offensive odours. Again, for accuracy, I shall quote some of his writings in summarizing his opinions. He explained that the "normal" odour is referred to as "sweet" in the industry and is not offensive. However, at various times the odour is offensive and this is because the composting process produces chemical compounds which are odorous. Sulphide compounds produce the most offensive odours. The various odorous compounds produce odours which he described as rotten eggs, foul, more rancid, vinegar, fishy.

Importantly, odours may be created by more than one compound, and this fact may be further complicated by the existence of synergistic effects between various compounds in a mixture, such that several moderately offensive smelling compounds in combination may form an excessively foul odour, or increase the overall perceived odour intensity. *The Analysis of Mushroom Composting Odours*, op. cit., at p.60.

182 He described his personal observations at GMF on visits between 1994 and 1998. He said on various visits he smelled odours which he described variously as a sulphur smell, an unpleasant odour from the poultry litter, stable odours, a strong smell of ammonia, a sulphur compound smell like a sewage treatment plant.

183 These observations bear a striking similarity to the observations of the plaintiffs and contradict the testimony of Mr. Snobelen and Mr. Clay Taylor that they did not smell such

odours at the site. I find that the phenomenon of not smelling the odour after long exposure does not explain this discrepancy. I note, for example, that Mr. Taylor also testified that at least on one occasion he did smell something which shows he had not lost his capacity to smell.

184 Dr. Rinker also explained that the levels of odorous compounds produced varied with the stage of the phase 1 composting process and in particular were high when the material was turned. This turning occurs every couple of days and because there are always several ricks of material each in a different stage of the process, it is clear that the high level of production could occur more frequently than every couple of days. As his paper put it, "Odorous compounds are produced throughout the course of a Phase 1 composting cycle." Duns, Ripley, and Rinker, *Monitoring the production of odorous compounds during Phase 1 mushroom composting*, Mushroom World, March 1998, p.60.

185 Dr. Rinker testified that some odours are detectable at a distance from the composting site. His opinions were based on his own experience and from the study he conducted during which periodic samples were taken from the Pyke property in October and November 1997. Over a nine week period samples were taken by instruments and a human observed the odours detectable by the human nose. The samples were taken on the same two days each week. The human observed offensive odours on 11 of the 34 occasions she took the samples. In the context of this trial, the weight of the opinions of Dr. Rinker is enhanced by the fact that the human observer who made the observations of the offensive odours was the wife of Mr. Brent Taylor who on occasion worked in the composting operation. Significantly, Mr. Taylor testified that he never smelled any offensive odours at the Pyke property where he now lives.

186 The testimony of all the witnesses and the opinion of Dr. Rinker show that the human nose is a very sensitive and a very subjective instrument.

> The key factor in the analysis of odours is the capture and detection of trace concentrations of volatile compounds. Due to this factor, odour problems can present complex challenges. Odour analysis and odour controls are a function of both the extreme sensitivity of the human sense of smell, and of the subjectivity of odour perception. The human nose is the ultimate instrument for odour detection, with a sensitivity capable of detecting one part of an odorous substance in hundreds of millions of parts of air. Some chemicals with characteristically offensive odours have odour thresholds in the sub parts-per-billion (ppb) range, which makes chemical analysis extremely difficult in that such low levels are often below the detection limit of conventional analytical instrumentation. ... The establishment of effective odour control measures is complicated by the fact that there is an absence of a direct relationship between the concentration and perceived intensity of odours for humans. Rather, human response to odour is known to be a non-linear effect, with the response or

perceived intensity related to the concentration of the odour by some fractional power of the concentration. This implies that a considerable reduction in concentration of the odour-producing chemical(s) may be required in order to provide a recognizable change in perceived odour intensity. *The Analysis of Mushroom Composting Odours*, op. cit., at p.59 - 60.

187 I also accept Dr. Rinker's opinion that a person can experience a loss or diminution of the ability to detect an offensive odour after a long period of exposure. This conclusion is also supported by the combination of the testimony of many witnesses.

188 I accept Dr. Rinker's opinion that the extent to which the odours are transmitted off-site can be affected by numerous factors in addition to the activity and stage of the composting process:

> The transport properties of compounds in air are determined by a combination of parameters, including atmospheric and meteorological factors, such as wind velocity and direction, air temperature and moisture content. In addition, the physical characteristics of the location of both the source of odours and of the surroundings to which the odours may drift, as well as the transport distance between sites, the rate of production and dispersion of compounds in air, and the chemical and physical properties of the particular compounds in question, may also play a role in the transport of odours. *Off-site Detection of Odorous Compounds Produced by Phase 1 Composting*, op. cit., at p. 18.

189 The evidence does not establish the extent to which the odours are carried in the vapour given off the ricks. Dr. Beyer mentioned that it is his practice to walk in the water vapour beside the ricks to see if he can detect anerobic odours. He said it was possible that the vapour could carry odours including ammonia but he was of the opinion that the ammonia would dissipate before it left the site. Dr. Rinker agreed.

190 Despite the testimony of Mr. Snobelen and Mr. Clay Taylor directed at showing that fog or vapour did not travel from the ricks to the plaintiffs' properties, Dr. Rinker's testimony gave some support to the plaintiffs' observations. He said that when he attended GMF in December 1994 he observed steam coming off the ricks, rising vertically for several hundred feet in the air and then going south. He and Dr. Beyer said this vapour was normal to the production process. Dr. Rinker also gave the opinion that it would be unsafe to put the composting process in a building because it would produce fog and could be dangerous because it would be difficult to see.

191 The overwhelming weight of the testimony of all the witnesses also establishes that the composting equipment and practices used by the defendants since the summer of 1995 inevitably produce periodic offensive odours.

2. How can the conflicting evidence about odours be reconciled?

192 The gist of the testimony of Mr. Snobelen, Mr. Clay Taylor, Mr. Brent Taylor and Mr. Van Dusen was that there were seldom any offensive odours in the immediate area of the composting operation and virtually never any off site.

193 I found the testimony of Mr. Snobelen and Mr. Clay Taylor confusing. Although they gave testimony along these lines they also said they thought the neighbours had legitimate complaints in 1994 and early 1995. That would make no sense unless there were offensive odours off-site at that time. Their testimony also conflicted with that of every plaintiff. I conclude that in their effort to minimize the plaintiffs' complaints they deliberately gave the court an inaccurate impression of the odours produced by composting.

194 The denial of GMF employees that composting was odorous at all was directly contradicted by their expert, Dr. Rinker.

195 In view of the testimony of Dr. Rinker it is not surprising that the degree of offensiveness observed by the plaintiffs may not have changed when the defendants changed their practices in 1995, or that the plaintiffs would make different observations from each other and the defendants on the same occasions in the same place or in different places. There might be no or little odour at the rick but be an offensive odour off-site. There might be an offensive odour on the property of one neighbour but not on the property of another at the same time. The odour could dissipate off-site before the defendants attended to investigate. The offensive odour detected at the same location off-site could come and go frequently and unpredictably.

196 These factors were so evident that neither counsel thought it worthwhile to attempt to chart or compare the observations of the plaintiffs on the same dates and for the same reason I shall not do so.

197 I was troubled by the testimony of Mr. Van Dusen who was the only employee of GMF who regularly made observations and kept logs of his observations of odours. His general practice was to open his car window when going to and from the farm and to make a note of whether or not he smelled odours. He kept these logs from 1995 to 1999.

198 His testimony and logs created a much different impression than the evidence of the plaintiffs. On most days he noted no odour at all. When he did it was only a slight odour and was often only noted at the farm gate or lane. He said that on only a couple of occasions over those years did he ever notice an odour which was sharp or pungent.

199 I find that his evidence and logs are unreliable indicators of the off-site odours for several reasons. He only made his observations from the car. He was not in the same position long enough to determine if an odour was present at a particular location during a day except at the very moment he drove by. He could have been in a pocket. He claims he only noticed what I would categorize as an offensive odour on a couple of occasions over 4 years; this directly contradicts the testimony of the many plaintiffs, the evidence of Dr. Rinker that offensive odour problems are commonplace off-site at farms everywhere and also conflicts with the research data of Dr. Rinker collected at this very farm. I conclude that the evidence of Mr. Van Dusen does not materially diminish the reliability of the plaintiffs' evidence.

200 Although some of the plaintiffs' exaggerated the degree and frequency of offensive odours, I generally found them to be credible witnesses. I was impressed by the detailed notes that many of them kept and that they were made without any significant collaboration. I was impressed with the similarity of their experiences. I was impressed that they described the odours from other farm operations such as the adjacent pig farm as being acceptable. It is significant that some of the plaintiffs have had long experience living on working farms and yet find the odours from GMF to be intolerable..

3. Do the odours constitute a nuisance?

The law of nuisance

201 I propose to analyze the claim in nuisance in accordance with the law of nuisance as summarized in Linden, *Canadian Tort Law*, 6th ed., Butterworths, 1997 in Chapter 15.

202 The material claim of the plaintiffs is about odours. There is no doubt that odours can be the subject of a claim in nuisance.

203 The fundamental issue in a nuisance claim is whether, taking into account all the circumstances, there has been an unreasonable interference with the use and enjoyment of the plaintiffs' land.

204 In this case the plaintiffs rely on the alleged injury to their health, comfort and convenience, and the alleged depreciation of the resale value of their lands.

205 To establish nuisance, the plaintiffs must show substantial interference which would not be tolerated by the ordinary occupier in their location. The test is objective. The interference must be repeated or continuous.

206 In considering the interference, the court must consider the type of interference, the severity, the duration, the character of the neighbourhood and the sensitivity of the plaintiffs'

use of their lands. With respect to the severity of the interference, it is not actionable if it is a substantial interference only because of the plaintiff's special sensibilities. With respect to the character of the neighbourhood, the court should consider the zoning, whether the defendant's conduct changed the character of the neighbourhood and the reactions of other persons in the neighbourhood.

207 The court must balance theses considerations against the value of the defendant's enterprise to the public and the defendant's attitude toward its neighbour. The court must consider whether the defendant is using the property reasonably having regard to the fact that the defendant has neighbours. The court should consider whether the defendant took all reasonable precautions.

208 The defence raised some arguments to the effect that the agricultural zoning barred a claim in nuisance. This is not so. A person's conduct can comply with zoning requirements but still produce a nuisance.

Findings as to whether the odours constitute a nuisance

209 I have no hesitation in finding that the operation of GMF has constituted a nuisance at common law from the commencement of its operations. I shall briefly explain my findings in the context of the law as I have summarized it above.

210 The operation of GMF has produced offensive odours and a haze and there is some evidence that it produces noise. While annoying, the haze is not sufficient to constitute a nuisance because it is infrequent. The evidence does not establish that the noise is a nuisance. However, the odours, some of which are associated with the haze, have affected the physical well-being of the plaintiffs to a significant degree and very substantially disrupted their use of their lands.

211 The number of the plaintiffs, their testimony and their varied backgrounds satisfy me that the interference would not be tolerated in their location by the ordinary occupier whether that person be only a resident or also a farmer. Other than the defendants, every owner called as a witness has found the interference intolerable. The only witness from the area who was not a party was the golf director of the Thunderbird Golf Club who took the same view as the plaintiffs. The interference has been repeated frequently.

212 The neighbourhood is rural. The zoning is agricultural but the majority of the owners to the southwest of GMF use their lands for primarily residential purposes. In the surrounding area there is also mixed farming, a hog farm, a dog kennel, a stable and a golf course. The severity of the interference is not the result of the plaintiffs' special sensibilities although one of the plaintiffs has special sensibilities which have magnified the impact on her. The operation of GMF has dramatically changed the nature of the neighbourhood. While the

mushroom farm is classified by statute as an agricultural operation the odours and haze it produces are completely unheard of and intolerable to the owners in the area which was the subject of the evidence. The plaintiffs have resided in the area for up to 58 years and the interference caused by GMF is unprecedented. Three of the plaintiffs have resided on working farms in the area for decades. The reasonableness of the plaintiffs' complaints is enhanced by the fact that they have tolerated the usual farm odours from mixed farms and a hog farm.

213 The defendants' operation produces a food product and an agricultural producer of food is a valued enterprise. However, it is not the growing of mushrooms which is the nuisance but only the composting of material used to grow the mushrooms. The defendants have made efforts at significant expense to reduce the nuisance caused by their operation but have deliberately tried to belittle the neighbours' complaints and have falsely denied under oath that their operation produces a nuisance. I accept the evidence of the defendants' experts that they now take all the reasonable precautions possible in the current state of the art of mushroom composting. However, the use of the defendants' land for composting is unreasonable having regard to the fact that they have neighbours.

214 Considering all these factors, I find that the defendants' operation has caused an unreasonable interference with the use and enjoyment of the plaintiffs' lands by producing offensive odours. The odours constitute a nuisance at common law.

4. Are the plaintiffs' claims in nuisance barred by the "right to farm" legislation?

A. What protection do the statues provide to farmers from civil actions based on the common law of nuisance?

215 In the course of the trial numerous references were made to two statutes which are at the centre of this controversy: the *Farm Practices Protection Act*, R.S.O. 1990, c. F.6 and its successor, the *Farming and Food Production Protection Act*, S.O. 1998, c.1. There are no court decisions interpreting or applying either of them. Counsel pointed out a number of ambiguities and confusing provisions of these Act and gave them conflicting interpretations.

216 Each statute established a Board to deal with various issues including complaints against farmers and each provided farmers with some protection against law suits complaining of odours.

217 Neither statute gave the Boards exclusive jurisdiction concerning odour complaints. The issues in dispute here were never taken to the Boards.

218 For the purpose of considering the issues in this case I shall first set out some of the provisions of the two statutes which are relevant and state my conclusions as to their meaning. I shall then consider the other issues raised concerning the two statutes.

(i) analysis of the Farm Practices Protection Act

219 I find that it applies to the operator of a mushroom farm including the composting operations. The definitions sections state that the Act applies to a person who carries on an agricultural operation which is defined to include the production of mushrooms. [s.1(d)]. An agricultural operation is also defined to include "the storage, disposal or use of organic wastes for farm purposes". [s.1(i)] In addition to the definitions and the expert evidence, I note that composting has been held by the courts of British Columbia to be a part of the operation of a mushroom farm in the context of similar farm protection legislation: *T & T Mushroom Farm Ltd. v. Langley (Township)*, [1997] B.C.J. No. 1520 (B.C. C.A.); leave refused [1997] S.C.C.A. No. 426 (S.C.C.).

220 The statute gives the operator some protection from law suits complaining of odours. Section 2 states:

> 2(1) A person who carries on an agricultural operation and who, in respect of that agricultural operation, does not violate,
>
> (a) any land use control law;
>
> (b) the Environmental Protection Act
>
> (c) the Pesticides Act;
>
> (d) the Health Protection and Promotion Act; or
>
> (e) the Ontario Water Resources Act,
>
> is not liable in nuisance to any person for any odour, noise, or dust resulting from the agricultural operation as a result of a normal farm practice and shall not be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates an odour, a noise or dust.
>
> (2) Subsection (1) does not apply to an owner or operator of an agricultural operation that fails to obey an order of the Board made under clause 5(3)(b).

221 The statute provides no protection to the operator from prosecution under the *Environmental Protection Act*.

222 In the context of this case the scope of the protection from law suits complaining of odour under the common law of nuisance is this: a court cannot award damages against the operator of a mushroom farm if all these factors exist:

a. The operator is not violating the *Environmental Protection Act*.

b. The odour results from the operation.

c. The odour is the result of a normal farm practice.

d. The operator has not failed to obey an order of the Board.

223 The court cannot grant an injunction against the operator unless one or more of those factors do not exist. Even if one or more of those factors does not exist s. 6 provides that a court cannot grant an injunction if the matter is before the Board unless there is a proceeding pending under one of the listed statutes.

(ii) analysis of the Farming And Food Production Protection Act, 1998

224 This statute replaced the *Farm Practices Protection Act*. It also specifically applies to an operator of a mushroom farm including the composting operations. [s.1(1), (2)]

225 It also gives the operator some protection from law suits complaining of odours but on different conditions. Section 1(1) defines 'disturbance' as including odour. Section 2 states:

> 2(1) A farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice.
>
> (2) No court shall issue an injunction or other order that prohibits a farmer from carrying on the agricultural operation because it causes or creates a disturbance.
>
> (3) Subsections (1) and (2) do not apply to preclude an injunction or order, in respect of a nuisance or disturbance, against a farmer who has a charge pending related to that nuisance or disturbance under the,
>
> (a) Environmental Protection Act;
>
> (b) Pesticides Act;
>
> (c) Health Protection and Promotion Act; or
>
> (d) Ontario Water Resources Act.

(4) Subsections (1) and (2) do not apply to preclude an injunction or order, in respect of a nuisance or disturbance, against a farmer who is in contravention of an order of the Board made under clause 5(4)(b) related to that nuisance or disturbance.

(5) This Act is subject to the Environmental Protection Act, the Pesticides Act and the Ontario Water Resources Act.

226 As stated in subsection 2(5), the Act provides no protection from the *Environmental Protection Act*. Mr. Stone who has been responsible for the administration of this statute and its predecessor said it is his department's view that farmers are exempt from prosecution. In my view that is clearly not what either statute says.

227 The protection from law suits for damages is different from the protection from injunctions.

228 The statute initially states in subsection 2(1) that a court cannot give a remedy under the common law of nuisance because of an odour if all these factors exist:

a. The odour results from the agricultural operation.

b. The operation is carried on as normal farm practice.

229 Subsection 2(2) omits any reference to a normal farm practice and consequently is broader than subsection 2(1). Subsection 2(2) generally prohibits a court from granting an injunction to stop a nuisance regardless of whether the operation is carried on as a normal farm practice.

230 It is not clear what effect subsections 2(3),(4) and (5) have.

231 With respect to subsections (3) and (4) it appears to me that they were intended to preserve the right of a complainant to seek relief when there is a pending prosecution under one of the statutes listed or where the operator is acting in contravention of an order of the Board.

232 Although subsection (3) refers to subsection (1) it appears to me that it does not mean that a complainant could obtain a judgment for damages where there is a prosecution pending under one of the listed statutes.. Because subsection (3) refers only to a *pending* prosecution, it would not be reasonable interpret it as removing the protection from damages simply because of an allegation of an offence which might never be proven. Also, the reference to a pending prosecution must mean that it would not permit an injunction after a conviction were registered.

233 With respect to subsection (4), it appears to me that this provision means that while an operator is absolutely protected from an injunction, and is generally protected from an award of damages while operating as a normal farm practice, the operator will lose the protection from both if the operator disobeys an order of the Board with respect to that nuisance.

234 Consequently, the current statute has significantly restricted the circumstances where an injunction was available under the previous statute. The protection in the previous statute did not distinguish between remedies but the current statute deals with each differently. No injunction can now be issued solely on the ground that the defendant is not following normal farm practice. A successful plaintiff in a nuisance action is now limited to a remedy of damages. It also seems clear from the combination of subsections (2), (3) and (4) that even if there is a conviction or if there is a judgment in a nuisance action, the court cannot issue an injunction. The remedy of a permanent injunction is limited to situations where the operator acts in contravention of an order of the Board.

235 Consequently, the most reasonable interpretation I can give this statute is this. A court can award damages against an operator under the common law of nuisance in only two situations: first, if the odour results from an operation which is not carried on as a normal farm practice; second, if the operator has failed to obey an order of the Board with respect to that nuisance.

236 Further, a court can only grant an injunction against an operator under the common law of nuisance in two situations: first, if there is a prosecution pending alleging that nuisance under one of the listed statutes; second, where the operator has failed to obey an order of the Board with respect to that nuisance.

237 Although an injunction could be issued as a remedy in a nuisance law suit under the previous statute, it cannot be issued under the *Farming and Food Production Act, 1998*. In my view it would be inappropriate to issue an injunction now that the current statute has removed the remedy because only the current statute applies to conduct occurring after it came into force.

238 Subsection (5) is more problematic. The previous statute clearly stated that the operator would not be immune to a law suit in nuisance if the nuisance also constituted an offence under the *Environmental Protection Act*. The current statute uses ambiguous language concerning the issue.

239 Counsel have drawn my attention to a number of principles of interpretation in support of their competing positions. They referred to the following passage from Sullivan, *Dreidger On the Construction of Statutes*, 3rd ed. Butterworths, 1994, at p. 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then 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 the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. [cited with approval in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015 at 1063-1064.

240 With respect to the purpose of the legislation, counsel pointed to the preamble to the statute which speaks of protecting farmers even though their operations may cause discomfort to neighbours. It also speaks of protecting farmers in a way which balances the needs of the agricultural community and environmental concerns.

241 I was also directed to the legislative debates preceding the enactment of this statute and its predecessor.

242 When the *Farm Practices Protection Act* was introduced, the Minister of Agriculture stated that the Act was not intended to give farmers the right to pollute: *Hansard*, December 17, 1987, p. 1279. He also said that farmers had expressed a concern that even though they follow normal farm practices they could still be subject to prosecution under the *Environmental Protection Act* and that in response to that concern, the government had developed protocols so that a complaint about pollution could be directed to the Farm Practices Protection Board and that a decision to prosecute under the *Environmental Protection Act* would not be made until the Board made a decision. Exhibit 42 is a publication of the Ministry of Agriculture which states that the Ministry of the Environment will not prosecute unless the complainant first takes the matter to the Board. The speech of the Minister, both statutes and that publication all recognize that technically a normal farm practice could constitute an offence under the *Environmental Protection Act*. If it could not, there would be no need for the provisions in s.2(1)(b) of the *Farm Practices Protection Act*, or s.2(5) of the *Farming and Food Production Protection Act, 1998*.

243 When the successor statute was introduced, the Minister stated that it was intended to give farmers additional protection and specifically mentioned the new protection in s.6 which meant that if the Board found the practice to be a normal farm practice, the farmer would be protected from any applicable municipal by-law: *Hansard*, June 26, 1997, p. 11175. The Minister also said the new statute was still intended to require farmers to adhere to all

environmental laws: *Hansard*, September 24, 1997, p. 12391. He did not explain what was intended by deleting s.2(1) which made it a condition of civil suit immunity that the farmer not be in violation of various statutes.

244 I infer from Exhibit 42 and the testimony before me that the Ministry of the Environment has adopted a policy that it will not prosecute unless the pollution complaint is referred to the Board and that the Ministry will not prosecute at all if the farmer follows normal farm practice. In my view the latter policy is based on an erroneous interpretation of the two right to farm statutes.

245 Counsel also relied on a number of presumptions and special rules of interpretation.

246 Generally, special legislation is taken to override general legislation if they are in conflict: *M.G.E.A. v. Manitoba* (1977), 79 D.L.R. (3d) 1 (S.C.C.). However, there is no conflict between the *Farming and Food Protection Act* and the *Environmental Protection Act* as to whether a normal farm practice can still amount to a pollution offence especially in view of the fact that s.2(5) makes the specific statute "subject to" the general statute.

247 There is also a general rule that a right should not be removed unless the statute does so specifically. The plaintiffs claim that the original Act specifically interfered with their right to sue under the common law of nuisance but permitted an action about a normal farm practice if the farmer was in breach of the *Environmental Protection Act*. They contend that this right to sue in those circumstances should be taken to remain because of s.2(5) of the successor Act. On the other hand, the defendants point out that the original Act specifically limited the farmer's protection to circumstances where the farmer was not in breach of the other statute and since this specific limitation has been removed it should be taken to be removed.

248 I also note that the reference to the *Health Protection and Promotion Act* was not included in the successor statute so that in this respect the legislature clearly intended that the protection from civil action did not depend on compliance with that statute.

249 The caselaw regarding statutory interpretation also directs the court to consider what would be a reasonable and just interpretation. In this regard, I must say that I am troubled by a policy that a farmer can cause serious harm to a neighbour as the result of a normal farm practice without that neighbour having any remedy in damages. From the plaintiffs' point of view it does not seem just that the neighbour should suffer a serious loss without compensation in order that the whole community can benefit from the production of agricultural products especially where, as in this case, the farmer is the newcomer and is introducing the harm to the neighbourhood. However, the legislature is entitled to make social policy even though it causes disadvantage to individuals. From the perspective of both parties it also does not seem practical to permit a court to award damages for a nuisance but not to permit the court to issue an injunction to stop it.

250 I conclude that the legislature removed the specific condition that a farmer is not entitled to protection from civil suit if the farmer is in breach of specified statutes, and replaced it with a provision that states that the statute is "subject to" some but not all of those statutes, for the purpose of removing the condition without expressly saying so. It may be that the legislature did not want to offend those who promote protection of the environment. In other words, it was a diplomatic or political way of rescinding the condition.

251 Taking all the factors into account I conclude that under the *Farming and Food Protection Act, 1998* the legislature has separated the concepts of civil liability from the quasi-criminal liability under the listed statutes. I conclude that all subsection 2(5) means is that the operator is still theoretically subject to prosecution under the *Environmental Protection Act* and the other two statutes listed even though the operator may have some immunity from civil action based on the same conduct. This interpretation would reflect the balance of the needs of agriculture and the other interests which are mentioned in the preamble to the statute.

B. Which statutes apply to this case?

252 The odours complained of in this case began in the fall of 1994 and continue today.

253 The *Farm Practices Protection Act* was in force in 1994 but was repealed on May 11, 1998 when the *Farming and Food Production Protection Act, 1998* came into force. Consequently, there is an issue as to whether the claims in this action are governed by one or both statutes.

254 The statutes are silent on this point.

255 The common law principles applicable to this issue are summarized in *Dreidger*, op. cit., at p.552.

256 There is a general presumption that legislation is not retroactive. I find nothing in the second statute to rebut this presumption.

257 It is presumed that a new statute will apply to on-going facts unless its application would interfere with vested substantive rights. Where the application to vested rights would be unfair it is presumed not to apply. Whether it is unfair is not simply a matter of looking at the effect on the parties in this case but involves considering the rights of all persons who would be affected by a retrospective application. I conclude it would be unfair to interpret the current statute as removing any vested rights to sue under the common law of nuisance under the first statute. The plaintiffs commenced their action before the second statute came into force.

258 The provisions of s.14 of the *Interpretation Act* also apply and I find that subsections 14(1)(b),(c) and (e) have the effect of making the repealed statute govern the claims relating to acts done while it was in force.

259 I conclude that the first statute applies to all claims based on facts occurring during the period when it was in force and that the second statute applies to all facts occurring since it came into force. Consequently, I conclude that the present action is governed by both statutes and that the claims must be considered in two time frames.

C. Should the court refer the issue of what is a normal farm practice to the board?

260 After I reserved judgment I asked counsel for submissions as to whether I should exercise my discretion to decline to decide if the defendants' operation fell in the category of normal farm practice and leave the plaintiffs to seek a ruling from the Board. I raised this issue only when my study of the right to farm legislation led me to the view that the there is a very significant policy-making role in determining what is a normal farm practice and that the determination does not involve only a comparison of existing farm procedures.

261 I am satisfied the court has the discretion to decline to make a determination which is within the jurisdiction of an administrative tribunal: *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.).

262 If this issue had been raised by the parties at the commencement of the trial I might have taken this approach but I have concluded it is not appropriate at this stage for a number of reasons.

263 The parties have gone to enormous expense to present this case to the court and if this issue were referred to the Board the evidence would have to called again. A transcript would not be sufficient as there are many credibility issues. The situation would become extremely complicated if the evidence called before the Board differed from that put before me.

264 While the Board obviously has expertise relating to farm procedures which I do not, the main factor on which I propose to rely in determining whether this is a case of normal farm practice is not one on which the Board has any special expertise.

265 There are numerous related issues of statutory interpretation here because of the poor drafting of the statutes and the use of ambiguous and unconventional language. I believe the court is better equipped to deal with them.

266 If the matter were referred to the Board there would be a very significant delay in resolving this dispute. The delay would become even worse if one of the parties appealed the ruling of the Board before returning to this court to continue the trial.

267 If the matter were referred to the Board and it found this was not a case of normal farm practice it could order the composting operation to stop but could not compensate the plaintiffs because this is not within their authority. The parties would have to return to the court once again. As I will discuss, if the plaintiffs succeed before me I can compensate them but cannot issue an injunction to terminate the nuisance. This is a very impractical and costly division of authority. To make matters worse we already have another proceeding pending in another court under the EPA.

268 The legislature apparently did not consider the Board to have a unique expertise on the subject matter covered by the Act as s.8 provides for an appeal on "any question of fact, law or jurisdiction" to the Divisional Court.

D. Do the right to farm statutes bar the plaintiffs' claims because the defendants' operation is protected as a normal farm practice?

269 The previous statute made the protection from all common law nuisance remedies conditional upon the disturbance being the result of a normal farm practice and the current statute retains that condition with respect to protection from damage awards.

270 The *Farm Practices Protection Act* sets out this definition in s.1:

> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices.

271 The *Farming and Food Protection Act, 1998* defines the term in subsection 1(1) as follows:

> "normal farm practice" means a practice that,
>
> (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or
>
> (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices.

272 I have underlined the only two differences in the definitions which in my view are material in this case.

273 Both statutes give the Board the power to determine whether a practice is a normal farm practice but do not prevent the court from making such a determination and do not require a complainant to go to the Board. Indeed, if the complainant sues without first going to the Board, the court must make a determination as to whether or not the operation is conducted as a normal farm practice before it can determine if the claim is barred.

274 Section 6 of the current statute gives some further direction. Subsection 6(1) states:

> (1) No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation.

275 Subsection 6(15) states:

> (15) In determining whether a practice is a normal farm practice, the Board shall consider the following factors:
>
> 1. The purpose of the by-law that has the effect of restricting the farm practice.
>
> 2. The effect of the farm practice on abutting lands and neighbours.
>
> 3. Whether the by-law reflects a provincial interest as established under any other piece of legislation or policy statement.
>
> 4. The specific circumstances pertaining to the site.

276 It appears to me that factors 1,2 and 3 have no relevance to any part of the statutory definition of 'normal farm practice' except the requirement that it be "acceptable". This supports my view that when the legislature changed the definition in the new statute by replacing "proper and accepted customs and standards" with "proper and *acceptable* customs and standards" it was the intention of the legislature to make clear that the Board and the court have the power to consider not just whether a practice was normal but also whether it was acceptable in a very broad context. The addition of the word 'proper' seems to reflect the same intention. Counsel for both parties agree that there is a broad policy power in determining what is a normal farm practice.

277 In introducing the current statute the Minister of Agriculture said:

> The board's central role under the act is to determine whether or not the activity in question is a normal farm practice. ... I have every confidence that the new board will have the necessary experience and knowledge to make fair and balanced decisions.
>
> Bill 146 is a major improvement over current legislation for a number of reasons. ... It spells out that normal farming practices are those that are consistent with proper and

> acceptable customs and standards followed by the industry. ... *Hansard*, September 24, 1997, p.12391. [my underlining]

278 The Minister also said in the same speech that determining what is a normal farm practice is not complicated [at p. 12391]. With respect, I disagree. Because the definition in the current statute includes a determination of what is acceptable, it is a very difficult decision which must, as he noted, take into account and balance a wide variety of factors.

279 Both statutes include in the definition of normal farm practice the factor of whether the operation is conducted "in a manner consistent with proper and accepted [acceptable] customs and standards as established and followed by similar agricultural operations under similar circumstances".

280 At the conclusion of the evidence counsel for the plaintiffs indicated that it was their position that the defendants had not proved they were entitled to the protection granted to normal farm practices because the defendants had not adduced sufficient evidence that their operation was conducted under "similar circumstances". In particular, the plaintiffs contended that the defendants had not established that comparable operations were adjacent to residences of other persons.

281 Mr. Colautti asked leave to adduce additional evidence on this point and I re-opened the trial.

282 I gave reasons at that time which I shall now summarize. One of the issues was this: what evidence does the farmer have to adduce to establish that his operation was conducted in similar circumstances? Does such evidence have to show that the actual effect of the defendant's operation is similar to the effect of other operations? For instance, does the defendant farmer have to call as witnesses the neighbours of other operations so they can describe the effect of those other operations on their property? In my reasons I said:

> It would be impractical and unreasonably onerous to require a farmer seeking exemption from liability in nuisance to establish that the actual effect of the farm operation is similar to that of other farm operations. In my view the actual effect is a relevant consideration but not one which a farmer must necessarily prove in order to establish that the defendant's operation is a normal farm practice.
>
> In this case the focus is on evidence relating to the odour of phase one composting operations carried on to produce substrate for mushroom farming. Without limiting the scope of what evidence may be relevant to show "similar circumstances" of the defendants' operation, I would say that in my view it would include evidence [to show how the defendant's operation compared to other operations] as to the location, the surrounding geographical features, the proximity of neighbours and the uses they make

of their lands, the zoning of the farm land and of the neighbours' lands, weather features of the area and other factors which may bear on the potential effect, if any, of the operation on others.

It would also include other factors which are already in evidence such as the size of the operation and the formula used.

When I say these factors are relevant I am not saying that there must be evidence on each factor in every case. The sufficiency of the scope of the evidence and its weight are matters which must be considered in the circumstances of each case which include the extent to which the plaintiffs take issue with the evidence. The court must make a finding as to whether the defendant has established that its operation is carried on as a normal farm practice in the context of the particular case. [I have added the words in brackets for clarity]

283 Counsel referred me to two decisions of the Board under the first statute which deal with the issue of similar circumstances and the issue of the effect on neighbours: *Huff and Prinzen*, Board File No. FPPB90-01, April 25, 1991; *Bazinet and Lapointe*, Board File No. FPPB95-01, November 30, 1995. In both cases the Board ruled that the proximity of neighbours was a relevant consideration in determining whether the operator's action was carried out under similar circumstances. In both cases the only evidence adduced concerning similar operations related to operations in the same immediate area. The Board did not comment on whether "similar circumstances" makes only the operations in the immediate area relevant or, for instance, whether operations all over the province are relevant. In the case before me the parties called evidence about the operations of mushroom farms all over the province. There was also some general evidence about the mushroom farm of the defendants a few miles to the west of GMF and about mushroom farms in Pennsylvania.

284 I did not receive enough evidence to enable me to compare the sequence of the start up of mushroom farms in any other area in the context of whether other mushroom farms were begun in an area where there were already a number of adjacent residences or whether the farms were in operation before residences were built nearby. In my view, the scheme of the two statutes and the approach taken in the decisions of the Board make this a relevant factor in determining normal farm practice.

285 The consideration of this factor would also seem to be a fair and reasonable way of balancing the interests of the public in agriculture and in providing housing. Within a five minute drive of the courthouse where this trial took place there are numerous examples of situations where there are agricultural operations immediately beside housing subdivisions. Indeed, the subdivisions are spreading rapidly into what has been farmland. In considering, for example, how these statutes would operate if the mushroom farm were immediately adjacent to one of these subdivisions, it would seem to me to be appropriate to consider what

was the normal farm practice in the area before the subdivisions were built. If GMF were adjacent to one of these subdivisions it would seem to me to be relevant to consider whether the farmland was first used for a mushroom farm before or after the subdivisions were built. Another example would be the situation where a mushroom farm was started in an area where there were already other mushroom farms operating in close proximity to residences. That would seem to me to be a significantly different situation from the one here where the previous farm operations adjacent to the plaintiffs' residences did not produce anything close to the degree and frequency of offensive odours which were introduced by GMF.

286 It also appears to me that the inclusion of this factor in determining what is normal farm practice would be consistent with the intention of the legislature in enacting this legislation. The speeches of the Ministers who introduced the two statutes and of the members of all parties in the legislature who supported them contain a number of comments like this:

> However, we have allowed land to be taken out of production throughout the province. A number of severances have taken place on farm land over the past. In many cases, a piece of land was severed to be used by the retiring parents on the farm, or by maybe a daughter or a son who wanted to come home and enjoy the country environment. We find that they would inhabit that house for a period of three to five years, and the first thing you know it would be on the market. Somebody from the city, clamouring for a country environment, would come out and buy that land, but would not be prepared to accept the odours, the dust and the noise accompanying good, normal farm practices. *Hansard*, November 16, 1988, p.5934.
>
> In addition, prior to implementation, the ministry, in partnership with the OFA, the CFFO and ROMA would launch an education and awareness campaign to inform potential rural property purchasers, real estate agents, farmers and municipalities about the normal farming practices used in that area. *Hansard*, June 26, 1997, p.11176.
>
> We made a pledge then that we would put in place a law that is more in step with the times; a law that protected the rights of farmers using normal farm practices to continue raising the food products we all use. ...
>
> The bill before us today does this because it balances the rights of those who conduct their farming businesses in rural Ontario with the rights of all those who live in rural Ontario. ...
>
> As growth encroaches on agricultural land, these nuisance issues of noise, odour and smell do emerge. What is the long-practising farm operation to do with the gradual migration of city folk who are less tolerant of those things?
>
> *Hansard*, September 24, 1997 at p. 12389, 12396..

287 It is clear that the legislation was intended to protect farmers from unreasonable complaints of people who are intolerant of agricultural disturbances because they are used to city living and that it was also intended to protect farmers who are already carrying on agricultural practices which produce disturbances which are normal in the area. The defendants in this case do not fall into either category.

288 I recognize that there is a broad spectrum of farm types and of agricultural practices and I am not suggesting that a farm will not be complying with normal farm practice if it commences operations in an area where that type of farm has not operated before. The issue would be whether the intensity and frequency of any nuisance produced by that farm would be consistent with normal farm practice in that area. In the case before me the evidence establishes that the GMF produces a nuisance which because of its intensity and frequency is completely out of character for this rural area.

289 It is not unreasonable to expect city folk moving to residences in the country to make enquiries and to tolerate any normal farm practices which already produce a nuisance in that area. Similarly, it is not unreasonable to expect new types of farms which produce a nuisance which is fundamentally different in intensity or frequency or both from those already existing in a rural area to make enquiries and desist from conducting such operations in that new area. Nor is this a new concept. As mentioned earlier, Dr. Rinker in his publication written for the Ministry of Agriculture and Food recognized that composting odours were a world wide problem and said, "... anyone considering constructing or purchasing a mushroom farm must be especially cautious in choosing the site for composting preparation". He noted that some farms had to relocate their composting operations up to 160 km. from the growing site. The evidence satisfies me that the defendants were well aware of the potential effect on neighbours and should not have started composting in this area.

290 In my view the protection available for normal farm practices is not available to the defendants for two reasons.

291 First, I find that the operation of GMF up until about the spring of 1995 was not conducted in a manner consistent with accepted customs and standards as established by similar mushroom farms under similar circumstances by virtue of the fact that the composting was not carried out properly. As I have noted, even some of the defendants acknowledged that there were unacceptable odour problems in that period. The defendants are not entitled to the protection for innovative technology or advanced management practices as they were not employing any new technology and there was nothing significantly new about their management practices. The statutes cannot be interpreted to protect careless and indifferent experimentation with untested procedures.

292 My second reason relates to the time frames of both statutes and concerns the factors of similar circumstances, acceptability and competing land uses.

293 The proximity of neighbours is not the decisive issue. It was the unanimous opinion of all the knowledgeable witnesses that the composting practices, equipment and facilities used by GMF since the spring of 1995 were customary in the mushroom industry. While Mr. Graham tried to draw distinctions between the relationship of GMF to residential neighbours compared to other mushroom farms, the overwhelming weight of the lay and expert evidence on this issue showed that there was no material difference. There was no evidence which would enable the court to form any opinion as to whether the neighbours of other farms were more or less affected by offensive odours. But that is not the only issue.

294 From the commencement of its operations GMF was not operating in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and was not operating in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances because GMF commenced its operations in an area where the nuisance it produced was completely out of character. There is no evidence that such a fundamental change in an area's environment had ever been introduced anywhere else in similar circumstances. In any event I do not think it is acceptable. In my view the intensity and frequency of the odours produced by GMF fundamentally changed the rural environment the plaintiffs enjoyed before. Even those of the plaintiffs who had been farmers themselves found the GMF odours intolerable.

295 Having considered the factors I discussed earlier as relating to what is a normal farm practice, I conclude that the GMF operation was never in the category of normal farm practice.

296 I have considered whether 1094581 Ontario Limited might be in a different position than the other plaintiffs because that plaintiff purchased its land after GMF started its operation. I have concluded that the defendants had no defence to the claim of that plaintiff. When that plaintiff purchased its land the defendants had no statutory defence to a claim in nuisance because the defendants were violating the *Environmental Protection Act*. Consequently, that plaintiff was entitled to take the view that while the defendants were creating a nuisance before the plaintiff purchased its land, that nuisance was actionable and could be stopped by an injunction.

E. What is the significance of the pending charge under the Environmental Protection Act?

297 Just as the trial was ending on the liability issue one of the plaintiffs, on the advice of counsel, swore out an information charging the defendants under s. 14 of the *Environmental Protection Act*.

298 This was presumably done to trigger the provisions of s.2 of the *Farming and Food Protection Act, 1998*.

299 The allegations in the information relate only to the period March 1, 1999 to May 30, 1999.

300 I have decided that the evidence about this charge should be admitted.

301 In view of my conclusion as to the meaning of s.2, I have also concluded that that proceeding is of no relevance in determining whether the plaintiffs may sue in nuisance since the right to sue is not conditional upon proving such an offence. It is relevant to whether or not the court could issue an injunction. However, in the circumstances of this case I would not issue an injunction simply because the plaintiffs have commenced a prosecution. I note that the statute would not permit the court to issue an injunction if there were a conviction.

F. Did the defendants lose the protection of the Farm Practices Protection Act up to May 10, 1998 because they were violating the Environmental Protection Act?

302 As noted, under the previous statute the operator was protected from a civil action based on the law of nuisance only if certain conditions are satisfied. One condition was that the operator "does not violate ... the *Environmental Protection Act*".

303 The plain meaning of the statute is that the operator cannot rely on the statutory protection if the operator's conduct constituted an offence under the *Environmental Protection Act*. It is not necessary that a charge be laid or that any conviction be obtained. It is sufficient if the court in the civil action finds that the conduct was a violation of the Act.

304 The plaintiffs allege that the defendants were in violation of the *Environmental Protection Act* during the period 1994 to 1998 when the *Farm Practices Protection Act* was in force. They rely on these provisions of the *Environmental Protection Act*:

> s.14(1) Despite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect.
>
> (2) Subsection (1) does not apply, in respect of an adverse effect referred to in clause (a) of the definition of "adverse effect" in subsection 1(1), to animal wastes disposed of in accordance with normal farm practices.

s.1(1) In this Act, "adverse effect" means one or more of,

(a) impairment of the quality of the natural environment for any use that can be made of it,

(b) injury or damage to property or to plant or animal life,

(c) harm or material discomfort to any person,

(d) an adverse effect on the health of any person,

(e) impairment of the safety of any person,

(f) rendering any property or plant or animal life unfit for human use,

(g) loss of enjoyment of normal use of property, and

(h) interference with the normal conduct of business.

"contaminant" means any ... gas, odour ... or combination of any of them resulting directly or indirectly from human activities that may cause an adverse effect.

305 The *Environmental Protection Act* does not define 'normal farm practices" as used in subsection 14(1).

306 The plaintiffs allege that the defendants violated ss.14(1) by discharging odours into the environment which had the adverse effects mentioned in paragraphs 1(1)(c),(d),(f), (g) and (h).

307 The defendants say that if the defendants were following normal farm practices then they could not be found to be committing an offence under s.14 because this would be inconsistent with the policy of the *Farm Practices Protection Act*. As I have already explained, I disagree. That statute did not provide any immunity under the *Environmental Protection Act* for normal farm practices. Nor does the current statute. The speeches of the Ministers of Agriculture when introducing both acts repeatedly made the point that the statutes were not intended to protect farmers from environmental prosecution. Also, the specific exemption in ss.14(2) of the EPA must mean that if the adverse effect is one under a paragraph other than (a), the person causing the effect is not exempt from prosecution.

308 The defendants also rely on the exemption in ss.14(2) of the EPA. It only provides protection where the adverse effect complained of is one falling under paragraph 1(1)(a) and the plaintiffs do not rely on that kind of adverse effect.

309 The parties agree that offences under the EPA are strict liability offences which do not require proof of any mental element or fault or blameworthiness.

310 Since this is a civil action it is only necessary to prove that GMF was in violation of the EPA on a balance of probabilities; however, I am satisfied beyond a reasonable doubt that it violated ss. 14(1). GMF discharged the odours which caused an adverse effect on the plaintiffs within the meaning of paragraphs 1(1)(c) and (g). The discomfort was substantial, would be material to any reasonable person and was entirely foreseeable. I have considered all the circumstances including the intensity and frequency of the odours, the consequences of the discomfort and the character of the neighbourhood. The plaintiffs also suffered very substantial loss of enjoyment of the normal use of their properties.

311 The defendants, however, rely on the defence of due diligence. They contend that the court must consider if the defendants exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. They contend that the court must take into account the many factors listed in *R. v. Commander Business Furniture Inc.*, [1992] O.J. No. 2904 (Ont. Prov. Div.). I have done so.

312 I find that the defendants have not proved that they took every precaution reasonable in the circumstances up to the spring of 1995 but have proved they did so after that time. Consequently, the defendants have made out a defence of due diligence only for the period after the spring of 1995.

313 Before the spring of 1995 the defendants were experimenting with the composting formula without any reasonable investigation or testing of the changes beforehand and they continued in the face of numerous complaints. They failed to monitor the odours. They did not investigate remedial actions in advance or reasonably promptly.

314 Consequently, I find there was a violation of the EPA during the period from the commencement of the operation until the spring of 1995. Those guilty of the violation included GMF and, pursuant to s. 194, Mr. Snobelen, and Mr. Clay Taylor. The evidence clearly establishes their knowledge and ability to control the discharges. Mr. Snobelen was the effective leader of the enterprise and Mr. Taylor was in charge of the composting.

5. Are the defendants liable in negligence?

315 The plaintiffs' counsel took the position that the plaintiffs' primary claim was in nuisance and that they relied on negligence only in the alternative. The plaintiffs relied on a breach of duty under s.14 of the EPA as the basis of the negligence claim.

316 The amended statement of claim alleges in paragraph 58 that the partnership was negligent in the design and operation of the farm. In my view this is no more than a repetition of the claim in nuisance. Paragraph 60 alleges that the defendants were negligent in selecting this site for a mushroom farm. There is no evidence to support this other than that relating to nuisance.

317 In my view the reliance on s. 14 in paragraph 59 does not add any separate ground of negligence to the pleading. In my view it does not create a civil cause of action separate from nuisance.

318 I conclude there is no case made out in negligence.

6. Are the directors of the corporate defendants personally liable?

319 The plaintiffs contend that in addition to the partnership, the individual defendants who are directors of various corporations should be held liable in nuisance.

320 The law on this subject was recently explained in *ADGA Systems International Ltd. v. Valcom Ltd.*, [1999] O.J. No. 27 (Ont. C.A.). In that case the court confirmed these principles:

> 1. "employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation" (at para. 26)
>
> 2. A plaintiff must plead a reasonable cause of action against the individual. To do so, the statement of claim must "single out their activities as individuals" and "the facts giving rise to personal liability" must be "specifically pleaded". (at para. 37 and 38)

321 There is evidence in this case to support a finding of personal liability in nuisance against some of the individual defendants but the amended statement of claim does not permit such a finding because it does not comply with the above principles.

322 The only paragraphs of the amended statement of claim which relate to a claim in nuisance against the individual defendants are paragraphs 56 to 57D and 62 to 65. Paragraph 56 refers to s. 194 of the EPA which states:

> 194(1) Every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such an unlawful deposit, addition, emission or discharge.

323 That section creates quasi-criminal liability but does not create any civil liability. Failing to stop a corporation from creating a nuisance is not a tort in the category outlined in *ADGA* because the court there ruled that an omission was not the basis of civil liability; the court ruled that it is necessary that the director personally perform an act which is tortious. The amended statement of claim does not allege that the individuals participated in causing the nuisance or that they directed it.

324 Paragraphs 57 to 57D do no more than allege that the individuals breached s. 194. They do not allege the breach of any civil duty. There are absolutely no allegations of fact to support the allegations.

325 Paragraphs 62 to 65 contain general allegations against "the Defendants". They state:

> 62. The Plaintiffs claim against the Defendants in nuisance for the interference the Defendants have caused with the use and enjoyment of the Plaintiffs' properties.
>
> 63. The Plaintiffs submit that the damages they have sustained are a reasonably foreseeable consequence of the Defendants' actions and as the operators of the mushroom operation, they are responsible for the damages sustained by the Plaintiffs as a result of these actions.

326 In view of the fact that there are numerous corporate and individual defendants with a wide variety of roles in the mushroom farm, this pleading is not sufficient to satisfy the requirements laid down in *ADGA*. The amended statement of claim generally alleges nuisance against the "Defendant Partnership" as revealed by the references to only that entity in paragraphs 13A, 19, 20, 22, 24, and 57.

327 The amended statement of claim does not permit the plaintiffs to succeed against the individual defendants in nuisance.

Conclusion on Liability

328 I conclude that the plaintiffs have proved that GMF is liable in nuisance for producing offensive odours from the commencement of its operations. The plaintiffs other than John and Nadia Lennox (whose claims were abandoned) are entitled to judgment against GMF which is a partnership and therefore each of these partners are also liable: TRI GRO Enterprises Ltd. and G.M.F. PART 2. In addition the following partners of G.M.F. PART 2 are also liable: Brent Taylor Holdings Ltd., Rick Campbell Holdings Ltd., and Snobelen Mushrooms Ltd..

329 As I have explained, the plaintiffs are entitled to a remedy in damages but not to an injunction.

Resumption of the Trial

330 In the peculiar circumstances of this case the parties all asked at the outset that the trial proceed first on liability and then after I made a finding on liability, it would continue on the issue of damages. It was agreed that the evidence adduced in the first stage would also apply to the damages issue but that the parties could adduce additional evidence from the same or other witnesses. I agreed to this.

331 Consequently, no judgment shall issue until I have heard the remainder of the evidence and made my findings on damages. The trial shall proceed on a date to be fixed at the attendance on August 31, 1999 when the parties will be attending for a hearing of a related matter. On August 31 I propose to set a timetable for the delivery of any expert reports and ask counsel to make enquiries and come prepared to speak to a timetable for any further production or other matters which must be completed before the resumption of the trial.

Action allowed in part.

Pyke et al. v. Tri Gro Enterprises Ltd. et al.; Ontario Federation of Agriculture, Intervenor*

[Indexed as: Pyke v. Tri Gro Enterprises Ltd.]

55 O.R. (3d) 257
[2001] O.J. No. 3209
Docket No. C32764

Court of Appeal for Ontario
Abella, Charron and Sharpe JJ.A.
August 3, 2001

* Application for leave to appeal to the Supreme Court of Canada dismissed with costs June 13, 2002 (Gonthier, Major and LeBel JJ.). S.C.C. File No. 28789. S.C.C. Bulletin, 2002, p. 921.

Environmental law--Farming--Farming and Food Production Protection Act does not oust jurisdiction of Superior Court Justice to decide whether defendant in nuisance action is immune from liability because subject matter of claim is "normal farm practice"--In absence of special circumstances court should nevertheless decline to determine that issue and should stay action until Normal Farm Practices Protection Board determines whether disturbance constitutes normal farm practice --Farming and Food Production Protection Act, 1998, S.O. 1998, c. 1.

Torts--Nuisance--Exemptions from liability--"Normal farm practice"--Plaintiffs sued defendant mushroom farmers in nuisance for damages resulting from odours emanating from composting phase of defendants' mushroom farm--Defendants pleaded protection of Farm Practices Protection Act and Farming and Food Protection Act on basis that operation in question constituted "normal farm practice"--Trial judge did not err in

allowing action in nuisance--Interpretation of "normal farm practice" includes evaluative element--Court entitled to consider wide range of factors bearing upon nature of practice and its impact upon complaining parties--Farming industry does not have carte blanche to establish its own standards without independent scrutiny--Degree and intensity of disturbance created intolerable situation for plaintiffs--Plaintiffs were there first--Defendants' mushroom farm operation created significantly greater and different disturbance than anything plaintiffs had previously experienced in area--Defendants failed to satisfy "normal farm practice" standard--Farm Practices Protection Act, R.S.O. 1990, c. F.6--Farming and Food Production Protection Act, 1998, S.O. 1998, c. 1.

The appellants were mushroom farmers. The respondents were property owners who resided in the vicinity of the appellants' mushroom farm. They brought an action against the appellants in negligence and in nuisance seeking damages for mental distress, health problems, interference with the use and enjoyment of their properties and decrease in the value of their properties resulting from the odours emanating from the composting phase of the mushroom farm. The appellants pleaded the protection of the Farm Practices Protection Act, R.S.O. 1990, c. F.6, the Farm Practices Protection Act, 1988, S.O. 1988, c. 62 ("the 1988 Act") and the Farming and Food Production Protection Act, 1998, S.O. 1998, c. 1 ("the 1998 Act"). These statutes exempt farmers from liability in nuisance in respect of certain adverse effects, including odours, resulting from "normal farm practice". "Normal farm practice" was defined in the 1988 Act as meaning "a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices". "Normal farm practice" was defined in the 1998 Act as meaning a practice that "(a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices". The odours complained of in this case began in the fall of 1994 and

continued to the time of trial in 1999.

The trial judge dismissed the claim in negligence and found the appellants liable in nuisance. He held that the 1988 Act applied to all claims based on facts occurring during the period when it was in force, and that the second statute applied to all the facts occurring since its coming into force in May 1998. The parties did not take issue with that finding. He held that the proximity of neighbours and the effect of the operation upon them was a relevant consideration in determining whether the operation was a normal farm practice. He further held that the timing of the start-up of the mushroom farm in relation to the commencement of adjacent residential development was a relevant consideration. He stated that the legislation was intended to protect farmers from unreasonable complaints of people who are intolerant of agricultural disturbances because they are used to city living, and that it was also intended to protect farmers who are already carrying on agricultural practices which produce disturbances which are normal in the area. The appellants, he held, did not fall into either category. From the commencement of the operation, the appellants were not operating in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations under similar circumstances. The appellants commenced their operations in an area where the nuisance it produced was completely out of character. The intensity and frequency of the odours produced by the appellants fundamentally changed the rural environment which the respondents had enjoyed before.

The appellants did not dispute any of the trial judge's findings of fact, and did not dispute the finding that the odours constituted a nuisance at law. They argued that the trial judge erred in his interpretation of the two statutes. The Ontario Federation of Agriculture, as intervenor, submitted that questions of this nature should be determined by the administrative tribunal created by the legislature for this purpose, the Normal Farm Practices Board, rather than by the courts.

Held, the appeal should be dismissed.

Per Sharpe J.A. (Abella J.A. concurring): For the reasons given by Charron J.A., absent special circumstances such as existed in this case, complaints with respect to nuisances created by agricultural operations should generally be brought first before the Normal Farm Practices Protection Board before any operation in nuisance is entertained by the courts.

The trial judge correctly found that the legislative language indicates that there should be a qualitative or evaluative element to the interpretation of "normal farm practice". Farming operations do not automatically gain statutory protection by showing that they follow some abstract definition of industry standards. Both statutes require that "circumstances" be taken into consideration. This means that the same practice may qualify as a normal farm practice in one situation, but not in another where the circumstances are different. The farming operation must also satisfy the tribunal hearing the case that, in the circumstances, the customs and standards are, in the words of the 1988 Act, "proper and accepted", and in the words of the 1998 Act, "proper and acceptable". The words "proper and acceptable" connote a qualitative, evaluative inquiry, and qualify and limit the phrase "customs and standards as established and followed by similar agricultural operations under similar circumstances". This statutory language indicates that the farming industry does not have carte blanche to establish its own standards without independent scrutiny. Only those industry standards that are judged to be "proper and acceptable" prevail. The adjudicative body must consider a wide range of factors which bear upon the nature of the practice at issue and its impact or effect upon the parties who complain of the disturbance.

The trial judge was warranted in taking into account both the degree and extent of the disturbance and the fact that the respondents were there first. The relative timing of the establishment of the farming operation and the occupancy of those who complain of the disturbance it creates is one of the relevant contextual, site-specific circumstances to be considered. The serious nature of the disturbance was also an important aspect of the site-specific circumstances the trial

judge was entitled to take into account in determining whether the appellants' operation constituted a "normal farm operation".

Per Charron J.A. (dissenting): The trial judge found that, since at least the spring of 1995, the composting practices, equipment and facilities used by the appellants were customary in the mushroom industry, and all reasonable precautions possible in the current state of mushroom composting to reduce the odours resulting from the process were being used. He also found that there was no material difference between the relationship of the appellants and residential neighbours in comparison with that of other mushroom farms. Based on these findings, the trial judge should have concluded that the appellants were entitled to the statutory protection against nuisance claims. He improperly concluded that the appellants were not, because the nuisance was new and out of character to the area previously enjoyed by the respondents. This approach introduced a notion of proximity in time that was inconsistent with the stated objectives of the legislation.

There is nothing in the 1998 Act that ousts the jurisdiction of the Superior Court of Justice to decide, in the context of a nuisance action, whether the defendants are immune from liability because the subject matter of the claim is a "normal farm practice". However, absent special circumstances, which existed in this case, the question should generally be left for the Normal Farm Practices Protection Board to determine and the action should be stayed pending such determination. The expertise of the Board was a very important factor supporting that conclusion. Further, the Board's special procedure and non-judicial means available under the legislative scheme to implement its purposes can present litigants with significant advantages over the traditional court system. The Board has extensive powers of relief that can, in many cases, be more suitable to the needs of the parties. Of particular significance is the Board's power, where the disturbance is not a normal farm practice, to require that a farmer implement certain farming techniques and methods to ensure compliance with normal farm practice. The court does not have such power. The Board has the power to order the farmer to cease the

practice. The court also has this power under the 1998 Act. A court has the power under s. 2(4) of the 1998 Act to issue an injunction against a farmer who is in contravention of an order made by the Board to cease a practice that is not a normal farm practice. The court, under s. 2(2), also retains the general power to issue an injunction against a farmer who creates a nuisance where the disturbance is not a normal farm practice and the Board has not issued such an order. However, the court's power to grant injunctive relief where the nuisance results from an operation that is not a normal farm practice is no greater than that exercisable by the Board. Indeed, the Board's general power to make inquiries and further orders to ensure compliance with its orders may present certain advantages to the litigants that are not as readily available before the courts.

As the trial judge noted in his reasons, had the issue been raised at the commencement of the trial, he might well have left the matter for the Board to determine, but as matters stood, the parties had gone to enormous expense to present the case before the court. If the issue were referred to the board, the evidence would have to be called again and significant delays would be occasioned. The trial judge appropriately went on to consider the issue instead of staying the action until the Board made a determination whether the disturbance constituted a normal farm practice.

Bader v. Dionis, Re, September 2, 1992, 92-01 (F.P.P.B.); Gardner v. Greenwood Mushroom Farms, September 21, 2000, 2000-01; Gunby v. Mushroom Producers' Co-operative Inc., July 30, 1999, 99-02; Thuss v. Shirley, Re, December 27, 1990, 90-02 (F.P.P.B.), consd

Other cases referred to

Attorney-General v. De Keyser's Royal Hotel Ltd., [1920] All E.R. Rep. 80, [1920] A.C. 508, 89 L.J. Ch. 417, 122 L.T. 691, 36 T.L.R. 600, 64 Sol. Jo. 513 (H.L.); Board of Industrial Relations v. Avco Financial Services Realty Ltd., [1979] 2 S.C.R. 699, 18 B.C.L.R. 23, 98 D.L.R. (3d) 695, 28 N.R. 140, 32

C.B.R. (N.S.) 34, 9 R.P.R. 231; Manitoba Fisheries Ltd. v. Canada, [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462, 23 N.R. 159, [1978] 6 W.W.R. 496 (sub nom. Manitoba Fisheries v. R.); Ordon Estate v. Grail, [1998] 3 S.C.R. 437, 40 O.R. (3d) 639n, 166 D.L.R. (4th) 193, 232 N.R. 201; Thomson v. Canada (Deputy Minister of Agriculture), [1992] 1 S.C.R. 385, 89 D.L.R. (4th) 218, 133 N.R. 345, 51 F.T.R. 267n; Waldick v. Malcolm, [1991] 2 S.C.R. 456, 3 O.R. (3d) 471n, 47 O.A.C. 241, 83 D.L.R. (4th) 114, 125 N.R. 372, 8 C.C.L.T. (2d) 1; Youcke v. Hermann, Re, September 29, 1993, 93-01 (F.P.P.B.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106
Environmental Protection Act, R.S.O. 1990, c. E.19
Farm Practices Protection Act, R.S.O. 1990, c. F.6 [repealed S.O. 1998, c. 1, s. 11]
Farm Practices Protection Act, 1988, S.O. 1988, c. 62, ss. 1 "agricultural operation", "normal farm practice", 2, 6(1)
Farming and Food Production Protection Act, 1998, S.O. 1998, c. 1, preamble, ss. 1 "disturbance", "normal farm practice", 2, 4, 5, 6, 7, 8
Health Protection and Promotion Act, R.S.O. 1990, c. H.7
Ontario Water Resources Act, R.S.O. 1990, c. O.40
Pesticides Act, R.S.O. 1990, c. P.11

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Ct, P.-A., The Interpretation of Legislation in Canada, 3rd ed. (Toronto: Carswell, 2000)
Sullivan, R., Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994)
The Farming and Food Production Protection Act (FFPPA) and Nuisance Complaints: A Fact Sheet (Ministry of Agriculture, Food and Rural Affairs)

APPEAL from a judgment allowing an action in nuisance.

Raymond G. Colautti, for appellants.

Donald R. Good, for respondents.
Brian S. McCall, Robert G. Waters and
Sheila C. Handler, for intervenor.

CHARRON J.A. (dissenting): --

I. Overview

[1] The appellants are mushroom farmers who operate the Greenwood Mushroom Farm on Heron Road in the Town of Whitby, Ontario. [See Note 1 at end of document] The respondents are property owners who reside in the vicinity of the appellants' mushroom farm. Ferguson J., by judgment dated April 11, 2000, found the appellants liable in nuisance to the respondents as a result of odours created by the operation of the mushroom farm. The sole issue on this appeal is whether the appellants' operation is exempt from liability in nuisance under the Farm Practices Protection Act, R.S.O. 1990, c. F.6 and the Farming and Food Production Protection Act, 1998, S.O. 1998, c. 1. This issue turns on whether the odours that formed the subject-matter of the action resulted from an agricultural operation carried on as a "normal farm practice" within the meaning of both statutes.

[2] The Greenwood Mushroom Farm ("GMF") purchased the present Heron Road farm site in 1993 for 1.1 million dollars. The property had formerly been the site of non-farming manufacturing businesses. Since the purchase, GMF has invested over four million dollars in capital improvements and equipment. GMF has become the sixth largest of about 25 mushroom farms in Ontario. The property is situated in an area that is zoned agricultural and the operation of a mushroom farm is permitted by the zoning.

[3] The respondents are owners of properties on or near the farm operation. Their properties are also zoned agricultural. All but one of the respondents live on their properties, and most use their properties only for residential and recreational purposes although some lease parts to farmers. All but one of the respondents owned their properties before the arrival of the appellants' mushroom farm.

[4] GMF operates mostly indoors. However, the process for growing mushrooms starts outdoors with the making of compost or substrate to feed the mushrooms. There is no issue between the parties that the formulation and production of composting material forms an integral part of growing mushrooms. Unfortunately, as the evidence at trial showed, the composting process, even when carried out according to the current state-of-the-art techniques, generates significant odours that can be extremely unpleasant.

[5] The odours resulting from the composting process form the subject-matter of this litigation. In December 1995, the respondents commenced this action in negligence and nuisance seeking damages for mental distress, health problems, interference with the use and enjoyment of their properties and decrease in the value of their properties. They also sought injunctive relief.

[6] The appellants denied that their conduct breached any standard of care and pleaded the protection of the Farm Practices Protection Act, 1988, S.O. 1988, c. 62 ("the 1988 Act"). The pleadings were amended at trial to include a reference to the Farming and Food Production Protection Act, 1998, S.O. 1998, c. 1 ("the 1998 Act"), enacted subsequent to the commencement of the action. Both statutes exempt farmers from liability in nuisance in respect of certain adverse effects, including odours, resulting from a "normal farming practice".

[7] The trial judge found no negligence and, accordingly, dismissed that part of the claim. No appeal is taken from this finding. The trial judge held, however, that the odours constituted a nuisance. He held further that the appellants could not claim the statutory protection because their operation was commenced in an area where the nuisance it produced was completely out of character with the area and, as such, did not constitute a "normal farming practice" within the meaning of each statute. He therefore assessed damages for each individual respondent ranging from $7,500 to $35,000 for the unreasonable interference with the use and enjoyment of their

property.

[8] The appellants do not appeal from the finding that the odours constitute a nuisance at law. Nor do they dispute any of the findings of fact made by the trial judge. They contend, however, that the trial judge erred in his interpretation of the two statutes, holding in effect that the statutory protection was limited to agricultural practices that pre-dated adjacent residential development in a particular area, or to new practices that are consistent with the character of the area in which they commence operations. They submit that this restricted interpretation is contrary to the broad purposes of the legislation. They submit that, based on the findings of fact made by the trial judge, their operation clearly falls within the scope of statutory exemption.

[9] The respondents disagree with the appellants' characterization of the trial judge's decision. They submit that the trial judge, in essence, found that the nuisance created by the appellants far exceeded the level of discomfort and inconvenience in respect of which the statutory protection can be claimed and that, consequently, he was correct in finding that the action was not barred by statute. They submit that the trial judge's decision was both reasonable and supported by the evidence, and that, consequently, the judgment should not be interfered with on appeal.

[10] In order to resolve the question raised on this appeal, it is necessary to consider the relevant statutory provisions and the findings of the trial judge, and then determine whether the statutory protection extends to the facts as determined at trial. In addition, the Ontario Federation of Agriculture, as intervenor, submits that questions of this nature should be determined by the administrative tribunal created by the legislature for this purpose rather than by the courts, and seeks direction from this court with respect to future cases.

II. Analysis

1. The statutory provisions

(a) The 1988 Act

[11] An issue arose at trial as to which statute should govern, the 1988 Act or the 1998 Act. The odours complained of in this case began in the fall of 1994 and continued to the time of trial in 1999. The trial judge held that the first statute applied to all claims based on facts occurring during the period when it was in force, and that the second statute applied to the facts occurring since its coming into force on May 11, 1998. The parties do not take issue with this finding.

[12] The 1988 Act was passed to protect persons who carried on an agricultural operation from liability under the common law of nuisance for any odour, noise or dust resulting from normal farming practices. An "agricultural operation", as defined in the 1988 Act, specifically included "the production of . . . mushrooms". A "normal farm practice" was defined in s. 1 of the 1988 Act:

> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices;

[13] In order to enjoy the protection from nuisance claims, farmers had to comply with any land use control law and other specified statutes:

> 2(1) A person who carries on an agricultural operation and who, in respect of that agricultural operation, does not violate,
>
> (a) any land use control law;
>
> (b) the Environmental Protection Act;
>
> (c) the Pesticides Act;
>
> (d) the Health Protection and Promotion Act, 1983; or

(e) the Ontario Water Resources Act,

is not liable in nuisance to any person for any odour, noise or dust resulting from the agricultural operation as a result of a normal farm practice and shall not be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates an odour, a noise or dust.

(2) Subsection (1) does not apply to an owner or operator of an agricultural operation that fails to obey an order of the Board made under clause 5(3)(b).

[14] A person aggrieved by any odour, noise or dust resulting from an agricultural operation could bring an application before the Farm Practices Protection Board, a tribunal appointed by the Minister of Agriculture, Food and Rural Affairs, for a determination as to whether the odour, noise or dust resulted from a normal farm practice. If, after a review, the Board determined that the complaint resulted from a normal farm practice, the application was dismissed. If the practice was not normal, the Board was empowered to order the farmer to cease the practice or to modify it so as to be consistent with normal farm practice. Any party to a hearing before the Board had a right to appeal an order of the Board on any question of fact or law or both to the Divisional Court.

[15] The 1988 Act further provided that any injunction proceedings in relation to a farm practice which was the subject of an application to the Board were to be held in abeyance pending the resolution of the application by the Board: s. 6(1). This latter provision did not apply, however, in respect to proceedings taken under the Environmental Protection Act, R.S.O. 1990, c. E.19, the Pesticides Act, R.S.O. 1990, c. P.11 or the Ontario Water Resources Act, R.S.O. 1990, c. O.40.

(b) The 1998 Act

[16] The 1998 Act, which is currently in force, repealed the 1988 Act effective May 11, 1998. The 1998 Act increases the protection afforded to farmers in several respects. The

definition of agricultural operation, which still includes the production of mushrooms, is expanded to include a wider variety of enterprises. The protection against nuisance claims is expanded to include complaints resulting not only from noise, odour and dust but also from light, vibration, smoke and flies arising from an agricultural operation carried on as a normal farm practice. Farmers who carry on a normal farm practice are also exempt from the application of municipal by-laws that restrict land use or vehicular transport. The Farm Practices Protection Board is continued under the name "Normal Farm Practices Protection Board" and its jurisdiction is expanded to deal with the wider protection afforded under the 1998 Act. The following provisions of the 1998 Act are more particularly relevant to the question for consideration on this appeal.

[17] The preamble to the 1998 Act provides much assistance in this case to determine the intent of the Legislature. It echoes many of the statements made during the debates preceding the enactment of the legislation:

> It is desirable to conserve, protect and encourage the development and improvement of agricultural lands for the production of food, fibre and other agricultural or horticultural products.
>
> Agricultural activities may include intensive operations that may cause discomfort and inconveniences to those on adjacent lands.
>
> Because of the pressures exerted on the agricultural community, it is increasingly difficult for agricultural owners and operators to effectively produce food, fibre and other agricultural or horticultural products.
>
> It is in the provincial interest that in agricultural areas, agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with provincial health, safety and environmental concerns.

[18] The protection against nuisance claims is set out in s.

2:

> 2(1) A farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice.
>
> (2) No court shall issue an injunction or other order that prohibits a farmer from carrying on the agricultural operation because it causes or creates a disturbance.

[19] Compliance with other specified statutes is no longer a precondition to the application of the s. 2 protection against nuisance claims under the 1998 Act. However, s. 2(3) provides that the protection afforded to farmers by the 1998 Act does not preclude the making of orders or injunctions under the Environmental Protection Act, the Pesticides Act, the Health Protection and Promotion Act, R.S.O. 1990, c. H.7 or the Ontario Water Resources Act. The 1998 Act is also expressly subject to the Environmental Protection Act, the Pesticides Act, and the Ontario Water Resources Act: s. 2(5). Hence farmers are not exempt from compliance with those statutes.

[20] A "disturbance" and a "normal farm practice" are defined under s. 1:

> "disturbance" means odour, dust, flies, light, smoke, noise and vibration;
>
> . . . . .
>
> "normal farm practice" means a practice that,
>
> (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or
>
> (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices;

[21] The definition of "normal farm practice" reads

substantially the same as it did under the earlier statute, except for the use of the word "acceptable customs and standards" as opposed to "accepted customs and standards" found in the 1988 Act, and the additional qualifier "proper" in the second part of the definition. The respondents submit that these amendments are significant. More will be said about this later.

[22] Three kinds of applications can be made to the Board under the 1998 Act: under s. 5, by a person affected by a disturbance; under s. 6, by a municipality or interested person in relation to municipal by-laws that restrict land use; and under s. 7, by a municipality or interested person in relation to municipal by-laws that restrict vehicular transport to and from an agricultural operation.

[23] Under s. 5, a person who is directly affected by a disturbance from an agricultural operation may apply to the Board for a determination as to whether the disturbance results from a normal farm practice. As in the earlier statute, if, after a review, the Board determines that the disturbance results from a normal farm practice, the application is dismissed. If the farm practice is not normal, the Board may order the farmer to cease the practice or to modify it so as to be consistent with normal farm practice.

[24] The 1998 Act provides further protection to farmers in respect of municipal by-laws:

> (1) No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation.

[25] Under s. 6(2), an application may be brought before the Board for a determination as to whether a practice is a normal farm practice for the purpose of the non-application of a municipal by-law. This application can be brought by a municipality or by the following persons [listed in s. 6(3)]:

> 6(3) An application may be made by,
>
> (a) farmers who are directly affected by a municipal by-law that may have the effect of restricting a

normal farm practice in connection with an agricultural operation; and

(b) persons who want to engage in a normal farm practice as part of an agricultural operation on land in the municipality and have demonstrable plans for it.

[26] The 1998 Act provides for certain factors to be taken into account in determining whether the practice is a normal farm practice for the purpose of a s. 6 application:

6(15) In determining whether a practice is a normal farm practice, the Board shall consider the following factors:

1. The purpose of the by-law that has the effect of restricting the farm practice.

2. The effect of the farm practice on abutting lands and neighbours.

3. Whether the by-law reflects a provincial interest as established under any other piece of legislation or policy statement.

4. The specific circumstances pertaining to the site.

[27] Section 7 provides that a municipal by-law that has the effect of restricting the times during which a vehicle may travel does not apply in certain specified circumstances related to agricultural operations. An application to the Board may be made under s. 7 by a municipality or interested person to determine whether the statutory conditions for the exemption have been met.

[28] Finally, the 1998 Act gives any party to a hearing under the Act a right of appeal from an order or a decision of the Board on any question of fact, law or jurisdiction to the Divisional Court within 30 days of the making of the order or decision: s. 8(2).

2. The decision at trial

[29] Extensive evidence was called at trial with respect to the appellants' agricultural operation and its effect on the respondents' use and enjoyment of their properties. During their final submissions at trial, the respondents took the position that the appellants had not proved that they were entitled to the statutory protection because they had not adduced sufficient evidence that their operation was conducted in a manner consistent to similar agricultural operations under "similar circumstances" within the meaning of the two Acts. The trial judge gave the appellants leave to call further evidence on this point. He ruled that such evidence could include evidence to show how the appellants' operation compared to other operations as to location, surrounding geographical features, proximity of neighbours and uses made of their lands, zoning, weather features of the area, and other factors that may bear on the potential effect, if any, of the operation on others. Further evidence was called accordingly.

[30] As indicated earlier, the parties take no issue with any of the findings of fact made by the trial judge. The material findings of fact may be summarized as follows:

1. The area within which the appellants' mushroom farm and the respondents' properties are situated is zoned agricultural. The mushroom farm is permitted by the zoning.

2. Phase one in the production of mushrooms involves the making of compost or substrate to feed the mushrooms. According to the existing technology, composting takes place outdoors.

3. The goal of the composting phase is to keep the process aerobic. If the process becomes anaerobic, it produces chemical compounds which are odorous. These odours can be most offensive. They have been described as rotten eggs, like a septic tank, like ammonia, like urine, putrid, nauseating, like decaying flesh, rancid, overpowering, like rotten fish, and worse than a hog farm. Even when the process is aerobic, it always has the potential of producing odours.

4. The problem of composting odours is becoming a significant issue world-wide and presents a problem for mushroom growers, especially those who compost in locations that are in proximity to areas zoned for residential purposes. There is no present solution to the problem.

5. The GMF started its operation in October 1994. Within a month, it was receiving complaints. As a result, the GMF took some action to remedy the problem and, since the spring of 1995, it has been using all the reasonable precautions possible in the current state of the art of mushroom composting to reduce the odours resulting from the process.

6. The composting operation of GMF, up until about the spring of 1995, was not carried out properly. Since the spring of 1995, the composting practices, equipment and facilities used by GMF were customary in the mushroom industry.

7. There is no material difference between the relationship of GMF to residential neighbours compared to other mushroom farms. There was no evidence that would enable the court to form any opinion as to whether the neighbours of other farms were more or less affected by offensive odours.

8. The GMF's composting process, with the resulting odours and haze it produces, has affected the physical well-being of the respondents to a significant degree and very substantially disrupted their use of their lands from the commencement of its operations. The interference caused by GMF is severe, unprecedented for the area, and intolerable to the respondents.

[31] The trial judge first determined whether the odours constituted a nuisance at common law, and then whether the appellants were entitled to the statutory protection.

[32] On the first question, the trial judge instructed himself on the law of nuisance as follows:

The material claim of the plaintiffs is about odours. There is no doubt that odours can be the subject of a claim in

nuisance.

The fundamental issue in a nuisance claim is whether, taking into account all the circumstances, there has been an unreasonable interference with the use and enjoyment of the plaintiffs' land.

In this case the plaintiffs rely on the alleged injury to their health, comfort and convenience, and the alleged depreciation of the resale value of their lands.

To establish nuisance, the plaintiffs must show substantial interference which would not be tolerated by the ordinary occupier in their location. The test is objective. The interference must be repeated or continuous.

In considering the interference, the court must consider the type of interference, the severity, the duration, the character of the neighbourhood and the sensitivity of the plaintiffs' use of their lands. With respect to the severity of the interference, it is not actionable if it is a substantial interference only because of the plaintiff's special sensibilities. With respect to the character of the neighbourhood, the court should consider the zoning, whether the defendant's conduct changed the character of the neighbourhood and the reactions of other persons in the neighbourhood.

The court must balance these considerations against the value of the defendant's enterprise to the public and the defendant's attitude toward its neighbour. The court must consider whether the defendant is using the property reasonably having regard to the fact that the defendant has neighbours. The court should consider whether the defendant took all reasonable precautions.

[33] The trial judge had no hesitation in concluding that the composting of material used to grow the mushrooms constituted a nuisance at common law from the commencement of the GMF's operations. His summary of the findings upon which this conclusion is based shows the extent of the interference with

the respondents' use and enjoyment of their properties. I find it useful to reproduce the trial judge's summary of findings in this respect in its entirety particularly since the respondents, on the subsequent question of the statutory protection, take the position that the statutes do not extend protection to nuisances that exceed a certain tolerance level:

> The operation of GMF has produced offensive odours and a haze and there is some evidence that it produces noise. While annoying, the haze is not sufficient to constitute a nuisance because it is infrequent. The evidence does not establish that the noise is a nuisance. However, the odours, some of which are associated with the haze, have affected the physical well-being of the plaintiffs to a significant degree and very substantially disrupted their use of their lands.
>
> The number of the plaintiffs, their testimony and their varied backgrounds satisfy me that the interference would not be tolerated in their location by the ordinary occupier whether that person be only a resident or also a farmer. Other than the defendants, every owner called as a witness has found the interference intolerable. The only witness from the area who was not a party was the golf director of the Thunderbird Golf Club who took the same view as the plaintiffs. The interference has been repeated frequently.
>
> The neighbourhood is rural. The zoning is agricultural but the majority of the owners to the southwest of GMF use their lands for primarily residential purposes. In the surrounding area there is also mixed farming, a hog farm, a dog kennel, a stable and a golf course. The severity of the interference is not the result of the plaintiffs' special sensibilities although one of the plaintiffs has special sensibilities which have magnified the impact on her. The operation of GMF has dramatically changed the nature of the neighbourhood. While the mushroom farm is classified by statute as an agricultural operation the odours and haze it produces are completely unheard of and intolerable to the owners in the area which was the subject of the evidence. The plaintiffs have resided in the area for up to 58 years and the interference caused by GMF is unprecedented. Three of the plaintiffs have resided on

working farms in the area for decades. The reasonableness of the plaintiffs' complaints is enhanced by the fact that they have tolerated the usual farm odours from mixed farms and a hog farm.

The defendants' operation produces a food product and an agricultural producer of food is a valued enterprise. However, it is not the growing of mushrooms which is the nuisance but only the composting of material used to grow the mushrooms. The defendants have made efforts at significant expense to reduce the nuisance caused by their operation but have deliberately tried to belittle the neighbours' complaints and have falsely denied under oath that their operation produces a nuisance. I accept the evidence of the defendants' experts that they now take all the reasonable precautions possible in the current state of the art of mushroom composting. However, the use of the defendants' land for composting is unreasonable having regard to the fact that they have neighbours.

Considering all these factors, I find that the defendants' operation has caused an unreasonable interference with the use and enjoyment of the plaintiffs' lands by producing offensive odours. The odours constitute a nuisance at common law.

[34] The trial judge then proceeded to determine whether the nuisance resulted from a normal farm practice. After reserving judgment but prior to determining this question, the trial judge asked counsel for submissions on whether, in the exercise of his discretion, he should decline to decide the issue and leave it for determination by the Normal Farm Practices Protection Board. After receiving submissions, the trial judge concluded that it would not be practical or appropriate at this late stage in the proceedings to follow such a course of action. Consequently, he proceeded to decide the issue.

[35] The trial judge reviewed the definition of "normal farm practice" contained in each statute and noted the differences between the wording of the two statutes that he considered to be material. For ease of reference, I reproduce again the two definitions and have underlined the differences that were noted by the trial judge in the later statute:

Under the 1988 Act:

> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices;

Under the 1998 Act:

> "normal farm practice" means a practice
>
> that,
>
> (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or
>
> (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices;

[36] The trial judge further considered the factors set out under s. 6(15) and concluded that:

> . . . when the legislature changed the definition in the new statute by replacing "proper and accepted customs and standards" with "proper and acceptable customs and standards" it was the intention of the legislature to make clear that the Board and the court have the power to consider not just whether a practice was normal but also whether it was acceptable in a very broad context. The addition of the word "proper" seems to reflect the same intention.

(Emphasis in original)

[37] The trial judge held that the proximity of neighbours and the effect of the operation upon them was a relevant consideration in determining whether the operation was a normal

farm practice. He further held that the timing of the start-up of mushroom farms in relation to the commencement of adjacent residential development was a relevant consideration. In his view, the "inclusion of this factor" in determining what is normal farm practice would provide "a fair and reasonable way of balancing the interests of the public in agriculture and in providing housing" and "would be consistent with the intention of the legislature in enacting [the] legislation". After quoting from the legislative debates, he stated as follows:

> It is clear that the legislation was intended to protect farmers from unreasonable complaints of people who are intolerant of agricultural disturbances because they are used to city living and that it was also intended to protect farmers who are already carrying on agricultural practices which produce disturbances which are normal in the area. The defendants in this case do not fall into either category.
>
> I recognize that there is a broad spectrum of farm types and of agricultural practices and I am not suggesting that a farm will not be complying with normal farm practice if it commences operations in an area where that type of farm has not operated before. The issue would be whether the intensity and frequency of any nuisance produced by that farm would be consistent with normal farm practice in that area. In the case before me the evidence establishes that the GMF produces a nuisance which because of its intensity and frequency is completely out of character for this rural area.
>
> It is not unreasonable to expect city folk moving to residences in the country to make enquiries and to tolerate any normal farm practices which already produce a nuisance in that area. Similarly, it is not unreasonable to expect new types of farms which produce a nuisance which is fundamentally different in intensity or frequency or both from those already existing in a rural area to make enquiries and desist from conducting such operations in that new area. Nor is this a new concept. As mentioned earlier, Dr. Rinker in his publication written for the Ministry of Agriculture and Food recognized that composting odours were a world wide problem and said, ". . . anyone considering constructing or purchasing a mushroom

farm must be especially cautious in choosing the site for composting preparation". He noted that some farms had to relocate their composting operations up to 160 km. from the growing site. The evidence satisfies me that the defendants were well aware of the potential effect on neighbours and should not have started composting in that area.

(Emphasis added)

[38] The trial judge concluded that the operation of GMF up until the spring of 1995 was not a "normal farm practice" because the composting was not carried out properly. With respect to the operation of GMF over the entire period of time, he further concluded as follows:

From the commencement of its operations GMF was not operating in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and was not operating in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances because GMF commenced its operations in an area where the nuisance it produced was completely out of character. There is no evidence that such a fundamental change in an area's environment had ever been introduced anywhere else in similar circumstances. In any event I do not think it is acceptable. In my view the intensity and frequency of the odours produced by GMF fundamentally changed the rural environment the plaintiffs enjoyed before. Even those of the plaintiffs who had been farmers themselves found the GMF odours intolerable.

Having considered the factors I discussed earlier as relating to what is a normal farm practice, I conclude that the GMF operation was never in the category of normal farm practice.

(Emphasis added)

3. Application of the statutes to the appellants' operation

[39] There is no question that the appellants' mushroom farm is an agricultural operation within the meaning of both statutes. There is also no issue on this appeal that the odours resulting from the composting phase of the operation constitute a nuisance at common law. The narrow issue for determination is whether the trial judge, based on the facts as he found them, erred in not concluding that the composting phase of the appellants' operation was carried on as a "normal farm practice" within the meaning of both statutes.

[40] The definition in each statute is comprised of two components. The first part of the definition necessitates that a comparative analysis be made between the practice in question and that followed by similar agricultural operations under similar circumstances. The second part of the definition concerns the use of innovative technology. Since proper subjects of comparison in cases where innovative technology is used may not be available, the question becomes, rather, one of measuring such use in a more general way against advanced management practices.

[41] The different wording of the definition in each statute was noted by the trial judge as "material in this case". As noted earlier, it was his view that when the legislature changed the definition to read "acceptable" instead of "accepted" and added the word "proper" it intended "to make clear that the Board and the court have the power to consider not just whether a practice was normal but also whether it was acceptable in a very broad context".

[42] I agree, and the parties do not dispute, that the determination of what constitutes a "normal farm practice" must be made in a proper context, and that, depending on the practice under review, the context may be broad indeed, involving the consideration of many relevant factors including the proximity of neighbours and the use they make of their lands. However, it is my view that this approach applies under either statute. Hence, nothing turns on the 1998 amendment to the definition of "normal farm practice" in this case and the differences between the two statutes are not "material" in any real sense.

[43] In this case, there is no suggestion that GMF was making use of innovative technology and it is therefore the comparative component of the definition that is applicable. The kind of evidence that will be relevant to this inquiry will vary greatly depending on the practice and the operation in question. The following hypothetical published by the Ministry of Agriculture, Food and Rural Affairs [See Note 2 at end of document] illustrates the highly fact-specific nature of the inquiry:

> Hypothetically, in a hearing before the [Board] by an applicant about noise-producing equipment frequently used to scare birds away from eating grapes in vineyards, the [Board] might decide that it was normal to use this equipment:
>
> -- in a location where few, if any, neighbours lived nearby, but not normal if there were many residences nearby
>
> -- in a vineyard in the Region of Niagara, but not normal if used to scare coyotes from sheep pastures in Bruce County
>
> -- with a method of operation using automatic shutoff switches, but not normal using manual shutoff switches
>
> -- when bird pressure was greatest during the timing of early morning and late afternoon, but not normal during the middle of the day during hot weather when birds eat less frequently.

(Emphasis in original)

[44] In my view, the trial judge properly identified the kind of evidence that could be relevant to the comparative analysis in this case in his ruling on the application to reopen the case. He repeated the relevant part of his reasons on the ruling in his final judgment:

> In this case the focus is on evidence relating to the odour of phase one composting operations carried on to produce substrate for mushroom farming. Without limiting the scope of what evidence may be relevant to show "similar circumstances" of the defendants' operation, I would say that in my view it

> would include evidence [to show how the defendant's operation compared to other operations] as to the location, the surrounding geographical features, the proximity of neighbours and the uses they make of their lands, the zoning of the farm land and of the neighbours' lands, weather features of the area and other factors which may bear on the potential effect, if any, of the operation on others.
>
> It would also include other factors which are already in evidence such as the size of the operation and the formula used.
>
> When I say these factors are relevant I am not saying that there must be evidence on each factor in every case. The sufficiency of the scope of the evidence and its weight are matters which must be considered in the circumstances of each case which include the extent to which the plaintiffs take issue with the evidence. The court must make a finding as to whether the defendant has established that its operation is carried on as a normal farm practice in the context of the particular case.

[45] The appellants called this kind of evidence about the composting practices followed by similar agricultural operations under similar circumstances and the trial judge made the appropriate comparison. As noted earlier, he concluded that, since at least the spring of 1995, the composting practices, equipment and facilities used by GMF were customary in the mushroom industry and all reasonable precautions possible in the current state of mushroom composting to reduce the odours resulting from the process were being used. He further concluded that there was no material difference between the relationship of GMF and residential neighbours compared to other mushroom farms.

[46] I agree with the appellants' position that, based on these findings with respect to the appellants' operation since the spring of 1995, the trial judge should have concluded that the appellants were entitled to the statutory protection against nuisance claims. Rather, he improperly concluded that the appellants were not entitled to the statutory protection because

the nuisance was new and out of character to the area previously enjoyed by the respondents. It is my view that this approach introduces a notion of proximity in time that is inconsistent with the stated objectives of the legislation. It would prohibit intensive agricultural activities from being established in new areas, even where properly zoned agricultural, simply because there are existing residences nearby. This prohibition would be inconsistent with the stated objective in the preamble to the 1998 Act to, not only "conserve" and "protect" but also "encourage the development and improvement of agricultural lands for the production of fo od". This approach also ignores the fact that the legislature expressly recognized that "agricultural activities may include intensive operations that may cause discomfort and inconveniences to those on adjacent lands".

[47] While the proximity of neighbours and the effect of the farm practice on the use of their lands are relevant considerations in the determination of whether the farm practice is "normal", the fact that the nuisance may be new to the area or to the complainants is irrelevant. It cannot change the character of a practice that is otherwise a "normal farm practice". Otherwise, the inclusion of the notion of "first in time, first in right" would effectively undermine one of the important objectives behind the legislation.

[48] Counsel for the respondents made no attempt to support the trial judge's inclusion of this additional factor in the interpretation of the legislation. Counsel argued, rather, that the trial judge's decision could be supported on the basis that the intensity and frequency of the odours produced by GMF exceeded any "acceptable" tolerance level and, hence, fell outside the scope of protection under the statutes. Counsel argued that it is implicit from the use of the words "discomfort and inconveniences" in the preamble and "proper and acceptable" in the definition of 'normal farm practice' under the 1998 Act that the protection does not extend to intolerable levels such as those experienced by the respondents in this case.

[49] I see no merit to this argument. The protection afforded under both Acts is against "nuisance" which, by definition, must

constitute a substantial interference that would not be tolerated by the ordinary occupier. The reference to "discomfort and inconveniences" in the preamble of the 1998 Act does not change the nature of the tort of nuisance. Further, I am unable to read any outer limit to the protection as contended by the respondents from the words "proper and acceptable" in the first part of the definition of "normal farm practice" in the 1998 Act. Quite clearly, these words qualify the nouns "customs and standards" as established and followed by similar agricultural operations under similar circumstances. While the effect of a particular practice on neighbouring properties can be a relevant consideration in determining what are the "proper and acceptable customs and standards" for an operation, it does not mean that the practice must be within the tolerance limits of, or acceptable to, the affect ed neighbour before the test can be met.

4. Conclusion

[50] In my view, the findings of fact made by the trial judge support his conclusion that GMF's composting practice was not a "normal farm practice" up until the spring of 1995, but not thereafter. The trial judge's conclusion with respect to the period of time up to the spring of 1995 was based on his specific finding that the manner in which the composting was conducted during the initial months of the operation was not consistent with accepted customs and standards as established by similar mushroom farms under similar circumstances. As such, the appellants cannot claim the statutory protection for that period of time. On the other hand, the trial judge's conclusion with respect to the period thereafter cannot be supported by the material findings of fact made at trial. The trial judge's findings can only lead to the conclusion that the composting practice followed by GMF after the spring of 1995 was a normal farm practice within the meaning of the statutes. The conclusion to the contrary was based on the trial judge's erroneous interpretation of the legislation and cannot be supported.

[51] In the result, I would allow the appeal, set aside the judgment and refer the matter to the trial judge for a reassessment of the damages and costs of the trial in accordance

with this analysis.

III. Intervention by the Ontario Federation of Agriculture

[52] Although the Ontario Federation of Agriculture ("the OFA") argued in its factum that the Superior Court of Justice did not have the jurisdiction to determine at first instance what constitutes a "normal farm practice" under the 1998 Act, this argument was not advanced in oral submissions. Counsel for the OFA conceded that, given the late stage in the proceedings when the question was raised, the trial judge did not err in deciding the issue himself rather than leaving the matter for determination by the Normal Farm Practices Protection Board.

[53] Although counsel did not expressly acknowledge the point, I take it from this concession that the OFA is retracting the primary submission in its factum that the Superior Court of Justice only acquires jurisdiction to make an award in a nuisance case against an agricultural operation after the Board determines that the "disturbance" complained of is not the result of a "normal farm practice". In any event, it is my view that there is nothing in the 1998 Act, express or implied, that ousts the jurisdiction of the Superior Court of Justice to decide, in the context of an action in nuisance, whether the defendants are immune from liability because the subject matter of the claim is a "normal farm practice" within the meaning of the statute. The question is, rather, whether the court should, in its discretion, decline to determine the issue and stay the action in nuisance until the Board makes the determination whether the disturbance constitutes a normal farm practice. See s. 106 of the Courts of Jus tice Act, R.S.O. 1990, c. C.43 for the general power to stay proceedings in appropriate circumstances. The intervenor takes the position that courts, in all cases, should decline to exercise their jurisdiction and leave the determination of what constitutes a normal farm practice to the Board.

[54] In the circumstances of this case, no one takes issue with the trial judge's decision to determine the matter himself. As he stated in his reasons, had the issue been raised at the commencement of the trial [See Note 3 at end of document], he

might well have left the matter for the Board to determine, but as matters stood, the parties had gone to enormous expense to present the case before the court and if the issue were referred to the Board, the evidence would have to be called again and significant delays would be occasioned. The trial judge also noted that the court was better equipped to determine the related questions of statutory interpretation than the Board. Finally, the trial judge remarked that, whether he declined to hear the matter or not, a multiplicity of proceedings appeared to be unavoidable:

> If the matter were referred to the Board and it found this was not a case of normal farm practice it could order the composting operation to stop but could not compensate the plaintiffs because this is not within their authority. The parties would have to return to the court once again. As I will discuss, if the plaintiffs succeed before me I can compensate them but cannot issue an injunction to terminate the nuisance. This is a very impractical and costly division of authority.

[55] Although the court's power to issue an injunction prohibiting a farmer from carrying on an agricultural operation that is not a normal farm practice is not in issue on this appeal, I find it important to determine the matter in the context of the issue raised by the intervenor. For reasons that I will set out below, it is my view that the court does retain this jurisdiction under the 1998 Act. Nonetheless, there remains a division of power between the Board and the court that lends much support to the intervenor's position. In my view, absent special circumstances (this case is one example), the question, raised within a nuisance action, of whether a disturbance constitutes a "normal farm practice" should generally be left for the Board to determine and the action should be stayed pending such determination. I find the intervenor's position persuasive for the following reasons.

[56] First, the expertise of the Board is a very important factor. The Board is an administrative tribunal that has been constituted with the particular expertise to achieve the purposes of the legislation. It also has the power to appoint

experts to assist it in performing any of its functions: s. 8(3).

[57] Second, the Board's special procedure and non-judicial means available under the legislative scheme to implement its purposes can present litigants with significant advantages over the traditional court system. I note the following. The Board has the general power to inquire into and resolve a dispute respecting an agricultural operation and to determine what constitutes a normal farm practice: s. 4(2)(a). The material before the court demonstrates that the informal procedures that have been put in place have proven quite effective. One consultation paper on the role of the Farm Practices Protection Board dated February 1996 reveals that, on average, the Ontario Ministry of Agriculture, Food and Rural Affairs receives approximately 700 environmentally related complaints annually, yet the Board holds only two hearings per year. The great majority of complaints are otherwise resolved by ministry staff and/or other experts. This is further confirmed in the Ministry's "fact sheet" referred to earlier where it is estimated that only about 1 per cent of the total complaints received by Ministry staff on nuisances covered by the Act actually end in a Board hearing. Even when the matter is not resolved informally and a hearing does take place, it is usually held in local municipalities, the procedure is less formal than court proceedings and, judging from the Board decisions that have been presented to this court, the entire process appears to be more accessible to the unrepresented litigant.

[58] Third, the Board has extensive powers of relief that can, in many cases, be more suitable to the needs of the parties. If the practice is a normal farm practice, there is no difference between the powers of the Board and the court. The Board must dismiss the application and likewise, the court must dismiss the action in nuisance. It is in those cases where the disturbance is not a normal farm practice that the differing powers can become significant.

[59] Of particular significance is the Board's power, where the disturbance is not a normal farm practice, to require that a farmer implement certain farming techniques and methods to

ensure compliance with normal farm practice: s. 5(4)(c). The court does not have such power. Example[s] of remedial orders made by the Board under the earlier statute can be found in the following decisions: Re Youcke v. Hermann (September 29, 1993) 93-01 (F.P.P.B.); and Re Thuss v. Shirley (December 27, 1990) 90-02 (F.P.P.B.). After making an order, the Board retains the power to make the necessary inquiries and orders to ensure compliance with its decisions: s. 4(2).

[60] If the practice is not a normal farm practice, the Board, in addition to its power to make remedial orders, has the power to order the farmer to cease the practice: s. 5(4)(b). In my view, the court also has this power under the 1998 Act. I reproduce the relevant provisions here for ease of reference:

> 2(1) A farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice.
>
> (2) No court shall issue an injunction or other order that prohibits a farmer from carrying on the agricultural operation because it causes or creates a disturbance.
>
> . . . . .
>
> (4) Subsections (1) and (2) do not apply to preclude an injunction or order, in respect of a nuisance or disturbance, against a farmer who is in contravention of an order of the Board made under clause 5(4)(b) related to that nuisance or disturbance.

[61] It is clear that a court has the power under s. 2(4) to issue an injunction against a farmer who is in contravention of an order made by the Board under s. 5(4)(b) to cease a practice that is not a normal farm practice. In my view, the court, under s. 2(2), also retains the general power to issue an injunction against a farmer who creates a nuisance where the disturbance is not a normal farm practice and the Board has not issued such an order. It is undisputed that the protection under s. 2(1) is limited to agricultural operations that are carried on as a normal farm practice. In my view, the words "the agricultural operation" under s. 2(2) can only be referable and limited to

the "agricultural operation carried on as a normal farm practice" to which the protection extends under s. 2(1). This interpretation is more consonant with the general principle that a superior court's jurisdiction cannot be ousted by legislation unless by clear and explicit statutory wording to th is effect: see Ordon Estate v. Grail, [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193.

[62] However, the court's power to grant injunctive relief where the nuisance results from an operation that is not a normal farm practice is no greater than that exercisable by the Board. Indeed, the Board's general power to make inquiries and further orders to ensure compliance with its orders may present certain advantages to the litigants that are not as readily available before the courts.

[63] Of course, as noted by the trial judge, the Board does not have the power to award damages. However, in those cases where the disturbance is held to not be a normal farm practice, the Board can issue an order to stop the practice, and the complainant, if so inclined, can pursue his claim before the courts. Presumably, the offending practice will have ceased and the total damages can then be assessed.

[64] For these reasons, it is my view that, absent special circumstances, complaints in respect of agricultural operations should generally be brought first before the Board before any action in nuisance is entertained by the courts.

[65] SHARPE J.A. (ABELLA J.A. concurring):--I have had the advantage of reading Charron J.A.'s reasons for judgment. I agree with paras. 52 to 64 of her reasons and with her conclusion that, absent special circumstances such as existed in the present case, complaints with respect to nuisances created by agricultural operations should generally be brought first before the Normal Farm Practices Board before any action in nuisance is entertained by the courts. However, I respectfully disagree with her conclusion that the trial judge erred in the manner in which he interpreted and applied the Farm Practices Protection Act, R.S.O. 1990, c. F.6 (the "1988 Act") and the Farming and Food Production Protection Act, 1998, S.O. 1998,

c.1. For the reasons that follow, I would dismiss the appeal and uphold the award of damages he made in favour of the respondents.

Facts

[66] My colleague has fully set out the facts, the legislation, and the findings of the trial judge. [See Note 4 at end of document] I need not repeat her comprehensive discussion of these points. I would, however, place greater emphasis on the trial judge's findings with respect to the degree of disturbance caused to the respondents by the appellant's mushroom farm operation, as I believe those findings were an important factor in his ultimate decision that the appellants were liable in nuisance despite the protective legislation.

[67] The trial judge generally accepted the evidence offered by the respondents describing the odours emanating from the appellant's mushroom farm and the effect those odours had upon the respondents. The odours were described in various graphic terms, including the following: "like a septic tank"; "rotten eggs, putrid, stink, rank and nauseating"; "decaying animals, cow manure"; "nauseating and like rotten flesh"; "like an outhouse, ammonia, sour, putrid, rotten vegetables"; "like ammonia or rotten meat and as bad, terrible and unbearable stenches"; "having one's face buried in faeces"; "worse than the pig farm"; and "unbelievably terrible."

[68] The trial judge accepted the respondents' evidence that these odours were regular and persistent and that they significantly interfered with the use and enjoyment of their properties. The respondents significantly curtailed their outdoor activities, including walking and gardening. Several respondents complained of sore throats and breathing difficulties, which they attributed to the odours. The trial judge found that the odours "have affected the physical well-being of the plaintiffs to a significant degree and very substantially disrupted their use of their lands". The trial judge also found that the respondents were not unusually sensitive, nor were they unfamiliar with odours emanating from farming operations. Indeed, several of them compared the odours

emanating from the appellant's operation to those experienced from a nearby pig farm. The odours from the appellant's operation were said to be stronger, more prevalent, and more of an interference with enjoyment and use of the respondent's property than those from the pig farm.

[69] I would also point out that at trial, the appellant led evidence disputing that of the respondents as to the significance of the offensive odours emanating from the mushroom farm. The trial judge specifically rejected the evidence of Mac Snobelen, Clay Taylor, Brent Taylor and David Van Dusen in this regard. As the trial judge noted, the gist of the testimony of these witnesses "was that there were seldom any offensive odours in the immediate area of the composting operation and virtually never any offsite". The trial judge concluded "that in their effort to minimize the plaintiffs' complaints they deliberately gave the court an inaccurate impression of the odours produced by composting".

Analysis

[70] The central issue on this appeal is the meaning to be given the phrase "normal farm practice". It is common ground that if the activities of the appellant qualify as a "normal farm practice", the respondent's claim in nuisance must be dismissed. For ease of reference, I repeat here the statutory definitions of "normal farm practice". The 1988 Act defined that term [in s. 1] as follows:

> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices.

The 1998 Act contains the following definition [in s. 1]:

> "normal farm practice" means a practice that,
>
> (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and

followed by similar agricultural operations under similar circumstances, or

(b) makes use of innovative technology in a manner consistent with proper advanced farm management practices.

[71] It appears to be common ground that the inquiry into whether a farming operation qualifies as a "normal farm practice" is both fact and site-specific. I agree with Charron J.A. at para. 42 that "the determination of what constitutes a 'normal farm practice' must be made in a proper context, and that, depending on the practice under review, the context may be broad indeed, involving the consideration of many relevant factors including the proximity of neighbours and the use they make of their lands."

[72] There appear to be no judicial decisions, apart from that under appeal in this case, interpreting these provisions of either of the statutes. In some cases, the Farm Practices Protection Board under the 1988 Act appears to have taken a broadly contextual, site-specific, and evaluative approach. In Bader v. Dionis (September 2, 1992), 92-01 (F.P.P.B.), the Board found that the use of acoustical bird scaring devices was a normal farm practice, but warned at p. 6 that "this does not mean that in all situations where it is in close proximity to residential dwellings that the use of a bird banger will be a normal farm practice." In Thuss v. Shirley (December 27, 1990), 90-2 (F.P.P.B.), the Board dealt with a red ginseng operation that required sandy soil with little or no organic material. The soil was susceptible to wind erosion, and blowing sand seriously disrupted the activities on, and enjoyment of, neighbouring non-agricultural properties. There was no evidence of similar operations in Ontario, but there was evidence that the farm had followed the practices of its Korean advisers. The Board concluded at p. 4 that the farm practice for this crop "will, by necessity, have to be innovative" and that "[i]nnovative management practices . . . cannot be deemed normal if they result in severe erosion. Consequently, in this case, the blowing soil and related sand storms, do not result from a normal farm practice." The underlying premise of this conclusion is that even though a practice may be appropriate from the

perspective of the farming operation that seeks to defend it, it will not be acceptable if it causes disproportionate harm to neighbouring non-agricultural users.

[73] The Normal Farm Practices Protection Board saw fit to express strong disagreement with the approach taken by the trial judge in the case on appeal when the situation of the appellants' operation came before it in another proceeding. In Gardner v. Greenwood Mushroom Farms (September 21, 2000), 2000-01, the complainants argued that the appellant was bound by the result in the judgment under appeal here. The Board rejected that contention and went on to state its concern that the trial judge did not fully appreciate the Board's approach to the determination of "normal farm practices". The Board expressed the view (at p. 7) that the trial judge had "placed too much weight upon the order in which competing land uses arrive in a particular area as a basis for determining normal farm practice". The Board added at p. 9 that "even though normal farm practices may cause 'discomfort and inconvenience' to other persons, those discomforts and inconveniences are the price which may have to be paid if the Province of Ontario chooses to maintain viable agricultural businesses."

[74] However, when dealing with another mushroom farm operation in Gunby v. Mushroom Producers' Co-operative Inc. (July 30, 1999), 99-02, the Board found that the operation satisfied the statutory definition of "normal farm practice" but at the same time expressed disappointment "that the mushroom industry in Ontario does not appear to take a leading role in the development of technology which would reduce the production of anaerobic gases. We strongly urge the mushroom industry to expend the money that is necessary to develop aerated floors and biofilters in mushroom production within Ontario. Otherwise, the entire industry may be adversely affected by a future ruling of this Board which may conclude that the standard of normal farm practice has shifted from conventional Phase 1 production to aerated floor and biofilter technology." This latter decision, like the others I have cited, indicates that the Board does take into account a broad range of factors, including the nature and the extent of the harm suffered by third parties, in determining whether farm practices gain the protection of the

Act. In effect, the Board adopts an appropriately evaluative approach that is in keeping with the legislative language, and does not strictly equate "normal farm practice" with those practices actually adopted by industry in Ontario.

[75] The appellants argue that the preamble to the Act indicates a legislative intention to "encourage the development and improvement of agricultural lands for the production of food . . ." and that this legislative purpose would be frustrated, if not defeated, if landowners could complain of a disturbance on the ground that they were there first. I agree that the preamble has an important bearing on the interpretation of the Act and that terms of a statute must be interpreted in light of its purposes. However, statutory interpretation does not occur in a vacuum and there are other important legal principles that a court can and should take into account. This Act represents a significant limitation on the property rights of landowners affected by the nuisances it protects. By protecting farming operations from nuisance suits, affected property owners suffer a loss of amenities, and a corresponding loss of property value. Profit-making ventures, such as that of the appellants, are given the corresponding be nefit of being able to carry on their nuisance creating activity without having to bear the full cost of their activities by compensating their affected neighbours. While the Act is motivated by a broader public purpose, it should not be overlooked that it has the effect of allowing farm operations, practically, to appropriate property value without compensation.

[76] It is, of course, open to the legislature to limit individual rights of property in order to achieve some broader social objective. On the other hand, it is a well-established principle of statutory interpretation that if legislation is inconclusive or ambiguous, the court may properly favour the protection of property rights: [P.-A. Ct, The Interpretation of Legislation in Canada, 3rd ed. (Toronto: Carswell, 2000)] at pp. 473-75, 482-86. In Manitoba Fisheries Ltd. v. Canada, [1979] 1 S.C.R. 101 at p. 109, 88 D.L.R. (3d) 462, the Supreme Court of Canada adopted the following passage from Attorney-General v. De Keyser's Royal Hotel Ltd., [1920] A.C. 508 at p. 542, [1920] All E.R. Rep. 80:

> The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

[77] There is also authority for the proposition that a court will lean against an interpretation that would allow one party to appropriate the property of another: Board of Industrial Relations v. Avco Financial Services Realty Ltd., [1979] 2 S.C.R. 699 at p. 706, 98 D.L.R. (3d) 695. Undoubtedly in the modern era, there has been an increasing judicial acceptance of laws restricting rights of private property to achieve some broader social purpose, but as pointed out by R. Sullivan in Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at p. 373, when interpreting such statutes the courts still have a role in achieving an appropriate balance:

> The idea that a legislature might intend to limit the free and full enjoyment of individual property rights for the purpose of securing a public benefit or promoting the interests of a larger community is familiar to modern courts and excites little resistance. The focus is on striking an appropriate balance between individual property rights, which remain important, and legislative goals.

[78] In my opinion, a broad approach, relating the inquiry to the specific circumstances pertaining to the site with a view to striking an appropriate balance between the rights of affected property owners and nuisance creating farming operations, is borne out by the language of the statute. I agree with the trial judge that the legislative language indicates that there should be a qualitative or evaluative element to the interpretation of "normal farm practice". As I read both the 1988 and the 1998 Acts, farming operations do not automatically gain statutory protection by showing that they follow some abstract definition of industry standards.

[79] First, both statutes require that the "circumstances" be taken into consideration. This means that the same practice may

qualify as a normal farm practice in one situation, but not in another where the circumstances are different. The definition of "normal farm practice" requires that the operation at issue be assessed with regard to the "customs and standards as established and followed by similar agricultural operations under similar circumstances" (emphasis added). Section 6 of the 1998 Act, exempting a "normal farm practice" from the application of municipal ordinance, sheds some light on the question. Section 6(1) provides that "[n]o municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation", and s. 6(2) allows the Normal Farm Practices Protection Board to determine whether the practice at issue is a normal farm practice for the purposes of non-application of a municipal by-law. Section s. 6(15) directs the Board to consider, among other factors, "[t]he specific circumstances pertaining to the site". Although these provisions do not apply directly to the circumstances of the present case, the phrase "normal farm practice" should be given a consistent interpretation and, if "the specific circumstances pertaining to the site" bear upon the definition of "normal farm practice" in one context, it would be anomalous to exclude site-specific considerations from the definition in another context. As Cory J. stated in Thomson v. Canada (Deputy Minister of Agriculture), [1992] 1 S.C.R. 385 at p. 400, 89 D.L.R. (4th) 218: "Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act": see also P.-A. Ct, [supra], at p. 332. In my opinion, the same holds equally true for phrases recurring throughout a statute.

[80] Second, the farming operation must also satisfy the tribunal hearing the case that, in the circumstances, the customs and standard are, in the words of the 1988 statute, "proper and accepted" and in the words of the 1998 statute, "proper and acceptable". The words "proper and acceptable" connote a qualitative, evaluative inquiry. The Shorter Oxford English Dictionary (Oxford: Clarendon Press, 1993) defines "proper" as (inter alia) "of requisite standard or type; fit, suitable, appropriate; fitting, right" and "acceptable" as "worth accepting; likely to be accepted; pleasing, welcome, tolerable". These words qualify and limit the phrase "customs

and standards as established and followed by similar agricultural operations under similar circumstances". I read this qualification as adding another important dimension to the inquiry.

[81] In my respectful view, this statutory language indicates that the farming industry does not have carte blanche to establish its own standards without independent scrutiny. Not all industry standards prevail -- only those that are judged to be "proper and acceptable". In my view, this statutory language requires the adjudicative body to consider a wide range of factors that bear upon the nature of the practice at issue and its impact or effect upon the parties who complain of the disturbance, with a view to determining whether the standard is "proper and acceptable". An analogy may be drawn from the law of negligence, where reliance on custom and established practice is relevant but not decisive on the requisite standard of care. In Waldick v. Malcolm, [1991] 2 S.C.R. 456 at p. 474, 83 D.L.R. (4th) 114, Iacobucci J. dealt with this issue in the context of an occupier's liability case: ". . . the existence of customary practices which are unreasonable in themselves, or which are not otherwise acceptable to courts, in no way ousts the duty of care owed by occupiers under s. 3(1) of the [Occupier's Liability] Act."

[82] To the extent there is any ambiguity in the legislation as to whether or not the words "proper and acceptable" limit or qualify the industry standards, the principles I have discussed suggest that ambiguity should be resolved in favour of the respondents whose property is adversely affected without compensation.

[83] In deciding that the appellants failed to satisfy the "normal farm practice" standard, the trial judge was strongly influenced by two factors. First, as I have already mentioned, he found that the degree and intensity of the disturbance created an intolerable situation for the respondents. The second was the fact that the respondents were there first and that the appellants' mushroom farm operation created a significantly greater and different disturbance than anything that had been experienced before in the area.

[84] The appellants take issue with the trial judge's approach. They argue that he erred in taking into account both the degree and extent of the disturbance and the fact that the respondents were there first. I disagree. In my view, the trial judge was warranted in taking these closely related factors into account in assessing the appellants' claim that they were simply following "proper and acceptable" customs and standards of the farming industry.

[85] I agree that a strict or automatic "first in time, first in right" approach would not be warranted and that it would result in an unduly restrictive interpretation of the Act that would unduly limit the establishment of new farming operations. However, I would not go to the other extreme and accept the proposition that the timing factor should be excluded as entirely irrelevant. In my view, the relative timing of the establishment of the farming operation and the occupancy of those who complain of the disturbance it creates is one of the relevant contextual, site-specific circumstances to be considered. On this point, I find the reasons of the trial judge to be persuasive (at para. 283):

> The consideration of this factor would also seem to be a fair and reasonable way of balancing the interests of the public in agriculture and in providing housing. Within a five minute drive of the courthouse where this trial took place there are numerous examples of situations where there are agricultural operations immediately beside housing subdivisions. Indeed, the subdivisions are spreading rapidly into what has been farmland. In considering, for example, how these statutes would operate if the mushroom farm were immediately adjacent to one of these subdivisions, it would seem to me to be appropriate to consider what was the normal farm practice in the area before the subdivisions were built. If [the appellant] GMF were adjacent to one of these subdivisions it would seem to me to be relevant to consider whether the farmland was first used for a mushroom farm before or after the subdivisions were built. Another example would be the situation where a mushroom farm was started in an area where there were a lready other mushroom farms operating in close

proximity to residences. That would seem to me to be a significantly different situation from the one here where the previous farm operations adjacent to the plaintiffs' residences did not produce anything close to the degree and frequency of offensive odours which were introduced by GMF.

[86] I do not agree that the trial judge's reasons rest on any strict or absolute rule of "first in time first in right." He expressly stated at para. 285: "I recognize that there is a broad spectrum of farm types and of agricultural practices and I am not suggesting that a farm will not be complying with normal farm practice if it commences operations in an area where that type of farm has not operated before." As I read his reasons, timing was one of the factors he took into account, albeit in this case an important factor, but it was only part of the much larger picture of a very significant disturbance suffered by the respondents.

[87] The second and related factor was the serious nature of the disturbance suffered by the respondents. Again, it seems to me that this was an important aspect of the site-specific circumstances the trial judge was entitled to take into account in determining whether the appellant's operation constituted a "normal farm operation" within the meaning of the Act.

[88] In my view, the trial judge was entitled to take these factors into account in assessing whether the appellants had brought themselves within the statutory exemption from liability afforded normal farm practices. I would not interfere with his determination that they failed to do so.

[89] For these reasons, I would dismiss the appeal with costs

Other Issues

[90] I agree with that portion of the reasons of Charron J.A. dealing with the issues raised by the intervention of the Ontario Federation of Agriculture. It follows that I do not agree with the trial judge's determination that he could not award an injunction or damages in lieu of an injunction. However, as there was no cross-appeal on that point, I would not

interfere with the remedy as ordered by the trial judge.

Appeal dismissed.

Notes

Note 1: The Greenwood Mushroom Farm is a partnership consisting of Tri Gro Enterprises Ltd and G.M.F. Part 2. G.M.F. Part 2 is also a partnership: its partners are the appellants Brent Taylor Holdings Ltd., Rick Campbell Holdings Ltd., and Snobelen Mushrooms Ltd. The latter corporation owns and operates the corporate appellant Mac Snobelen Holdings Ltd. The individual defendants are employees or officers and directors of the defendant corporations and the action was dismissed as against them. The dismissal of the action against the individual defendants is not an issue on this appeal.

Note 2: This hypothetical is set out in a "fact sheet" entitled The Farming and Food Production Protection Act (FFPPA) and Nuisance Complaints.

Note 3: Sometime before trial, the appellants moved for the dismissal of the respondent's action on the ground that it was barred under the Farm Practices Protection Act. Alternatively, they sought an order staying the action. The motion was heard and dismissed by Chadwick J. on October 26, 1998. The motions judge held that there was a genuine issue for trial i.e. whether the appellants' operation fell within the definition of "normal farm practice" and he therefore refused to grant summary judgment. However, it does not appear from the motions judge's endorsement that the alternative question of a stay was considered, and the parties on appeal could not provide any explanation.

Note 4: The trial judge's reasons are reported at [1999] O.J. No. 3217 (S.C.J.).

WDPH

TAB 9

Français

Legislation Act, 2006

S.O. 2006, CHAPTER 21
Schedule F

Consolidation Period: From March 22, 2017 to the e-Laws currency date.

Last amendment: 2017, c. 2, Sched. 2, s. 25.

Legislative History: 2009, c. 33, Sched. 2, s. 43; 2016, c. 23, s. 56; 2017, c. 2, Sched. 2, s. 25.

CONTENTS

PART I
GENERAL

Definitions

1 (1) In this Act,

"consolidated law" means a source law into which are incorporated,

(a) amendments, if any, that are enacted by the Legislature or filed with the Registrar of Regulations under Part III (Regulations) or under a predecessor of that Part, and

(b) changes, if any, that are made under Part V (Change Powers); ("texte législatif codifié")

"e-Laws website" means the website of the Government of Ontario for statutes, regulations and related materials that is available on the Internet at www.e-laws.gov.on.ca or at another website address specified by a regulation made under subsection (3); ("site Web Lois-en-ligne")

"legislation" means Acts and regulations; ("législation")

"source law" means,

(a) in the case of an Act, the Act as enacted by the Legislature, and

(b) in the case of a regulation, the regulation as filed with the Registrar of Regulations under Part III (Regulations) or under a predecessor of that Part. ("texte législatif source") 2006, c. 21, Sched. F, s. 1 (1); 2009, c. 33, Sched. 2, s. 43 (1-3).

Reference to amendment includes reference to repeal, revocation

(2) A reference in this Act to amendment in relation to legislation is also a reference to repeal or revocation, unless a contrary intention appears. 2006, c. 21, Sched. F, s. 1 (2).

Regulations re e-Laws website

(3) The Attorney General may, by regulation, specify another website address for the purpose of the definition of "e-Laws website" in subsection (1). 2006, c. 21, Sched. F, s. 1 (3).

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

2009, c. 33, Sched. 2, s. 43 (1-3) - 15/12/2009

Role of Attorney General

2 The Attorney General shall,

(a) maintain the electronic database of source law and consolidated law for the e-Laws website so as to facilitate convenient and reliable public access to Ontario legislation;

(b) safeguard the accuracy and integrity of the electronic database of source law and consolidated law that appears on the e-Laws website; and

(c) safeguard the accuracy and integrity of publications of source law and consolidated law printed by the Queen's Printer or by an entity prescribed under clause 41 (1) (a). 2006, c. 21, Sched. F, s. 2.

Designation by Chief Legislative Counsel

3 The Chief Legislative Counsel may designate one or more lawyers employed in the Office of Legislative Counsel to exercise the powers and perform the duties of the Chief Legislative Counsel in his or her place. 2006, c. 21, Sched. F, s. 3.

Duty, obsolete Acts

4 The Chief Legislative Counsel shall, from time to time, provide to the Attorney General a list of Acts, or any parts, portions or sections of Acts, that have been rendered obsolete by events or the passage of time. 2006, c. 21, Sched. F, s. 4.

PART II
STATUTES

Citation of Acts

5 (1) An Act may be cited,

(a) by its long or short title;

(b) in English as "Statutes of Ontario" or "S.O." and in French as "Lois de l'Ontario" or "L.O.", followed by its year of enactment and its chapter number. 2006, c. 21, Sched. F, s. 5 (1); 2009, c. 33, Sched. 2, s. 43 (4).

Same

(2) An Act set out in the Revised Statutes of Ontario may be cited in English as "Revised Statutes of Ontario, (*year*)" or "R.S.O. (*year*)" and in French as "Lois refondues de l'Ontario de (*year*)" or "L.R.O. (*year*)", followed by its chapter number. 2006, c. 21, Sched. F, s. 5 (2); 2009, c. 33, Sched. 2, s. 43 (5).

Same

(3) An Act may also be cited in accordance with a method prescribed under clause 16 (a) or in accordance with accepted legislation citation practices. 2006, c. 21, Sched. F, s. 5 (3); 2009, c. 33, Sched. 2, s. 43 (6).

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

2009, c. 33, Sched. 2, s. 43 (4-6) - 15/12/2009

Enacting clause

6 An Act shall contain, at the beginning, the following words to indicate the authority by virtue of which it is passed: "Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows". 2006, c. 21, Sched. F, s. 6.

Power to amend or repeal

7 (1) Every Act reserves to the Legislature power to repeal or amend it and to revoke or modify any power or advantage that it confers. 2006, c. 21, Sched. F, s. 7 (1).

Same

(2) Any Act may be amended or repealed by an Act passed in the same session of the Legislature. 2006, c. 21, Sched. F, s. 7 (2).

Commencement of Acts

8 (1) Unless otherwise provided, an Act comes into force on the day it receives Royal Assent. 2006, c. 21, Sched. F, s. 8 (1).

Same

(2) Commencement and short title provisions in an Act and the long title of the Act are deemed to come into force on the day the Act receives Royal Assent, regardless of when the Act is specified to come into force. 2006, c. 21, Sched. F, s. 8 (2).

Selective proclamation

(3) If an Act provides that it is to come into force on a day to be named by proclamation, proclamations may be issued at different times for different parts, portions or sections of the Act. 2006, c. 21, Sched. F, s. 8 (3).

Time of commencement and repeal

Commencement

9 (1) Unless otherwise provided, an Act comes into force at the first instant of the day on which it comes into force. 2006, c. 21, Sched. F, s. 9 (1).

Limitation

(2) Unless otherwise provided, an Act that comes into force on Royal Assent is not effective against a person before the earlier of the following times:

1. When the person has actual notice of it.
2. The last instant of the day on which it comes into force. 2006, c. 21, Sched. F, s. 9 (2).

Repeal

(3) Unless otherwise provided, the repeal of an Act takes effect at the first instant of the day of repeal. 2006, c. 21, Sched. F, s. 9 (3).

Exercise of delegated power before commencement

10 (1) A power conferred by an Act to make regulations or appointments or do any other thing may be exercised at any time after Royal Assent even if the Act is not yet in force. 2006, c. 21, Sched. F, s. 10 (1).

Same

(2) Until the Act comes into force, the exercise of a power in accordance with subsection (1) has no effect except as may be necessary to make the Act effective when it comes into force. 2006, c. 21, Sched. F, s. 10 (2).

Repeal of unproclaimed Acts, provisions

Annual report

10.1 (1) On one of the first five days on which the Legislative Assembly sits in each calendar year, the Attorney General shall table in the Assembly a report listing every Act or provision of an Act that,

(a) is to come into force on a day to be named by proclamation of the Lieutenant Governor;

(b) was enacted nine years or more before December 31 of the preceding calendar year; and

(c) was not in force on December 31 of the preceding calendar year. 2009, c. 33, Sched. 2, s. 43 (7).

Repeal

(2) Every Act or provision listed in the annual report is repealed on December 31 of the calendar year in which the report is tabled unless,

(a) it comes into force on or before December 31 of that calendar year; or

(b) during that calendar year, the Assembly adopts a resolution that the Act or provision listed in the report not be repealed. 2009, c. 33, Sched. 2, s. 43 (7).

Publication

(3) The Attorney General shall, in each calendar year, publish on the e-Laws website a list of every Act or provision repealed under this section on December 31 of the preceding calendar year, and may publish the list in any other manner that he or she considers appropriate. 2009, c. 33, Sched. 2, s. 43 (7).

First report

(4) The first report under subsection (1) shall be tabled in 2011. 2009, c. 33, Sched. 2, s. 43 (7).

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

2009, c. 33, Sched. 2, s. 43 (7) - 15/12/2009

Endorsements on Acts

11 (1) The Clerk of the Assembly shall indicate on every Act, after the title, the date on which it receives Royal Assent. 2006, c. 21, Sched. F, s. 11 (1).

Same

(2) The date of assent forms part of the Act. 2006, c. 21, Sched. F, s. 11 (2).

Reserved bills

12 (1) In this Part, a reference to the day or date on which an Act receives Royal Assent is, in the case of a bill reserved by the Lieutenant Governor, a reference to the day on which the Lieutenant Governor signifies, by speech or message to the Assembly or by proclamation, that the bill was laid before the Governor General in Council and that the Governor General was pleased to assent to it. 2006, c. 21, Sched. F, s. 12 (1).

Endorsement, date of reservation

(2) The Clerk of the Assembly shall indicate, on every bill that is reserved, the date of reservation. 2006, c. 21, Sched. F, s. 12 (2).

Judicial notice

13 Judicial notice shall be taken of the enactment and contents of an Act. 2006, c. 21, Sched. F, s. 13.

Copies for publication

14 The Clerk of the Assembly shall provide a certified copy of each Act of the Legislature, as soon as it has been assented to, for the purpose of publication on the e-Laws website and print publication. 2006, c. 21, Sched. F, s. 14.

Publication

15 (1) Every Act of the Legislature shall be published on the e-Laws website and in print. 2006, c. 21, Sched. F, s. 15 (1).

Corrections on e-Laws website

(2) If the Chief Legislative Counsel discovers that an Act published on the e-Laws website differs from the Act as assented to, he or she shall ensure that a corrected Act is promptly published on the e-Laws website. 2006, c. 21, Sched. F, s. 15 (2); 2009, c. 33, Sched. 2, s. 43 (8).

Corrections in print

(3) If the Chief Legislative Counsel discovers that an Act published in print under subsection (1) differs from the Act as assented to, he or she may cause the corrected Act to be published in print, if he or she considers it appropriate. 2006, c. 21, Sched. F, s. 15 (3); 2009, c. 33, Sched. 2, s. 43 (9).

Notice

(4) Where subsection (2) or (3) applies, the Chief Legislative Counsel may, if he or she considers it appropriate, publish a notice of correction on the e-Laws website or in print. 2009, c. 33, Sched. 2, s. 43 (10).

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

2009, c. 33, Sched. 2, s. 43 (8-10) - 15/12/2009

Regulations

16 The Attorney General may make regulations,

(a) prescribing methods of citing Acts to supplement or provide alternatives to the methods set out in section 5;

(b) prescribing the manner of publishing Acts on the e-Laws website and in print for the purposes of subsection 15 (1). 2006, c. 21, Sched. F, s. 16; 2009, c. 33, Sched. 2, s. 43 (11).

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

2009, c. 33, Sched. 2, s. 43 (11) - 15/12/2009

PART III
REGULATIONS

Definitions

17 In this Part,

"Registrar" means the Registrar of Regulations appointed under section 31; ("registrateur")

"regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,

(a) a by-law of a municipality or local board as defined in the *Municipal Affairs Act*, or

(b) an order of the Ontario Municipal Board. ("règlement") 2006, c. 21, Sched. F, s. 17.

Filing of regulations

18 (1) Every regulation shall be filed with the Registrar, except as provided in sections 19 to 21. 2006, c. 21, Sched. F, s. 18 (1).

Regulations made or approved by Lieutenant Governor in Council

(2) If a regulation is made or approved by the Lieutenant Governor in Council, a copy of the regulation certified to be a true copy by the Clerk or Deputy Clerk of the Executive Council shall be filed. 2006, c. 21, Sched. F, s. 18 (2).

Other regulations

(3) If a regulation is not made or approved by the Lieutenant Governor in Council, the original regulation, signed by the person or entity authorized to make the regulation, shall be filed. 2006, c. 21, Sched. F, s. 18 (3).

Same

(4) If a regulation described in subsection (3) requires the approval of a person or entity other than the Lieutenant Governor in Council, the original regulation, signed by the person or entity authorized to make the regulation and by the person or entity whose approval is required, shall be filed. 2006, c. 21, Sched. F, s. 18 (4).

Corporation or other entity

(5) If a corporation or other entity makes or approves a regulation, the signature of an officer or agent who has authority to sign on behalf of the corporation or entity is deemed to be the signature of the corporation or entity for the purposes of subsections (3) and (4). 2006, c. 21, Sched. F, s. 18 (5).

Proof of office not required

(6) A regulation signed by an officer or agent under subsection (5) may be filed without proof of the authority, office or signature of the person signing on behalf of the corporation or entity, but the signed regulation shall show his or her office or title. 2006, c. 21, Sched. F, s. 18 (6).

Other requirement

(7) A regulation presented for filing shall show the date on which it was made and, if approval is required, the date on which it was approved. 2006, c. 21, Sched. F, s. 18 (7).

Public inspection

(8) A filed regulation shall be made available for public inspection. 2006, c. 21, Sched. F, s. 18 (8).

Filing date

19 (1) A regulation shall not be filed on a date that is later than four months after the date on which it was made or, if approval of the regulation is required, the date it is approved. 2006, c. 21, Sched. F, s. 19 (1).

Consent to extend filing date

(2) Despite subsection (1), a regulation may be filed on a date that is later than that described in subsection (1) if consent to do so has been obtained from the person or entity authorized to make the regulation and, if the regulation requires approval, from the person or entity authorized to approve the regulation. 2006, c. 21, Sched. F, s. 19 (2).

Date to be specified

(3) The consent shall specify a date after the four-month period described in subsection (1) by which the regulation shall be filed. 2006, c. 21, Sched. F, s. 19 (3).

Timing of consent

(4) A consent to extend the filing date and any subsequent consents may be given at any time,

(a) whether before or after the four-month period described in subsection (1) has expired; and

(b) whether or not a date set out in an earlier consent has expired. 2006, c. 21, Sched. F, s. 19 (4).

Filing restriction

(5) The regulation shall not be filed after the date specified in the consent. 2006, c. 21, Sched. F, s. 19 (5).

Consent to be filed

(6) The consent extending the filing date shall be filed with the Registrar at the same time as the regulation is filed, and the rules for signing and certifying the regulation set out in section 18 apply to the consent, with necessary modifications. 2006, c. 21, Sched. F, s. 19 (6).

Same

(7) A consent filed under this section need not be published. 2006, c. 21, Sched. F, s. 19 (7).

Transition

(8) This section does not apply to a regulation made on or before the coming into force of this section, even if approval, if required, was given after the coming into force of this section. 2006, c. 21, Sched. F, s. 19 (8).

Registrar's discretion not to file

20 The Registrar may refuse to file a regulation if the rules for filing set out in section 18 or prescribed under clause 32 (a) have not been complied with. 2006, c. 21, Sched. F, s. 20.

Registrar's duty not to file

21 (1) The Registrar shall refuse to file a regulation if the regulation is not bilingual but purports to amend a bilingual regulation. 2006, c. 21, Sched. F, s. 21 (1).

Same

(2) The Registrar shall refuse to file a regulation if section 19 has not been complied with. 2006, c. 21, Sched. F, s. 21 (2).

Deemed validity of filing

(3) If a regulation that fails to meet the requirements of this section is inadvertently accepted for filing, the regulation is deemed to be validly filed despite that failure. 2006, c. 21, Sched. F, s. 21 (3).

Same

(4) Subsection (3) shall be interpreted only as validating a procedural irregularity. 2006, c. 21, Sched. F, s. 21 (4).

When regulation effective

22 (1) A regulation that is not filed has no effect. 2006, c. 21, Sched. F, s. 22 (1).

Same

(2) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force on the day on which it is filed. 2006, c. 21, Sched. F, s. 22 (2).

No retroactivity authorized

(3) Nothing in this section authorizes the making of a regulation that is effective with respect to a period before its filing. 2006, c. 21, Sched. F, s. 22 (3).

Time of commencement and revocation

Commencement

23 (1) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force at the first instant of the day on which it comes into force. 2006, c. 21, Sched. F, s. 23 (1).

Limitation

(2) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation is not effective against a person before the earliest of the following times:

1. When the person has actual notice of it.
2. The last instant of the day on which it is published on the e-Laws website.
3. The last instant of the day on which it is published in the print version of *The Ontario Gazette*. 2006, c. 21, Sched. F, s. 23 (2).

Revocation

(3) Unless a regulation or an Act provides otherwise, the revocation of a regulation takes effect at the first instant of the day of revocation. 2006, c. 21, Sched. F, s. 23 (3).

Proof of making, approval, filing and publication

When made

24 (1) Unless the contrary is proved, the date indicated on the e-Laws website or in the print version of *The Ontario Gazette* as the date on which a regulation was made is proof that the regulation was made on that date. 2006, c. 21, Sched. F, s. 24 (1).

When approved

(2) Unless the contrary is proved, if approval is required for the making of a regulation, the date indicated on the e-Laws website or in the print version of *The Ontario Gazette* as the date on which approval was given is proof that the regulation was approved on that date. 2006, c. 21, Sched. F, s. 24 (2).

When filed

(3) Unless the contrary is proved, the date indicated on the e-Laws website or in the print version of *The Ontario Gazette* as the date on which a regulation was filed is proof that the regulation was filed on that date. 2006, c. 21, Sched. F, s. 24 (3).

When published on e-Laws

(4) Unless the contrary is proved, the date of publication indicated for a regulation on the e-Laws website is proof that the regulation was published on the e-Laws website on that date. 2006, c. 21, Sched. F, s. 24 (4).

When published in *The Ontario Gazette*

(5) Unless the contrary is proved, the date of publication indicated for a regulation in the print version of *The Ontario Gazette* is proof that the regulation was published in the print version of *The Ontario Gazette* on that date. 2006, c. 21, Sched. F, s. 24 (5).

When published

25 (1) Every regulation shall be published,

(a) on the e-Laws website promptly after its filing; and

(b) in the print version of *The Ontario Gazette* within one month after its filing or in accordance with such other timelines as may be specified in a regulation made under clause 32 (c). 2006, c. 21, Sched. F, s. 25 (1).

Date of filing, publication, etc.

(2) A published regulation shall show the date of its filing, the date of its publication on the e-Laws website and the date of its publication in the print version of *The Ontario Gazette*, in the manner directed by the Registrar. 2006, c. 21, Sched. F, s. 25 (2).

Publication in order of filing

(3) Regulations shall be published in the order in which they are filed unless, in the opinion of the Registrar, for practical or technical reasons related to the publication process, it is impossible, impractical or unreasonably difficult or costly to do so. 2006, c. 21, Sched. F, s. 25 (3).

Numbering

(4) Regulations shall be numbered in the order in which they are filed, and a new series shall be commenced each year. 2006, c. 21, Sched. F, s. 25 (4).

Same, e-Laws publication

(5) For the purposes of subsection (3), regulations that are published on the e-Laws website simultaneously or as a batch are deemed to be published in the order in which they are filed. 2006, c. 21, Sched. F, s. 25 (5).

Pre-publication corrections

26 (1) At any time before a filed regulation is first published under subsection 25 (1), the Registrar may,

(a) correct spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature;

(b) alter the style or presentation of text or graphics to be consistent with the editorial or drafting practices of Ontario, or to improve electronic or print presentation; and

(c) correct errors in the numbering of provisions and make any changes in cross-references that are required as a result. 2006, c. 21, Sched. F, s. 26 (1).

Same

(2) Corrections and alterations made under this section are deemed to be part of the regulation as filed with the Registrar under this Part. 2006, c. 21, Sched. F, s. 26 (2).

Post-publication corrections

Correction on e-Laws website

27 (1) If the Registrar discovers that a regulation published on the e-Laws website differs from the filed regulation, he or she shall ensure that a corrected regulation is promptly published on the e-Laws website. 2006, c. 21, Sched. F, s. 27 (1); 2009, c. 33, Sched. 2, s. 43 (12).

Notice of correction on e-Laws website

(2) Where subsection (1) applies, the Registrar may, if he or she considers it appropriate, publish a notice of correction on the e-Laws website. 2009, c. 33, Sched. 2, s. 43 (13).

Notice of correction in Gazette

(3) If the Registrar discovers that a regulation published in the print version of *The Ontario Gazette* differs from the filed regulation, the Registrar may, if he or she considers it appropriate, publish a notice of correction in the print version of *The Ontario Gazette*. 2006, c. 21, Sched. F, s. 27 (3); 2009, c. 33, Sched. 2, s. 43 (14).

Same

(4) A notice of correction published under subsection (3) may include a corrected regulation, if the Registrar considers it appropriate. 2009, c. 33, Sched. 2, s. 43 (15).

(5) REPEALED: 2009, c. 33, Sched. 2, s. 43 (15).

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

2009, c. 33, Sched. 2, s. 43 (12-15) - 15/12/2009

No validation

28 The filing, publication or correction of a regulation under this Act does not validate the regulation if it is otherwise invalid. 2006, c. 21, Sched. F, s. 28.

Judicial notice

29 Judicial notice shall be taken of the making, approval where required, filing, contents and publication of a regulation that is published on the e-Laws website or in the print version of *The Ontario Gazette*. 2006, c. 21, Sched. F, s. 29.

Citation of regulations

30 (1) A regulation may be cited in English as "Ontario Regulation" or "O. Reg." and in French as "Règlement de l'Ontario" or "Règl. de l'Ont." followed by its filing number, a forward slash and the year of its filing. 2006, c. 21, Sched. F, s. 30 (1); 2009, c. 33, Sched. 2, s. 43 (16).

Same

(2) The year of filing of a regulation may be indicated in full or by the last two figures in the year. 2006, c. 21, Sched. F, s. 30 (2).

Same

(3) A regulation set out in the Revised Regulations of Ontario may be cited,

(a) in English as "Revised Regulations of Ontario, (*year*) , Regulation (*number*)" or as "R.R.O. (*year*), Reg. (*number*)"; and

(b) in French as "Règlements refondus de l'Ontario de (*year*), Règlement (*number*)" or as "R.R.O. (*year*), Règl. (*number*)". 2006, c. 21, Sched. F, s. 30 (3); 2009, c. 33, Sched. 2, s. 43 (17).

Same

(4) A regulation may also be cited in accordance with a method prescribed under clause 32 (b) or in accordance with accepted legislation citation practices. 2006, c. 21, Sched. F, s. 30 (4); 2009, c. 33, Sched. 2, s. 43 (18).

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

2009, c. 33, Sched. 2, s. 43 (16-18) - 15/12/2009

Registrar

31 (1) A lawyer employed in the Office of Legislative Counsel shall be appointed by the Lieutenant Governor in Council as Registrar of Regulations. 2006, c. 21, Sched. F, s. 31 (1).

Duty, preparation of regulations

(2) The Registrar shall advise on and assist in the preparation of regulations. 2006, c. 21, Sched. F, s. 31 (2).

Other duties

(3) The Registrar shall,

(a) be responsible for the numbering, indexing and publication of all regulations filed under this Part;

(b) set standards respecting the format in which regulations shall be submitted for filing;

(c) exercise the powers given and perform the duties assigned under this Part. 2006, c. 21, Sched. F, s. 31 (3).

Assistant Registrars

(4) The Registrar may designate one or more lawyers employed in the Office of Legislative Counsel as Assistant Registrar to exercise the powers and perform the duties of the Registrar in his or her place. 2006, c. 21, Sched. F, s. 31 (4).

Regulations

32 The Attorney General may make regulations,

(a) prescribing methods and rules for filing regulations that supplement or provide alternatives to the rules described in section 18, to permit the establishment of an electronic regulations filing system or otherwise address technological change;

(b) prescribing methods of citing regulations to supplement or provide alternatives to the methods set out in section 30;

(c) prescribing timelines for the purposes of clause 25 (1) (b);

(d) respecting the powers and duties of the Registrar. 2006, c. 21, Sched. F, s. 32; 2009, c. 33, Sched. 2, s. 43 (19).

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

2009, c. 33, Sched. 2, s. 43 (19) - 15/12/2009

Standing committee

33 (1) At the commencement of each session of the Legislature, a standing committee of the Assembly shall be appointed under this section with authority to sit during the session. 2006, c. 21, Sched. F, s. 33 (1).

Regulations referred

(2) Every regulation stands permanently referred to the standing committee for the purposes of subsection (3). 2006, c. 21, Sched. F, s. 33 (2).

Terms of reference

(3) The standing committee shall examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling Acts, and shall deal with such other matters as are referred to it by the Assembly. 2006, c. 21, Sched. F, s. 33 (3).

Authority to call persons

(4) The standing committee may examine any member of the Executive Council or any public servant designated by the member respecting any regulation made under an Act that is under his or her administration. 2006, c. 21, Sched. F, s. 33 (4).

Report

(5) The standing committee shall, from time to time, report to the Assembly its observations, opinions and recommendations. 2006, c. 21, Sched. F, s. 33 (5).

PART IV
PROOF OF LEGISLATION

Official law

34 (1) A bill that receives Royal Assent and is endorsed by the Clerk of the Assembly as having received Royal Assent is official law. 2006, c. 21, Sched. F, s. 34 (1).

Same

(2) A regulation that is filed with the Registrar of Regulations under Part III (Regulations) or a predecessor of that Part is official law. 2006, c. 21, Sched. F, s. 34 (2).

Official copy

35 (1) A copy of a source law or a consolidated law is an official copy of that law if,

(a) it is printed by the Queen's Printer or by an entity that is prescribed under clause 41 (1) (a);

(b) it is accessed from the e-Laws website in a form or format prescribed under clause 41 (1) (b); or

(c) it is prescribed under clause 41 (1) (c) as an official copy. 2006, c. 21, Sched. F, s. 35 (1).

Disclaimer

(2) Subsection (1) does not apply to a copy that is accompanied by a disclaimer to the effect that it is not intended as official. 2006, c. 21, Sched. F, s. 35 (2); 2009, c. 33, Sched. 2, s. 43 (20).

Same

(3) In the case of a copy referred to in clause (1) (b), the copy is accompanied by a disclaimer if the disclaimer is on the e-Laws website when the copy is accessed. 2006, c. 21, Sched. F, s. 35 (3); 2009, c. 33, Sched. 2, s. 43 (21).

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

2009, c. 33, Sched. 2, s. 43 (20, 21) - 15/12/2009

Presumption, printed by Queen's Printer

36 Unless the contrary is proved, a copy of a source law or consolidated law purporting to be printed by the Queen's Printer or other prescribed entity was so printed. 2006, c. 21, Sched. F, s. 36.

Presumption, accessed from e-Laws

37 Unless the contrary is proved, a copy of a source law or consolidated law submitted with an oral or written statement to the effect that it was accessed from the e-Laws website in a form or format prescribed under clause 41 (1) (b) was so accessed. 2006, c. 21, Sched. F, s. 37.

Official copies of source law as evidence

38 Unless the contrary is proved, an official copy of a source law is an accurate statement of that law. 2006, c. 21, Sched. F, s. 38.

Official copies of consolidated law as evidence

39 Unless the contrary is proved, an official copy of a consolidated law is an accurate statement of that law,

(a) in the case of an official copy described in clause 35 (1) (a), on the consolidation date shown on the copy;

(b) in the case of an official copy accessed from the e-Laws website in a form or format prescribed under clause 41 (1) (b), during the period indicated on the e-Laws website in respect of the copy when the copy is accessed;

(c) in the case of an official copy prescribed under clause 41 (1) (c), on the date or during the period prescribed under clause 41 (1) (d). 2006, c. 21, Sched. F, s. 39.

e-Laws, provisions not in force

40 (1) A source law or consolidated law published on the e-Laws website shall include provisions that have been enacted by the Legislature or filed under Part III (Regulations) or a predecessor of that Part, as the case may be, but that are not yet in force. 2006, c. 21, Sched. F, s. 40 (1).

Same

(2) Where a provision that is not yet in force is included in a law published on the e-Laws website, the fact that it is not yet in force shall be indicated on the website, in the manner and to the extent directed by the Chief Legislative Counsel. 2006, c. 21, Sched. F, s. 40 (2).

Regulations

41 (1) The Attorney General may make regulations,

(a) prescribing an entity for the purposes of clause 35 (1) (a);

(b) prescribing forms or formats, including print-outs, on-screen displays or other output of electronic data, for the purposes of clause 35 (1) (b);

(c) prescribing official copies for the purposes of clause 35 (1) (c);

(d) prescribing the date on or period during which a copy prescribed under clause (c) is an accurate statement of a consolidated law. 2006, c. 21, Sched. F, s. 41 (1).

Same

(2) A regulation made under clause (1) (b), (c) or (d) may be made with respect to,

(a) the manner in which a copy is created, recorded, transmitted, stored, authenticated, received, displayed or perceived;

(b) the person, body or thing that created, recorded, transmitted, stored, authenticated, received, displayed or perceived the copy; and

(c) any statement, mark or certification associated with the creation, recording, transmission, storage, authentication, reception, display or perception of the copy. 2006, c. 21, Sched. F, s. 41 (2).

PART V
CHANGE POWERS

Editorial and other changes

42 (1) This Part does not authorize any change that alters the legal effect of any Act or regulation. 2006, c. 21, Sched. F, s. 42 (1).

Same

(2) The Chief Legislative Counsel may make the following changes to consolidated laws:

1. Correct spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature.
2. Alter the style or presentation of text or graphics to be consistent with the editorial or drafting practices of Ontario, or to improve electronic or print presentation.

2.1 Make such minor changes as may be required to ensure a consistent form of expression.

2.2 Make such minor changes as may be required to make the form of expression of an Act or regulation in French or in English more compatible with its form of expression in the other language.

3. Replace a form of reference to an Act or regulation, or a provision or other portion of an Act or regulation, with a different form of reference, in accordance with Ontario drafting practices.
4. Replace a description of a date or time with the actual date or time.
5. After a bill has been enacted, replace a reference to the bill or a provision or other portion of the bill with a reference to the Act or provision or other portion of the Act.
6. If a provision provides that it is contingent on the occurrence of a future event and the event occurs, remove text referring to the contingency and make any other changes that are required as a result.

7. Make such changes to the title of an Act or regulation, including but not limited to omitting the year from the title of an Act, as are required to accord with changes in methods of citing Acts or regulations or changes in the electronic or print presentation of Acts or regulations, and make any other changes that are required as a result.
8. If an Act or regulation provides that references to a body, office, person, place or thing are deemed or considered to be references to another body, office, person, place or thing, replace a reference to the original body, office, person, place or thing with a reference to the other.
9. When the name, title, location or address of a body, office, person, place or thing has been altered, change references to the name, title, location or address to reflect the alteration, if the body, office, person, place or thing continues under the new name or title or at the new location or address.
10. Correct errors in the numbering of provisions or other portions of an Act or regulation and make any changes in cross-references that are required as a result.
11. If a provision of a transitional nature is contained in an amending Act or regulation, incorporate it as a provision of the relevant consolidated law and make any other changes that are required as a result.
12. Make a correction, if it is patent both that an error has been made and what the correction should be. 2006, c. 21, Sched. F, s. 42 (2); 2009, c. 33, Sched. 2, s. 43 (22, 23).

Exception, par. 9 of subs. (2)

(3) Paragraph 9 of subsection (2) does not apply to alterations to the name or title of,

(a) a Minister or Ministry of the Government of Ontario;

(b) a municipality, as defined in the *Municipal Act, 2001*;

(c) a non-legislative document incorporated by reference into an Act or regulation; or

(d) an Act or regulation. 2006, c. 21, Sched. F, s. 42 (3).

Error in consolidation

(4) If the Chief Legislative Counsel discovers that an error was made in the process of publishing or consolidating a consolidated law,

(a) in the case of a consolidated law published on the e-Laws website, he or she shall ensure that a corrected consolidated law is published on the e-Laws website; and

(b) in the case of a consolidated law printed by the Queen's Printer or by an entity that is prescribed under clause 41 (1) (a), he or she may cause a corrected consolidated law to be published in print, if he or she considers it appropriate in the circumstances. 2006, c. 21, Sched. F, s. 42 (4); 2009, c. 33, Sched. 2, s. 43 (24).

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

2009, c. 33, Sched. 2, s. 43 (22-24) - 15/12/2009

Notice

43 (1) The Chief Legislative Counsel may provide notice of the changes made under paragraphs 1 to 3 of subsection 42 (2) and of corrections made under subsection 42 (4), in the manner that he or she considers appropriate. 2006, c. 21, Sched. F, s. 43 (1).

Same

(2) The Chief Legislative Counsel shall provide notice of the changes made under paragraphs 4 to 12 of subsection 42 (2), in the manner that he or she considers appropriate. 2006, c. 21, Sched. F, s. 43 (2).

Same

(3) In determining whether to provide notice of a change made under paragraphs 1 to 3 of subsection 42 (2) or of a correction made under subsection 42 (4), the Chief Legislative Counsel shall consider,

(a) the nature of the change or correction; and

(b) the extent to which notice, and the information provided in it, would provide assistance in understanding the relevant legislative history. 2006, c. 21, Sched. F, s. 43 (3); 2009, c. 33, Sched. 2, s. 43 (25, 26).

Same

(4) In providing notice of a change under subsection (1) or (2), the Chief Legislative Counsel shall state the change or the nature of the change. 2009, c. 33, Sched. 2, s. 43 (27).

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

2009, c. 33, Sched. 2, s. 43 (25-27) - 15/12/2009

Date of change

44 No legal significance shall be inferred from the timing of the exercise of a power under this Part. 2006, c. 21, Sched. F, s. 44.

Interpretation

45 Regardless of when a change is made to a consolidated law under this Part, the change may be read, if it is appropriate to do so,

(a) into the source law as of the date it was enacted or filed; or

(b) into earlier consolidations of the Act or regulation. 2006, c. 21, Sched. F, s. 45.

PART VI
INTERPRETATION

APPLICATION

Application to Acts and regulations

46 Every provision of this Part applies to every Act and regulation. 2006, c. 21, Sched. F, s. 46.

Contrary intention or context requiring otherwise

47 Section 46 applies unless,

(a) a contrary intention appears; or

(b) its application would give to a term or provision a meaning that is inconsistent with the context. 2006, c. 21, Sched. F, s. 47.

Existing and future legislation

48 Section 46 applies whether the Act or regulation was enacted or made before, on or after the day the *Access to Justice Act, 2006* receives Royal Assent. 2006, c. 21, Sched. F, s. 48.

Other documents

49 The following provisions also apply, in the same way as to a regulation, to every document that is made under an Act but is not a regulation:

1. Subsection 52 (6) (regulation continues).
2. Section 54 (regulations – power to make, amend, etc.).
3. Section 58 (reference to Act or regulation includes reference to individual provisions).
4. Section 59 (rolling incorporation of Ontario legislation), but only with respect to the document that contains the reference.
5. Section 86 (terms used in regulations).
6. Section 89 (computation of time). 2006, c. 21, Sched. F, s. 49.

Interpretation and definition provisions

50 The interpretation and definition provisions in every Act and regulation are subject to the exceptions contained in section 47. 2006, c. 21, Sched. F, s. 50.

LEGISLATIVE CHANGES

Effect of repeal and revocation

51 (1) The repeal of an Act or the revocation of a regulation does not,

(a) affect the previous operation of the repealed or revoked Act or regulation;

(b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;

(c) affect an offence committed against the repealed or revoked Act or regulation, or any penalty, forfeiture or punishment incurred in connection with the offence;

(d) affect an investigation, proceeding or remedy in respect of,

(i) a right, privilege, obligation or liability described in clause (b), or

(ii) a penalty, forfeiture or punishment described in clause (c). 2006, c. 21, Sched. F, s. 51 (1).

Same

(2) An investigation, proceeding or remedy described in clause (1) (d) may be commenced, continued and enforced as if the Act or regulation had not been repealed or revoked. 2006, c. 21, Sched. F, s. 51 (2).

Same

(3) A penalty, forfeiture or punishment described in clause (1) (c) may be imposed as if the Act or regulation had not been repealed or revoked. 2006, c. 21, Sched. F, s. 51 (3).

Effect of amendment and replacement

Application

52 (1) This section applies,

(a) if an Act is repealed and replaced;

(b) if a regulation is revoked and replaced;

(c) if an Act or regulation is amended. 2006, c. 21, Sched. F, s. 52 (1).

Authorized persons continue to act

(2) A person authorized to act under the former Act or regulation has authority to act under the corresponding provisions, if any, of the new or amended one until another person becomes authorized to do so. 2006, c. 21, Sched. F, s. 52 (2).

Proceedings continued

(3) Proceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible. 2006, c. 21, Sched. F, s. 52 (3).

New procedure

(4) The procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment. 2006, c. 21, Sched. F, s. 52 (4).

Reduction of penalty

(5) If the new or amended Act or regulation provides for a lesser penalty, forfeiture or punishment, the lesser one applies when a sanction is imposed, after the replacement or amendment, in respect of matters that happened before that time. 2006, c. 21, Sched. F, s. 52 (5).

Regulation continues

(6) If an Act under which a regulation has been made is replaced or amended, the regulation remains in force to the extent that it is authorized by the new or amended Act. 2006, c. 21, Sched. F, s. 52 (6).

Effect of repeal and revocation on amendments

53 The repeal or revocation of an Act or regulation includes the repeal or revocation of any amendment to the Act or regulation. 2006, c. 21, Sched. F, s. 53.

Regulations – power to make, amend, etc.

54 (1) Power to make regulations includes power to amend, revoke or replace them from time to time. 2006, c. 21, Sched. F, s. 54 (1).

Survival of power to revoke

(2) Power to revoke a regulation remains even if the provision conferring power to make it has been repealed. 2006, c. 21, Sched. F, s. 54 (2).

New regulation-maker

(3) If a provision conferring power on a person or entity to make a regulation is amended, or repealed and replaced, so as to confer the power or substantially the same power on a different person or entity, the second person or entity has power to revoke, amend or replace the regulation made by the first one. 2006, c. 21, Sched. F, s. 54 (3).

Obsolete regulations

55 (1) If a provision of an Act under which a regulation is made is repealed and not replaced, the regulation ceases to have effect, subject to section 51 and subsection 59 (3). 2006, c. 21, Sched. F, s. 55 (1).

Same

(2) The Lieutenant Governor in Council may, by regulation, revoke a regulation,

(a) that has ceased to have effect under subsection (1); or

(b) that has been rendered obsolete by events or the passage of time. 2006, c. 21, Sched. F, s. 55 (2).

No implication

56 (1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force. 2006, c. 21, Sched. F, s. 56 (1).

Same

(2) The amendment of an Act or regulation does not imply that the previous state of the law was different. 2006, c. 21, Sched. F, s. 56 (2).

Same

(3) The re-enactment, remaking, amendment or changing under Part V (Change Powers) of an Act or regulation does not imply an adoption of any judicial or other interpretation of the language used in the Act or regulation, or of similar language. 2006, c. 21, Sched. F, s. 56 (3).

No revival

57 The repeal or revocation of an Act or regulation does not imply the revival of an Act or regulation that is not in force or another thing that is not in existence at the time the repeal or revocation takes effect. 2006, c. 21, Sched. F, s. 57.

REFERENCES

Reference to Act or regulation includes reference to individual provisions

58 A reference to an Act or regulation is also a reference to each provision of the Act or regulation. 2006, c. 21, Sched. F, s. 58.

Rolling incorporation of Ontario legislation

59 (1) A reference in an Act or regulation to a provision of another Act or regulation is a reference to the provision,

(a) as amended, re-enacted or remade; or

(b) as changed under Part V (Change Powers). 2006, c. 21, Sched. F, s. 59 (1).

Same

(2) Subsection (1) applies whether the provision is amended, re-enacted, remade or changed under Part V before or after the commencement of the provision containing the reference. 2006, c. 21, Sched. F, s. 59 (2).

Reference to repealed and unreplaced provision

(3) If the provision referred to is repealed or revoked, without being replaced,

(a) the repealed or revoked provision continues to have effect, but only to the extent that is necessary to give effect to the Act or regulation that contains the reference; and

(b) the reference is to the provision as it read immediately before the repeal or revocation. 2006, c. 21, Sched. F, s. 59 (3).

Rolling incorporation of other Canadian legislation

60 (1) A reference in an Act or regulation to a provision of an Act or regulation of Canada or of another province or territory of Canada is a reference to the provision,

(a) as amended, re-enacted or remade; or

(b) as changed in the exercise of a statutory power to make non-substantive changes. 2006, c. 21, Sched. F, s. 60 (1).

Same

(2) Subsection (1) applies whether the provision is amended, re-enacted, remade or changed as described in clause (1) (b) before or after the commencement of the provision containing the reference. 2006, c. 21, Sched. F, s. 60 (2).

Reference to repealed and unreplaced provision

(3) If the provision referred to is repealed or revoked, without being replaced, the reference is to the provision as it read immediately before the repeal or revocation. 2006, c. 21, Sched. F, s. 60 (3).

Static incorporation of foreign legislation

61 A reference in an Act or regulation to a provision of an Act or regulation of a jurisdiction outside Canada is a reference to the provision as it read when the Ontario provision containing the reference was most recently enacted, made or amended. 2006, c. 21, Sched. F, s. 61.

Incorporation of documents by reference

62 (1) The power to make a regulation may be exercised by incorporating an existing document by reference, in whole or in part. 2006, c. 21, Sched. F, s. 62 (1).

Changes

(2) The document may be incorporated subject to such changes as the maker of the regulation considers necessary. 2006, c. 21, Sched. F, s. 62 (2).

Static incorporation

(3) The reference to the document is a reference to it as it read when the provision containing the reference was most recently enacted, made or amended. 2006, c. 21, Sched. F, s. 62 (3).

Access to incorporated document and earlier versions

(4) When a document is incorporated by reference as described in subsection (1), the Minister responsible for the administration of the Act under which the regulation is made shall take steps to ensure that,

(a) the incorporated document is readily available to the public, on and after the day the regulation or amending regulation containing the reference is filed under Part III (Regulations); and

(b) the incorporated document and any earlier versions of it that were previously incorporated into the regulation or into a predecessor of the regulation remain readily available to the public. 2006, c. 21, Sched. F, s. 62 (4); 2009, c. 33, Sched. 2, s. 43 (28).

Transition

(5) Subsection (4) applies with respect to documents incorporated by reference as described in subsection (1) on and after the day the *Access to Justice Act, 2006* receives Royal Assent. 2006, c. 21, Sched. F, s. 62 (5).

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

2009, c. 33, Sched. 2, s. 43 (28) - 15/12/2009

GENERAL RULES OF CONSTRUCTION

Law always speaking

63 The law is always speaking, and the present tense shall be applied to circumstances as they arise. 2006, c. 21, Sched. F, s. 63.

Rule of liberal interpretation

64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

Same

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act. 2006, c. 21, Sched. F, s. 64 (2).

Bilingual texts

65 The English and French versions of Acts and regulations that are enacted or made in both languages are equally authoritative. 2006, c. 21, Sched. F, s. 65.

Bilingual names

66 If the Act or regulation that creates or continues an entity refers to it by both an English and a French name, or if the English and French versions of the Act or regulation refer to the entity by different names, it may be referred to for any purpose by either name or by both names. 2006, c. 21, Sched. F, s. 66.

Number

67 Words in the singular include the plural and words in the plural include the singular. 2006, c. 21, Sched. F, s. 67.

Gender

68 Gender-specific terms refer to any gender and include corporations. 2016, c. 23, s. 56.

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

2016, c. 23, s. 56 - 01/01/2017

PREAMBLES AND REFERENCE AIDS

Preambles

69 (1) A preamble to a new Act is part of that Act and may be used to help explain its purpose. 2006, c. 21, Sched. F, s. 69 (1).

Same

(2) A preamble to an Act that amends one or more other Acts is part of the amending Act and may be used to help explain the purpose of the amendments. 2006, c. 21, Sched. F, s. 69 (2).

Reference aids

70 Tables of contents, marginal notes, information included to provide legislative history, headnotes and headings are inserted in an Act or regulation for convenience of reference only and do not form part of it. 2006, c. 21, Sched. F, s. 70.

CROWN

Crown not bound, exception

71 No Act or regulation binds Her Majesty or affects Her Majesty's rights or prerogatives unless it expressly states an intention to do so. 2006, c. 21, Sched. F, s. 71.

Succession

72 Anything begun under a reigning sovereign continues under his or her successor as if no succession had taken place. 2006, c. 21, Sched. F, s. 72.

PROCLAMATIONS

How proclamations issued

73 When an Act authorizes the Lieutenant Governor to do anything by proclamation, the proclamation,

(a) shall be issued under an order of the Lieutenant Governor in Council recommending that the proclamation be issued; and

(b) need not refer to the order in council. 2006, c. 21, Sched. F, s. 73.

Judicial notice

74 Judicial notice shall be taken of the issuing and contents of every proclamation. 2006, c. 21, Sched. F, s. 74.

Amendment and revocation – restriction

75 (1) A proclamation that brings an Act into force may be amended or revoked by a further proclamation before the commencement date specified in the original proclamation, but not on or after that date. 2006, c. 21, Sched. F, s. 75 (1).

Same

(2) A proclamation that specifies different commencement dates for different provisions may be amended or revoked with respect to a particular provision before the commencement date specified for that provision, but not on or after that date. 2006, c. 21, Sched. F, s. 75 (2).

APPOINTMENTS, POWERS AND DELEGATION

Appointments

76 (1) A provision authorizing the Lieutenant Governor in Council, the Lieutenant Governor or a minister of the Crown to appoint a person to an office authorizes an appointment for a fixed term or an appointment during pleasure, and if the appointment is during pleasure, it may be revoked at any time, without cause and without giving notice. 2006, c. 21, Sched. F, s. 76 (1).

Remuneration and expenses

(2) A provision described in subsection (1) authorizes the Lieutenant Governor in Council to determine the remuneration and expenses of the person who is appointed. 2006, c. 21, Sched. F, s. 76 (2).

Implied powers

77 Power to appoint a person to a public office includes power to,

(a) reappoint or remove the person;

(b) appoint a deputy with the same powers as the holder of the office, subject to specified conditions, or with limited powers as specified; and

(c) temporarily appoint another person to the office if it is vacant or if the holder of the office is absent or unable to act. 2006, c. 21, Sched. F, s. 77.

Incidental powers

78 If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included. 2006, c. 21, Sched. F, s. 78.

Performance when occasion requires

79 Powers that are conferred on a person may be exercised, and duties that are imposed on a person shall be performed, whenever the occasion requires. 2006, c. 21, Sched. F, s. 79.

Powers and duties remain despite delegation

80 A person on whom an Act confers a power or imposes a duty may exercise it even if it has been delegated to another person. 2006, c. 21, Sched. F, s. 80.

Delegation of regulation-making power

80.1 (1) A person on whom an Act confers power to make a regulation may delegate the power only if an Act specifically authorizes the delegation of that regulation-making power. 2009, c. 33, Sched. 2, s. 43 (29).

Exception

(2) Subsection (1) does not apply in respect of orders made under section 17 of the *Ontario Planning and Development Act, 1994*, section 47 of the *Planning Act*, or a predecessor of either of those sections. 2009, c. 33, Sched. 2, s. 43 (29).

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

2009, c. 33, Sched. 2, s. 43 (29) - 15/12/2009

Survival of delegation

81 The delegation of a power or duty remains valid until it is revoked or amended, even if the author of the delegation is no longer in office. 2006, c. 21, Sched. F, s. 81.

REGULATIONS AND FORMS

General or particular

82 (1) A regulation may be general or particular in its application. 2006, c. 21, Sched. F, s. 82 (1).

Classes

(2) The power to make a regulation includes the power to prescribe a class. 2006, c. 21, Sched. F, s. 82 (2).

Same

(3) For the purposes of subsection (2), a class may be defined,

(a) in terms of any attribute or combination of attributes; or

(b) as consisting of, including or excluding a specified member. 2006, c. 21, Sched. F, s. 82 (3).

Fee regulations

83 This Act authorizes the Lieutenant Governor in Council to make regulations under an Act, prescribing fees to be charged by persons whom the Act or a regulation made under the Act requires or authorizes to do anything, if the Act itself does not provide for such regulations. 2006, c. 21, Sched. F, s. 83.

Deviations from required form

84 Deviations from a form whose use is required under an Act do not invalidate the form if,

(a) they do not affect the substance and are unlikely to mislead; and

(b) the form is organized in the same or substantially the same way as the form whose use is required. 2006, c. 21, Sched. F, s. 84.

DEFINITIONS

Different forms of defined terms

85 If a term is defined, other forms of the same term have corresponding meanings. 2006, c. 21, Sched. F, s. 85.

Terms used in regulations

86 Terms used in regulations have the same meaning as in the Act under whose authority they are made. 2006, c. 21, Sched. F, s. 86.

Definitions

87 In every Act and regulation,

"Act" means an Act of the Legislature, and "statute" has the same meaning; ("loi")

"Assembly" and "Legislative Assembly" mean the Legislative Assembly of Ontario; ("Assemblée", "Assemblée législative")

"Court of Appeal" means the Court of Appeal for Ontario; ("Cour d'appel")

"Divisional Court" means the Divisional Court of the Superior Court of Justice; ("Cour divisionnaire")

"Her Majesty", "His Majesty", "the Queen", "the King" or "the Crown" means the Sovereign of the United Kingdom, Canada and Her other Realms and Territories, and Head of the Commonwealth; ("Sa Majesté", "la Reine", "le Roi", "la Couronne")

"holiday" means a holiday as described in section 88; ("jour férié")

"individual" means a natural person; ("particulier")

"legally qualified medical practitioner" and similar expressions indicating legal recognition of a person as a member of the medical profession mean a member of the College of Physicians and Surgeons of Ontario; ("médecin dûment qualifié")

"Legislature" means the Lieutenant Governor acting by and with the advice and consent of the Assembly; ("Législature")

"Lieutenant Governor" means the Lieutenant Governor of Ontario, or the person administering the Government of Ontario for the time being in Her Majesty's name, by whatever title he or she is designated; ("lieutenant-gouverneur")

"Lieutenant Governor in Council" means the Lieutenant Governor acting by and with the advice of the Executive Council of Ontario; ("lieutenant-gouverneur en conseil")

"mentally ill", when used in reference to a person, means suffering from such a disorder of the mind that he or she requires care, supervision and control for his or her own protection or welfare, or for the protection of others; ("mentalement malade")

"newspaper", in a provision requiring publication, means a document that,

(a) is printed in sheet form, published at regular intervals of a week or less and circulated to the general public, and

(b) consists primarily of news of current events of general interest; ("journal")

"now", "next", "heretofore" and "hereafter" relate to the date of coming into force of the provision in which they are used; ("maintenant", "prochainement", "jusqu'ici", "dorénavant")

"peace officer" includes,

(a) a person employed to serve or execute civil process, including a sheriff, deputy sheriff and sheriff's officer, and a bailiff of the Small Claims Court,

(b) a justice of the peace,

(c) an officer or permanent employee of a correctional institution, or of a place of detention or custody, and

(d) a person employed to maintain the public peace, including a police officer and constable; ("agent de la paix")

"person" includes a corporation; ("personne")

"proclamation" means a proclamation issued by the Lieutenant Governor under the Great Seal; ("proclamation")

"regulation" means a regulation that is filed under Part III (Regulations); ("règlement")

"rules of court" means rules made under Part IV of the *Courts of Justice Act*, or otherwise by an authority having power to make rules regulating court practices and procedures. ("règles de pratique") 2006, c. 21, Sched. F, s. 87; 2009, c. 33, Sched. 2, s. 43 (30, 31); 2017, c. 2, Sched. 2, s. 25.

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

2009, c. 33, Sched. 2, s. 43 (30, 31) - 15/12/2009

2017, c. 2, Sched. 2, s. 25 - 22/03/2017

TIME

Holidays

88 (1) This section applies for the purposes of the definition of "holiday" in section 87. 2006, c. 21, Sched. F, s. 88 (1).

Same

(2) The following days are holidays:

1. Sunday.
2. New Year's Day.

2.1 Family Day.

3. Good Friday.

4. Easter Monday.
5. Victoria Day.
6. Canada Day.
7. Labour Day.
8. Thanksgiving Day.
9. Remembrance Day.
10. Christmas Day.
11. Boxing Day.
12. Any day fixed as a holiday by proclamation of the Governor General or Lieutenant Governor. 2006, c. 21, Sched. F, s. 88 (2); 2009, c. 33, Sched. 2, s. 43 (32).

Same

(3) When New Year's Day falls on a Sunday, the following Monday is also a holiday. 2006, c. 21, Sched. F, s. 88 (3).

Same

(4) In accordance with the *Holidays Act* (Canada), when July 1 is a Sunday, Canada Day falls on July 2. 2006, c. 21, Sched. F, s. 88 (4).

Same

(5) When Christmas Day falls on a Saturday, the following Monday is also a holiday, and when it falls on a Sunday, the following Tuesday is also a holiday. 2006, c. 21, Sched. F, s. 88 (5).

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

2009, c. 33, Sched. 2, s. 43 (32) - 15/12/2009

Computation of time

Holidays

89 (1) Time limits that would otherwise expire on a holiday are extended to include the next day that is not a holiday. 2006, c. 21, Sched. F, s. 89 (1).

Days on which offices closed

(2) Time limits for registering or filing documents or for doing anything else that expire on a day when the place for doing so is not open during its regular hours of business are extended to include the next day the place is open during its regular hours of business. 2006, c. 21, Sched. F, s. 89 (2).

Number of days between events

(3) A reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens, even if the reference is to "at least" or "not less than" a number of days. 2006, c. 21, Sched. F, s. 89 (3).

Specified day included

(4) A period of time described as beginning or ending on, at or with a specified day includes that day. 2006, c. 21, Sched. F, s. 89 (4).

Specified day excluded

(5) A period of time described as beginning before or after a specified day excludes that day. 2006, c. 21, Sched. F, s. 89 (5).

Months

(6) If a period of time is described as a number of months before or after a specified day, the following rules apply:

1. The number of months are counted from the specified day, excluding the month in which the specified day falls.
2. The period includes the day in the last month counted that has the same calendar number as the specified day or, if that month has no day with that number, its last day.
3. REPEALED: 2009, c. 33, Sched. 2, s. 43 (33).

2006, c. 21, Sched. F, s. 89 (6); 2009, c. 33, Sched. 2, s. 43 (33).

Leap years

(7) The anniversary of an event that took place on February 29 falls on February 28, except in a leap year. 2006, c. 21, Sched. F, s. 89 (7).

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

2009, c. 33, Sched. 2, s. 43 (33) - 15/12/2009

Age

90 A person attains an age specified as a number of years at the first instant of the corresponding anniversary of his or her birth. 2006, c. 21, Sched. F, s. 90.

MISCELLANEOUS

Private Acts

91 (1) A private Act does not affect the rights of a person or entity except as mentioned in the Act. 2006, c. 21, Sched. F, s. 91 (1).

Same

(2) Subsection (1) does not apply to a private Act respecting the powers or duties of a municipality. 2006, c. 21, Sched. F, s. 91 (2).

Corporations, implied provisions

92 (1) A provision of an Act that creates a corporation,

(a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated;

(b) gives a majority of the members of the corporation power to bind the others by their acts; and

(c) exempts the members of the corporation from personal liability for its debts, acts and obligations, if they do not contravene the Act that incorporates them. 2006, c. 21, Sched. F, s. 92 (1).

Restricted application

(2) Subsection (1) applies to a corporation only if the provision creating it is in force on the day before the day the *Access to Justice Act, 2006* receives Royal Assent. 2006, c. 21, Sched. F, s. 92 (2).

Majority

93 If something is required or authorized to be done by more than two persons, a majority of them may do it. 2006, c. 21, Sched. F, s. 93.

Reference to series

94 If reference is made to a series, the first and last items are included. 2006, c. 21, Sched. F, s. 94.

Oaths, affirmations and declarations

95 A requirement that a person take an oath or be sworn is satisfied by an affirmation or a declaration. 2006, c. 21, Sched. F, s. 95.

Requirements for security and sureties

Security

96 (1) A requirement to give security is a requirement to give security that is sufficient for the purpose. 2006, c. 21, Sched. F, s. 96 (1).

Sureties

(2) Subsection (1) also applies, with necessary modifications, to a surety, and if the provision refers to sureties without specifying the number of persons, one is sufficient. 2006, c. 21, Sched. F, s. 96 (2).

Immunity provisions

97 (1) Where words referring to actions or other proceedings for damages are used in a provision excluding or limiting the liability of the Crown or any other person, third or subsequent party proceedings and proceedings for contribution and indemnity or restitution are included. 2006, c. 21, Sched. F, s. 97 (1).

Transition

(2) Subsection (1) applies in respect of proceedings commenced on or after October 4, 2000. 2006, c. 21, Sched. F, s. 97 (2).

PART VII
UNCONSOLIDATED ACTS AND REGULATIONS

Unconsolidated Acts

98 (1)-(3) OMITTED (AMENDS OR REPEALS OTHER ACTS). 2006, c. 21, Sched. F, s. 98 (1-3).

Consolidation

(4) The Chief Legislative Counsel may at any time cause an Act that is unconsolidated and unrepealed to be consolidated and published on the e-Laws website as consolidated law. 2009, c. 33, Sched. 2, s. 43 (34).

French version

(5) If the Chief Legislative Counsel causes an Act to be consolidated under subsection (4), he or she shall, in the case of a public Act, or may, in the case of a private Act,

(a) prepare a French version of the Act; and

(b) cause the French version to be consolidated and published on the e-Laws website as consolidated law together with the English version. 2009, c. 33, Sched. 2, s. 43 (34).

Revision

(6) For the purposes of consolidating an Act under subsection (4), Part V (Change Powers) applies in respect of the consolidated Act with the following modifications:

1. Subsection 42 (2) shall be read as including power to,
   i. omit provisions that are obsolete, and
   ii. alter the numbering and arrangement of provisions.
2. Subsection 42 (3) does not apply.
3. Subsection 43 (1) shall be read as including reference to the changes referred to in subparagraphs 1 i and ii. 2009, c. 33, Sched. 2, s. 43 (34).

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

2009, c. 33, Sched. 2, s. 43 (34) - 15/12/2009

Unconsolidated regulations

99 (1), (2) OMITTED (AMENDS, REPEALS OR REVOKES OTHER LEGISLATION). 2006, c. 21, Sched. F, s. 99 (1, 2).

Consolidation

(3) The Chief Legislative Counsel may at any time cause a regulation that is unconsolidated and unrevoked to be consolidated and published on the e-Laws website as consolidated law. 2009, c. 33, Sched. 2, s. 43 (35).

French version

(4) If the Chief Legislative Counsel causes a regulation to be consolidated under subsection (3), he or she may,

(a) prepare a French version of the regulation; and

(b) cause the French version to be consolidated and published on the e-Laws website as consolidated law together with the English version. 2009, c. 33, Sched. 2, s. 43 (35).

Revision

(5) For the purposes of consolidating a regulation under subsection (3), Part V (Change Powers) applies in respect of the consolidated regulation with the following modifications:

1. Subsection 42 (2) shall be read as including power to,
   i. omit provisions that are obsolete, and
   ii. alter the numbering and arrangement of provisions.
2. Subsection 42 (3) does not apply.
3. Subsection 43 (1) shall be read as including reference to the changes referred to in subparagraphs 1 i and ii. 2009, c. 33, Sched. 2, s. 43 (35).

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

2009, c. 33, Sched. 2, s. 43 (35) - 15/12/2009

RESOLUTION OF UNCERTAINTY OR TRANSITION

Resolution of uncertainty or transition

100 (1) The Lieutenant Governor in Council may make regulations in respect of an Act repealed by section 98 or a regulation revoked by section 99,

(a) to resolve any uncertainty in respect of,

(i) any right, privilege, obligation or liability related to the Act or regulation, or

(ii) the effect of the repeal of the Act or the revocation of the regulation;

(b) to resolve any transitional matters that may arise in relation to the repeal or revocation. 2006, c. 21, Sched. F, s. 100 (1).

Same

(2) For greater certainty, a regulation under subsection (1) may address any uncertainty or transitional matter that arises before the day the regulation is filed. 2006, c. 21, Sched. F, s. 100 (2).

PART VIII (OMITTED)

101-142 OMITTED (AMENDS OR REPEALS OTHER ACTS). 2006, c. 21, Sched. F, ss. 101-142.

PART IX (OMITTED)

143 OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 2006, c. 21, Sched. F, s. 143.

144 OMITTED (ENACTS SHORT TITLE OF THIS ACT). 2006, c. 21, Sched. F, s. 144.

Français

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TAB 10

Township of Nepean v. Leikin

[1971] 1 O.R. 567-574

ONTARIO
[COURT OF APPEAL]
GALE, C.J.O., EVANS
and JESSUP, JJ.A.
4th JANUARY 1971.

Planning legislation -- Subdivision control -- Exceptions -- Agreement for sale of more than 10 acres -- Vendor retaining more than 10 acres -- Agreement entered into prior to repeal of s. 26(1)(c) of Planning Act -- Property not transferred until after repeal of s. 26(1)(c) -- Whether consent of Committee of Adjustment required -- Planning Act, ss. 26(1)(c), 32b(9a) -- Interpretation Act, s. 14(1)(c).

Statutes -- Interpretation -- Retroactivity -- Exception to consent requirements under subdivision control legislation repealed -- Whether repeal of exception to be given retroactive effect -- Planning Act, s. 26(1)(c) -- Interpretation Act, s. 14(1)(c).

The defendant owned lands in the plaintiff township, part of which he had agreed to sell under an agreement entered into in April, 1968. The lands sold and the lands retained both were in excess of 10 acres and thus, since the sale fell within s. 26(1)(c) (rep. & sub. 1960-61, c. 76, s. 1(1); further rep. & sub. 1970, c. 72, s. 1) of the Planning Act, R.S.O. 1960, c. 296, as amended, a consent to the severance was not required from the Committee of Adjustment of the plaintiff township. However, prior to the completion of the sale the Planning Act was amended by the repeal of s. 26(1)(c). The defendant then applied for a consent from the Committee of Adjustment, which was granted on condition that the defendant pay to the

municipality $17,000, which equalled 5% of the sale price. Upon the failure of the defendant to make payment, the plaintiff obtained judgment against the defendant for $17,000.

On appeal by way of stated case pursuant to Rule 128 of the Rules of Practice, held, the appeal should be allowed. Upon the signing of the agreement the defendant had acquired a right to payment of the purchase price and incurred an obligation to deliver a deed to the land. This "right" and "obligation" were within the meaning of s. 14(1)(c) of the Interpretation Act, R.S.O. 1960, c. 191, which provides in part that the repeal of an Act does not, except where otherwise provided, affect any right or obligation acquired under the Act. The defendant, therefore, had acquired a right and incurred an obligation in accordance with the law as it stood at the time the right and obligation arose and was not to be adversely affected by giving retroactive effect to the amendment to the Planning Act by 1968 (Ont.), c. 96, s. 2(1), unless the repealing legislation clearly stated that it was to be applied retroactively.

[Hamilton Gell v. White, [1922] 2 K.B. 422, apld]

APPEAL upon a special case stated pursuant to Rule 128 of the Rules of Practice from the judgment of Donohue, J., in favour of the respondent township for money due but not paid under the provisions of s-s. 9(a) of s. 32b of the Planning Act.

Gordon F. Henderson, Q.C. and Y.A. George Hynna for defendant, appellant.

Walter D. Baker, Q.C., for plaintiff, respondent.

The judgment of the Court was delivered by

EVANS, J.A.:-- The defendant appeals from the judgment

pronounced by Donohue, J., on July 27, 1970, upon a special case stated pursuant to Rule 128 wherein judgment was granted to the plaintiff in the sum of $17,000. The appellant seeks to reverse the said judgment and asks for a dismissal of the action.

The plaintiff in a specially endorsed writ sought from the defendant the sum of $17,000, being money due and unpaid under the provisions of s-s. (9a) [rep. & sub. 1966, c. 116, s. 5(2); am. 1967, c. 75, s. 8(1); later rep. 1970, c. 72, s. 5(2)] of s. 32b [enacted 1961-62, c. 104, s. 8] of the Planning Act, R.S.O. 1960, c. 296, and amendments thereto.

The following were the particulars endorsed on the writ of summons:

> The Committee of Adjustment of the plaintiff made it a condition of the approval of the sale by the defendant of part of Lot 35, Concession 1 R.F. that the said sum of $17,000.00 be paid by the defendant to the plaintiff by a decision made pursuant to the said Act on June 7th, 1968.
>
> The defendant was furnished with full particulars of the claim herein by a registered letter sent to the defendant by the solicitors for the plaintiff dated November 20th, 1968.

The case stated for the opinion of the Court read as follows:

> The parties hereto concur in stating the following special case for the opinion of the Court pursuant to Rule 128.
>
> 1. On or about the 26th day of April, A.D. 1968 an agreement was entered into between the defendant, Harry Leikin, and The Board of Governors of Algonquin College of Applied Arts and Technology, a copy of which is attached hereto as Exhibit "A". The land to be conveyed pursuant to the said agreement exceeded 10 acres in area and the defendant retained land in excess of 10 acres in area.
>
> 2. By Statutes of Ontario, 1968, Chapter 96, Section 2(1) coming into force on the 3rd day of May, 1968, Section 28(1)

of The Planning Act of Ontario was amended by repealing Subsection 1(c) thereof. Accordingly the application hereinafter set forth was made to the Committee of Adjustments of the Township of Nepean.

3. An application for consent to convey was made to the Committee of Adjustment of the Corporation of the Township of Nepean under Subsection 2(a) of Section 32(b) of The Planning Act. A copy of the Application is attached hereto as Exhibit "B".

4. On or about the 4th day of June, 1968 the above Application was heard by the said Committee and the defendant and his agent were in attendance. 5. On or about the 7th day of June, 1968 the Committee of Adjustment gave its decision in writing and inter alia consented to the conveyance subject to the condition that "(a) Cash to the value of 5% of the lands to be conveyed to be made payable to the Township". A copy of the decision is attached hereto and marked Exhibit "C".

6. Prior to the 7th day of June, A.D. 1968 and specifically on the 12th day of June, 1967 the Council of the Corporation of the Township of Nepean passed Motion Number 358, a copy of which is annexed hereto as Exhibit "D".

7. No appeal to the Ontario Municipal Board was taken with respect to the decision of the Committee of Adjustment as hereinbefore set forth and the Defendant conveyed the lands in question by a deed dated the 2nd day of July, 1968 and registered on the 16th day of July, 1968 as instrument Number 545403 in the Registry Office for the Registry Division of the City of Ottawa.

8. The "cash to the value of 5%" as set out in paragraph 5 has not been paid by the defendant to the plaintiff and it is agreed that if an amount is payable to the plaintiff that amount is the sum of $17,000.00.

9. It is agreed that the writ of summons, affidavit of merits and transcript of the cross-examination of the

defendant upon the affidavit of merits dated the 19th day of June, A.D. 1969 shall form part of the Record of the Stated Case herein.

> The question for the opinion of the Court is whether the sum of $17,000.00 as aforesaid is due and payable by the defendant to the plaintiff.

It is further agreed that upon judgment of the Court being given on this Stated Case, judgment shall be pronounced in this action declaring and directing accordingly and disposing of the question of costs of the parties to this action.

Dated at Ottawa this 15th day of October, A.D. 1969.

The factual situation is that in the latter part of 1967 the appellant negotiated a sale of a portion of his lands in the Township of Nepean, but certain technical matters delayed execution of the formal agreement of purchase and sale and it was finally signed by the appellant on April 4, 1968, and by the purchaser on April 26, 1968. At the time of execution of the said agreement the transaction fell within the exception contained in cl. (c) of s-s. (1) of s. 26 [rep. & sub. 1960-61, c. 76, s. 1(1); later rep. & sub. 1970, c. 72, s. 1] of the Planning Act, as amended, and therefore there was no need to obtain the consent of the Committee of Adjustment to the sale. The said exception contained in s. 26(1)(c) of the Planning Act was repealed by 1968 (Ont.), c. 96, s. 2(1), which came into force on May 3, 1968.

While the agreement provided for closing on or before May 1, 1968, the transaction was in fact not concluded until some weeks later and, in view of the amendment which came into force on May 3rd, the appellant applied to the Committee of Adjustment for the Township of Nepean under s-s. 2(a) of the Planning Act for consent to the conveyance of the lands. The application was made on May 21, 1968; was dealt with by the committee on June 4, 1968, and on June 7, 1968, the Committee of Adjustment gave the following decision in writing:

township of nepean

committee of adjustment

decision

An application by Mr. Harry Leikin for consent to convey part of Lot 35 Concession 1, R.F., being two parcels of land on the south side of Baseline Road and being --

(1) an area of 12.6 acres which lies approximately 585 feet south of Baseline Road,

(2) an area of 1.606 acres which has the northerly limit 120 feet south of the Baseline Road and extends to parcel number 1, has been heard by the Committee of Adjustment of June 4th, 1968. The committee realized that parcel number one, the 12.6 acre parcel, is to be used for an extension to the Algonquin College with a 5.3 acre parcel within this area to be used for the proposed Vanier School of Nursing, and parcel number two will be used as a means of access from this parcel.

The Committee could see no objection to these conveyances and the application is therefore approved, subject to the following condition:

(a) Cash to the valuee of 5% of the lands to be conveyed to be made payable to the Township.

Date of Submission to the Minister: June 7th, 1968

Last Date of Appeal of Decision: June 21st, 1968

Signed this 7th day of June, 1968 by the Committee of Adjustment for the Township of Nepean.

The condition attached by the Committee of Adjustment in granting approval was in conformity with a motion passed by the Corporation of the Township of Nepean on June 12, 1967, which read as follows:

WHEREAS Subsection (9a) of Section 32b of The Planning Act, R.S.O. 1960 permits the Committee of Adjustment to impose conditions in granting a consent as the Minister of Municipal Affairs has to the approval of a plan of subdivision under Subsections 5 and 8 of section 28 of The Planning Act.

AND WHEREAS to this date no such conditions have been imposed.

BE IT THEREFORE resolved that the Committee of Adjustment be requested to attach as a condition of approval to the granting of each consent the imposition of a 5% dedication of cash in lieu of land. To apply only to those lands where 5% land has not already been dedicated. No appeal was taken to the Ontario Municipal Board with respect to the decision of the Committee of Adjustment and the defendant conveyed the lands in question by a deed dated July 2, 1968, and registered on July 16, 1968. The defendant did not pay the 5% of the purchase price which was agreed upon at a figure of $17,000, nor did he enter into any agreement witht eh corporation to pay the said sum.

Section 26(1) of the Planning Act, prior to the amendment which became effective on May 3, 1968, provided as follows:

> 26(1) The council of a municipality may by by-law designate any area within the municipality as an area of subdivision control and thereafter no person shall convey land in the area by way of a deed or transfer on any sale, or mortgage or charge land in the area, or enter into an agreement of sale and purchase of land in the area or enter into any agreement that has the effect of granting the use of or right in land in the area directly or by entitlement to renewal for a period of twenty-one years or more unless,
>
> (c) the land is ten acres or more in area and each parcel of land remaining in the grantor, mortgagor or vendor abutting on the land conveyed or otherwise dealt with is also ten acres or more in area; or [am. 1966, c. 116, s. 2(1)]

(e) the consent,

(i) of the Committee of Adjustment of the municipality under subsection 2a of section 32b, ...

is given to convey, mortgage, charge or enter into an agreement with respect to the land. [rep. & sub. 1964, c. 90, s. 1(1); further rep. & sub. 1966, c. 116, s. 2(2)]

The appellant's land with which we are here concerned fell within an area of subdivision control and the respondent had set up a Committee of Adjustment. Had the transaction been completed on May 1, 1968, the date specified in the agreement of sale as the closing date, no difficulty would have arisen, as clearly the agreement would fall within the exemption in cl. (c) of s. 26(1). The main question for determination by this Court is the effect of the repeal of s. 26(1)(c) on May 3rd, subsequent to the date upon which the agreement was executed but prior to the date of actual transfer.

The Interpretation Act, R.S.O. 1960, c. 191, s. 14(1)(c), reads as follows:

14(1) Where an Act is repealed or where a regulation is revoked, the repeal or revocation does not, except as in this Act otherwise provided,

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked; The common law rule was that, if an Act expired or was repealed, it was regarded, in the absence of a specific provision to the contrary, as having never existed except as to matters and transactions past and closed. The Interpretation Act is a statutory embodiment of that common law rule. Atkin, L.J., when discussing cl. (c) of the English Interpretation Act, 1889 (U.K.), c. 63, s. 38, which is almost

identical to the Ontario Act, in Hamilton Gell v. White, [1922] 2 K.B. 422 at p. 431, said:

> ... that provision was not intended to preserve the abstract rights conferred by the repealed Act, ... It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute.

In the present case the appellant, in my view, had acquired a right "under the Act", within the meaning of s. 14(1)(c) of the Interpretation Act, to the payment of the purchase price and had also incurred an obligation within that meaning to deliver a deed in pursuance of the terms of the agreement for sale entered into prior to the date upon which the exclusionary section of the Planning Ace was repealed. It would appear to me right on principle that a person who had acquired certain rights and incurred certain obligations in accordance with the law as it stood at the time such rights and obligations arose should not be adversely affected by giving retroactive effect to legislation which seriously impairs those rights and obligations unless the repealing legislation clearly states that it shall be applied in a retroactive manner. I am further of the opinion that Hamilton Gell v. White supports that view. In that case, the landlord of an agricultural holding, being desirous of selling it, gave his tenant notice to quit. By the Agricultural Holdings Act, 1914 (U.K.), c. 7, when the tenancy of a holding was determined by a notice to quit given in view of a sale of the holding, the notice to quit was treated as an unreasonable disturbance under the Act and the tenant was entitled to compensation upon the terms and subject to the conditions of that section. One of the conditions of the tenant's right to compensation was that he should within two months after receipt of the notice to quit give the landlord notice of his intention to claim compensation and a second condition was that he should make his claim for compensation within three months after quitting the holding. The tenant duly gave notice of his intention to claim compensation within the time so limited, but, before the tenancy had expired, and therefore before he could satisfy the second condition, the section of the Act was repealed. The tenant subsequently made his claim within the three months limited by the repealed

section. It was held that, notwithstanding the repeal, the tenant was entitled to claim compensation by virtue of s. 38 of the Interpretation Act, 1889, which is similar to the Ontario Act. As soon as the landlord, in view of a sale of the property, gave the tenant notice to quit, the tenant "acquired a right" to compensation for disturbance subject to his satisfying the conditions of that section.

In the present case, as in Hamilton Gell v. White, we are not dealing with an abstract right conferred by the repealed Act but with the preservation of a specific right which had accrued to the appellant and with a specific obligation which he had incurred prior to the amendment. Both "the right" and "the obligation" are "under the Act" within the meaning of s. 14(1)(c) of the Interpretation Act.

Although the Committee of Adjustment had power to define the condition subject to which it would grant a consent to severance, that is, either a conveyance to the municipality of land up to 5% of the land sought to be conveyed or, in lieu thereof, a payment of money of equal value, it did not have power to impose an enforceable condition. The property owner retained the right to reject the condition defined by the committee and the absence of any agreement between the municipality and the property owner is evidence of his rejection. The fact that, subsequent to the decision of the Committee of Adjustment, he proceeded with registration is not in my opinion evidence of acceptance of the terms defined by the Committee of Adjustment. The appellant takes the position that he was not required to obtain the consent of the committee but that he did so in order to facilitate the registration of the conveyance. Practical considerations may well have indicated this course of action, but it in no way created an obligation to pay upon the appellant.

Section 32b (9a) of the Planning Act states that the committee "shall require that any or all conditions imposed by fulfilled prior to the granting of a consent ...". It has a duty to impose and to require fulfilment of conditions prior to granting a consent to severance but, once it has seen fit to grant a consent which is acted upon, it has no statutory

authority to enforce compliance with the condition imposed.

The appellant further argued that there was no right of action in the respondent and that the Committee of Adjustment acted improperly in following the request of the municipality in imposing a levy of 5% of the value of the land sought to be conveyed. In view of the disposition which I have made of this case, I do not find it necessary to deal with this submission other than to say that I am not in agreement with it.

The matters which are to be considered by the Committee of Adjustment in determining whether a consent shall be given, by virtue of s. 32b(9a), are the same as those matters to be considered by the Minister under s. 28(4) and (5). Section 32b(9a) provides that the committee shall require that any or all conditions imposed by fulfilled prior to the granting of the consent. This is the section under which the respondent claimed for compensation in the writ, but in this Court he referred also to s. 32b(13) which states that, if within 14 days no notice of appeal is given, the decision of the committee is final and binding. The effect of this submission would be that a vendor would be required to pay the amount of money specified in the decision of the committee even though the transaction did not close because of some flaw on title unrelated to the consent. This would result in an unjust enrichment of the municipality at the expense of the landowner in the absnece of some agreement to refund if the transaction did not close.

There is no doubt that the Committee of Adjustment and the municipality have the power to require land or cash in lieu of property as a condition precedent to the granting of a consent and the proper procedure would appear to be that the municipality and the landowner enter into an agreement to provide for such conveyance or payment prior to granting such consent. The vendor would thereby retain his right to reject the agreement, but in the present case no option was available to the vendor. He had concluded a valid and binding agreement for sale in accordance with the law existing at the time of the execution of the agreement, and it would be manifestly unjust to give retroactive effect to the amendment and thereby deprive

the vendor of the exclusionary provisions applicable to his particular transaction.

The appeal is allowed, the judgment below is set aside and an order will issue dismissing the action with costs here and below.

Appeal allowed.

TAB 11

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2005 ABCA 122

Date: 20050329
Docket: 0201-0015-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant (Applicant)

- and -

Alberta Energy and Utilities Board

Respondent (Respondent)

The Court:

The Honourable Mr. Justice Willis O'Leary
The Honourable Madam Justice Anne Russell
The Honourable Mr. Justice Neil Wittmann

Reasons for Judgment Reserved of The Honourable Madam Justice Russell
Concurred in by The Honourable Mr. Justice O'Leary
Concurred in by The Honourable Mr. Justice Wittmann

Appeal from the Decision of the
Alberta Energy and Utilities Board
Dated the 13th day of December, 2001

Reasons for Judgment of
The Honourable Madam Justice Russell

[1] On December 13, 2001, following a Deferred Gas Account Reconciliation Hearing, the Alberta Energy and Utilities Board (the "Board"), in its Decision 2001-110, found the appellant ATCO Gas and Pipelines Ltd. ("ATCO") acted imprudently in managing its gas supplies for the winter of 2000/2001. As a result the Board ordered ATCO to pay $4 million to its customers to compensate them for missed cost savings. In ***Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, 2003 ABCA 188, ATCO was granted leave to appeal that decision pursuant to s. 26 of the ***Alberta Energy and Utilities Board Act***, R.S.A. 2000, c. A-17 and section 70 of the ***Public Utilities Board Act***, R.S.A. 2000, c. P-45, on the following issue:

> Did the Board err in law in determining the appropriate standard to be applied with respect to the prudence and reasonableness of the decision of the Applicant utility in the context of this case?

[2] The chambers judge expressly denied leave on the calculation of the $4 million refund.

[3] The City of Calgary ("Calgary") opposed ATCO's application at the Reconciliation Hearing before the Board and was permitted to make submissions on this appeal.

INTRODUCTION

[4] ATCO is a gas distribution utility. It is governed by legislation which authorizes the Board to regulate public utilities and to "ensure that the public pays a fair and reasonable rate for the gas and the owner of the gas obtains a fair and reasonable return on its investment": ***Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*** (2004), 339 A.R. 250, 2004 ABCA 3 at para. 36 ("***Atco Gas***"). Customers of ATCO are charged the actual cost ATCO incurs for the gas it supplies.

[5] The Board has statutory authority to set just and reasonable rates: ***Gas Utilities Act***, R.S.A. 1980, c. G-4, s. 28; ***Public Utilities Board Act***, R.S.A. 1980, c. P-37, s. 81. Gas utility rates, or Gas Cost Recovery Rates (GCRRs) are meant to reflect the market price a utility pays to purchase natural gas. Gas utilities generally apply semi-annually to have GCRRs set by the Board. At the end of a rate period, the Board sets the upcoming rate period's GCRR through a process of reconciling the forecast costs with the actual costs incurred. To account for the risks of fluctuating costs, utilities are allowed to accumulate variances between forecast costs and actual costs: ***ATCO Electric Limited v. Alberta (Energy and Utilities Board)***, 2004 ABCA 215 at para. 26 ("***ATCO Electric***"). That variance is accumulated in a Deferred Gas Account (DGA).

[6] GCRRs are based on forecasts of future prices and costs, as well as any revenue surplus or deficiency incurred from the previous season as a result of the variance between actual costs and

forecast costs. GCRRs are intended to ensure any surplus will be distributed to customers, or to allow the utility to recover any deficiency, depending on the DGA balance. GCRRs are also intended to minimize future variance between actual costs and forecast costs.

[7] Where there is a significant change in gas supply costs between regular applications, a utility is encouraged to apply to the Board for approval of an adjustment to the GCRR in order to minimize the DGA balance: AEUB Order U2000 308. ATCO made such an application in January 2001.

[8] This appeal relates to the reconciliation of ATCO's DGA for the 2000/2001 winter season, and the test applied by the Board in assessing the prudence demonstrated by ATCO in managing its gas supplies during that period.

BACKGROUND

[9] ATCO owns a natural gas storage facility near Carbon, Alberta (the "Carbon facility") which is capable of storing enormous quantities of gas. A certain amount of the gas in storage is needed to provide the minimum pressure required to meet minimum design deliverability. That gas is called 'base gas', or 'cushion gas', and is a rate base asset.

[10] ATCO's practice was to purchase gas and inject it into storage at the Carbon facility during the summer months when demand was low, and to withdraw the stored gas during the winter when demand was high. The gas injected and withdrawn on a cyclical basis is called 'working gas', and is essentially gas inventory.

[11] Because the demand for gas corresponds with price, the practice of injecting and withdrawing working gas can have a favourable effect on prices, referred to as a "physical hedge."

[12] Although ATCO acknowledges the potential cost benefit to customers, it denies engaging in the practice of injecting and withdrawing gas from storage for the purpose of managing gas prices. Rather, ATCO argues its use of storage from the Carbon facility was to meet the operational requirements of the pipeline system, withdrawing gas at variable rates in order to manage fluctuations in demand.

[13] Commencing in the winter of 2000/2001, ATCO decided the Carbon facility was no longer needed for operational purposes. ATCO says its decision was based in part on previous decisions of the Board, which ATCO interpreted as not permitting it to engage in financial hedging because it would be costly over time and adversely affect retail gas market development. Other factors which led ATCO to discontinue use of the Carbon facility for operational purposes were deregulation in the gas utility industry and an abundance of gas supply in the open market in this province. ATCO claims it had no assurance of a market for its gas supply as a result of those factors. However, the Board found that the proposed deregulation of Carbon was not relevant to ATCO's use of gas storage during the 2000/2001 winter season, when the Carbon facility was still in use.

[14] Prior to the 2000/2001 winter season, ATCO had used a flexible withdrawal strategy, dependent on seasonal fluctuations in demand. During the winter of 2000/2001, ATCO changed to a flat withdrawal strategy, meaning that ATCO withdrew gas from the Carbon facility at set monthly flat rates. ATCO claims that as a result of its withdrawal strategy during that season of unprecedented high gas prices, it generated savings to its customers of about $60 million. However, Calgary contends that savings realized from the sale of gas purchased during the summer months when gas prices were low, does not exonerate ATCO from abandoning a flexible withdrawal strategy during the winter, which would have achieved additional savings. Calgary also notes that ATCO's own expert admitted that flexibility has value in a competitive market.

[15] ATCO says its flat withdrawal strategy was designed to avoid speculation as to future prices in the day-to-day management of gas in storage, in keeping with the Board's cautions against engaging in trading.

[16] In Order U2000-161, the Board determined that the use of financial hedging had not previously been used as a method of gas portfolio management (AB VIII, E7). It rejected arguments that ATCO had acted inappropriately by failing to engage in the purchase of gas for storage and simultaneous sale of it on the forward market for later withdrawal. The Board did so on the basis that such activity would be tantamount to trading, for which it had not given any approval (AB VIII, E-8). However, in that Order, the Board recommended that:

> [ATCO] revisit the issue of using financial hedging to help manage its gas portfolio and provide. . . a comprehensive cost/benefit analysis for its use prior to applying for a winter period Gas Cost Recovery Rate (GCRR) effective November 1, 2000, in order to determine if there is a general consensus among its sales customers for implementation of this form of risk management. (AB VIII, E8-E9)

[17] In a subsequent Order, U2000-183, the Board approved a storage strategy for the April 1, 2000 - March 31, 2001 storage season. That strategy allowed ATCO to buy blocks of fixed price physical gas in the summer and sell blocks of fixed price physical gas for the winter. Order U2000-183 states:

> In . . . Order [U2000-161] the EUB agreed that ATCO GS acted appropriately in the circumstances at that particular time by following the DGA procedures in place, which did not include the use of forward markets or other forms of financial hedging as a method of gas portfolio management. The EUB recommended however that ATCO GS revisit the issue of using financial hedging to help manage its gas portfolio.

[18] Orders U2000-161 and 183 do not support ATCO's position that it was prohibited by the Board from engaging in financial hedging.

[19] ATCO claims its decision to switch withdrawal strategies reflected the fact that the historical need to vary withdrawals in response to operational requirements for the pipeline system no longer existed. ATCO relies in part on expert reports recommending the best solutions for fluctuations in gas prices. Two of those reports are dated March 16 and April 2, 2001. But since ATCO's decision was made prior to the winter of 2000/2001, those reports could not possibly have influenced it. A third report, dated January 14, 2000 may be applicable, but does not expressly support ATCO's decision to cease using flexible withdrawal; it merely outlines the value and risks inherent in using various strategies.

[20] At ATCO's DGA Reconciliation Hearing in 2001, Calgary introduced a report, prepared by its expert VanderSchee, which concluded that had ATCO withdrawn gas at flexible rates in response to price fluctuations during the winter of 2000/2001 rather than withdrawing at a flat rate, it could have saved customers an additional $8.9 million. According to VanderSchee, such a strategy avoids the need to purchase gas at elevated prices by providing a utility with some flexibility to withdraw variable amounts of gas from storage in response to fluctuations in market prices.

[21] ATCO counters that VanderSchee's report was based on hindsight, and that the recommended strategy would have required ATCO to engage in trading.

Board Decision

[22] The Board ruled that ATCO's decision to implement flat withdrawal in the context of the winter period for 2000/2001 was imprudent. In its decision, the Board applied the following test of prudence:

> . . . [T]he utility would be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information that the owner of the utility knew or ought to have known at the time the decision was made. In making a decision, a utility must take into account the best interests of its customers, while still being entitled to a fair return.

[23] The Board noted that both before and during the winter period 2000/2001, gas forecasts predicted higher gas prices. While the Board recognized that ATCO did not have the benefit of the computer program used by VanderSchee, and could not have predicted the actual price fluctuations so as to realize the optimal savings calculated with the benefit of hindsight, in the Board's view, ATCO ought to have employed a strategy similar to that described by VanderSchee. The Board accepted that VanderSchee's method was not a trading strategy.

[24] The Board held that ATCO ought to have done something to mitigate the high gas prices over the 2000/2001 winter season. The Board found that some of the options available to ATCO at the time included: continued withdrawal of gas on a flexible basis depending on market conditions, as had been done in the past; use of the excess deliverability on days when gas prices spiked; sale of that portion it did not intend to use; or development of other strategies to deal with the forecast

high gas prices.

[25] The Board estimated the total savings not realized by ATCO to be $4 million, and ordered ATCO to refund that amount to its customers through reduced rates in the future.

RELEVANT LEGISLATION

[26] Both the appellant's and respondents' facta make reference to the ***Gas Utilities Act***, R.S.A. 2000 c. G-5, the ***Alberta Energy and Utilities Board Act,*** R.S.A. 2000, c. A-17 and the ***Public Utilities Board Act***, R.S.A. 2000, c. P-45. The gas sales in question and the decision under appeal took place prior to the coming into force of the 2000 Revised Statutes of Alberta on January 1, 2002 by proclamation O.C. 424/2001. Accordingly, although the R.S.A. 2000 statutes apply with respect to ATCO's application for leave to appeal, which occurred after the proclamation date, the matters before the Board, now under appeal, are governed by the ***Gas Utilities Act***, R.S.A. 1980, c. G-4, as amended ("***GUA***"), the ***Alberta Energy and Utilities Board Act***, S.A. 1994, c. A-19.5 ("***AEUBA***"), and the ***Public Utilities Board Act***, **R.S.A**. 1980, c. P-37, as amended ("***PUBA***"). Therefore, all references in this decision are to those Acts as amended on the relevant dates.

[27] All relevant legislation is listed in Appendix A, attached hereto.

BRIEF CONCLUSIONS

[28] The only question before this Court is one of law relating to the test for prudence set by the Board. The application of the four factors of the pragmatic and functional analysis to that question results in a standard of review of reasonableness *simpliciter*.

[29] Applying that standard, we find the Board's test for prudence reasonable and dismiss ATCO's appeal.

STANDARD OF REVIEW

[30] This is an appeal from the decision of an administrative tribunal. Therefore, this Court must determine, in light of the governing legislation, the appropriate level of scrutiny to be applied on review of that decision: ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 ("***Pushpanathan***") at para. 26; ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, 2003 SCC 19 ("***Dr. Q***") at paras. 21-22; ***Voice Construction Ltd. v. Construction & General Workers' Union, Local 92***, 2004 SCC 23 ("***Voice***") at para. 15.

[31] The standard of review must be determined by applying the pragmatic and functional analysis developed in ***U.E.S., Local 298 v. Bibeault***, [1988] 2 S.C.R. 1048, which entails consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory

right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question – law, fact or mixed law and fact: ***Pushpanathan***, *supra* at paras. 29-38; ***Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.***, [2001] 2 S.C.R. 100, 2001 SCC 36 ("***Mattel***") at para. 24; ***Dr. Q***, *supra* at para. 26; ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247, 2003 SCC 20 ("***Ryan***") at para. 27; ***Voice***, *supra* at para. 16; ***A.U.P.E. v. Lethbridge Community College***, 2004 SCC 28 ("***Lethbridge***") at para. 14. None of those four factors are determinative: ***Pushpanathan***, *supra* at para. 27; ***Mattel***, *supra* at para. 24, but evaluated collectively, they will indicate the appropriate degree of deference to afford the administrative decision-maker.

[32] There are three standards of review, from least to most deferential: correctness, reasonableness, and patent unreasonableness: ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 at para. 30; ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 at para. 55; ***Ryan***, *supra* at paras. 20 & 24.

[33] Legislative intent underlies each factor in the pragmatic and functional analysis: ***Dr. Q***, *supra*; ***Voice***, *supra* at para. 18. In this case, the governing legislation is the ***GUA***, the ***AEUBA***, and the ***PUBA***. (See Appendix A)

Privative Clause/Right of Appeal

[34] Section 10 of the ***AEUBA*** gives the Board the same jurisdiction and powers granted to the Public Utilities Board ("PUB"). Thus, the Board has jurisdiction to "hear and determine all questions of law or of fact" pursuant to s. 30 of the ***PUBA***.

[35] Section 26 of the ***Alberta Energy and Utilities Board Act***, R.S.A. 2000, c. A-17 and s. 70 of the ***Public Utilities Board Act***, R.S.A. 2000, c. P-45 allow for appeals from decisions of the Board on questions of law or jurisdiction where leave has been granted. Such a statutory right of appeal implies legislative intent to afford the Board less deference on questions of law or jurisdiction: ***Barrie Public Utilities et al. v. Canadian Cable Television Association et al.*** (2003), 304 N.R. 1, 225 D.L.R. (4th) 206 at 217 (S.C.C.) ("***Barrie***"). However, granting leave on a matter of law or jurisdiction will not necessarily attract a correctness standard: ***Barrie***, *ibid*; ***Alberta Energy v. Goodwell Petroleum*** (2003), 339 A.R. 201, 2003 ABCA 277 at para. 23. Matters falling within the Board's expertise will warrant deference even where there is a statutory right of appeal: ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557 at 591 ("***Pezim***"); ***Atco Gas***, *supra* at para. 35.

[36] This factor suggests that the Board's decision be afforded limited deference.

Relative Expertise

[37] The Board is a specialized tribunal with expertise in the area of gas utility regulation, which includes protecting the public interest by balancing the competing interests of customers and utilities: ***Coalition of Citizens v. Alberta (Energy and Utilities Board)*** (1996), 187 A.R. 205 at para. 14 (C.A.); ***ATCO Ltd. v. Calgary Power* Ltd.**, [1982] 2 S.C.R. 557 at 576; ***Atco Gas***, *supra* at para. 34; ***ATCO Electric*** at para. 53. However, the expertise of the Board relative to that of this Court will depend on the issue in question: ***Pushpanathan***, *supra* at para. 33; ***Barrie***, *supra* at 219.

[38] In this case, the issue for which ATCO was granted leave is the following:

> Did the Board err in law in determining the appropriate standard to be applied with respect to the prudence and reasonableness of the decision of the Applicant utility in the context of this case?

[39] This question could be understood in two ways. Did the Board have jurisdiction to set and apply a standard of prudence in reviewing ATCO's decisions? Alternatively, assuming the Board did have jurisdiction, did the Board employ the proper standard of prudence in respect of ATCO's management decisions? If it is the former, the issue involves legislative interpretation, for which the Board's expertise does not necessarily exceed that of this Court. However, if it is the latter, the issue straddles the line between statutory interpretation and industry-specific practice, in which case, the Board's expertise may very well exceed that of this Court. For the reasons that follow, I conclude the question is one of law and not of jurisdiction.

[40] In support of its position that the proper standard of review is correctness, ATCO argues that any authority the Board has in terms of denying recovery of costs or imposing obligations on ATCO to refund are matters of statutory interpretation, which go to the Board's jurisdiction. However, ATCO was not granted leave on the jurisdictional argument.

[41] ATCO argues the broad applicability of the issue respecting prudence suggests minimal deference, citing ***Chieu v. Canada (Minister of Citizenship and Immigration)*** (2002), 208 D.L.R. (4^{th}) 107 at 120. While conceding the Board has expertise, ATCO says in the absence of a statutory framework, the Board has no expertise with respect to the test for prudence.

[42] ATCO's submissions on the leave question focus predominantly on what ought to be the proper test for prudence, as do submissions by the Board and by Calgary. None of the parties make submissions regarding the Board's jurisdiction to set such a test. Moreover, the issue on which leave was granted was framed as one of law and not as one of jurisdiction. Therefore, focus will be confined to the issue of law as to whether the Board adopted the proper test of prudence.

[43] The Board enunciated its test of prudence in the context of rate-setting. Fixing just and reasonable rates is a matter squarely within the Board's expertise: ***TransAlta Utilities Corp. v.***

Alberta Public Utilities Board (1986), 68 A.R. 171 at para. 22 (C.A.) ("***TransAlta***"); ***Industrial Power Consumers Assn. of Alberta v. TransAlta Utilities Corp.*** (2000), 255 A.R. 194 at para. 4 (C.A.). The issue is polycentric and requires expertise.

[44] Given the nature of the legal issue and the context surrounding it, the expertise of this Court does not exceed that of the Board which suggests the Board must be afforded curial deference.

Legislative Purpose

[45] The purpose of the governing statutory scheme as a whole, and the specific applicable provisions in particular, must also be considered in determining the appropriate standard of review: ***Dr. Q***, *supra* at para. 30; ***Lethbridge***, *supra* at para. 18.

[46] The Supreme Court of Canada spoke generally to the mandate conferred on the Board by the ***GUA*** and the ***PUBA*** in ***ATCO v. Calgary Power***, [1982] 2 S.C.R. 557 at 576:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities.

[47] The general legislative mandate on the Board is to protect the public interest by way of regulating public utilities. A reviewing court should grant deference where the statutory scheme governing an expert tribunal allows the tribunal to balance competing interests and address broad policy concerns: ***Pezim***, *supra* at 591-92; ***ATCO Electric***, *supra* at para. 56.

[48] In reconciling the DGA and setting a 'just and reasonable' prospective GCRR, the Board conducted a prudence review of the Board's management decisions respecting withdrawal from storage. The question is whether the Board applied the correct test for prudence.

[49] Specific provisions of the governing legislation that confer authority on the administrative tribunal can also be indicators of limited review.[1] Although there is no particular provision in any of the governing Acts which refers to a prudence review, the applicable legislative provisions do give the Board authority to fix 'just and reasonable' rates, a specific mandate connected to the

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[1] In ***TransAlta***, *supra* at para. 22, Kerans J.A. stated:

> . . . Sometimes a legislature invites limited review not by purporting to limit the power of the reviewing court but rather by conferring delegated legislative powers on the tribunal. When the delegation is manifest, as when the tribunal is empowered to "make regulations", the matter is beyond dispute. In other cases, the delegation is not so obvious but is found in the description of the powers of a tribunal in terms which are at once imprecise and evocative. The use of elastic adjectives is usually considered by a court as an implicit granting of a power to the tribunal to form its own "opinion" or make "policy" or to exercise a "discretion" - in fine, to make law. The key power of this Board is to fix "fair and reasonable" rates. This is a good example of a grant of a wide discretion.

general legislative purpose: ***Re City of Dartmouth*** (1976), 17 N.S.R. (2d) 425 at 432 (S.C.A.D.). The words 'just and reasonable' suggest that the criteria with which the Board exercises its power is flexible and discretionary, and subject to limited review.

[50] The Board has authority to fix just and reasonable rates, taking into account retrospective considerations respecting revenues and costs: ***GUA***, ss. 28(a) and 32(a); ***PUBA***, ss. 81(a) and 83(a). The Board also has authority to fix just and reasonable standards to be observed by utilities: ***GUA***, s. 28(c); ***PUBA***, s. 81(c).

[51] The discretion to determine what is just and reasonable includes the discretion to define justness and reasonableness: see ***Memorial Gardens Association (Can.) Ltd. v. Colwood Cemetery Co.*** [1958] S.C.R. 353 at 357; and ***TransAlta****, supra* at para. 24, citing ***Edmonton, Jasper Place et al v. Northwestern Utilities Ltd.*** (1960) 34 W.W.R. 241 (Alta. S.C.A.D.). Such discretion suggests a legislative intent to give deference to the Board's methodology in fixing rates and standards. Support for that premise is found in ***Newfoundland Light & Power Co. v. P.U.C. (Bd.)*** (1987), 25 Admin. L.R. 180 (NFCA). There the Court rejected the argument that the Board had exceeded its jurisdiction in determining a just and reasonable rate of return by failing to adopt a particular methodology. That decision was cited with approval in ***Newfoundland (Board of Commissioners of Public Utilities) (Re)*** (1998), 164 Nfld. & P.E.I.R. 60 at para. 29 (NFCA) by Green J.A., who stated:

> . . . The Board therefore has a broad discretion to adopt appropriate methodologies for the calculation of allowable rates of return. So long as the methodologies chosen are not inconsistent with generally accepted sound public utility practice and the purposes and policies of the Act, and can be supported by the available opinion evidence, the determination of what constitutes a just and reasonable return in a given case will generally be within the province of the Board and will not normally be interfered with.

[52] ATCO's customers are charged with the actual cost of gas supplied by ATCO. Actual costs incurred by a utility are reflected in the DGA balance. Those costs depend in part on that utility's management strategy, including the execution and management of a hedging plan. Assessing management decisions may necessarily factor into a reconciliation hearing and the Board's determination and implementation of just and reasonable rates: see Costello, K., "Should Commissions Pre-Approve a Gas Utility's Hedging Activities?" (***NRRI***, 34th Annual Regulatory Conference: Tampa, Florida, December 10, 2002).

[53] The Board's determination of the test governing its review of ATCO's management decisions accords with the general legislative mandate to serve the public interest by balancing the consumer's interest in just and reasonable rates with the utility's interest in earning a reasonable rate of return. In light of the discretionary nature of the specific rate-setting provisions, this factor

suggests that deference be given by this Court.

Nature of the Question

[54] Leave to appeal is granted only on questions of law or jurisdiction, which would generally favour less deference. However, as the question relates to the management of a utility and marketing strategies, it is one for which the Board has greater expertise than does this Court. Where the question of law is at the core of the administrative decision-maker's expertise, some deference is owed to that decision-maker: ***Voice***, *supra* at para. 29.

[55] ATCO argues the Board erred in its articulation and application of the prudence test, in finding ATCO imprudent. The application of the test is an issue of mixed fact and law. Because the governing legislation grants a right of appeal with leave only on questions of law or jurisdiction, questions of mixed fact and law can only come before this Court where there is an extricable legal question: see ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235 at para. 36. The Board's application of its prudence test is an issue inextricably bound to the facts and is therefore not properly before us. The question of whether the prudence test set by the Board was correct, is extricable and is a question of law. Because it is a question which falls within the discretion granted to the Board by its governing legislation, some deference must be afforded.

Conclusion on Standard of Review

[56] In the context of this case, only one of the four ***Pushpanathan*** factors, the statutory right of appeal, indicates a less deferential standard. Otherwise, the Board's expertise and the governing legislation suggest the Board be given a high degree of deference, given the nature of the issue.

[57] In a decision released after oral argument concluded in this case, this Court found that because the legal question engaged was of general import, the appropriate standard to be applied to the Board's decision concerning entitlement to carrying costs is in the mid-range of judicial review spectrum, that is reasonableness. But the Court also found that "the Board enjoys expertise superior to this Court in determining the appropriate methodology for calculating prudent costs of financing a particular segment of a utility's operations": ***ATCO Electric***, *supra* at para. 62. Thus, Fraser C.J.A. concluded the appropriate standard to apply to that decision is patent unreasonableness. However, here, the Court is not being asked to review a methodology of calculation of rates, but rather whether the Board erred in determining the appropriate standard in reviewing the reasonableness of managerial decisions.

[58] Considering the four contextual factors in this case, and the import of the prudence test to the utilities industry, I conclude the appropriate standard of review is reasonableness *simpliciter*. Applying that standard, the Court must ask "whether there is a rational basis for the decision . . . in light of the statutory framework and the circumstances of the case": ***Cartaway Resources Corp. (Re)*** (2004), 319 N.R. 1, 2004 SCC 26 at para. 49.

ANALYSIS

Did the Board err in law in determining the appropriate test to be applied with respect to the prudence and reasonableness of the decision of the Applicant utility in the context of this case?

[59] The Board concluded ATCO acted imprudently because it "could have, and ought to have, maximized the value of the 'excess' deliverability by using it on days when prices were spiking or by selling the deliverability it did not intend to use . . .", and by failing to do so, ATCO "was not acting in the best interests of customers . . ." In reaching that conclusion the Board adopted the following test of prudence:

> . . . a utility will be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information the owner of the utility knew or ought to have known at the time the decision was made. In making decisions, a utility must take into account the best interests of its customers, while still being entitled to a fair return.

[60] The Board cited its earlier Decision 2000-01, wherein it stated:

> [The concept of prudence]. . . has been recognized as a tool available to regulators, and in most instances involves an evaluation of whether or not a decision reflects good judgment and discretion and is reasonable in the circumstances which were known, or reasonably should have been known when the decision was made.

[61] ATCO maintains that the proper test for prudence requires the presumption of managerial prudence, and that the Board erred by failing to presume management had acted prudently. Although the Board did not expressly presume prudence, it may have done so implicitly by determining to uphold ATCO's decision unless it was satisfied that ATCO acted unreasonably: AB I, p. F21. But ATCO also submits that mere unreasonableness or error in judgment is not sufficient to establish imprudence and that a regulator is not entitled to step into the role of a manager. In ATCO's view, if any error was made at all, it was a mere error of judgment and not outside the realm of what any reasonable business person would do. Any such error would not constitute negligence and could thus not properly constitute imprudence.

[62] In the course of ATCO Pipelines 2003/2004 General Rate Application (Tab 18 ATCO's authorities), Calgary disputed any presumption of prudence in regulatory law that ATCO Pipelines' forecasts are reasonable, which in its view would be a reversal of the onus of proof. Further, Calgary says there is no logical reason to apply a presumption of correctness to a utility budget. Instead, Calgary says the utility has the onus of establishing the reliability of its forecast expenditure. Calgary says there is no major difference between the Board's and ATCO's articulation of the test for prudence, and that ATCO's main complaint is with the application of the test.

[63] Calgary also notes that the test applied by the Board has been applied by the Ontario Energy Board, which addressed the test for prudence in the context of rate regulation in the transportation industry in RP - 2001-0029. That Board acknowledged that a presumption of prudence on the part of a regulated utility is implicit in the framework underlying rate regulation. The Ontario Energy Board said that in considering the prudence of any action, it is engaged in a retrospective review of the reasonableness of the utility's action at a given point, and the forseeability of any changes in circumstances is critical to that review. At para. 2.36 that Board stated:

> A poor outcome does not govern the assessment of prudence. Prudence is however, called into question if the commitment was made casually, that is without a reasonable level and scope of analysis, or recklessly, or primarily for some ulterior non-utility or ulterior corporate purpose. (Calgary authorities Tab 18 p. 21)

[64] The term "prudence" is well known in the utility rate-making industry and has a significant history. Included in Calgary's materials is a 2002 paper from The National Regulatory Research Institute of Ohio State University (the "NRRI") entitled, "State Commission Regulatory Considerations Concerning Security-Related Cost Recovery in Utility Network Industries", which references a 1985 NRRI publication: *The Prudent Investment Test in the 1980's* (the "*Prudent Investment Test*"). *The Prudent Investment Test* describes the history of the concept of prudence and its use in regulated public utilities. The authors describe the concept of prudent investment as: "a regulatory oversight standard that attempts to serve as a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": ch. 2, p. 20. The 2002 NRRI paper cited by Calgary and *The Prudent Investment Test* at 93, both suggest that before a regulator investigates the prudence of a utility, the presumption of prudence must be rebutted.

[65] As a standard in public utility regulation, prudence is described as a concept borrowed from legal principles, such as negligence. In other words, the public utility will be held to a managerial duty of care:

> What is prudent is deemed to be ascertainable through the reasonable efforts of competent managers with sound and reasonable judgment. That risk is involved in managerial decision making is judicially acknowledged. But, the deliberate exposure to substantial risk in the exercise of managerial discretion is by its very nature imprudent, for risk is to be avoided, if not altogether, at least insofar as possible under the circumstances: *The Prudent Investment Test*, p. 47.

[66] A presumption of prudence triggers an onus of proof on the party impugning managerial decisions. However, if that presumption is rebutted, a public utility's decision will be reviewed, applying an objective test of reasonableness to the facts and circumstances surrounding the decision, without relying on hindsight: *The Prudent Investment Test*, p. 93

[67] In determining whether a company had exercised proper discretion in matters requiring business judgment, the U.S. Supreme Court in ***State of Missouri ex re, Southwestern Bell Telephone Company v. Public Service Commission of Missouri*** 262 U.S. 276, 289 (1923), stated:

> The Commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.

[68] In support of its submission that for actions to qualify as imprudent they must be dishonest or obviously wasteful, ATCO cites the dissenting judgment of Justice Brandeis, in footnote 1 at 289 of that case:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

[69] In ***West Ohio Gas Co. v. Public Utilities Commission of Ohio (No. 1)***, 294 U.S. 63, 68 (1935), at p. 25 the U.S. Supreme Court held that:

> A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial.

The Court continued at p. 26:

> Good faith is to be presumed on the part of the manager of a business. . . In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay.

[70] There, the Court concluded that imposition of a penalty was wholly arbitrary in the absence of evidence showing any warning to the company that fault was imputed to it and that it must give evidence of care.

[71] The Board concedes that the standard of prudence is similar to the standard of care required in assessing negligence, but argues that with respect to a regulated public utility, the test is not what a reasonable businessman would have done in the circumstances, but rather what a reasonable public utility would have done. In ***Acker v. United States***, 298 U.S. 426, 431 (1936), cited in *The Prudent Investment Test* at 32, regarding management judgment, the U.S. Supreme Court held that:

> ...[T]he charge is for a public service, and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs...

[72] The Board's broad discretion to set just and reasonable utilities rates must be exercised in the public interest, which requires consideration of both sides of the rate paying equation: ***ATCO Electric***, *supra* at 132. That process implicitly entails scrutiny of management decisions. With respect to negotiated settlements Fraser C.J.A. held in ***ATCO Electric*** at para. 145 that the Board "is entitled to assume that what the utility has negotiated and agreed to is in fact in the utility's best interests." However, in the context of rate setting, the starting point for scrutinizing management decisions is the presumption that it is in the utility's interest to make prudent decisions which also reflect the interests of its customers, by avoiding needless expenditure. That presumption will matter only when the scales are evenly balanced.

[73] In this case, in determining to uphold ATCO's decision unless satisfied ATCO had acted unreasonably, the Board correctly acknowledged the presumption of prudence. The test it articulated to be applied in reviewing the prudence and reasonableness of ATCO's decisions is reasonable.

CONCLUSION

[74] ATCO's complaint with the Board's application of the prudence test involves questions of fact, and is not properly before this Court. The only matters at issue on this appeal are whether the Board properly acknowledged a presumption of prudence, and properly articulated the test of prudence, in assessing ATCO's management decisions. The Board's articulation of the prudence test is consistent with its previous decisions and with the line of authority addressing the concept of prudence in the context of public utilities. Given the governing legislation and the circumstances of this case, there is a rational basis for the test of prudence articulated and relied on by the Board in its decision.

[75] Accordingly, the appeal is dismissed.

Appeal heard on April 21, 2004

Reasons filed at Calgary, Alberta
this 29th day of March, 2005

Russell J.A.

I concur:

O’Leary J.A.

I concur:

Wittmann J.A.

Appearances:

H.M. Kay, Q.C.
L.E. Smith, Q.C.
For the Appellant

J.R. McKee
A.E. Domes
for the Respondent

P.L. Quinton-Campbell
R.B. Brander
for the Third Party

Appendix "A"

Current Legislative Provisions

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

> **26(1)** Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.
>
> **(2)** Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made
>
> (a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
>
> (b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.
>
> . . . . .

Public Utilities Board Act, R.S.A. 2000, c. P-45

> **70(1)** Subject to subsection (2), on a question of jurisdiction or on a question of law, an appeal lies from the Board to the Court of Appeal.
>
> **(2)** Leave to appeal shall be obtained from a judge of the Court of Appeal on application made within one month after the making of the order, decision, rule or regulation sought to be appealed from, or within any further time that the judge under special circumstances allows, and on notice to the parties and to the Board, and on hearing those of them that appear and desire to be heard, and the costs of the application are in the discretion of the judge.
>
> . . . . .

Applicable Repealed Legislative Provisions

Alberta Energy and Utilities Board Act, S.A. 1994, c. A-19.5 [repealed] ("***AEUBA***")

> **10(1)** Fort he purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.
>
> . . . . .

Gas Utilities Act, R.S.A. 1980, c. G-4, as amended. [Repealed] ("***GUA***")

> **16** When it is made to appear to the board, on the application of any owner of a gas utility or of any municipality or person having an interest, present or contingent, in the matter in

respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a gas utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the gas supplied, the Board

> **(*a*)** may proceed to hold any investigation that it thinks fit into all matters relating to the nature and quality of the service or the gas supplied, or to the performance of the service and the tolls or charges demanded therefor,
>
> . . .
>
> **(*c*)** may disallow or change, as it thinks reasonable, any tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any contract existing between the owner of the gas utility and a municipality at the time the application is made that the Board considers fair and reasonable.
>
> . . .

25(1) No owner of a gas utility shall

> **(*a*)** make, impose or extract any unjust or unreasonable or unjustly discriminatory or unduly preferential individual or joint rate, commutation rate or other special rate, toll, fare, charge or schedule for any gas or service supplied or rendered by it within Alberta,
>
> . . .
>
> **(*c*)** adopt, maintain or enforce any regulation, practice or measurement that is unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or otherwise in contravention of law, or provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service that can reasonably be demanded and furnished when ordered by the Board,
>
> . . .

28 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which shall be made after giving notice to and hearing the parties interested,

> **(*a*)** fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed thereafter by the owner of the gas utility,
>
> . . .
>
> **(*c*)** fix just and reasonable standards, classifications, regulations, practices, measurements or service which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,
>
> . . .
>
> **(*e*)** require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the

Board directs, fixes or imposes.

. . .

32 In fixing just and reasonable rates, tolls or charges, or schedules thereof, to be imposed, observed and followed thereafter by an owner of a gas utility,

> **(*a*)** the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of
>
> > **(*i*)** the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,
> > **(*ii*)** a subsequent fiscal year of the owner, or
> > **(*iii*)** 2 or more of the fiscal years of the owner referred to in subclauses (I) and (ii) if they are consecutive
>
> and need not consider the allocation of those revenues and costs to any part of that period,
>
> **(*b*)** the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,
>
> **(*c*)** the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and
>
> **(*d*)** the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

. . . . .

Public Utilities Board Act, R.S.A. 1980, c. P-37, as amended. [Repealed] ("***PUBA***")

30 The Board may, as to matters within its jurisdiction, hear and determine all questions of law or of fact.

. . .

81 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which shall be made after giving notice to and hearing

the parties interested,

> (a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed thereafter by the owner of the public utility;
> . . .
> (c) fix just and reasonable standards, classifications, regulations, practices, measurements or service which shall be furnished, imposed, observed and followed thereafter by the owner of the public utility;
> . . .

. . .

83(1) Subject to subsection (2), in fixing just and reasonable rates, tolls or charges, or schedules thereof, to be imposed, observed and followed by an owner of a public utility,

> (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of
>
> > (i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules thereof,
> > (ii) a subsequent fiscal year of the owner, or
> > (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,
>
> and need not consider the allocation of those revenues and costs to any part of such a period,
> . . .
> (b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules thereof, as the Board determines is just and reasonable.
>
> (c) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules thereof, as the Board determines has been due to undue delay in the hearing and determining of the matter, and
>
> (d) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

1981, c. E-4.1, s. 17; 1984, c. 60, s. 4; 1988, c. S-13.75, s. 9; 1995, c. 11, s. 14.

TAB 12

Archived Backgrounder

Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions

Between The Gouvernement du Québec, The Government of California and The Government of Ontario

September 22, 2017 10:45 A.M. | Office of the Premier

WHEREAS, the Parties publicly adopted their own greenhouse gas emissions reduction targets, their own regulation on greenhouse gas emissions reporting programs and their own regulation(s) on their cap-and-trade programs;

WHEREAS, the Parties are participants of Western Climate Initiative, Inc. (WCI, Inc.), a non-profit corporation incorporated in October 2011, providing administrative and technical services to its participants to support and facilitate the implementation of their cap-and-trade programs for reducing greenhouse gas emissions;

WHEREAS, the Parties share a common interest in working jointly and collaboratively toward the harmonization and integrationof their greenhouse gas emissions reporting programs and of their cap-and-trade programs for reducing greenhouse gas emissions;

WHEREAS, the Parties recognize that the harmonization and integration of their greenhouse gas emissions reporting programs and their cap-and-trade programs are to be attained by means of regulations adopted by each Party;

WHEREAS, the Parties have developed constructive working relationships among their respective staff and officials, and have demonstrated the ability to harmonize their programs and integrate their program operations, including by enabling staff to work jointly through workgroups to develop proposed harmonized approaches for consideration by each Party on topics including, but not limited to, greenhouse gas emissions reporting, issuance of compliance instruments, program scopes, compliance requirements, offset protocols, program registry, auction design and execution, auction platform, market regulations, invalidation of offset credits, enforcement, public disclosure of information, and information sharing among the Parties;

WHEREAS, the Parties further recognize that this Agreement is intended to facilitate continued consultation, using and building on existing working relationships, during the implementation and the operation of the Parties' respective programs and supporting the development of any proposed program

WHEREAS, the Parties further recognize the importance of effective and timely public consultation regarding their respective program operations, program changes, new offset protocols, and new program elements;

WHEREAS, the Parties further recognize that the present Agreement does not, will not and cannot be interpreted to restrict, limit or otherwise prevail over relevant national obligations of each Party, if applicable, and each Party's sovereign right and authority to adopt, maintain, modify, repeal or revoke any of their respective program regulations or enabling legislation;

WHEREAS, the Gouvernement du Québec and the California Air Resources Board agreed to link their cap-and-trade programs by signing in September 2013 the "*Agreement between the Gouvernement du Québec and the California Air Resources Board concerning the harmonization of cap-and-trade programs for reducing greenhouse gas emissions*";

WHEREAS, the Gouvernement du Québec and the California Air Resources Board have agreed to terminate their 2013 "*Agreement between the* Gouvernement du Québec *and the California Air Resources Board concerning the harmonization of cap-and-trade programs for reducing greenhouse gas emissions*" in order to pursue the objectives of this Agreement, including entering into a new Agreement that also includes the Government of Ontario and that provides for other jurisdictions to enter into this Agreement;

WHEREAS, the Parties are committed to harmonize and integrate their greenhouse gas emissions reporting programs and their cap-and-trade programs for reducing greenhouse gas emissions as well as to facilitate the inclusion of new Parties to this Agreement;

THEREFORE, to collaborate in the achievement of the Parties' respective goals in the fight against climate change through the harmonization and integration of their greenhouse gas emissions reporting programs and cap-and-trade programs for reducing greenhouse gas emissions,

THE PARTIES AGREE TO THE FOLLOWING:

CHAPTER I

GENERAL PROVISIONS

ARTICLE 1

OBJECTIVE

The objective of this Agreement is for the Parties to work jointly and collaboratively toward the harmonization and integration of the Parties' greenhouse gas emissions reporting programs and cap-and-trade programs for reducing greenhouse gas emissions.

The intended outcome of the harmonization and integration is to enable each Party under its own statutory and regulatory authority to:

a) achieve the harmonization of its regulation for reporting of greenhouse gas emissions and regulations for the cap-and-trade program such that the regulations will be compatible between the Parties;

b) provide for the equivalence and interchangeability of compliance instruments issued by the Parties for the purpose of compliance with their respective cap-and-trade programs;

c) develop and implement an accounting mechanism that provides for a transparent and data-driven calculation that attributes to each Party its portion of the total greenhouse gas emission reduction achieved jointly by the Parties' linked cap-and-trade programs, the results of which will be used to avoid double claiming of emission reductions by the Parties;

d) permit the transfer and exchange of compliance instruments between participants registered with the Parties' respective cap-and-trade programs using a common secure registry;

e) develop compatible market requirements that are applied and enforced for all participants registered in the Parties' respective cap-and-trade programs;

f) allow for planning and holding joint auctions of compliance instruments;

g) enable the sharing of information to support effective administration and enforcement of each party's statutes and regulations.

The Parties shall report to the public annually on the status of achieving this objective.

ARTICLE 2

DEFINITIONS

For the purposes of this Agreement:

"**Auction**" means the process in which one Party sells a determined number of compliance instruments by offering them up for bid, taking bids, and then distributing the compliance instruments to winning bidders;

"**Auction platform**" means the auction system used to conduct auctions;

"**Compliance instruments**" means an instrument, issued by one of the Parties, that can be used by a covered entity or a voluntary participant to fulfill a compliance obligation and having a value corresponding to the emission of one metric ton of CO2 equivalent greenhouse gas;

"**Covered entity**" means an entity with an obligation to surrender compliance instruments for its greenhouse gas emissions under a Party's statute and regulation(s) for the applicable cap-and-trade program for reducing greenhouse gas emissions;

"**Greenhouse gas**" means carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF6) or nitrogen trifluoride (NF3), as well as other greenhouse gases publicly identified as such by the Parties' statutes and regulations;

"**Offset protocol**" means a documented set of procedures and requirements to quantify ongoing greenhouse gas emission reductions, avoidances, removals or removal enhancements for an offset project as adopted by each Party;

"**Voluntary participant**" means a person or entity whose voluntary registration creates the obligation to surrender compliance instruments for its greenhouse gas emissions under a Party's statute and regulation (s) for the applicable cap-and-trade program for reducing greenhouse gas emissions;

"**Market participant**" means a person or an entity who does not report greenhouse gas emissions and is registered in the program registry and participates in one of the respective cap-and-trade programs for reducing greenhouse gas emissions;

"**Program**" means a Party's cap-and-trade program for reducing greenhouse gas emissions, including offsets, and a Party's greenhouse gas emissions reporting program;

"**Program registry**" means the data system in which covered entities and voluntary and market participants are registered, and in which compliance instruments are recorded and tracked;

"**Registered participant**" means a covered entity or a voluntary or market participant who is registered in the Parties' program registry.

CHAPTER II

HARMONIZATION AND INTEGRATION PROCESS

ARTICLE 3

CONSULTATION PROCESS

The Parties shall consult each other regularly and constructively to achieve the objective of this harmonization and integration Agreement. Consultation shall build on existing working relationships and shall enable Parties' staff to work constructively through workgroups under the direction of the Parties' officials.

The procedural requirements of each Party shall be respected, including appropriate and effective openness and transparency of each Party's public consultations.

The topics of the collaboration and the joint work shall include, but are not limited to, those of the articles in this chapter.

ARTICLE 4

REGULATORY HARMONIZATION

The Parties shall continue to examine their respective regulations for the reporting of greenhouse gas emissions and for the cap-and-trade program in order to promote continued harmonization and integration of the Parties' programs.

In the case where a difference between certain elements of the Parties' programs is identified, the Parties shall determine if such elements need to be harmonized for the proper functioning and integration of the programs. If so determined, the Parties shall consult each other regarding a harmonized approach.

A Party may consider making changes to its respective programs, including changes or additions to its emissions reporting regulation, cap-and-trade program regulations, and program related operating procedures. To support the objective of harmonization and integration of the programs, any proposed changes or additions to those programs shall be discussed between the Parties. The Parties acknowledge that sufficient time is required to enable effective public review and comment prior to adoption. The Parties shall consult regarding changes that may affect the harmonization and integration process or have other impacts on any Parties. Each Party's public process for making program changes must be respected.

In the event that program conditions arise that indicate a need for rapid or emergency program changes or other actions by one or all Parties, the Parties shall work to harmonize such changes to maintain harmonization and integration and to resolve the conditions.

ARTICLE 5

OFFSET PROTOCOLS

In order to achieve harmonization and integration of the Parties' cap-and-trade programs, the offset protocols in each of the Parties' programs require that all offset emission reductions, avoidances, removals or removal enhancements achieve the essential qualities of being real, additional, quantifiable, permanent, verifiable, and enforceable.

A Party may consider making changes to the offset components of its program, including by adding additional offset protocols, or changing procedures for issuing offset credits. To support the objective of maintaining the harmonization and integration of the programs, any proposed changes shall be discussed between the Parties. The Parties acknowledge that sufficient time is required to enable effective public review and comment prior to adoption of any changes. The Parties shall consult regarding changes that may affect the harmonization and integration process or that may have other impacts on any Party. Each Party's public process for making program changes must be respected.

ARTICLE 6

MUTUAL RECOGNITION OF COMPLIANCE INSTRUMENTS

In order to achieve harmonization and integration of the Parties' cap-and-trade programs, mutual recognition of the Parties' compliance instruments shall occur as provided for under their respective cap-and-trade program regulations.

If a Party determines that a compliance instrument that it has issued should not have been issued or must be voided, it shall notify the other Parties. Each Party recognizes and respects the authority of the other Parties to take actions to recover or void compliance instruments that have been surrendered or that are held by registered participants.

ARTICLE 7

TRADE OF COMPLIANCE INSTRUMENTS

In order to achieve harmonization and integration of the Parties' cap-and-trade programs, trading of compliance instruments among registered participants in the Parties' respective programs shall occur as provided for under their respective cap-and-trade program regulations.

The Parties shall keep each other informed of any investigation, pertaining to but not limited to acts or omissions on the part of any of its registered participants or other persons regulated under the programs and any violation, penalty or fine, or decision rendered following such investigations.

ARTICLE 8

ACCOUNTING MECHANISM AND TREATMENT OF EMISSION REDUCTIONS

In order to ensure clarity and transparency in how greenhouse gas reductions from cap-and-trade programs are counted toward each Party's emission reduction target, the Parties agree to develop and implement an accounting mechanism that provides a transparent and data-driven calculation that attributes to each Party its portion of the total greenhouse gas emission reduction achieved jointly by the Parties' linked cap-and-trade programs.

The agreed upon accounting mechanism should achieve a high level of transparency and careful and secure management of confidential and market sensitive information in the Parties' cap-and-trade programs. The Parties will build on international principles and criteria, namely those pertaining to environmental integrity and robust accounting, with an emphasis on transparency and on avoiding double counting.

The Parties recognize that to avoid double claiming of emission reductions, only the Party to which an emission reduction is attributed by the accounting mechanism can use that reduction when assessing its progress toward meeting its emission reduction target, and other Parties will appropriately recognize a corresponding opposite emission impact when assessing their progress toward meeting their respective emission reduction targets.

The Parties acknowledge that when developing and implementing the accounting mechanism, each Party's applicable statutory and regulatory requirements will be respected.

The Parties agree to periodic review of the accounting mechanism in response to the development of laws applicable to each Party or relevant national and international principles and criteria.

ARTICLE 9

JOINT AUCTIONS

In order to achieve harmonization and integration of the Parties' cap-and-trade programs, the auctioning of compliance instruments by the Parties' respective programs shall occur jointly and in accordance with harmonized procedures developed by the Parties, as provided for under their respective cap-and-trade programs.

ARTICLE 10

COMMON PROGRAM REGISTRY AND AUCTION PLATFORMS

The Parties shall work together to develop and use common electronic platforms in order to ensure program compatibility, integrity, and integration, including but not limited to a program registry platform and an auction platform.

The common program registry and auction platforms shall be available in English and French and allow for recording and performing transactions in the currencies of each Party. The program registry and auction platforms shall conform to the requirements of the Parties' statutes, regulations and operating procedures.

CHAPTER III

OPERATION OF THE AGREEMENT

ARTICLE 11

SUPERVISION AND ENFORCEMENT

The Parties shall work cooperatively to maintain market integrity, including preventing fraud, abuse and market manipulation and to ensure the reliability of the joint auction and their respective programs. The Parties shall work cooperatively in applying their respective program requirements governing the supervision of all transactions carried out among registered participants of each of the Parties and of any auction or reserve sale.

The Parties shall facilitate, in accordance with the privacy, and other statutes and regulations applicable in each of their jurisdictions and the provisions of article 15 hereunder, the sharing of information to support the effective administration and enforcement of each party's statutes and regulations.

ARTICLE 12

COORDINATED ADMINISTRATIVE AND TECHNICAL SUPPORT

The Parties shall continue coordinating administrative and technical support through the WCI, Inc., an entity which was created to perform such services, including for the Parties.

If one of the Parties wishes to consider approaches other than WCI, Inc. for coordinating any of the administrative and technical program support, it shall consult the other Parties with the objective of jointly developing a harmonized approach.

If one of the Parties wishes to use the services of a party other than WCI, Inc. for technical or administrative support, or services of another nature required for the development or the operation of common program registry and auction platforms, it shall consult the other Parties with the objective of jointly developing a harmonized approach.

ARTICLE 13

CONSULTATION COMMITTEE

To facilitate the harmonization and integration process of the programs and the operation of the Agreement, the Parties shall create a Consultation Committee composed of one representative from each

of the Parties. This Consultation Committee shall meet as needed to ensure timely and effective consultation in support of the objectives of this Agreement.

The representatives of each Party on the consultation committee are presented in Annex 1.

The Consultation Committee shall:

a) monitor the implementation of all measures that are required for the effective harmonization and integration of the Parties' programs;

b) recommend measures to improve the harmonization and integration of the Parties' programs, when needed; and

c) address any other issues at the request of the Parties.

The Consultation Committee shall receive and review updates from the Parties on each area of activity as needed under this Agreement in a timely manner. If the Consultation Committee identifies or becomes aware of differences between the Parties regarding how to maintain the harmonization and integration of their programs, the Consultation Committee shall undertake to resolve the differences in accordance with Article 20.

CHAPTER IV

MISCELLANEOUS PROVISIONS

ARTICLE 14

JURISDICTION

The Parties acknowledge that this Agreement does not modify any existing statutes and regulations nor does it require or commit the Parties or their respective regulatory or statutory bodies to create new statutes or regulations in relation to this Agreement, and agree that the provisions of the Agreement shall not be interpreted by the Parties as amending any agreement or provision of an agreement entered into or to be entered into by any Party.

ARTICLE 15

CONFIDENTIALITY OF INFORMATION

To support and enhance the administration, including the analysis, operation and supervision, and the enforcement of the Parties' respective program requirements, the Parties shall jointly arrange to share information collected or developed under their respective programs. Nothing in this Agreement requires a Party to breach privacy or confidentiality obligations or requirements prohibiting the collection, use or disclosure of information to which it is bound under its own laws, nor compromise the security with which information is held, nor disclose confidential information such as commercially sensitive or personal information.

When information is shared between the Parties, each Party shall undertake to protect the information they disclose and collect, in accordance with the privacy and other statutes and regulations applicable in

each of their jurisdictions, and take all necessary measures to such end, particularly with respect to the mode of communication, use, control, management and destruction. Shared information is to be used solely for the purposes of meeting the objectives of this Agreement.

If confidential information must be communicated by a Party to a non-Party to this Agreement under a law or following a court order, it shall notify the other Parties as soon as possible.

ARTICLE 16

PUBLIC ANNOUNCEMENT

The Parties shall keep each other informed in advance of any public announcement related to their respective programs.

Any announcement concerning the harmonization or integration of the Parties' programs shall be prepared and, if possible, made public jointly.

CHAPTER V

FINAL PROVISIONS

ARTICLE 17

WITHDRAWAL PROCEDURE

A Party may withdraw from this Agreement by giving written notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavour to give 12 months notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavour to match the effective date of withdrawal with the end of a compliance period.

Withdrawal from this Agreement does not end a Party's obligations under article 15 regarding confidentiality of information, which continue to remain in effect.

If a Party withdraws, the Agreement shall remain in force for the remaining Parties.

ARTICLE 18

AMENDMENTS

Any amendment to this Agreement shall be in writing and requires the consent of all Parties to the Agreement at the time of the amendment.

An amendment that all Parties have agreed to and that has been authorized in accordance with the requirements of each Party shall constitute an integral part of this Agreement beginning on the date of its coming into force.

ARTICLE 19

ACCESSION

Recognizing that the Parties welcome effective, timely, and meaningful action to reduce greenhouse gas emissions by other jurisdictions, a candidate Party may be added as a Party to the Agreement if the candidate Party has adopted a program that is harmonized and can be integrated with each of the Parties' programs, if all of the Parties to the Agreement agree to add the candidate Party by signing an Accession Amending Agreement and then the candidate Party agrees to become a party to the Agreement by signing an Instrument of Accession.

To do so, the legal procedures required by each Party must be respected.

The standard form of the Accession Amending Agreement and the Instrument of Accession that can be found in Annex 2 and Annex 3, respectively, shall be used. Once the Parties have signed an Accession Amending Agreement, the candidate Party shall sign an Instrument of Accession.

ARTICLE 20

RESOLUTION OF DIFFERENCES

The Parties shall consult each other constructively to resolve differences that may arise regarding how to achieve the objective of harmonizing and integrating their programs.

The Parties shall resolve differences by using and building on established working relationships, including enabling staff to work jointly through workgroups to develop proposed harmonized and integrated approaches for consideration by each Party. If approaches for resolving differences that are acceptable to the Parties cannot be developed in a timely manner through staff workgroups, the Parties shall constructively engage through the Consultation Committee, and if needed with additional officials of the Parties, or their designees. The Parties will endeavour to resolve differences in a timely manner, so that the harmonization and integration of the programs can be maintained.

ARTICLE 21

COMMUNICATIONS

The Parties agree to communicate on matters regarding this Agreement in writing and hand delivered or transmitted by telegram, fax, e-mail, messenger, courier or registered mail to the contact of the Party concerned (see Annex 1 for contacts).

Any change of address of one of the Parties or of the representatives designated in Annex 1 shall be notified to the other Parties.

Each Party shall designate a contact to facilitate communications between the Parties on any matter covered by this Agreement. On the request of any Party, the contact shall identify the office or official responsible for the matter and assist, as necessary, in facilitating communication between the office or official and the requesting Party.

ARTICLE 22

COMING INTO FORCE AND DURATION OF THE AGREEMENT

Each of the Parties shall notify all the other Parties as soon as possible after the Party has completed any procedures required for the Agreement's entry into force.

The Agreement shall enter into full force and effect on the first day of the month following the date of receipt of notification from the last of the Parties informing the other Parties that any legally required measures have been completed.

The Agreement may only be terminated by the written consent of all of the Parties. Termination of the Agreement shall be effective 12 months after the last of the Parties has provided its consent to the other Parties.

Termination of this Agreement does not end a Party's obligations under Article 15 regarding the confidentiality of information, which continue to remain in effect.

ARTICLE 23

ANNEXES

The Annexes to this Agreement constitute an integral part of this Agreement.

The original English and French texts of this Agreement have the same legal force.

ANNEX 1 -- Parties' representative on the consultation committee and contact

Party	Representative on the consultation committee	Contact
Gouvernement du Québec	Assistant Deputy Minister for the Fight against climate change at the *Ministère du Développement durable, de l'Environnement et de la lutte contre les changements climatiques*	Director Direction du marché du carbone Ministère du Développement durable, de l'Environnement et de la lutte contre les changements climatiques 675 René-Lévesque Blvd. East, 6th Floor, Box 31 Québec (Québec) G1R 5V7 Phone: 418 521-3868 Fax: 418 646-4920
California Air Resources Board	Executive Officer of the Air Resources Board	Executive Officer California Air Resources Board 1001 I Street Sacramento, California 95814 Phone: 916-322-7077 Fax: 916-323-1045 Director

Government of Ontario	Executive Director of the Ontario Climate Change Directorate	Air Policy Instruments and Program Design Branch Ministry of the Environment and Climate Change 77 Wellesley Street West, 10th Floor Ferguson Block Toronto, Ontario M7A 2T5 Phone: 416-314-6419

ANNEX 2 -- [Standard Form]

ACCESSION AMENDING AGREEMENT

TO

THE AGREEMENT ON THE HARMONIZATION AND INTEGRATION OF CAP-AND-TRADE PROGRAMS FOR REDUCING GREENHOUSE GAS EMISSIONS

WHEREAS the Parties concluded, on [DATE], the Agreement on the harmonization and integration of cap-and-trade programs for reducing greenhouse gas emissions, hereinafter the "Agreement";

WHEREAS [candidate PARTY's name], hereinafter the "Candidate Party", wishes to become a Party to the Agreement in accordance with its articles 18 and 19;

THE PARTIES AGREE to THE FOLLOWING:

ARTICLE 1

PURPOSE OF THE AMENDING AGREEMENT

The Parties unanimously consent that the Candidate Party becomes a Party to the Agreement.

ARTICLE 2

CANDIDATE PARTY'S INSTRUMENT OF ACCESSION

The Candidate Party indicates it consents and agrees to become a Party to the Agreement by signing the Instrument of Accession, which is annexed to the Agreement.

The Instrument of Accession duly signed by the Candidate Party constitutes an integral part of the Agreement.

ARTICLE 3

PARTIES INTERNAL LEGAL FORMALITIES

The Parties shall complete any procedures required for the entry into force of the Accession Amending Agreement, if necessary, for the accession of the Candidate Party to the Agreement.

ARTICLE 4

ACCESSION OF THE CANDIDATE PARTY

The accession of the Candidate Party to the Agreements shall enter into full force and effect as described in the Instrument of Accession signed by the Candidate Party.

ARTICLE 5

ENTRY INTO FORCE OF THE ACCESSION AMENDING AGREEMENT

This Accession Amending Agreement shall enter into full force and effect on the date on which all the Parties have signed it.

The original English and French texts of this Agreement have the same legal force.

ANNEX 3 -- [Standard Form]

INSTRUMENT OF ACCESSION

to

THE AGREEMENT ON THE HARMONIZATION AND INTEGRATION OF CAP-AND-TRADE PROGRAMS FOR REDUCING GREENHOUSE GAS EMISSIONS

WHEREAS the Parties concluded, on [DATE], the Agreement on the harmonization and integration of cap-and-trade programs for reducing greenhouse gas emissions, hereinafter the "Agreement";

WHEREAS [candidate PARTY's name], hereinafter the "Candidate Party", wishes to become a Party to the Agreement in accordance with its articles 18 and 19;

WHEREAS the Parties unanimously consented, on [DATE], that the Candidate Party becomes a Party to the Agreement.

ACCESSION

The Candidate Party consents and accepts to become a Party to the Agreement.

The accession of the Candidate Party to the Agreements shall enter into full force and effect on the first day of the month following the date of receipt of the last notification from either the Parties or the Candidate Party informing the other Parties and the Candidate Party that any legally required measures have been completed.